

Nos. 10-1330 and 10-1360

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

ARC BRIDGES, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certify as following:

(a) *Parties and Amici*: The Board is respondent/cross-petitioner before the Court; its General Counsel was a party before the Board (Board Case No. 13-CA-44627). The American Federation of Professionals (“the Union”) was the charging party before the Board. Arc Bridges, Inc. (“the Employer”), petitioner/cross-respondent before the Court, was respondent before the Board.

(b) *Rulings Under Review*: This case is before the Court on a petition filed by the Employer for review of an order issued by the Board on September 29, 2010, and reported at 355 NLRB No. 199. The Board seeks enforcement of that order against the Employer.

(c) *Related Cases*: This case has not been before this or any other court. Board counsel are unaware of any related cases either pending or about to be presented to this or any other court.

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GLOSSARY OF ABBREVIATIONS

Act	National Labor Relations Act
Board	National Labor Relations Board
Employer	Arc Bridges, Inc.
Union	American Federation of Professionals

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Arc Bridges, Inc. (“the Employer”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, the Board’s Order issued against the Employer. The Board found that the Employer committed an unfair labor practice by withholding a scheduled wage increase from employees who had recently elected representation by the American Federation of Professionals (“the Union”), while

granting that benefit to unrepresented employees, which was inherently destructive of represented employees' Section 7 rights.

The Board had subject matter jurisdiction over the unfair-labor-practice proceeding below pursuant to Section 10(a) of the National Labor Relations Act ("the Act"),¹ which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Order issued September 29, 2010, and is reported at 355 NLRB No. 199. (A. 8-13.)² It is a final order with respect to all parties under Section 10(e) and (f) of the Act.³

Venue is proper in this Court pursuant to Section 10(e) and (f) of the Act,⁴ which provides that petitions for review and cross-applications for enforcement may be filed in this Court. The Employer filed its petition for review in this Court on October 15, 2010, and the Board cross-applied for enforcement on November 5, 2010. Both were timely, as the Act places no time limitation on such filings.

¹ 29 U.S.C. §§ 151, 160(a).

² "A." references in this final brief are to the Joint Appendix filed by the Company. "Br." references are to the Employer's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

³ 29 U.S.C. § 160(e) and (f).

⁴ *Id.*

STATEMENT OF THE ISSUES PRESENTED

Whether substantial evidence supports the Board's finding that the Employer's withholding of an expected wage increase from unionized employees was inherently destructive of their Section 7 rights, in violation of Section 8(a)(3) and (1) of the Act. That issue turns on two subsidiary questions:

- I. whether the annual wage review process, with its resultant wage increase, was an established condition of employment, and
- II. whether the Employer's withholding of the scheduled wage increase from its represented employees was "inherently destructive" of their rights under Section 7 of the Act.

RELEVANT STATUTES AND REGULATIONS

Relevant statutory and regulatory provisions are contained in the Addendum at the end of this brief.

STATEMENT OF THE CASE

Acting on an unfair-labor-practice charge filed by the Union (A. 94), the Board's General Counsel issued a complaint alleging that the Employer violated Section 8(a)(3) and (1) of the Act by withholding a 3% wage increase from its unionized employees while granting that benefit to nonunionized employees, thereby discriminating in regard to employees' terms or conditions of employment and discouraging employee membership in the Union. (A. 95-107.) After a

hearing, the administrative law judge issued a decision dismissing the complaint. The General Counsel and Union filed exceptions to the judge's decision, and the Employer filed cross-exceptions. On review, the Board reversed the judge and found that the Employer violated Section 8(a)(3) and (1) of the Act. (A. 8, 11.) The facts supporting the Board's decision, as well as the Board's Conclusions and Order, are summarized below.

STATEMENT OF FACTS

I. The Board's Findings of Fact

A. Over the Employer's Opposition, the Union Becomes the Certified Bargaining Representative of Two Units of Employees

The Employer is a 501(c)(3) organization that provides services to developmentally disabled adults in northwest Indiana. The Union won Board-conducted elections in two separate bargaining units of employees: the Day Services (DS) unit and Residential Supportive Living (RSL) unit. On November 15, 2006 and February 22, 2007⁵, respectively, the Board certified the Union as the collective-bargaining agent of the DS and RSL units. The Union represents approximately 260 employees in both units; about 121 individuals, including supervisors, managers, and support staff are not unionized. (A. 8; 22-27, 59-60, 170.)

⁵ All dates are in 2007 unless otherwise noted.

The Union won the elections over the Employer's opposition. After the DS employees voted for the Union, Director of Community Services Dorothy Shawver distributed a memorandum to the RSL employees who had not yet voted, stating that they "will begin to see how things turn out and whether the [DS employees] who voted for the [Union] are able to get what they thought they would obtain." And in January 2007, prior to the election in the RSL unit, Shawver sent a note to those employees, stating in relevant part: "During the union campaign, many people have said to me 'don't take it personally.' I do take this personally." (A. 13; 47-50, 108-09.)

B. The Employer Customarily Reviews Its Budget Each June And, If Feasible, Grants Across-the-Board Wage Increases in July

The Employer's fiscal year extends from July 1 to June 30. For eight consecutive years, the Employer reviewed its finances in June as part of its budget process and, if financially feasible, customarily granted across-the-board wage increases in July, also referred to as "cost-of-living adjustments." (A. 8-10, 14; 119, 299-300.) From 1999 to 2006, Executive Director Kris Prohl conducted this review procedure and granted staff-wide nonmerit-based wage increases in all but three years, as follows:

- July 1999 – 2% across-the-board increase
- July 2000 – 2% across-the-board increase
- July 2001 – 2% across-the-board increase
- July 2002 – no increase
- July 2003 – no increase

- July 2004 – no increase
- July 2005 – 3% across-the-board increase
- July 2006 – 3% across-the-board increase

Thus, the Employer provided 2% across-the-board increases from July 1999-2001; in July 2002-2004, it did not grant across-the-board increases; and it granted 3% across-the-board increases in July 2005 and 2006. (A. 8; 200-15, 292-93.)

C. The Employer and Union Unsuccessfully Attempt to Negotiate an Initial Collective-Bargaining Agreement

Collective bargaining for the DS and RSL units began in December 2006 and March 2007, respectively. (A. 13.) Separate bargaining sessions were held for each unit, but economic issues, such as wages, discussed during the course of negotiations were identical for both groups. (A. 14; 26-27.) On July 10, 2007, the Union presented its initial economic proposals, which included calling for a 50% wage increase over three years. (A. 8, 13; 61, 120-159.) At the following bargaining session on July 12, the Employer gave the Union several documents showing its projected income for 2007 and the cost to the Employer of the Union's wage proposal. The Employer's chief negotiator also told the Union that its demands were unrealistic, requested that the Union "narrow its focus," and countered that the Employer would freeze wages across the board for bargaining-unit employees. (A. 14; 70, 160-61, 182.)

Before another negotiation session was held, in August, the Union sent an announcement to bargaining-unit employees explaining the status of negotiations

and calling for a “strike vote.” In response to the Union’s announcement, one manager, Raymond Teso, asked employee Teresa Pendleton to speak to other employees about voting against the strike vote and said that Executive Director Kris Prohl “would pat [them] on the back” for doing so. And on August 13, Teso held a meeting with nine bargaining-unit employees under his supervision, including Pendleton, in which he stated that the Union wanted \$4 million in benefits and that the Employer only had \$56,000 to spend on raises for represented employees. In late August, the Union held a “strike vote” by mail-in ballot. Though unit employees voted to authorize a strike, no strike was ever instituted. (A. 9, 14-16; 36-40, 69, 73, 76-77, 163-64.)

