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KAG-West, LLC and Miscellaneous Warehousemen Drivers and Helpers, Local 986, International Brotherhood of Teamsters. Cases 21–CA–039488 and 21–CA–039665

September 28, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On December 30, 2011, Administrative Law Judge William G. Kocol issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The Acting General Counsel 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, as further explained below, and to adopt the recommended Order.

We affirm the judge’s finding that the Respondent violated Section 8(a)(3) and (1) by discriminatorily withholding a wage increase from unit employees following their selection of Miscellaneous Warehousemen Drivers and Helpers, Local 986, International Brotherhood of Teamsters as their collective-bargaining representative. In doing so, we agree with the judge that the Acting General Counsel carried his initial burden under *Wright Line*.² Union activity and employer knowledge are undisputed, and the record supports a finding of antiunion animus for the following reasons.

First, the timing of the Respondent’s actions strongly supports a finding that the Respondent was motivated by antiunion animus. See generally *Masland Industries*, 311 NLRB 184, 197 (1993) (“Timing alone may suggest

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

There are no exceptions to the judge’s dismissal of the allegation that the Respondent unlawfully created the impression that its employees’ union activities were under surveillance.

² 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Because the alleged violation turns on the Respondent’s motive for withholding the wage increase, we agree with the judge that *Wright Line* is the appropriate analytical framework.

antiunion animus as a motivating factor in an employer’s action.”) (quoting *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984)). In December 2009, the Respondent reduced wages for economic reasons and informed employees that there would be no wage increases in 2010. Three months later, however, after becoming aware of the Union’s organizing campaign at the Respondent’s southern California facilities, the Respondent prepared to implement a wage increase. A March 16 email between two managers, apparently referring to the organizing campaign, stated that the Respondent needed to begin “moving quickly on the situation in southern California.”³ The email then referred to plans for a “positive adjustment in pay” in late summer. In early August, shortly before the election, the Respondent decided to grant a wage increase to its unrepresented employees but to exclude the bargaining unit employees.⁴ Thus, when faced with an organizing campaign, the Respondent abruptly changed course and began taking steps to implement a wage increase, but only for employees who were not seeking to unionize.

Second, although the Respondent disseminated its August 24 memo announcing the wage increase for unrepresented

³ The email stated in full:

Dennis wants us to make sure we are moving quickly on the situation in Southern California. I’m thinking about catching an early flight in the morning and suspending Wed, Thur, and Friday at Rialto. May stay or come back out the next weekend to continue. Your thoughts?

Points to make:

We lost 16 trucks worth of Chevron work last fall due to rate cuts from competitors of 12%-20%.

We lost 1.5-2.0 million worth of Circle K business in January due to rate cuts from competitors.

We trimmed our overhead cost of Sacramento to try to protect driver pay.

We are working hard on adding new business and private fleet conversions to keep revenue up and protect jobs and further financial deterioration.

We have rolled PCT in to try gain additional savings.

In other words, we have encountered a big challenge in a very difficult market (KAG West actually lost money last year) and we have worked very hard to make some tough decisions to protect our employees and our company. At this time it appears the moves are paying off and the numbers are improving. Our full intention is to keep moving forward and if by late summer we feel confident we have weathered the storm and are on more solid footing, we plan to make positive adjustments in pay, etc. The key is everyone pulling together and making it happen. That’s how we all win in the long run.

⁴ The Respondent did not announce or implement the increase until August 24, the day before the Union was certified. The judge rejected, on credibility grounds, the Respondent’s argument that the delay was based on advice of counsel to avoid the appearance of trying to influence the election.

sented employees at facilities where the unit employees worked, the Respondent made no contemporaneous announcement to unit employees that it intended to bargain over implementation of a wage increase for them. We find that this silence, when contrasted with the Respondent's communication with its unrepresented employees, further indicates that the Respondent's actions were motivated by animus toward the unit employees for having selected the Union as their bargaining representative.

