

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Dish Network Service, LLC and Communications Workers of America, Local 1108. Cases 29–CA–030578 and 29–CA–030583

May 23, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND FLYNN

On October 12, 2011, Administrative Law Judge Raymond P. Green issued the attached decision. The Acting General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge’s rulings, findings,¹ and conclusions and to adopt the recommended Order.

¹ Although the judge did not explicitly rely on *Wright Line*, 251 NLRB 1083, *enfd.* 662 F.2d 899 (1st Cir. 1981), in dismissing the 8(a)(3) and (1) allegation concerning the discharge of employee Shawn Ryals, his analysis is consistent with that decision. Under *Wright Line*, the Acting General Counsel has the initial burden of proving that an employee’s Sec. 7 activity was a motivating factor in the respondent’s action. If this burden is met, the respondent must show that it would have taken the same action even in the absence of the protected activity.

By concluding that any protected activity by Ryals played no role in the Respondent’s decision to discharge him, the judge effectively found that the Acting General Counsel failed to meet his initial burden. Even if the Acting General Counsel satisfied his burden, the judge found that the Respondent discharged Ryals based on his unauthorized absence and his loud, aggressive, and unrepentant behavior in a meeting concerning that absence. Thus, the judge essentially determined, and we agree, that the Respondent met its rebuttal burden under *Wright Line*.

In adopting the judge’s dismissal of the allegation that the Respondent violated Sec. 8(a)(3) and (1) by withholding stack ranking bonuses from unit employees, we rely solely on the conclusion that the allegation is time-barred under Sec. 10(b) of the Act. This allegation depends on a statement made by General Manager John Shaw to Ryals in the summer of 2009 that “if the Union were dropped,” Ryals and other unit employees would receive the stack ranking bonuses. However, as the judge noted, the conversation that included this statement was the subject of a previous charge alleging a separate violation, and the Acting General Counsel acknowledged at the hearing that the previous charge was withdrawn as untimely under Sec. 10(b). The present charge allegation concerning Shaw’s statement about the bonuses is therefore also time-barred. Accordingly, we find it unnecessary to pass on the judge’s analysis of the merits of the allegation.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. May 23, 2012

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Terence F. Flynn, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
Annie Hsu, Esq., for the Acting General Counsel.
George Basara, Esq., Counsel for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in Brooklyn, New York, on July 12, 2011. The charge 29–CA–30578 was filed on January 5, 2011. The charge and the amended charge in 29–CA–30583 were filed on January 13 and April 25, 2011. The Complaint that was issued on May 10, 2011, alleged as follows:

1. That since July 11, 2010, the Respondent failed to provide certain bonuses to employees because its employees engaged in union and protected concerted activity.

2. That on January 3, 2011, the Respondent discharged Shawn Ryals because in September 2010, he with other employees complained to the employer about safety issues and in order to discourage employees from engaging in union or protected concerted activities.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

It is agreed and I find that the Respondent is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is agreed and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Prior History with the NLRB

The Respondent is a corporation that provides satellite television services to customers throughout the United States. Its headquarters are in Colorado and it operates out of more than 100 facilities, 3 of which are, at the present time, unionized.

The facility involved in the present case is located in Farmingdale, New York, and employs 11 field service technicians.

At this facility, the Union was certified by the Board as the collective-bargaining representative of the field representatives on June 21, 2001.