D. After Its Annual Financial Review, the Employer Decides That a 3% Across-the-Board Wage Increase Is Feasible, But Withholds It From Represented Employees While Granting It to Nonunion Employees

In accordance with the Employer’s annual wage review process, Executive Director Kris Prohl prepared the Employer’s budget for the board of directors in June 2007, and received budget authority to grant a 3% wage increase to all employees. (A. 8, 14; 248.) Though the Employer “could have given a three percent increase” to all staff, including managers and supervisors, Prohl decided not to grant any increase in July “because the situation [with the Union] was not clear to us to be able to expect what was going to happen.” (A. 14; 232.)

Around the end of July 2007, Residential Department Area Manager Bonnie Gronendyke telephoned Shirley Bullock, one of her supervisees in the RSL bargaining unit. They discussed the prospect of wage increases, and Gronendyke told Bullock that Executive Director Prohl had planned “to give [represented employees] a 3% raise until [they] voted the union in.” (A. 8, 17; 50-53, 194-97.)

On August 21, Manager Raymond Teso told employee Teresa Pendleton that Prohl intended to grant wage increases to bargaining unit employees in June, but did not do so because represented employees had taken a strike vote; he also told her that the \$56,000 that the Employer had budgeted for represented employees’ wage increases would be spent on the Employer’s lawyers, and that “the Union would be gone in November,” the end of the certification year⁶ for the DS unit. (A. 8, 16-17; 38-44.)

On October 12, 2007, Prohl gave unrepresented workers a 3% wage increase, retroactive to July, but did not grant it to represented employees. (A. 14; 220-21, 299-300.) Prohl distributed a memo to supervisors announcing that the Employer granted nonunionized employees a 3% wage increase and asking supervisors not to share this information with represented employees unless asked. (A. 15; 297-98, 224-29.)

⁶ The “certification year” is the one-year period following a union’s official Board certification as employees’ exclusive bargaining representative, during which a union’s representative status cannot be challenged.

At the hearing, Prohl described the various union-related factors that influenced her decision to withhold the wage increase from unionized employees only: “The fact that all the literature that was coming out from the union [against the Employer], the fact that we had 50 percent raises on the table with numerous other things . . . [and] [t]he fact that there was a strike vote.” Prohl testified that she never told the Union that the Employer could grant a 3% wage increase because she was afraid the Union would not agree and would file an unfair-labor-practice charge against the Employer. She further explained, “If [the Union] had agreed to the three percent at that point there would have been nothing left in our scenario to bargain with.” Prohl also thought that the 3% increase, compared with the Union’s proposed 50% increase over three years, “would make the bargaining unit [] employees very unhappy and that that might facilitate or cause a strike.” When asked why she did not give unionized employees a raise if she thought a strike was pending, Prohl responded, “[I]f I gave them the three percent, what was I going to be left to bargain with.” (A. 9, 15; 251-60.)

July 2007, after the arrival of the Union in November 2006, marked the first time that the Employer concluded it could afford to grant across-the-board increases but did not do so. The Employer had also never granted a retroactive wage increase prior to October 2007. (A. 186-87, 200-15, 232, 248, 292-93.) In March 2008, after granting unrepresented employees the retroactive 3% wage

increase, the Employer offered the Union 1.5% and 2% retroactive wage increases for unit employees. It never offered the full 3% increase because, according to Prohl, “subsequently there have been significantly more costs . . . and less income.” (A. 9, 15; 183, 259-61.)

II. The Board’s Conclusions and Order

On the foregoing facts, the Board (Chairman Liebman and Members Becker and Hayes) reversed the judge’s dismissal of the complaint and found that the Employer violated Section 8(a)(3) and (1) of the Act by unilaterally withholding from its newly organized employees a wage increase that they would have received but for the Employer’s discrimination, thereby discouraging membership in the Union. (A. 11.)

The Board’s Order requires the Employer to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act. Affirmatively, the Order requires the Employer to make whole employees in the DS and RSL units for any monetary loss suffered as a result of the Employer’s failure to grant those employees the increased wages, plus interest. Lastly, the Board also ordered the Employer to post remedial notices at its facilities in Gary, Indiana and elsewhere. (A. 11-12.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Employer violated Section 8(a)(3) and (1) by withholding an expected across-the-board increase from unionized employees because of their union representation. Under settled Board and court law, an employer may not withhold from organized employees an established condition of employment that it would have otherwise granted, but for the presence of the union; such conduct is "inherently destructive," as it discourages employees' from exercising their right to join a labor organization.

First, the Board properly found that the Employer's annual wage review process was an established condition of employment: the Employer reviewed its finances each June to assess whether it could grant an across-the-board increase and, if possible, gave raises to all employees in July. This procedure was conducted on a regular, consistent basis using fixed criteria, and employees came to expect all staff would receive an increase if the Employer deemed it affordable.

Second, the Board correctly concluded that withholding the planned, expected raise was "inherently destructive" of represented employees' Section 7 rights, even without relying on specific proof of antiunion motivation. "Inherently destructive" conduct is that which directly penalizes employees for choosing to join a union or is potentially disruptive of the future opportunity to organize, and no proof of antiunion motivation is needed to establish a violation under this

theory. In line with two factually similar cases, enforced by courts of appeals, the Board here concluded that withholding established benefits because of the Union's presence and as a bargaining tactic was inherently destructive conduct. Though the Board found that the record strongly indicated that the Employer's decision to delay the increase and withhold it from unionized employees was motivated by union animus, it found it unnecessary to rely on that evidence in determining that the Employer's conduct was unlawful.

To the extent that the Employer challenges the Board's *sua sponte* adoption of the analytical framework under the Supreme Court's decision in *Great Dane Trailers, Inc. v. NLRB*,⁷ rather than the judge's analysis, and its resultant finding of inherently destructive conduct, those arguments are not properly before this Court. Under Section 10(e) of the Act, the Employer was required to first raise those issues to the Board through a motion for reconsideration, after the Board issued its decision; since the Employer did not do so, it may not now contest the Board's application of *Great Dane*. In any event, the Board correctly declined to follow the judge's *Shell Oil* and *Wright Line*⁸ analysis because *Shell Oil* and its progeny apply to the granting of *new* benefits and the *Wright Line* test applies only when a

⁷ 388 U.S. 26 (1967).

⁸ *Shell Oil Co.*, 77 NLRB 1306 (1948); *Wright Line*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981).

determination of motive is necessary. Thus, the Board's application of *Great Dane's* "inherently destructive" test to the withholding of *established* benefits due to the Union was a rational interpretation of the Act and consistent with its precedent.

Finally, contrary to the Employer's overarching argument that the Board's decision should not be enforced because it departs from its precedent on past practice and "inherently destructive" conduct, the Board's conclusion fully comports with prior Board decisions and circuit precedent. The Employer unsuccessfully offers numerous case summaries and comparisons to support its contention, but those cases only highlight the soundness of the Board's reasoning. Moreover, the Employer's misplaced reliance on those cases misrepresents its wage review practice and misreads Board law concerning established conditions of employment and employers' inability to withhold existing benefits as a bargaining strategy. Accordingly, this Court should reject the Employer's arguments and enforce the Board's Order.