In sum, the circumstances as a whole support the judge's finding that the Respondent's withholding of the wage increase from unit employees was discriminatorily motivated. The Respondent's March 16 email shows that, from the beginning, the decision to grant the pay increase was linked to employee sentiment about the Union. When the southern California employees made their sentiments clear by voting to unionize, the Respondent proceeded to treat them less favorably than those who remained unrepresented, without reassuring the unionized employees that they would have the opportunity to bargain for similar treatment. Thus, we find the evidence sufficient to support an inference that the Respondent's decision was motivated by its opposition to the unionization effort. We therefore conclude that the Acting General Counsel met his initial burden under *Wright Line*.

We also agree with the judge, for the reasons stated in his decision, that the Respondent did not meet its rebuttal burden under *Wright Line* to prove that the wage increase would have been withheld from unit employees notwithstanding their union activity. In doing so, we observe that the judge discredited the Respondent's witnesses' testimony regarding their reasons both for implementing the wage increase for unrepresented employees and for withholding it from unit employees.⁵ Other than discredited testimony, the Respondent has put forth no evidence to rebut the inference of discriminatory motive. Accordingly, we affirm the judge's finding that the Respondent violated Section 8(a)(3) and (1) by discriminatorily withholding the wage increase from employees because they selected the Union as their bargaining representative.

⁵ The judge also relied on *Aluminum Casting & Engineering Co.*, 328 NLRB 8, 16 (1999), enfd. in relevant part and remanded 230 F.3d 286 (7th Cir. 2000). The Respondent correctly observes that *Aluminum Casting* is factually distinguishable: there, the employer had a regular practice of granting wage increases, but withheld the wage increase that it would otherwise have implemented during the union organizing campaign and expressly cast the blame for its decision on the union. Nevertheless, the underlying principle of *Aluminum Casting*—that employers may not delay or withhold an increase in order to punish employees for unionizing—is applicable here.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, KAG West, LLC, Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. September 28, 2012

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Alice J. Garfield, Esq., for the Acting General Counsel.

Lawrence C. DiNardo and *Michael S. Farrell (Jones Day)*, of Chicago, Illinois, for the Respondent.

Debra S. Goldberg, Esq., *Labor Counsel*, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Los Angeles, California, on October 24–25, 2011. The Miscellaneous Warehousemen Drivers and Helpers, Local 986, International Brotherhood of Teamsters (the Union) filed the charge in Case 21–CA–039488 on September 20, 2010,¹ and the Acting General Counsel issued the complaint on July 27, 2011. The complaint as amended at the hearing alleges that KAG WEST–LLC (KAG) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by creating an impression among employees that their union activities were under surveillance and violated Section 8(a)(1) and (3) by withholding a wage increase from employees who selected the Union as their collective-bargaining representative while at the same time granting the wage increase to unrepresented employees.

KAG filed a timely answer that admitted the allegations in the complaint concerning the filing and service of the charges, interstate commerce and jurisdiction, labor organization status, and the supervisory and agency status of certain individuals; KAG denied committing any unfair labor practices. KAG alleged affirmatively that the allegations in the complaint were outside the scope of the charges and that the allegations were barred by Section 10(b).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and KAG, I make the following

¹ All dates are in 2010, unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

KAG, a California limited liability corporation, is engaged in the transportation of bulk petroleum products, including automotive fuels and petroleum lubricants that it accomplishes with and through various facilities and operating locations in California and other States. KAG is a subsidiary of Kenan Advantage Group, Inc. and its principal office is located in West Sacramento, California. KAG annually purchases and receives at its California facilities goods valued in excess of \$50,000 directly from points outside the State of California. KAG admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Kenan Advantage Group, Inc., of which KAG is a subsidiary, operates nationwide; it holds itself out as the Nation's largest transporter of bulk commodities. It employs about 7200 persons. Douglas Allen is executive vice president for the Kenan Advantage Group, Inc.; Ryan Walls is its director of employee relations and benefits. Again, KAG is a subsidiary of Kenan Advantage Group, Inc. KAG operates in California, Washington, Oregon, Nevada, and Arizona. Calvin Kniffin is director of operations for KAG.

On July 2, the Union filed a petition to represent drivers, mechanics, and polishers at KAG's terminals in southern California. KAG and the Union agreed to a stipulated election that was approved by the Regional Director on July 14. Both the Union and KAG conducted campaigns designed to persuade employees to vote yes and no, respectively, in the election. The election was held on August 13 and 16, the ballots were counted on August 17, and the Union won. No objections were filed, so the Union was certified on August 25. The parties have been bargaining but no contract has been reached.