On June 27, 2002, an administrative law judge issued a decision finding that certain conduct by the Respondent's managers at Farmingdale, occurring in or about December 2001, violated the Act. Despite a dissenting opinion, the Board sustained the Judge's findings and conclusion in a decision reported at 339 NLRB 1126 (2003). In substance, the Board concluded that the Respondent violated the Act when it failed to provide the Union with a copy of a disciplinary action that was issued to an employee and by telling employees that it did not recognize the union shop stewards.²

Although I do not know when bargaining commenced regarding the Farmingdale employees, it is apparent that no agreement was reached over the next 2 years. The Employer's conduct during bargaining was the subject of another unfair labor practice case that ultimately was decided by the Board on July 6, 2006, at 347 NLRB No. 69 (not reported in Board volumes). In that case the Board concluded that the Respondent committed various violations of the Act in 2004. These included (1) bypassing the Union and dealing directly with employees by promising them promotions to managerial positions so that they no longer would be part of the bargaining unit; (2) telling employees that their transfer requests were denied because they were shop stewards; (3) urging employees to sign a petition to decertify the Union; (4) bypassing the Union and dealing directly with employees by promising them wage increases, commissions, and job security if they abandoned their support for the Union or if they decertified the Union; (5) informing employees that it would be futile for them to support the Union because the Union could not assist employees who were discharged; and (6) engaging in surface bargaining with no intention of reaching an agreement. As part of the remedy, the Board ordered that the Respondent pay the Union for its bargaining expenses and pay any employees for lost wages caused by their attendance at negotiations.³

It is not clear from this record, whether the parties recommenced negotiations at some point after the Board's Decision and Order.

B. The Discharge of Shawn Ryals

At the Farmingdale facility, the field service representatives are supervised by two field service supervisors (Milton Anderson and Chris Lannon). They in turn report to the general manager (John Shaw) and the installation manager, (Keith Knipschild). The general manager and the installation manager

² The judge dismissed certain other allegations of the complaint. For example he dismissed the allegation that supervisors threatened employees with discipline if they discussed with their coworkers or shop stewards, disciplinary meetings held by the Company. He also dismissed an allegation that a supervisor stated that he did not recognize the Union. Finally, he dismissed an allegation that the Respondent reneged on an agreement regarding a verbal warning issued to an employee.

³ More recently in a case at another location, the Board found that the Respondent engaged in a number of significant violations. *Dish Network Service Corp.*, 347 NLRB No. 69, above.

report to the northeast regional manager who is Bill Savino. Also tangentially involved in this case is Anthony Bowen who is the Respondent's vice president of the northeast region. There is a corporatewide human resources department that is headed up by Emily Feugill.

Shawn Ryals began his employment in Raleigh North, Carolina. He asked for and received a transfer to the Farmingdale office in or about June 2009. When he arrived, he was told *inter alia*, that the pay scale and other terms of employment were different at Farmingdale than what they were at Raleigh or for that matter at all of the other nonunionized facilities in the United States.

In Farmingdale, Ryals was employed as a field technician and was one of the people in the bargaining unit. Soon after his transfer, he joined the Union. However, apart from joining the Union, he did not engage in any other union activities.

In 2010, Ryals was given an extended bereavement leave due to a death in his family. He returned to work in August, having used up all of his leave for the year.

On or about September 12, Ryals was assigned to drive van number 9 which he refused to drive, asserting that the van was dirty and that the ladder was loose thereby making the van unsafe. Ryals talked to his direct supervisor, Milton Anderson about this and was offered van number 1. According to Ryals, he refused to drive this van too, because he had heard from another person that this van had a steering problem. Ryals asked Anderson about van number 5 and Anderson responded that this was his van and he needed it. In the end, Ryals told Anderson that he would not drive either van and he left to go home.

Ryals testified that he did not receive any disciplinary action as a result of his refusal to drive the vans. Ryals also testified that later in September, Bob Malta told him that he had tested van number 1 and could not find anything wrong with the steering.

On or about September 13, Ryals clocked in and asked to speak to Shaw about the events of the day before. Ryals explained to Shaw why he had refused to take either van the preceding day and Shaw told him that he had to take van number 1 even after Ryals asserted that it was unsafe. Shaw told him that if he didn't take van number 1, he would be out of a job. Ryals took the van and called a number of people including the union's business agent John Howell, who told him to drive the van slowly. Ryals did drive the van and testified that the steering wheel was so loose that he had to keep moving it to keep the vehicle going in a straight line.