STANDARD OF REVIEW

This Court's review of Board decisions "is quite narrow."⁹ The Board's factual findings are conclusive if supported by substantial evidence on the record

⁹ *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000).

as a whole,¹⁰ and the Board’s application of the law to particular facts is also reviewable under the “substantial evidence” standard.¹¹ This Court “accords due deference to the reasonable inferences that the Board draws from the evidence, [even if] the court might have reached a different conclusion *de novo*.”¹² Finally, the Court will affirm the Board’s interpretation of the Act “as long as it is rational and consistent.”¹³ As the Supreme Court explained, “For the Board to prevail, it need not show that its construction is the *best* way to read the statute; rather, courts must respect the Board’s judgment so long as its reading is a reasonable one.”¹⁴

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE EMPLOYER’S WITHHOLDING OF AN EXPECTED WAGE INCREASE FROM UNIONIZED EMPLOYEES WAS INHERENTLY DESTRUCTIVE OF THEIR SECTION 7 RIGHTS, IN VIOLATION OF SECTION 8(a)(3) AND (1) OF THE ACT

When an employer denies employees an established condition of employment because of their union representation, such conduct discourages

¹⁰ 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951).

¹¹ *United Food & Commercial Workers Local 150-A v. NLRB*, 1 F.3d 24, 33 (D.C. Cir. 1993).

¹² *United States Testing Co. v. NLRB*, 160 F.3d 14, 18 (D.C. Cir. 1998).

¹³ *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990); *Ceridian Corp. v. NLRB*, 435 F.3d 352, 356 (D.C. Cir. 2006).

¹⁴ *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996) (emphasis in original).

employees from exercising their right to join a labor organization and, thus, is “inherently destructive” of their statutory rights.¹⁵ As the Second Circuit explained: “Once it is decided that the [wage] increase was one of the conditions of employment at [the employer], the conclusion that the withholding was unlawful readily follows” as it is “inherently destructive of important employee rights.”¹⁶ Here, the Board first properly found that the Employer had a practice of annually reviewing its finances in June and, if feasible, granting across-the-board wage increases in July. Second, the Board correctly concluded that the Employer’s denial of the 2007 wage increase, an established condition of employment, to unionized employees solely because of ongoing bargaining with the Union was “inherently destructive” of their statutory rights. Both conclusions were reasonable, and the Court should enforce the Board’s Order.

I. General Section 8(a)(3) Principles

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate “in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor

¹⁵ See *NLRB v. United Aircraft Corp.*, 490 F.2d 1105, 1109-10 (2d Cir. 1973), enforcing in relevant part 199 NLRB 658 (1972).

¹⁶ *Id.* (internal quotation marks omitted).

organization.”¹⁷ A violation of Section 8(a)(3) also constitutes a “derivative” violation of Section 8(a)(1) of the Act,¹⁸ which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.”¹⁹ As discussed below, it is well settled that an employer violates these sections if, because of employees’ affiliation with the union, it withholds from organized employees a benefit that would otherwise have been granted.²⁰

The finding of a violation under Section 8(a)(3) usually turns on whether an employer’s action against an employee “was motivated by an antiunion purpose.”²¹ However, as the Supreme Court recognized, some conduct “is so inherently

¹⁷ 29 U.S.C. § 158(a)(3).

¹⁸ *S. Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1356 n.6 (D.C. Cir. 2008); *see Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Brewers & Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 41 (D.C. Cir. 2005).

¹⁹ 29 U.S.C. § 158(a)(1); *see* 29 U.S.C. § 157 (guaranteeing employees the right to “form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”).

²⁰ *E.g.*, *United Aircraft Corp.*, 490 F.2d at 1109-10; *cf. Federated Logistics and Operations, a Div. of Federated Corporate Serv., Inc. v. NLRB*, 400 F.3d 920, 927 (D.C. Cir. 2005) (employer may not withhold planned wage increase that would have been granted but for union organizing campaign).

²¹ *Am. Ship Building Co. v. NLRB*, 380 U.S. 300, 311-13 (1956); *accord Radio Officers’ Union v. NLRB*, 347 U.S. 17, 43-44 (1954); *Local 702, Int’l Bhd. of Elec. Workers v. NLRB*, 215 F.3d 11, 15 (D.C. Cir. 2000).

destructive of employee interests that it may be deemed proscribed without need for proof of an underlying improper motive.”²² In *NLRB v. Great Dane Trailers, Inc.*, the Supreme Court described two types of employer conduct—“inherently destructive” and “comparatively slight”—which, because of their adverse effect on employee rights, can be found unlawful even without proof of antiunion motivation.²³ Regarding “inherently destructive” conduct, the Supreme Court explained: “[I]f it can reasonably be concluded that the employer’s discriminatory conduct was ‘inherently destructive’ of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. . . .”²⁴ Accordingly, when an employer’s conduct is inherently

²² *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967) (internal quotation marks omitted); *accord Local 702*, 215 F.3d at 16.

²³ 388 U.S. at 34; *see Lane v. NLRB*, 418 F.2d 1208, 1211 (D.C. Cir. 1969) (antiunion motivation is relevant in “comparatively slight” cases only if “the employer demonstrates that there were ‘legitimate and substantial business justifications for the conduct’”).

²⁴ *Great Dane Trailers*, 388 U.S. at 34; *see Radio Officers’ Union*, 347 U.S. at 44 (where employer conduct is inherently destructive of Section 7 rights, “specific evidence of intent to encourage or discourage [protected activity] is not an indispensable element of proof of violation of Section 8(a)(3)”).

destructive, “no specific evidence of intent to discourage union membership is necessary.”²⁵

II. The Board Correctly Found That the Employer Withheld an Established Condition of Employment from Represented Employees

A. Definition of an Established Condition of Employment

The Board equates an established condition of employment with a past practice, defining the latter as “an activity which has been ‘satisfactorily established’ by practice or custom; an ‘established practice’; [or an] ‘established condition of employment.’”²⁶ As the Board held, with this Court’s approval, an employer’s activity becomes a past practice, or established condition of employment, “if it occurs with such regularity and frequency, e.g., over an extended period of time, that employees could reasonably view [the practice] as part of their wage structure and that [it] would reasonably be expected to continue.”²⁷ In this regard, both this Court and the Board have found wage

²⁵ *NLRB v. Brown*, 380 U.S. 278, 288 (1965).

²⁶ *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988) (citations omitted); *see NLRB v. Hendel Mfg. Co.*, 523 F.2d 133, 135 (2d Cir. 1975) (discussing past practice as “established patterns of practice”).

²⁷ *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353 (2003), *enforced*, 112 F. App’x 65 (D.C. Cir. 2004) (per curiam); *accord Sunoco, Inc.*, 349 NLRB 240, 244 (2007); *see Int’l Bhd. of Elec. Workers Local 1466 v. NLRB*, 795 F.2d 150, 153 (D.C. Cir. 1986) (“An employer’s ‘[p]ast practice’ can become ‘clearly established as a term and condition of employment.’”).

increases that occurred at regular intervals based on fixed criteria to be established conditions of employment,²⁸ even if the employer retained some element of discretion in granting the increase.²⁹ Put another way, wage increases are not established conditions of employment if they are unpredictable as to timing and amount,³⁰ or “ad hoc or highly discretionary.”³¹ Thus, a finding that annual wage reviews and any resulting increases are an established condition of employment turns largely on whether employees “had come to view the [wage] increases as fixed terms or conditions of employment.”³²

²⁸ *E.g.*, *Vico Prods. Co. v. NLRB*, 33 F.3d 198, 205, 208-09 (D.C. Cir. 2003) (past practice of giving “across-the-board increases equally to all employees”); *Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 411-12 (D.C. Cir. 1996) (employer established regular wage-increase program with fixed criterion of merit), *enforcing* 315 NLRB 1236 (1994).

