

**Arc Bridges, Inc. and American Federation of Professionals.** Case 13–CA–044627

March 31, 2015

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA  
AND HIROZAWA

This case is on remand from the United States Court of Appeals for the District of Columbia Circuit. The sole question is whether the Respondent's decision, made during bargaining negotiations, to withhold a wage increase from represented employees was unlawfully motivated and, therefore, violated Section 8(a)(3) and (1) of the Act. After carefully considering the record and position statements filed by the parties, we answer that question in the affirmative.

On September 29, 2010, the National Labor Relations Board issued a Decision and Order in this proceeding.<sup>1</sup> The Board found that the Respondent's practice of reviewing its finances each June and then granting across-the-board wage increases to employees each July, if sufficient funds existed, was an established condition of employment.<sup>2</sup> Applying that finding, the Board concluded that the wage increase granted to unrepresented employees on October 12, 2007, was an existing benefit; that the Respondent's failure to provide it to represented employees was "inherently destructive" of their Section 7 rights; and that withholding of the wage increase violated Section 8(a)(3) and (1) even without proof of anti-union motivation. Although the Board noted that the evidence "strongly indicate[d] that the Respondent's conduct was motivated by union animus," it did not rely on that evidence in finding that the withholding was "inherently destructive," nor did it decide whether the evidence of unlawful motivation would establish a violation under a *Wright Line*<sup>3</sup> theory.<sup>4</sup>

Subsequently, the Respondent petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the Board's Order, and the General Counsel cross-applied for enforcement. On December 9, 2011, the court granted the petition for review and denied the cross-application for enforcement.<sup>5</sup> The court rejected the Board's finding that the Respondent's practice of annually reviewing its budget and giving an across-the-board wage increase, if sufficient funds existed, was an

established condition of employment.<sup>6</sup> As a result, the court set aside the Board's order and remanded the case "for further proceedings, in light of the Board's decision to reserve judgment on the *Wright Line* theory."<sup>7</sup>

On May 23, 2012, the Board invited the parties to submit statements of position concerning the issue raised by the court's decision. The General Counsel and the Respondent each filed a statement of position.

We accept the court's remand as the law of the case. Having considered the parties' statements of position, we find, for the reasons set forth below, that the Respondent's decision was unlawfully motivated. Accordingly, we conclude that the Respondent violated Section 8(a)(3) and (1) of the Act by withholding the October 12, 2007 wage increase from represented employees, and we will issue an appropriate supplemental Order.

Facts

The Respondent provides services for developmentally disabled individuals. In November 2006 and February 2007, the Board certified the American Federation of Professionals (the Union) as the collective-bargaining representative of two separate units of employees, respectively, the day services (DS) unit and the residential supportive living (RSL) unit. There are approximately 260 employees in the two units. The Respondent also employs about 120 other individuals—including managers, supervisors, and support staff—who are not represented by the Union.

On January 24, 2007, shortly before the election in the RSL unit, the Respondent's director of community services, Dorothy Shawver, sent a note to employees that stated:

During the union campaign, many people have said to me "don't take it personally". I do take this personally. If you were in my position I think you'd take it personally too. I have worked at Arc Bridges for 22 years. I have built wonderful working relationships with many of you. It saddens me to think that all of that could change in the coming weeks. The Area Managers, Directors and I have spent the last few months making sure you have the facts in order to make an informed choice. I hope these *facts* have assisted you in your choice. It is important that you vote. This is your chance to let your voice be heard. I ask that you vote "NO", put this experience behind us and refocus our efforts on those people that are most important to us—our clients. [Emphasis in original.]

<sup>1</sup> *Arc Bridges, Inc.*, 355 NLRB 1222 (2010).

<sup>2</sup> *Id.* at 1223–1224.

<sup>3</sup> 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

<sup>4</sup> 355 NLRB at 1225 fn. 9.

<sup>5</sup> *Arc Bridges, Inc. v. NLRB*, 662 F.3d 1235, 1240 (D.C. Cir. 2011).

<sup>6</sup> *Id.* at 1238.

<sup>7</sup> *Id.* at 1240.

The Respondent's fiscal year runs from July 1 to June 30. For many years it has been the Respondent's practice to review wages in June of each year as a component of the budget process, and to budget for wage increases, if financially feasible. Customarily, such wage increases, if given, are granted in July. In July of each of the prior 2 years, 2005 and 2006, the Respondent granted across-the-board 3-percent wage increases to all staff, including managers and supervisors.

In June 2007,<sup>8</sup> the Respondent's board of directors authorized Executive Director Kris Prohl to grant a 3-percent nonmerit wage increase to all staff in July. Prohl, however, did not grant the increase to any employees in July "because the situation was not clear to us to be able to expect what was going to happen [with the Union]."

Meanwhile, the Respondent and the Union had been engaged in collective bargaining since December 2006 for the DS unit, and since March 2007 for the RSL unit. In July, the Union made its initial economic proposals for both units, which, among other things, sought wage increases totaling 50 percent over 3 years. The Respondent rejected the proposals on the ground that the Union sought much more than the Respondent could afford. The Respondent did not present counterproposals.