After the election, KAG described itself, in part, as follows:

KAG has historically been a union-free environment because we believe a direct working relationship with our employees provides the best opportunity for success for all of us. *We continue to firmly stand by this belief.*

We do not believe the union would be good for our employees, their families or our business. We will only be successful by working together without any outsiders coming between us.

KAG also prepared the following talking points for its terminal managers.

- As we feared because of Union influence, there have been instances of bickering, name calling, and disrespect between our drivers.
- We've also had individuals purposefully leave equipment and trucks in disarray to harass fellow co-workers.
- The bickering must stop. Each driver must treat their

co-worker with dignity and respect and as a teammate for KAG West to provide the best service to our customers.

- We don't need to become a topic of conversation in the local industry which could affect our reputation with our customers.
- Another concern has to do with organizing rumors being spread to our customers. Who is spreading these rumors? Our competitors trying (sic) to get the available Chevron business, and soon-to-be unemployed union drivers making sure they don't lose their seniority at their next job. We need your help to dispel these rumors that could take away this new business.
- Newly unemployed union drivers don't want to lose their seniority when they find a job with a new company. And guess what ... KAG, a non-union company, is their best opportunity for a job in this marketplace.
- These drivers soliciting you are not your friends. They are trying to protect themselves, not you.
- The customers don't need to be concerned about our internal issues and the potential negative impact on their business.
- We see this behavior in many Union organization drives. KAG West and its drivers cannot allow these issues to affect our customer base or reputation.
- This hurts all of us during these challenging market conditions and must stop now. It definitely threatens our business and our jobs which is not in the best interest of our families, customers or fellow employees.
- Help us keep our customers and protect our jobs by working respectfully together while being safe – productive - and competitive.

B. Wage Increase

The complaint alleges that in early August KAG decided to grant a systemwide wage increase to its employees but to withhold that wage increase from unit employees if they voted in favor of union representation. The complaint also alleges that on August 21 KAG granted a wage increase to employees but unlawfully withheld the wage increase from unit employees.

KAG does not grant regular, periodic, across-the-board wage increases to its employees.² In 2005, KAG gave employees a substantial wage increase amounting to about \$3 per hour. At that time, it was facing difficulty retaining drivers at a time when the economy was booming. In December 2009, KAG reduced wages when faced with the economic downturn of that time period; wages were reduced about \$1.90 per hour for most employees. Allen held meetings with KAG employees to explain the situation to them. During this process, Allen also announced, "No wage increases will be given in 2010."

In the aftermath of the wage reduction, employees began to seek union representation. In February 2010, KAG became aware that the Union was mounting an organizing drive among

² Other than for probationary employees who receive wage increases upon completion of the probationary periods.

its drivers. In March, Bruce Blaise, then an executive vice president, received permission to travel to southern California and meet with the drivers. One point Blaise made to the drivers was that KAG's:

[F]ull intention is to keep moving forward and if by late summer we feel confident we have weathered the storm and are on more solid footing, we plan to make positive adjustments in pay, etc.

This is despite the announcement, made only a few months earlier, that there would not be any wage increases in 2010.³ KAG then began the process for making the adjustments in pricing with customers needed to cover the anticipated wage increases.

In about early August, about 10 months after reducing wages, Blaise decided to grant wage increases to employees; he then obtained final approval to do so. Of course, this decision was made in the midst of the Union's organizing effort among the drivers in southern California. As explained in KAG's Statement of Position submitted during the investigation:

With respect to KAG West, it was decided to implement the wage increases for non-bargaining unit employees, including dispatchers and administrative staff in Southern California, and to defer any decision on changes in wages for bargaining unit employees until after the election and, if the Union wins, to the collective-bargaining process, where wages will be negotiated as part of a comprehensive agreement, as required by law.

At the time, the NLRB supervised representation election to determine whether a majority of employees supported the Union as their exclusive bargaining representative was approaching on August 13 and 16, 2010. It was determined that any announcement pertaining to changes in wages be delayed until after August 16 so as not to risk interfering with the election and the filing of related unfair labor practice charges.

On about August 24, KAG disseminated the following memorandum to its employees in California, Arizona, and Nevada, including those employees in sSouthern California who had recently selected the Union to represent them.