²⁹ *Daily News of Los Angeles*, 73 F.3d at 411-12; *accord E. Maine Med. Ctr. v. NLRB*, 658 F.2d 1, 8 (1st Cir. 1981) (“Indefiniteness as to amount and a flavor of discretion do not . . . prevent [wage increases] from becoming a part of the conditions of employment.”).

³⁰ *American Mirror Co.*, 269 NLRB 1091, 1092 & n.7, 1095 n.20 (1984) (“[T]he timing and amount of the raises varies from year to year. . . .”); *Phelps Dodge Mining Co. v. NLRB*, 22 F.3d 1493, 1496-98 (10th Cir. 1994) (employees had “no reasonable expectation” of increases given their “unscheduled nature and indefinite amount”).

³¹ *Local 512, Warehouse and Office Workers’ Union v. NLRB*, 795 F.2d 705, 711 (9th Cir. 1986).

³² *Daily News of Los Angeles*, 73 F.3d at 412 (affirming Board’s finding that annual performance evaluations and resulting wage raises, based solely on merit and discretionary in amount, were established condition of employment); *see United Rentals, Inc.*, 349 NLRB 853, 855 (2007) (employer’s practice of

B. The Scheduled 2007 Increase Withheld from Unionized Employees Was an Established Condition of Employment

Substantial evidence supports the Board's finding that the Employer had a practice of reviewing its budget, and, if feasible, giving employees nonmerit-based, across-the-board wage increases. (A. 9; 292-93.) The record demonstrates that this process was conducted consistently each year as part of an established procedure and that employees came to expect across-the-board increases in July if the Employer could afford to grant them. (A. 292-93, 55-56, 90, 200-15, 247-50.)

The Employer had an established procedure for granting across-the-board wage increases: it reviewed its finances each June to determine if the increases would be viable and, upon receiving the board of directors' authorization, granted all employees an increase in July.³³ As explained above,³⁴ every June from 1999 to 2006, the Employer conducted this review, and in five of those eight years, it determined that staff-wide increases were feasible and granted them.³⁵ Thus, aside

conducting annual merit reviews and adjusting wages based in part on those reviews "was an established practice regularly expected by its employees and hence a term or condition of employment").

³³ See *supra* notes 28-30 and accompanying text.

³⁴ See *supra* at 5-6.

³⁵ See *The Courier-Journal, A Div. of Gannett Kentucky Ltd. P'ship*, 342 NLRB 1093, 1093-94 (2004) (finding past practice of increasing employee contributions to healthcare premiums where employer did so in 1992, 1993, 1994, 1999, and 2000, or five out of nine years).

from whether the Employer ultimately decided to grant other nonmerit-based increases in a particular year, it adhered to its routine procedure of annually reviewing its budget in June and making a determination about cost-of-living increases in July based on that review.³⁶ (A. 9-10; 292-93, 200-15, 247-50.) This process had become such a settled practice that employees came to expect *all* staff would get an across-the-board wage increase in July, if the Employer could afford it.³⁷ (A. 55, 89-90.)

In June 2007, Executive Director Prohl reviewed the budget for the upcoming fiscal year and again received authority from the board of directors to grant an across-the-board increase, as she did in 1999, 2000, 2001, 2005 and 2006.³⁸ However, she abandoned the Employer's practice of implementing these across-the-board increases when they were approved. Prohl planned to grant all employees a 3% increase in July, but postponed the 2007 increase admittedly and exclusively because of the Union. In October 2007, she implemented the planned

³⁶ See *Am. Packaging Corp.*, 311 NLRB 482, 483 (1993) (finding that employer's decision not to grant an annual across-the-board bonus in a particular year did not change its existing practice because employer made that determination based on customary, settled procedures used in the past).

³⁷ See, e.g., *Daily News of Los Angeles*, 73 F.3d at 412; *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353 (2003); *Sunoco*, 349 NLRB 240, 244 (2007); *United Rentals*, 349 NLRB at 855.

³⁸ See *supra* text accompanying note 35.

raise for nonunionized employees. But she withheld that expected benefit from organized employees because she feared the Employer would have “nothing left in [its] scenario to bargain with.” The Employer’s handling of the 2007 wage increase disturbed an eight-year pattern of giving staff-wide raises when the budget allowed for them. (A. 8-10; 50-51, 232, 247-50.) Indeed, the October 2007 raise given to nonunionized employees was retroactive to July, reinforcing the annual July pattern anticipated by employees and found by the Board.

C. The Employer’s Argument That the Board Erred in Finding the Employer’s Annual Wage Review Process Was an Established Condition of Employment Is Without Merit

The Employer points to every wage adjustment between 1992 and 2006 in an effort to disguise the routine procedure by which the Employer determined whether to grant yearly across-the-board increases, or cost-of-living adjustments, the only type of wage adjustment at issue and relevant to this case. In doing so, it conflates (Br. 7, 24-25, 29) the annual cost-of-living increase with bonuses and other wage adjustments given for other specified reasons. However, Board findings of past practice are fact-intensive inquiries³⁹ and, as such, consider whether the *particular* benefit denied to employees in a specific factual context

³⁹ See *N. Star Steel Co.*, 347 NLRB 1364, 1364 n.5 (2006); see also *Daily News of Los Angeles*, 73 F.3d at 411 (evaluating Board’s finding that merit increases were term and condition of employment under “substantial evidence” standard, under which courts review factual findings).

was an established condition of employment.⁴⁰ Thus, as the Board's inquiry here concerned whether budget-based across-the-board increases became an established practice, its analysis properly focused on that type of wage increase. (A. 9-10.)

The Employer incorrectly insists (Br. 25, 29) that the Board's finding of an established practice relies on "nothing more than a two-year history of across-the-board increases." However, assuming there was only a two-year history, the Board has already rejected this view.⁴¹ Moreover, that assertion ignores the evidence chronicling the Employer's eight-year practice of reviewing the budget in June and granting staff-wide wage increases in July. (A. 10; 292-93.) Though the Employer periodically implemented bonuses and merit-based and position-specific raises, there is no evidence that, in those years, the Employer abandoned its usual process of deciding whether to grant annual cost-of-living adjustments. (A. 292-93, 213, 247-48.) For example, the record shows that the credential-based raises in July 2002-2004 were given "regardless of any other increases," not in lieu of the annual budget-based July increase, as the Employer suggests (Br. 24-25, 30).

⁴⁰ See *N. Star Steel Co.*, 347 NLRB at 1364 n.5 (focusing on employer's wage practice in "the [ten-year] period of most compatibility" to the company's "declining business situation" that existed at the time the wage increase at issue was withheld).

⁴¹ See *Kurdziel Iron of Wauseon, Inc.*, 327 NLRB 155, 155, 159 (1998) (employer had established 2-year practice of granting October wage increases in 1994 and 1995 and violated Section 8(a)(3) and (1) by withholding October 1996 increase from newly unionized employees).