On or about September 14, Ryals spoke on the phone with Anthony Bowen, the vice president of the northeast region and complained about being forced to drive the van. He testified that Bowen told him that the Company's policy was to assign an employee to another van if the employee felt that the vehicle was unsafe. Ryals said that he felt that the Farmingdale facility was being treated differently because it was a union shop and that Bowens did not respond. Ryals told him that he was trying to get in touch with the human resources department and Bowen said that he would make some calls on Ryals' behalf. Several days later Ryals received a call from a person in human resources who told him that they would have a meeting.

In relation to this incident, I cannot say, based on the evidence at hand, if the vans that Ryals was asked to drive on September 12 and 13 were unsafe. The Respondent's witnesses testified that they did have van number 1 tested and that they did not find any problems with the steering.

At a safety meeting held sometimes later in September 2010, there were a lot of complaints aired by many of the employees including Ryals. One of the items was the issue of fall protection which involves procedures to use a harness when an employee is working on a customer's roof. Another issue was a complaint by some of the employees regarding Milton Anderson and his style of supervision. Ryals testified that he brought up the steering wheel issue and that Savino told him to hold off on that and that he wanted to speak to him privately. According to Ryals, there were many employees who brought up different issues and that no one acted as a spokesman for the group.

Ryals testified that after the meeting, he was told by Savino that he wanted Ryals to drop the van issue. Ryals asserts that he said that he would not because he felt that Shaw had put his and other employees' lives in danger. It was at this point, according to Ryals that Bob Malta said that he would take out the van and check it himself.

It is the General Counsel's theory that a reason that the Company decided to discharge Ryals in January 2011 was because of his "concerted" activity of complaining about the van safety issue in September 2010. She also asserts that a reason for his discharge was because of his union activity notwithstanding a lack of evidence showing that he engaged in any union activity other than becoming a member.

I note here that Ryals never followed up on his van safety complaints by filing any written complaint internally within the Company or to any outside agency such as the Department of Transportation. I also note that as a matter of policy, the drivers are required to list any problems with their vehicles as part of their regular job duties. It therefore seems less likely that the Respondent's supervisors would have been particularly upset about Ryals' complaints about a van's safety expressed in September 2010. And although I can understand why the managers might have been upset about his refusal to drive a van, this was a one shot event that resulted in no disciplinary action at the time. Moreover, it occurred more than 3 months before his discharge. Assuming that Ryals' complaints about van safety, and as expressed in the group meeting in late September, would be construed as concerted activity, there is no evidence that Ryals engaged in any other concerted activity between that time and the time of his discharge.

As noted above, when Ryals returned from bereavement leave in August 2010, he had used up all of his paid time off.

In November 2010, General Manager Shaw posted a notice near the timeclock stating that requests for unpaid days off would not be approved. This was posted because of a heavy workload and because of anticipated requests by employees for paid days off during the holiday season.

Under the Company's policy, employees receive 12 paid days off which they can take for any reason. Thus, if an employee had used only 5 paid days off by November, he would have the right to take 7 more paid days off before the end of the

year. Employees can also take up to 4 unpaid days off if approved by the Company. Beyond that, employees can be subject to discipline if they have unexcused absences.

In any event, Ryals had much earlier in the year, booked a trip to Colorado for the Christmas holidays which would mean that he intended to be absent from work on December 26 and 27.⁴ It seems that when the notice was posted, Ryals filled out a form asking for unpaid days off in December and this was declined by Shaw. After the notice was posted, Ryals did not make any other requests for unpaid time off and made no attempt to change his airline tickets. Instead, he waited until December 22 when he advised Anderson and Knipschild that he would not be coming to work on December 26 and 27. Claiming that they approved or at least didn't object, Ryals went to Colorado and, while there, had his return flight canceled because of a big snowstorm in New York.