TO: Northern CA - All Employees
Southern CA - Dispatchers/Administrative Staff
AZ and NV - All Employees

Date: August 24, 2010

³ Although there is not allegation in the complaint that the decision to grant the wage increase was designed to chill union activity, KAG presented evidence to show what motivated that decision. Blaise testified that this sudden turnaround was due to an improving economic situation. While there indeed may have been some improvement in the Nation's economy during the spring of 2010, I do not credit any testimony that this was the reason that motivated the decision to consider granting the wage increase. Rather, I conclude that it was the union activity of the drivers in southern California that motivated KAG to begin the process of granting wage increases to employees. Said differently, had the employees in southern California not engaged in union activities KAG would not have begun to consider granting the wage increases at that time.

RE: Wage Increase

As you know, over the last several months we have been actively soliciting our customers for rate increases to help fulfill our commitment to maintain and recruit the best drivers and employees in the industry. We are pleased to report we have been successful with process as our customers continue to value the exceptional service we provide. This increase comes after basically a two-year hiatus in rate increases due to the country's slow economy.

In light of these developments and our commitment to our employees to always share in the company's success, effective for the pay period beginning August 21, 2010, we will be implementing wage increases in your area. Your immediate supervisor will be discussing the details of those increases with you directly.

It has been a very difficult couple of years battling the worse (sic) recession in history resulting in unprecedented unemployment. We are proud to say that with your help and hard work, we were able to survive in this economy while protecting our jobs. Many companies, including those in the transportation industry, were not so fortunate and had to either close their doors or implement massive layoffs.

We have tremendous opportunities on the horizon, a solid financial structure and a strong investment group willing to back our success. Most importantly, we have a skilled and talented team of employees that are truly the backbone of our accomplishments.

Thanks you for your patience, your support and your dedication to the Kenan Advantage Group and KAG West. We look forward to working side-by-side with all of you as we continue to make KAG a great place to work.

As promised, KAG implemented the wage increases for certain unrepresented employees but it did not give any wage increases to the employees represented by the Union. Depending on location and driver classification, the wage increases were from \$1 to \$2.07 per hour. As Blaise admitted if the employees had voted against the Union they would have received the wage increase.

Analysis

The question is whether, because employees selected the Union to represent them, KAG unlawfully withheld a wage increase from them that it granted to other employees because those employees selected the Union as their collective-bargaining representative. In assessing this issue I apply *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). The employees engaged in union activity, KAG was aware of that activity and KAG was hostile to that activity. The 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; only those employees voting for the Union did not receive the wage increase. Indeed, KAG admits that it withheld the wage increase because the employees chose to be represented by the Union. Remember, this was in the context of KAG suddenly deciding to reconsider the earlier wage reduction after employees began seeking union representation. I conclude that the Acting General Counsel has

easily met his burden under *Wright Line*. KAG argues that the decision to withhold the wage increase was not unlawfully motivated. In doing so, it relies on “uncontroverted” testimony that KAG made the decision to withhold the wage increase based on advice of counsel. I do not have to credit testimony even if “uncontroverted” and I do not do so in this case. I conclude that testimony was entirely self-serving and unconvincing. Blaise, for example, seemed more eager to repeat KAG’s legal position than simply relate the facts as best he could. Moreover, that testimony is undermined by the facts described above that establish the unlawful motivation.⁴

I turn to assess whether KAG 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. The short answer is that KAG admits that it would have granted these employees the wage increase if they had rejected the Union. KAG, however, argues that as a matter of law under Section 8(a)(5) it was required to withhold the wage increase because it was required to bargain first with the Union concerning the matter. In this regard, KAG relies on *Shell Oil Co.*, 77 NLRB 1306 (1948), and similar cases. In *Arc Bridges, Inc.*, 355 NLRB No. 199 (2010), enf. denied 192 LRRM 2263, 662 F.3d. 1235 (D.C. Cir. 2011), the Board noted:

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.

Id., slip op. at 2. The critical wording, so far as this case is concerned, is “provided the withholding is not discriminatorily motivated.”