(A. 211-13.) The Employer’s failure to grant the cost-of-living increases in those years does not negate the established procedure found by the Board.⁴² Thus, as the Board noted (A. 10), the other wage adjustments do not “change[] the fact that [the Employer] still reviewed its finances each June and, when financially feasible, granted an across-the-board increase each July.” (A. 292-93.)

The Employer also mistakenly claims (Br. 24) that the Board decision “equat[es] budget forecasting of labor costs, to a narrow assessment of funding wage improvements only.” In making this assertion, the Employer misrepresents the record as stating that Executive Director Prohl was “limited to increasing ‘labor costs’ by not more than 3%.” In contrast, Prohl testified that the Employer’s board of directors approved the budget and granted her “budget authority” with which she “could have granted a three percent wage increase.” (A. 247-48.) Further, managers’ statements to employees⁴³—that the Employer planned to give the July 2007 raise and only withheld it because of the Union—bolsters the Board’s finding that the board of directors approved an increase in *wages*, not labor costs generally.

⁴² See *Am. Packaging Corp.*, 311 NLRB 482, 483 (1993) (finding that employer’s decision not to grant annual across-the-board bonuses in a particular year did not change its existing practice because employer based its determination on established procedures used in the past).

⁴³ See *supra* at 7-8; *infra* at 33-35.

D. Contrary to the Employer’s Contention, the Board Did Not Depart From Its Precedent in Finding That the Annual Wage Review Process Was an Established Condition of Employment

The Employer erroneously argues (Br. 23-31) that this Court should not enforce the Board’s Order because the Board’s finding of a practice of annual wage reviews and corresponding increases does not comport with its precedent and the Board failed to explain its alleged departure from some prior decisions. As an initial matter, this Court has observed that the Board is “by no means required to distinguish every precedent cited to it by an aggrieved party.”⁴⁴ Moreover, determining past practice is a fact-intensive inquiry,⁴⁵ not a legal question as the Employer suggests (Br. 27-31), and the Court must review the Board’s findings on this record. Here, the Board did not deviate from its precedent in concluding that the annual wage review process was an established condition of employment, and the few cases the Employer cites support this conclusion. Thus, as the Board’s decision here is well supported by the record and consistent with its prior decisions on past practices, the Court should reject the Employer’s assertion.

⁴⁴ *Lemoyne-Owen College v. NLRB*, 357 F.3d 55, 60-61 (D.C. Cir. 2004).

⁴⁵ *See supra* notes 39-40 and accompanying text.

The Employer relies primarily on three cases⁴⁶ to demonstrate the Board's asserted deviation from its precedent, but those cases only illustrate the consistency of the Board's decision here with its precedent on established conditions of employment.⁴⁷ In *United Rentals* (Br. 29-30), the Board found that the employer's merit wage-increase program was an established practice regularly expected by employees because, for four years, the employer "used fixed criteria," such as analyzing its financial status, to determine whether employees would receive a raise and the amount of that raise and, if so, granted merit raises on April 1 of each year.⁴⁸ Here, for eight consecutive years, the Employer reviewed its finances in June to assess whether it could grant an across-the-board increase and, if so, granted those increases in July, which it did in five of the eight years. Thus, the yearly analysis of individualized merit and the budget to determine the amount of raises was no more fixed in *United Rentals* than this Employer's annual budgetary

⁴⁶ *United Rentals*, 349 NLRB 853 (2007); *N. Star Steel Co.*, 347 NLRB 1364 (2006); *The Great Atl. & Pac. Tea Co.*, 192 NLRB 645 (1971).

⁴⁷ In arguing that the Board is inconsistent, the Employer also seeks to analogize (Br. 25-27) this case to *Acme Die Casting v. NLRB*, 93 F.3d 854 (D.C. Cir. 1996). That case is distinguishable because the Court found that the timing of increases "was by no means fixed" and the employer did not follow any "established procedures." *Id.* at 856, 858. This case does not present those problems—the timing and procedures were fixed and established because the annual raises in July were based solely on the June budgetary review.

⁴⁸ *United Rentals*, 349 NLRB at 854.

review to determine the amount of across-the-board increases. In both cases, the *process* of deciding whether to grant increases, and subsequently implementing them, was the same from year to year, so employees expected it to continue.

The Employer contends that the Board was required to apply the factors considered in *United Rentals*: the number of years the program was in place, the regularity of raises, and whether fixed criteria were used to determine the raise and amount. (Br. 29-30.) But applying those factors in this case would only support the Board's conclusion, given the regularity of the annual wage review process and fixed process for determining the increases. The Employer's view that *United Rentals* supports its position rests on its erroneous reference to wage adjustments given for different, specified reasons rather than the annual budget-based staff-wide wage increases.

On the other hand, *North Star Steel Co.* and *The Great Atlantic & Pacific Tea Co.* are easily distinguishable from this case, as they did not involve a benefit that would otherwise have been granted. In *North Star Steel* (Br. 30), the Board found that the employer had no established practice of granting annual wage increases in years when the company faced economic hardship, as it only granted increases in five of those ten years, so employees could not expect to receive increases in the midst of the similarly "declining business situation" at issue

there.⁴⁹ The Employer errs by focusing on the raises given in eleven of the twelve years preceding the union's certification, rather than the narrower and more remote time frame involving years of financial hardship, which was the actual basis of the Board's finding in that case. Likewise, in *Great Atlantic & Pacific Tea* (Br. 31), "there was no established past practice from which it could be concluded with any degree of certainty when a wage increase would have been given" so it would have been unreasonable for employees to expect an increase.⁵⁰

In contrast, here, employees testified that they expected that, when the Employer reviewed its finances in June and decided that across-the-board wage increases were affordable, raises would be given to *all* employees in July. (A. 55-56, 89-90, 247-50, 292-93.) Managers later told employees that the Employer intended to give the annual across-the-board increase in 2007, but withheld it only because of the Union. Thus, the Board did not depart from its precedent in finding that the Employer's wage review process was an established condition of employment—the July 2007 raise was planned by the Employer, consistent with its customary procedure, and was reasonably expected by employees.

⁴⁹ *N. Star Steel Co.*, 347 NLRB at 1364 n.5.

⁵⁰ *The Great Atl. & Pac. Tea Co.*, 192 NLRB at 645 (no prior promise of an increase and no set date).

III. The Board Properly Concluded That the Employer’s Withholding of an Expected Wage Increase from Represented Employees Was Inherently Destructive of Their Statutory Rights

A. Definition of “Inherently Destructive” Conduct

As this Court stated, “[E]mployer conduct which is ‘inherently destructive’ of employee rights is an unfair labor practice whether or not such conduct was based upon important business considerations.”⁵¹ The Board and courts of appeals have identified conduct to be “inherently destructive” because of its potential for discouraging concerted activity and employees’ choice of union representation. Therefore, conduct that “directly or unambiguously penalizes or deters protected activity”⁵² or that is “potentially disruptive of the opportunity for future employee organization and concerted activity”⁵³ is inherently destructive because it creates “visible and continuing obstacles to the future exercise of employee rights.”⁵⁴ Moreover, as the Tenth Circuit recognized, in finding conduct inherently

⁵¹ *Lane v. NLRB*, 418 F.2d 1208, 1211 (D.C. Cir. 1969).