The Company denies that either Anderson or Knipschild approved Ryals' absences for December 26 and 27. And in this regard, it doesn't seem all that likely that these two people who were lower in authority, would take it upon themselves to overrule a decision previously made by their superior.⁵

In the meantime, because of the snowstorm, the Farmingdale facility was closed on December 27 and many employees could not make it to work on December 28. Obviously, no employees in New York were penalized for failing to come to work on either day.

Ryals called in and spoke to Anderson on December 27 to inform him that his flight had been canceled. He also called on December 28 because he was still stuck in Colorado. Ultimately Ryals was able to return to New York on December 29.

On January 1, 2011, Anderson phoned Ryals and told him not to report to work on January 2. When asked, Anderson told Ryals that he was being suspended because he had been absent from work without permission. Ryals thereupon contacted his union representatives and ultimately a meeting was arranged for January 3.

On January 3, 2011, a meeting was held at the Company's facility. At this meeting, Ryals was represented by two union representatives. Also attending this meeting was Bill Savino who happened to be at the facility that day and who hadn't had any previous involvement with the situation. The evidence shows that Savino took charge of the meeting and ran it something like an investigation or inquest. Savino asked Ryals to tell him what happened and Ryals related his version of the events, including his claim that he had been given permission on December 22 to take the days off. Savino called up Knipschild on the speaker phone and he denied this. Ryals testified that he stated that Anderson was also involved and that Savino called him up and told him to attend the meeting. According to Ryals, they waited for Anderson to show up and that Savino asked him about the situation when he joined the meet-

⁴ He testified that he bought airline tickets in January or February 2010.

⁵ Jaime Bosque, a witness called by the General Counsel did not support Ryals assertion that Anderson gave him permission to be absent on December 26 and 27. He testified that he overheard a conversation between the two men and that Anderson merely said to "follow regular protocol." Also, I found Anderson to be a credible witness.

ing. Ryals testified that there was some discussion and that in the end Anderson denied giving him permission to leave. Ryals concedes that at this point, he got a little angry especially when it was pointed out to him that he had used up all his paid days because of a family death. According to Ryals, at this point, Savino “cut me off and he said, ‘Okay, you’re terminated.’”⁶

Savino testified that he had no idea what this was all about when he arrived at the facility on January 3. He testified that he decided to conduct an investigation into the matter and as described above, he had Ryals relate his side of the story and had Knipschild and Anderson relate their version of the events. Savino testified that when he went into the meeting he was aware that Ryals had been suspended for taking unauthorized absences but that he had no intention of firing him at the time.

According to Savino, he made up his mind to terminate Ryals when Ryals became loud and aggressive and accused Anderson of lying. Given that Ryals testified that he got a bit angry during Anderson’s appearance at the meeting and that Savino then cut him off and blurted out that he was being fired, it seems to me that this is how the events actually transpired. Thus, although the termination notice relates details of Ryals’ absences from December 26 through 29, this does not, in my opinion, fully explain the reason for his discharge.

Had Ryals simply explained his situation at the meeting on January 3, I think that Savino would probably have given him some form of discipline short of termination. In this regard, the record shows that the local management has not rigidly followed its own rules regarding unexcused absences. The records shows that other employees on numerous occasions have managed to be absent for longer than the written rules allow without suffering termination.

If the General Counsel had postulated the theory that the Respondent discharged Ryals because of his participation in the January 3, 2011 meeting, I could see an argument that Ryals’ participation in the meeting would constitute concerted activity within the meaning of Section 7 of the Act. This was, after all, a meeting that was attended by union representatives and was held with the Company to discuss what if any discipline was to be given to an employee in relation to his absences. (Clearly a term and condition of employment.) It was, in effect, analogous to a grievance meeting. But this is not the contention.⁷

In the complaint, at the hearing and in the Brief, the General Counsel asserted that the motivation for discharging Ryals was (a) because of his union activities and (b) because of his concerted activity consisting of his complaints about the safety of the vehicles he was assigned to drive. The Complaint specifically alleges that Ryals’ concerted activity took place on September 13, 2010 and that he was discharged for engaging in that specific activity. In neither case, can I agree with the Gen-

⁶ Savino’s testimony was basically the same. He testified that; “he [Ryals] even abused him [Anderson] and I even allowed that to happen, against my better judgment. Then when I tried to explain to him and he started getting loud with me, I says [sic] at that point; “You know what, this conversation’s over, you’re terminated.”