In *Aluminum Casting & Engineering Co.*, 328 NLRB 8, 16 (1999), the Board upheld the finding that the respondent violated Section 8(a)(3) by withholding a regular wage increase from employees. The judge noted:

Respondent also argues that it was caught between a rock and a hard place in deciding whether to grant the wage increase. It argues that it decided not to grant the increase in order to avoid being charged by the Board with attempting to unlawfully influence the election. An exception to the requirement that an employer must follow its normal practice in granting wage increases during an organizing campaign has been allowed by the Board where the employer advises employees that an expected raise is to be deferred pending the outcome of the election to avoid the appearance of election interference. *Parma Industries*, supra; *Centre Engineering, Inc.*, 253 NLRB 419 (1980). In the latter situation the employer must take care not to place the blame for the lack of a pay increase on the union, otherwise the employer will be found to violate

⁴ KAG argues that the Acting General Counsel conceded that its motive was lawful by stating to Blaise, “[W]e all understand that you were trying to follow the letter of the law.” But this was an obviously facetious comment given that Blaise, sounding like a broken record, repeatedly invoked the advice of counsel defense.

the Act by withholding the pay increase. *Atlantic Forest Products*, 282 NLRB 855 (1987); *Truss-Span Co.*, 236 NLRB 50 (1978). In my opinion, that exception does not apply in this case. . . . *The exception described above was not designed to be manipulated by employers as a legal cover for punishing employees for having voted in favor of a union.* [Emphasis added.]

By withholding a wage increase from employees because they selected the Union to be their collective-bargaining representative, KAG violated Section 8(a)(3) and (1).

I find it unnecessary to resolve the Acting General Counsel’s alternative argument that KAG’s failure to grant the wage increase violated Section 8(a)(1) because it was inherently destructive of the Section 7 rights of employees.

C. Impression of Surveillance

The complaint alleges that KAG unlawfully created an impression among employees that their union activities were under surveillance. Walter Bingham has worked for KAG in San Diego since January 2007; he drives tankers filled with flammable liquid. Bob Almeida is Bingham’s terminal manager.

In early July, Almeida announced that there would be a meeting that drivers had to attend; the purpose of the meeting was for KAG to inform employees why it was urging employees to reject union representation in the upcoming election. Bingham spoke to Almeida and informed him of family difficulties he was experiencing and Almeida excused Bingham from attending that meeting. Later that month, Almeida told Bingham of another meeting that was to be held to discuss the Union; this time Bingham informed Almeida that he had to attend a wake and therefore could not attend that meeting. In late July, a third meeting was announced and again Bingham informed Almeida that he could not attend because he had “a lot on his plate.” In early August, Almeida announced that there would be yet another mandatory meeting. This time Bingham told Almeida that he should be able to attend the meeting. Again, however, Bingham did not attend the meeting.

On August 12, Almeida met with Bingham. Almeida questioned Bingham concerning why he worked for KAG and then discussed an incident where Bingham was allegedly rude and disrespectful to a customer. After discussing certain of KAG’s practices, Almeida then raised Bingham’s failure to attend the last two mandatory meetings. Almeida then gave Bingham copies of two disciplinary notices covering each of the two matters; the disciplinary notices are not at issue in this proceeding. After Bingham signed the disciplinary forms he left and went to the copy machine to make copies. Almeida approached him there and commented that the meeting with Bingham had cut into his campaigning time because he had to stop campaigning by noon because the election started the next day. Almeida then said that there were only four drivers at the San Diego terminal who were voting for the Union. After they talked about Bingham’s motorcycle, Bingham left.

The facts in the paragraph above are based on Bingham’s credible testimony. I have considered Almeida’s testimony that Bingham raised the subject of the election. Almeida explained that he had received instructions from counsel not to threaten, interrogate, promise, or spy on employees in relation to their

union activities, so according to Almeida, after Bingham announced that he was uncertain about how he would vote, Almeida exclaimed, “Hey, I don’t—really don’t want to discuss anything with the Union or union issues.” But after making this alleged disclaimer, Almeida admitted that he did discuss the Union with Bingham by stating that it was his impression that there was not a whole lot of support for the Union in the San Diego terminal. Almeida denied that he told Bingham that there were only four drivers in San Diego supporting the Union; but KAG presented evidence of a flier that the Union distributed to employees before the election; the flier showed the faces of four supporters of the Union from KAG’s San Diego terminal: Almeida saw this flier before he spoke with Bingham. Thus, identification of four union supporters at the terminal was not pulled from thin air. Almeida also denied that he told Bingham that the meeting was cutting into his campaigning time. Almeida did admit that he scheduled the meeting with Bingham to start at 4 a.m., 1 hour before Bingham’s starting time, and that the meeting lasted until 6 a.m. on the day before the election. Again, these facts lend credibility to Bingham’s testimony. Finally, Bingham’s demeanor was more impressive than Almeida’s was.