⁵² *NLRB v. Haberman Constr. Co.*, 641 F.2d 351, 359 (5th Cir. 1981); *see also Local 15, Int’l Bhd. of Elec. Workers v. NLRB*, 429 F.3d 651, 656 (7th Cir. 2005) (“Actions that harm the collective bargaining process, interfere with employees’ right to strike, or are taken against employees based upon union status are ‘inherently destructive.’”).

⁵³ *Int’l Bhd. of Boilermakers, Local 88 v. NLRB*, 858 F.2d 756, 763 (D.C. Cir. 1988) (citation omitted).

⁵⁴ *Id.* (quoting *Inter-Collegiate Press, Graphic Arts Div. v. NLRB*, 486 F.2d 837, 845 (8th Cir. 1973) (internal quotation marks omitted)).

destructive, “there need not be proof of an actual . . . discouraging effect on the employee.”⁵⁵

B. The Employer’s Denial of the 2007 Wage Increase to Unionized Employees To Improve Its Bargaining Position Was Inherently Destructive of Their Section 7 Rights

In finding that the Employer’s conduct was inherently destructive of represented employees’ statutory rights, the Board affirmed its settled law that an employer cannot withhold from organized employees “an existing benefit (i.e., an established condition of employment)” as a bargaining strategy in ongoing negotiations. (A. 9-10.) That view is accepted by this and other courts.⁵⁶ Indeed, this Court has held that an employer’s withdrawal of employee benefits to put economic pressure on a union is “inherently prejudicial” to union interests, as it comes “with the attendant natural consequence of discouraging membership in the Union.”⁵⁷ As the Second Circuit reasoned:

If the Company’s position [that withholding established benefits is a permissible bargaining tactic] were accepted, an employer would appear to be entitled, in the hope of improving his bargaining position,

⁵⁵ *NLRB v. The Am. Can Co.*, 658 F.2d 746, 754 (10th Cir. 1981); accord *Local 155, Int’l Molders & Allied Workers Union v. NLRB*, 442 F.2d 742, 748 (D.C. Cir. 1972).

⁵⁶ See, e.g., *Local 155*, 442 F.2d at 746-48; *United Aircraft Corp.*, 199 NLRB 658, 662 (1972), enforced in relevant part, 490 F.2d 1105 (2d Cir. 1973); *E. Maine Med. Ctr.*, 253 NLRB 224, 241-42 (1980), enforced, 658 F.2d 1 (1st Cir. 1981).

⁵⁷ *Local 155*, 442 F.2d at 748.

to alter all conditions of employment after union certification, reducing wages to the legal minimum and allowing the work environment to deteriorate.⁵⁸

Thus, withholding expected benefits penalizes employees for choosing union representation and deters them from exercising their right to organize in the future. As the Board observed (A. 11 n.8), an employer is no more privileged to withhold an established wage increase than to withhold other benefits like health insurance or vacation.⁵⁹ And contrary to the Employer's suggestion (Br. 34, 45) that it lawfully withheld the planned increase because it feared an unfair-labor-practice charge for refusing to bargain in good faith, the First Circuit has dismissed that exact justification as "untenable."⁶⁰

The Board properly relied on two very similar cases, *United Aircraft Corp.* and *Eastern Maine Medical Center*, in concluding that the Employer's conduct

⁵⁸ *United Aircraft Corp.*, 490 F.2d at 1110.

⁵⁹ See, e.g., *Keeler Brass Co.*, 327 NLRB 585, 589 (1999) (finding unlawful employer's discontinuation of paid flu shots for unionized employees); *Duncan Foundry & Mach. Works, Inc.*, 176 NLRB 263, 264 (1969) (paying accrued vacation benefits to one group of employees, while withholding them from another group of employees "distinguishable only by participation in protected concerted activity," is "destructive of important employee rights").

⁶⁰ *E. Maine Med. Ctr.*, 658 F.2d at 8 & n.6 (rejecting company's position that "whatever action it took would necessarily have been taken unilaterally, hence the risk of unilaterally changing conditions of employment by granting or denying the wage increase" because it "could have avoided this dilemma by bargaining with the union about its plans" but "failed to raise the matter at the bargaining table").

was inherently destructive. In *United Aircraft*, the employer denied a scheduled annual wage increase to newly organized employees, after reviewing its finances and deeming it possible, solely because it was negotiating with the union over wages.⁶¹ The Board found that the scheduled wage increase was an established condition of employment for all employees and, as such, its denial was “inherently destructive of important employee rights” even without a specific showing of antiunion motivation.⁶² The Second Circuit agreed with the Board, stating: “[I]t is difficult to imagine discriminatory employer conduct more likely to discourage the exercise by employees of their [Section 7] rights . . . than the refusal to put a scheduled wage increase into effect because the employees . . . selected a union as bargaining representative.”⁶³

In *Eastern Maine Medical Center*, the employer had an established eight-year practice of conducting wage surveys and subsequently granting across-the-board wage increases, but withheld two expected annual wage increases from newly represented employees, partly “as an economic weapon to improve its

⁶¹ *United Aircraft Corp.*, 199 NLRB at 662.

⁶² *Id.*; see *United Aircraft Corp.*, 490 F.2d at 1109 (“It is clear that conditions of employment include not only what an employer has already granted but what it has announced it intends to grant.”).

⁶³ *United Aircraft Corp.*, 490 F.2d at 1108-10.

bargaining position.”⁶⁴ The Board concluded that the employer’s refusal to provide the raises, an established condition of employment, because of ongoing negotiations was inherently destructive.⁶⁵

As in those cases, the Employer withheld from represented employees an established condition of employment that would have been granted but for the Union’s presence, and did so as a bargaining strategy. (A. 10-11.) First, an across-the-board wage increase, when the annual review of finances found it possible, was an established condition of employment for all employees. Second, Executive Director Kris Prohl had planned to give organized employees the raise until they “voted the union in.” As unit employee Bobbie McKinley testified, during a weekly staff meeting, she asked Supervisor Susan Balchack why represented employees did not get the raise. Balchack responded that represented employees “couldn’t get a raise because of the Union” and said, “I got mine and you would have gotten yours if you had not belonged to the Union.” (A. 88-89, 166-69.) Finally, Prohl admitted she withheld the scheduled increase from organized employees because “there would be nothing left . . . to bargain with.” (A. 10-11; 50-53, 88-89, 166-69, 231-32, 252-60.) Accordingly, the Board correctly concluded that the Employer unlawfully withheld an established condition of

⁶⁴ *E. Maine Med. Ctr.*, 658 F.2d at 8-9.

⁶⁵ *E. Maine Med. Ctr.*, 253 NLRB at 242.

employment from represented employees, ultimately, because employees selected union representation. (A. 10.)

To the extent the Employer suggests (Br. 50) that the Board's analysis is inconsistent with this Court's decision in *Contractors' Labor Pool v. NLRB*,⁶⁶ such an assertion is without merit. In that case, the Court interpreted *Great Dane's* statement that no proof of antiunion motive is required as "meaning that no *further* proof of antiunion motivation [is required], because if the employer's conduct was inherently destructive of union rights the Board could legitimately draw the inference that the employer had the proscribed motivation."⁶⁷ Because the Board there explicitly found that the employer's policy of refusing to hire applicants whose recent wages were 30% higher or lower than its starting wages was *not* motivated by antiunion animus, the Court found that there could be no Section 8(a)(3) violation.⁶⁸ However, here, the Board emphasized that "the record strongly indicates that the [Employer's] conduct was motivated by union animus" and identified that evidence, despite finding it unnecessary to rely on it, given the inherently destructive nature of the Employer's conduct. (A. 11 n.9.)