⁷ Had this been the theory of the case, an issue would have been whether Ryals’ conduct at this meeting was “misconduct” of the kind that would have removed it from the Act’s protection. See *Atlantic Steel Co.*, 245 NLRB 814, 816.

eral Counsel that either factor played any role in the decision to discharge Ryals.

In light of the above, and even though it seems more likely that Savino decided to discharge Ryals because of Ryals statements at the January 3 meeting; a meeting that could reasonably be construed as concerted, I cannot conclude that this violated the Act because it is not based on any theory argued by the General Counsel. See *New York Post*, 353 NLRB 343 (2008).

C. The Bonus Issue

Ryals testified that in June 2009, he was approached by Shaw, the local manager, on several occasions and was told that if the employees decertified the Union they would receive the bonus plan that was applicable to employees in other parts of the country. This was in the context of alleged interrogations about Ryals’ and other employees’ union sympathies. The Union later filed an unfair labor practice charge relating to these allegations but it was withdrawn apparently because they occurred more than 6 months before the filing of the charge. (Sec. 10(b) of the Act precludes the issuance of a complaint based on allegations occurring more than 6 months before an unfair labor practice charge is filed.)

Ryals testified that on one occasion in January 2010, he was given a list of employees by Shaw and asked to state who was for or against the Union. This too, was almost a year before any of the instant charges were filed and is therefore outside the 10(b) period.

The evidence shows that since 2001, the wages and certain conditions of employment for the Farmingdale employees have been different from those of employees in the rest of the country. I surmise that this is because wages and benefits were frozen for these employees while negotiations were ongoing.

The record suggests that since as far back as 2001, the Farmingdale employees have received, on top of a basic wage scale, some kind of supplemental “bonus” system that allows employees to earn extra money based on a type of productivity or performance formula. The details of this were not explained. There is some testimony by Ryals that when he arrived in New York from Raleigh, he was told by the local manager that this “bonus” system was to compensate the Farmingdale employees because they were being paid at a lower rate than employees at the other nonunion New York locations. This is the only evidence on this point.

The testimony of Savino suggests that sometime in mid 2008, management at corporate headquarters rolled out a new bonus system that was applied to all nonunion facilities throughout the United States. He testified that he had nothing to do with the planning of this program and testified that he was not all that familiar with its details. This was called the stack rank bonus system.

General Counsel Exhibit 5 is a three page document issued by the Company’s human resources department. At the top it states: “DNS 2008 Stack Ranking Updated Incentive Program. Effective Stack Rank Period 6/14/2008–7/11/2008.” In substance the document describes a system of monetary incentives based on performance.

According to Savino, the program was started for the non-

union field service technicians on a trial basis in June 2008. Thereafter, it was permanently implemented.

In General Counsel Exhibit 3, the parties stipulated that:

Dish Network Service LLC's ("the Employer") nonunion locations paid technicians until in or about the last week of February 2011 additional money based upon their rank at the end of each month as long as they fall within one of the three top levels in the stack rank system. The Employer's Farmingdale facility technicians are represented by the Communication Workers of America Local 1108 and do not receive stack rank compensation.