Analysis

An employer violates Section 8(a)(1) when it makes a statement from which employees would reasonably assume that the employer had engaged in surveillance of their union activities. *Flexsteel Industries*, 311 NLRB 257 (1993). The standard is an objective one, based on the perspective of a reasonable employee. *Id.* Citing *Dallas & Mavis Specialized Carrier*, 346 NLRB 253, 254 fn. 6 (2006), the Acting General Counsel points out that “it is not required to show that the employer gained knowledge of the employee’s union activities through *unlawful* surveillance” (emphasis added). But to my knowledge, the Board has never articulated a rationale for this conclusion. Employers may lawfully observe employees engaged in union activities under certain circumstances; not all surveillance is unlawful. Logically, it seems to follow that if a reasonable employee would understand from an employer’s statement that its knowledge of union activities came about through lawful means then that statement would itself be lawful. KAG cites *Grouse Mountain Lodge*, 333 NLRB 1322 (2001). There, the Board indicated that the test “does not require that an employer’s words *on their face* reveal that the employer acquired its knowledge of the employee’s activities by unlawful means” (emphasis added). *Id.* at 1322–1323. Perhaps this is a more precise articulation of the Board’s standard. In any event, the Board examines not only the statement itself but also the context in which the statement was made to assess whether an employee would reasonably conclude that the employer had engaged in surveillance of employees’ union activities. *Id.* at 1323. By examining the context, the Board appears to determine whether a reasonable employee would understand that the statement concerning the union activities did not come about as a result of *unlawful* surveillance. *Grouse Mountain*, *supra*; *Sunshine Piping, Inc.*, 350 NLRB 1186 (2007). Here, KAG presented evidence of a flier that the Union distributed to employees before the election; the flier showed the faces of four

supporters of the Union from KAG’s San Diego terminal and Almeida saw this flier before he spoke with Bingham. I have inferred and concluded above that this was the source of Almeida’s statement to Bingham that there were only four drivers at the San Diego terminal who were voting for the Union. In light of the widespread distribution of that flier it appears that a reasonable employee would conclude that Almeida’s knowledge that four employees supported the Union came from the Union itself broadcasting that knowledge in an open manner and not from KAG’s (dare I say “unlawful”) surveillance. The Acting General Counsel points out that Bingham credibly testified that he never saw that flier and therefore would not make an inference that it was the source of Almeida’s information concerning the number of employees who supported the Union. But the Board has not delved into an employee’s specific knowledge of otherwise open and notorious union activities. On balance, I dismiss this allegation of the complaint.

CONCLUSION OF LAW

By withholding a wage increase from employees because they selected the Union to be their collective-bargaining representative, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent, having discriminatorily denied employees a wage increase, must make them whole for any loss of earnings and other benefits. Backpay shall be computed with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), .

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, KAG-WEST LLC, California, Arizona, and Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withholding a wage increase from employees because they selected the Union to be their collective-bargaining representative.

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

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

(a) Make the employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against

⁵ 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.

them in the manner set forth in the remedy section of the decision.

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

(c) Within 14 days after service by the Region, post at all its facilities in California, Arizona, and Nevada,⁶ copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 24, 2010.

⁶ I require this posting because the Respondent advised employees in these States that it was granting the wage increase to employees except for those who had recently selected the Union.

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. December 30, 2011.

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT withhold wage increases from employees because they selected the Miscellaneous Warehousemen Drivers and Helpers, Local 986, International Brotherhood of Teamsters, or any other labor organization as their collective-bargaining representative.

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

WE WILL make the employees whole for any loss of earnings and other benefits, plus interest compounded daily.

KAG-WEST, LLC