⁶⁶ *Contractors' Labor Pool v. NLRB*, 323 F.3d 1051 (D.C. Cir. 2003).

⁶⁷ *Id.* at 1058 (emphasis in original).

⁶⁸ *Id.* at 1054, 1059 ("[T]he Board certainly cannot conclude explicitly that [the employer's] motivation is benign and then hold that its practice independently violates [Section] 8(a)(3).").

Specifically, as the Board explained (A. 11 n.9), first, Executive Director Prohl blamed the Union and effectively penalized organized employees for choosing the Union when she admitted that she had planned to give them the 3% wage increase “until they voted the Union in.” Second, Prohl’s decision to withhold the raise, partly because she believed such a low increase would precipitate a strike, was undermined by her subsequent offers of smaller increases of 1.5% and 2%. Third, supervisors told employees that the money initially allotted for their increases would instead “go to pay for the lawyers,” that Prohl would “pat [them] on the back” for opposing the Union, that represented employees would have received a raise if they did not belong to the Union, and that “the Union would be gone in November.” The statement referencing November—the end of the certification year for one unit, at which time the Union’s representation could be challenged—further indicates that the decision to delay the increase until October and then grant it only to unrepresented employees was motivated by union-related considerations. (A. 8, 16-17; 109, 30-44, 48-51, 88-89, 183, 190-91, 248, 260.) The Employer has not disputed the Board’s findings on these four points. Thus, the Board identified proof of antiunion motivation, consistent with *Contractors’ Labor Pool*, but found it unnecessary to rely on it in finding the Employer’s conduct “inherently destructive.”

C. The Employer May Not Challenge the Board’s Application of the *Great Dane* Analysis Because It Did Not File a Motion for Reconsideration

The Employer asserts that the Board incorrectly invoked and applied *Great Dane*’s inherently destructive analysis to this case (Br. 54), but this argument is unreviewable by the Court. In reversing the judge’s dismissal of the complaint, the Board declined to follow the judge’s reasoning under *Shell Oil* and *Wright Line*⁶⁹ and, instead, relied on the “inherently destructive” test of *Great Dane*. (A. 9.) The parties did not invoke or even cite *Great Dane* at the hearing, in their posthearing briefs, or in any exceptions, cross-exceptions, and briefs to the Board. Thus, to the extent the Employer challenges the Board’s *sua sponte* application of *Great Dane* instead of *Wright Line* (Br. 47-54) and its finding that the Employer’s conduct was inherently destructive (Br. 20, 51, 54-55), this Court may not consider those issues pursuant to Section 10(e), since the Employer failed to first present its challenges to the Board through a motion for reconsideration.⁷⁰ Assuming the issues are properly before the Court, the Board correctly chose not to apply *Wright Line* and the *Shell Oil* cases, instead finding that the Employer’s denial of the annual wage

⁶⁹ *Shell Oil Co.*, 77 NLRB 1306 (1948); *Wright Line*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981).

⁷⁰ *See* 29 U.S.C. § 160(e); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 310 F.3d 209, 216-17 (D.C. Cir. 2002) (“The company’s failure to seek Board reconsideration bars our review under [S]ection 10(e).”).

increase, an established condition of employment, was inherently destructive of represented employees' Section 7 rights.

The Board's Rules and Regulations allow a party to assert a material error in the Board's decision and order by filing with the Board a postdecisional motion for reconsideration.⁷¹ Section 10(e) states, "No objection that has not been urged before the Board . . . shall be considered by the court. . . ."⁷² And as this Court explained, "Where, as here, a petitioner objects to a finding on an issue first raised in the decision of the Board rather than of the ALJ, the petitioner must file a petition for reconsideration with the Board to permit it to correct the error (if there was one)."⁷³ Thus, under Section 10(e), the Employer's failure to seek the Board's reconsideration of its application of *Great Dane* jurisdictionally bars this Court from reviewing the issue.⁷⁴

In any event, there is no merit to the Employer's contention (Br. 32-35, 44-47, 49-51, 54) that the Board erred by declining to apply *Wright Line* and the *Shell Oil* line of cases. In cases requiring proof of antiunion purpose, the Board assesses

⁷¹ 29 C.F.R. § 102.48(d)(1).

⁷² 29 U.S.C. § 160(e).

⁷³ *Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 185-86 (D.C. Cir. 2006); *accord Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982).

⁷⁴ *See Woelke & Romero*, 456 U.S. at 666; *Lee Lumber*, 310 F.3d at 216.

whether an unlawful motive exists using its *Wright Line* burden-shifting test.⁷⁵ In *Shell Oil*, which predates *Wright Line*, the Board found that the employer did not violate Section 8(a)(3) of the Act by implementing new wage and hour benefits and refusing to extend them to organized employees because those benefits were not “withheld for antiunion considerations.”⁷⁶ In making this finding, the Board reiterated: “Absent an unlawful motive, an employer is privileged to give wage increases to his unorganized employees” but is not obligated “to make such wage increases applicable to union members.”⁷⁷ Therefore, as in *Shell Oil*, an employer may withhold a new benefit if that conduct is not motivated by union animus.

However, where the benefits at issue are established conditions of employment, *Shell Oil* is not controlling⁷⁸ (A. 9-10), the Board is not necessarily required to find union animus,⁷⁹ and a *Wright Line* analysis is unnecessary. Rather,

⁷⁵ 251 NLRB at 1089; see, e.g., *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2001) (“The central question is the employer’s motivation for taking the adverse action, and to make that determination the NLRB employs the so-called *Wright Line* test.”); *Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 956 (D.C. Cir. 1988) (stating that *Wright Line* applies in cases of “mixed motive” to determine if employer’s actions were discriminatorily motivated).

⁷⁶ 77 NLRB at 1310.

⁷⁷ *Id.* (emphasis in original).

⁷⁸ See *B.F. Goodrich Co.*, 195 NLRB 914, 915 (1972) (*Shell Oil* principles “apply equally to the granting of other new benefits”).

⁷⁹ See, e.g., *NLRB v. Brown*, 380 U.S. 278, 288 (1965) (for inherently destructive analysis, “no specific evidence of intent to discourage union membership is

the Board—as it did in *United Aircraft Corporation* and *Eastern Maine Medical Center*⁸⁰—may analyze the case under the “inherently destructive” theory of *Great Dane* to determine whether the conduct penalizes employees for exercising their Section 7 rights. If so, a specific finding of unlawful motivation is not required.⁸¹ Thus, the Board’s decision to apply *Great Dane* in this case was rational and consistent with the Act, and its conclusion that the Employer’s conduct was inherently destructive of employees’ Section 7 rights likewise comports with Board law and the record.⁸²

**D. The Board’s Decision is Fully Consistent with Its Precedent,
Contrary to the Employer’s Assertion**

The Employer urges this Court not to enforce the Board’s Order (Br. 54) because the “Board fail[ed] to explain its departure from its own precedent” on “inherently destructive” conduct. Specifically, the Employer argues (Br. 36-44)

necessary”); *NLRB v. United Aircraft Corp.*, 490 F.2d 1105, 1110 & n.3 (2d Cir. 1973) (affirming Board’s finding that company’s conduct was “inherently destructive” without specific proof of antiunion motivation).