There is no evidence to show that after June 2008, any bonuses or incentives provided to the employees at nonunionized facilities were greater, the same, or lower than bonuses or incentives that were paid to the Farmingdale employees. Although not shown in the record, I surmise that the Union was not notified by the Company that the stack ranking system was being implemented at its other locations. I also surmise that the Company did not notify the Union that this system was not being offered to the unionized employees at the Farmingdale facility. Likewise, there is no evidence that once finding out about the implementation of the new bonus system at nonunionized facilities, the Union asked the Employer to implement or bargain about this system for the Farmingdale facility.

The General Counsel alleges that the new bonus system was illegally withheld from the Farmingdale employees because they were represented by the Union and was therefore discriminatorily motivated. Although the new bonus system was implemented at nonunion facilities and not applied to the Farmingdale facility outside the statute of limitations Section 10(b) period, the General Counsel argues that the failure to implement this bonus system at the Farmingdale facility is a continuing violation. The Employer argues that the entire issue is barred by Section 10(b) because the decision was made and carried out in 2008.

D. Discussion

The question here is whether a company violates the Act when it refuses to grant to unionized employees the same wages or benefits that it grants to its non-unionized employees. The answer seems to be: It depends.

In *Shell Oil, Co.*, 77 NLRB 1306, 1309 (1948), and cases thereafter,⁸ the Board has stated that an employer is not required to afford represented and unrepresented employees the same wages and benefits. The Board stated that unless the General Counsel has demonstrated that the withheld wage or benefit was discriminatorily motivated, an employer may, as part of a bargaining strategy, withhold from the union represented employees a wage increase that was granted to its other non-union employees.

In *Arc Bridges, Inc.*, 355 NLRB 1222, 1223–1224 (2010), the Board held that an employer violated the Act by withholding annual wage reviews and increases from newly unionized employees while continuing them for nonunion employees at the same facility. The Board held that as to both sets of em-

ployees, these annual wage reviews and increases were an established condition of employment and therefore, the decision to withhold them from the union employees was inherently destructive of employee rights. The Board ordered the employer to make the newly unionized employees whole by payment to them of difference between their actual wages and the wages granted to nonunion employees. The Board stated *inter alia*:

The *Shell Oil* cases applied by the judge 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. The key fact in the *Shell Oil* cases, however, is that the wages or benefits withheld from represented employees were new.

By contrast, where an employer withholds from its represented employees an existing benefit (i.e., an established condition of employment), the proper analytical framework is found in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). In those circumstances, the Board will find that the unilateral withholding of an established condition of employment from only the represented employees is "inherently destructive" of their Section 7 rights, even absent proof of antiunion motivation.⁶ See *United Aircraft Corp.*, 199 NLRB 658, 662 (1972), *enfd.* in relevant part 490 F.2d 1105 (2d Cir. 1973); *Eastern Maine Medical Center*, 253 NLRB 224, 242 (1980), *enfd.* 658 F.2d 1 (1st Cir. 1981). The key question, therefore, is whether the June–July wage review process was, as the judge found, an established condition of employment for all of the Respondent's employees, including those represented by the Union.

....

The Respondent's rationale is essentially an admission that the represented employees did not receive the October 2007 across-the-board wage increase *because* they chose union representation. Indeed, that choice, the Respondent contends, is what permitted it to withhold the annual increase and, in effect, take the position that the increase would have to be negotiated back by the Union. Leaving no room for doubt, the Respondent, in its answering brief, echoes the judge's characterization of its conduct as a "legitimate bargaining strategy." Board law, however, is clearly to the contrary.