⁸⁰ *United Aircraft Corp.*, 490 F.2d at 1110 & n.3; *E. Maine Med. Ctr.*, 253 NLRB 225, 242 (1980).

⁸¹ *United Aircraft Corp.*, 490 F.2d at 1110 n.3 (“On this view of the case, we need not discuss the [ALJ’s] alternative finding that the withholding was unlawfully motivated.”); *see also Sierra Realty Corp. v. NLRB*, 82 F.3d 494, 495 (D.C. Cir. 1996) (“If the employer’s actions do not have an ‘inherently destructive’ effect on union activity” . . . “the Board focuses on the [employer’s] motivation. . .”).

⁸² *See supra* at 30-35.

that the Board improperly distinguished *Shell Oil* and its progeny on the basis that the withheld benefits in those cases were new, not established, conditions of employment.⁸³ (A. 9.) However, the cases cited by the Employer to dispel that distinction only reinforce the Board’s reasoning. Those cases did not involve established conditions of employment and, thus, are inapplicable here where the annual budget-based across-the-board wage increase was an established practice.⁸⁴

The Employer relies primarily on *United States Postal Service*⁸⁵ and *Winn-Dixie Raleigh, Inc.*⁸⁶ for the proposition that withholding existing benefits because

⁸³ See, e.g., *Shell Oil Co.*, 77 NLRB 1306, 1309 (1948) (implementing new work hours and higher wage rates for unrepresented workers); *Sun Transport, Inc.*, 340 NLRB 70, 72 (2003) (offering lower severance pay to unionized employees due to union negotiations, contrary to termination agreement); *Empire Pac. Indus.*, 57 NLRB 1425, 1425-26 (1981) (providing new cost-of-living increase to nonunion employees only); *B.F. Goodrich Co.*, 195 NLRB 914, 915 (1972) (granting new profit-sharing benefits to unrepresented employees only).

⁸⁴ E.g., *Orval Kent Food Co.*, 278 NLRB 402, 402 (1986) (finding no violation where company had irregular practice of granting merit increases on discretionary basis and its failure to grant raises was not a proven result of union animus); *Am. Mirror Co.*, 269 NLRB 1091, 1092-94 (1984) (finding that employer’s denial of wage increase during union organizing campaign was not unlawful because “there was [no] existing benefit by virtue of the Company’s pattern of wage increases in previous years”); *Winn-Dixie Raleigh, Inc.*, 267 NLRB 231, 235 (1983); *United States Postal Service*, 261 NLRB 505, 505-06 (1982); see also *B.F. Goodrich Co.*, 195 NLRB at 915 (*Shell Oil* principles “apply equally to the granting of other new benefits”) (emphasis added)).

⁸⁵ 261 NLRB 505 (1982).

⁸⁶ 267 NLRB 231 (1983).

of union negotiations has been found lawful. (Br. 37-38.) As with its other cited cases, these two cases did not involve established benefits. In *United States Postal Service*, the Board found the granting of a wage increase only to nonunion employees lawful where the employer “granted its unorganized employees wage increases at irregular intervals,” such that the newly unionized employees “could not anticipate when increases would be granted because of the random nature of the increases.”⁸⁷ Therefore, the Employer’s characterization of the withheld increase in *Postal Service* as not “new” (Br. 38) is only correct insofar as it was not unprecedented; yet, because those previous increases were given at random intervals, they were not an established benefit, unlike in this case. Furthermore, the Board there confirmed its longstanding view that “the granting of *new* benefits to unorganized employees but not to represented employees has not been held, in and of itself, a violation of the Act,”⁸⁸ supporting the Board’s distinction here between new benefits and established conditions of employment.

Likewise, the Employer’s reliance (Br. 38-40) on *Winn-Dixie Raleigh* is also misplaced because there was no established condition of employment.⁸⁹ Though

⁸⁷ *United States Postal Service*, 261 NLRB at 505.

⁸⁸ *Id.* at 506 (emphasis added).

⁸⁹ *Winn-Dixie Raleigh*, 267 NLRB at 235; see *Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 413 n.7 (D.C. Cir. 1996).

the employer granted annual across-the-board wage increases and denied an increase to unionized employees because of ongoing negotiations, the Board found no violation of Section 8(a)(3) because the company did not use “established fixed criteria for determining the amount” of the increase.⁹⁰ Moreover, in declining to find a violation in that case, the Board principally relied on the lack of evidence of antiunion motive,⁹¹ whereas here the Board identified specific evidence of union animus, such as multiple supervisors’ statements exhibiting strong antiunion sentiments and indicating that the Employer withheld the increase from represented employees as a punishment for choosing the Union. (A. 11 n.9.)

Nevertheless, in relying on these cases finding lawful the disparate treatment of union and nonunion employees, the Employer overemphasizes the significance of that fact. Here, though the disparate granting of the October 2007 raise undoubtedly exacerbated the destructive effect of this conduct on employees’ Section 7 rights, the unlawfulness of the Employer’s conduct is based on its withholding of an established, expected benefit, not a theory of disparate treatment.

Lastly, the Employer’s response (Br. 51-53) to *United Aircraft* and *Eastern Maine Medical Center*—the two principal cases relied on by the Board and most

⁹⁰ *Winn-Dixie Raleigh*, 267 NLRB at 235; see *Daily News of Los Angeles*, 73 F.3d at 412 n.3 (stating that “fixed timing alone would [not] be sufficient” to make annual wage increases a fixed term or condition of employment).

⁹¹ *Winn-Dixie Raleigh*, 267 NLRB at 235-36.

factually similar to this case—is that they are inapposite because, here, there was no established practice regarding wage increases. Thus, this case ultimately turns on whether there is substantial evidence in *this* record to support the Board’s conclusion that the wage increases, based on the annual budgetary review, were an established term and condition of employment. As discussed earlier,⁹² the Board’s conclusion is well supported.

⁹² *See supra* at 18-24.

CONCLUSION

Pursuant to its longstanding practice of annually reviewing its finances and, when possible, granting across-the-board wage increases, the Employer determined that it could afford a staff-wide increase in 2007 and intended to grant one. But it withheld that benefit from newly organized employees, unlawfully punishing them for choosing union representation. Based on the foregoing, the Board respectfully requests that the Court enforce the Board's Order in full and deny the petition for review.

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JULY 2011

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ARC BRIDGES, INC.)
)
 Petitioner/Cross-Respondent) Nos. 10-1330
) 10-1360
)
 v.) Board Case No.
) 13-CA-44627
 NATIONAL LABOR RELATIONS BOARD)
)
 Respondent/Cross-Petitioner)
)

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 10,119 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 20th day of July 2011

UNITED STATES COURT OF APPEALS
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ARC BRIDGES, INC.)	
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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC
this 20th day of July, 2011

ADDENDUM OF STATUTES, RULES, AND REGULATIONS

Relevant provisions of the National Labor Relations Act (29 U.S.C. § 151, et seq.) are as follows:

Sec. 7. [29 U.S.C. § 157]

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8. [29 U.S.C. § 158]

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

....

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

....

Sec. 10 [29 U.S.C. § 160]

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . .

....

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in such 2112 of title 28, United States Code. Upon the filing of such petition, the Court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive. . . .

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Relevant provisions of the Board's Rules and Regulations are as follows:

Sec. 102.48 [29 C.F.R. § 102.48]

(d)(1) A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing de novo and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.