In *Chevron Oil Co.*, 182 NLRB 445, 449–450 (1979), the judge concluded that the employer violated the Act by telling employees that they did not receive certain benefits because of their representation by the union. He dismissed, however, the allegations that the company engaged in bad-faith bargaining or that it had violated the Act by withholding benefits that had, in the past, been granted to unionized and nonunion employees alike. The larger portion of the decision related to a reversal of the judge's conclusions that the company did not engage in

⁸ See, for example, *Sun Transport Inc.*, 340 NLRB 70 (2003).

surface bargaining. (The Board concluded that despite meeting with the Union, the evidence showed that the employer engaged in bargaining with no intention of reaching an agreement.) As to the allegation that the employer violated Section 8(a)(1) and (3) by withholding the benefits, the Board stated, *inter alia*:

The Trial Examiner dismissed the complaint's 8(a)(1) and (3) allegations predicated on Respondent's wage benefit withholdings. In his view, Respondent's conduct amounted to no more than an exertion of "economic pressure at the bargaining table" which had neither the purpose nor the effect of coercing employees in the exercise of their bargaining rights or of discouraging their desire for membership in the Union. In arriving at that conclusion, the Trial Examiner, as his analysis of this issue shows, evaluated Respondent's withholding action in isolation, without relating it to Respondent's unlawful course of bargaining and to the 8(a)(1) violation that he found. In this respect we believe the Trial Examiner erred, and therefore erred, as well in the conclusion he reached.

Were it not for the unfair labor practice setting in which the withholding action occurred, we would have had no hesitancy in adopting the Trial Examiner's finding. 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. *Shell Oil Co.*, 77 NLRB 130. As the Supreme Court made clear in *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300, the Act accords employees no right to insist upon their bargaining demands free from economic disadvantages, and an employer's use of economic pressures solely for that reason alone.

....

In our judgment, the record in this case establishes all the elements necessary to support the complaint's 8(a)(1) and (3) allegations relating to the wage benefit withholdings. Clearly there was discrimination in the sense of economic injury, both because the unit employees were being denied benefits granted others, and because they were being deprived of benefits they would have enjoyed had they remained unrepresented. As the injury thus imposed was a direct outgrowth of the employee's selection of the Union and the Union's frustrated effort to bargain on their behalf, the discrimination had a natural tendency and foreseeable effect of reducing employee desires for continued union representation. We have already found that the withholding action may not in the circumstances of this case be viewed as a "legitimate" use of economic pressure to obtain a favorable contract. There remains, then, only the question of unlawful motivation. We believe that this element is adequately satisfied by the finding of Respondent's unlawful bargaining, which the withholding served to implement and of which it was part and parcel. But if more specific proof of unlawful purposes in the withholding itself is deemed necessary, it is supplied by the findings

based on Kirkvold's December 6, 1967 coercive statements to employees to which we made reference above.

In *Meredith Corp.*, 194 NLRB 588, 591 (1971), the Board sustained the Judge's dismissal of an allegation that an employer violated Section 8(a)(3) by withholding a benefit to represented employees. In that case, the employer, while paying nonrepresented employees for being sent home during a snow storm, refused to make such payments to represented employees on the grounds that their wages and benefits were controlled by the existing collective-bargaining agreement. In her decision, Judge Josephine Klein stated:

The present case, on the other hand, involves a specific, isolated instance of differentiation, not inherently discriminatory on its face. Toffenetti, *supra*, illustrates the basic difference between the "fund" cases and those, like the present, involving ad hoc differentiation. The published plan in Toffenetti was held to be discriminatory on its face and thus violative of the Act irrespective of the employer's motivation. However, in holding that the employer also violated Section 8(a)(3) by withholding Christmas bonuses from its organized employees, the Examiner, affirmed by the Board, expressly found that "the record herein clearly discloses Respondent's anti-union motivation for the disparate bonus payments by substantial evidence independent of the bonus payment alone." 136 NLRB at 1168. Since the differentiation here involved may very well be based solely on reasonable economic or other nondiscriminatory considerations, it is entitled to a presumption of validity, the General Counsel shouldering his usual initial burden of proof.

In the present case, there is no suggestion of union animus on the part of Respondent. Indeed, Respondent and the Union here involved have been bargaining for around 40 years. And Respondent has collective agreements covering 13 bargaining units in Des Moines and 11 in other locations. There is no evidence that Respondent opposed the unsuccessful attempt to organize its clerical employees in Des Moines which led to an election in 1965. In January 1971, the time here involved, there were no organizational or bargaining activities in progress or in immediate prospect.

Nor has the General Counsel presented any affirmative evidence from which it could be found that Respondent's decision was motivated by a desire to discourage union membership. On the other hand, Respondent articulated a sound basis for distinguishing generally between production and clerical workers. Production lost when machines are down is forever gone unless made up on other time; much office work, such as that of switchboard operators and receptionists need not and cannot be made up, and other functions, such as typing and filing, can usually be fitted in without extending other regularly scheduled work time. The Examiner might well take official notice of what Vice President Arnold referred to as the "inherent difference" between clerical and production work which would warrant a difference in the treatment of pay for time not worked. [Footnotes omitted.]

The present case, in my opinion, falls somewhere between the above cited cases.

Unlike the facts in *Arc Bridges, Inc.*, supra, the bonus plan introduced nationally by the Respondent and withheld from the employees at unionized facilities was a new benefit and was not an existing benefit that both union and nonunion employees had previously enjoyed. As such, the facts here are more like those in *Shell Oil*, supra, where the Board opined that the NLRA does not require an employer to afford represented and unrepresented employees the same wages and benefits.

At the same time, the facts here are not like those in *Meredith Corp.*, supra where the benefit withheld was rather minor and was essentially a one off event. In the present case the bonus plan, even though not fully described, seems to me to be a substantial condition of employment and was a transaction that would affect the Farmingdale employees for years.

In my opinion, this case most closely resembles the facts in *Chevron Oil Co.*, supra. In that case, the Board held that by withholding certain benefits to union represented employees while granting those benefits to similarly situated non-union employees, the Employer violated Section 8(a)(1) and (3) of the Act. The Board specifically noted, however, that this withholding of benefits occurred in a context where the Employer had (a) simultaneously engaged in bad-faith bargaining and (b) that its manager had told employees that they were not receiving the benefit because they were represented by a union. (Assuming arguendo that Sec. 10(b) would not bar this allegation.)

In my opinion a good argument can be made that the facts in the present case are substantially similar to the facts in *Chevron*. However, I also think that there are some important distinctions. Although the Respondent in the present case engaged in surface bargaining, that bargaining took place in 2004. That is about 4 years before the bonus system at issue here was put into effect on a nationwide basis. The timing of the benefit's withholding was not coincident with the negotiations between the Company and the Union and it therefore is not so likely that "the injury thus imposed was a direct outgrowth of the employee's selection of the Union and the Union's frustrated effort to bargain on their behalf." Had the benefit's withholding occurred within a shorter time of the bad-faith bargaining, I

would reach a different result.

The fact that Respondent's local manager, sometime in 2009, told one employee (Ryals) that the Farmingdale employees would receive the stack ranking bonus system if they were not represented by the Union is not quite the same as the statements made by a higher ranking manager of *Chevron*, who stated that the employees were not getting the benefit because they were represented by a union. For one thing, the stack ranking bonus system was developed and implemented from the Respondent's headquarters. The local people in Long Island had nothing to do with its design or the decision to put it into effect. For another, the statement made to Ryals was, in essence, a true statement of fact and does not necessarily prove that the reason this new bonus system was withheld was in order to punish employees because they selected the Union.

The fact is that since 2001, the Company has essentially frozen wages and benefits at those facilities where it has been required to bargain. And unless one wants to conclude, despite the language in *Shell Oil Co.*, that the withholding of any benefit from unionized employees that has been given to nonunion employees is inherently discriminatory in any circumstance, it is hard for me to see that a violation of the Act has occurred in this case.

Conclusions

For the reasons stated above, I conclude that the Respondent has not violated the Act in any manner encompassed by the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The complaint is dismissed.

Dated, Washington, D.C., October 12, 2011

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.