On various dates between May and August, Supervisor Raymond Teso spoke to employee Teresa Pendleton about the Union. On May 7, during Pendleton's employment interview, Teso told her that "the Union would be gone in November."<sup>9</sup> Several months later, in late August, Teso told Pendleton that Prohl had intended to give the employees raises in June and that the \$56,000 the Respondent had budgeted for the unit employees' wage increases was now going to pay its lawyers. Teso then urged Pendleton to vote against a strike and asked her to talk to other employees about opposing the Union, adding that Prohl "would pat us on the back" if she did. In another conversation, in late July or early August, Area Manager Bonnie Gronendyke told employee Shirley Bullock that Prohl "was going to give us a raise until we voted the Union in."

<sup>8</sup> Subsequent dates are in 2007, unless otherwise noted.

<sup>9</sup> For a period of 1 year after the Board certifies a union's election, the employer may not withdraw recognition from the union and the Board will not entertain a petition contesting the union's majority status. This period, known as the certification year, provides the parties the opportunity to negotiate a collective-bargaining agreement without the union's having to defend against possible decertification. See *Brooks v. NLRB*, 348 U.S. 96 (1954). After the certification year expires, the Board will process a properly filed election petition, including a petition to decertify the bargaining representative. The certification year for the DS unit ended on November 15.

In August, the parties having made only limited progress in bargaining, the Union announced a "strike vote." Although the employees in both units voted in late August to authorize a strike, the Union never announced or instituted a strike.

On October 12, the Respondent granted a 3-percent wage increase, retroactive to July, to all nonbargaining unit personnel; union-represented employees received no increase. At the hearing, Prohl proffered several explanations for the decision not to grant the increase to the represented employees, including her concerns that the Respondent would have lost bargaining leverage and that, in light of the Union's proposal for a 50-percent wage increase over 3 years, the relatively small 3-percent wage increase would have made the employees "very unhappy" and "might facilitate or cause a strike." Prohl also testified that she granted the increase to the unrepresented employees, particularly the supervisory and managerial staff, among whom there was a 40-percent turnover rate, "so we can retain them, so that we can keep people here."

In bargaining, the Respondent later offered its represented employees a 1.5-percent wage increase and, later still, a 2-percent increase, both retroactive to July. The Respondent never offered its represented employees the full 3-percent increase that it provided to its unrepresented employees.

#### Discussion

Because we have accepted the court's decision as the law of the case, its findings and conclusions are binding upon us. The court held that the record failed to support the Board's finding that the Respondent's "annual budget review plus the custom of . . . giving an across-the-board wage increase 'if feasible' or 'if sufficient funds existed'" resulted in an established condition of employment. Accordingly, we now reexamine the complaint allegation on the premise that the wage increase provided to unrepresented employees on October 12 was not an established condition of employment.

Under *Shell Oil Co.*<sup>10</sup> and its progeny,<sup>11</sup> an employer may, during the course of collective-bargaining negotiations, treat represented and unrepresented employees differently when providing new benefits, so long as the disparate treatment is not unlawfully motivated. In this case, therefore, the Board must determine whether the General Counsel met his burden to show that the Respondent's decision not to extend the 3-percent wage

<sup>10</sup> 77 NLRB 1306, 1310 (1948).

<sup>11</sup> See, e.g., *Sun Transport, Inc.*, 340 NLRB 70, 72-73 (2003); *Empire Pacific Industries*, 257 NLRB 1425, 1426 (1981); *B. F. Goodrich Co.*, 195 NLRB 914, 914-915 (1972).

increase to its represented employees was unlawfully motivated. For the reasons set forth below, we find that he did.

To establish unlawful motivation under *Wright Line*,<sup>12</sup> the General Counsel bears the initial burden to establish by a preponderance of the evidence that protected activity was a motivating factor for the adverse employment action. If the General Counsel makes a showing of discriminatory motivation by proving the existence of protected activity, the respondent's knowledge of the activity, and animus toward the protected activity, the burden of persuasion "shifts to the respondent to show that it would have taken the same action even in the absence of the employee[s'] protected activity."<sup>13</sup>

Here, it is indisputable that the Respondent's employees engaged in protected activity and that the Respondent had knowledge of that activity: the employees in the DS and RSL units elected the Union as their bargaining representative, engaged in collective bargaining with the Respondent, and voted to authorize a strike. The Respondent's opposition to the Union is also well established. Director of Communication Services Shawver informed employees that she took their support for union representation "personally"; Supervisor Teso urged employee Pendleton to vote against the strike and to talk to other employees about doing the same; and Teso told Pendleton that Executive Director Prohl would "pat [unit employees] on the back" for opposing the Union.

We find that the following record evidence, taken as a whole, establishes that the Respondent's decision to withhold the October 12 wage increase from represented employees was motivated by antiunion animus.

First, the record shows that Prohl intended to give employees a 3-percent wage increase until they voted for the Union. Area Manager Gronendyke told employee Bullock that Prohl "was going to give [represented employees] a raise until [they] voted the Union in."<sup>14</sup> As men-

tioned above, under *Shell Oil*, an employer "may offer different benefits to represented and unrepresented groups of employees *as part of its bargaining strategy*."<sup>15</sup> But the evidence shows that the Respondent's decision was not motivated by bargaining strategy. Rather, it withheld the wage increase because the employees selected the Union as their bargaining representative, activity protected by Section 7 of the Act. Under *Shell Oil*, such motivation is unlawful.

Second, statements made by the Respondent's managers essentially encouraged employees to blame the Union (or those employees who voted for the Union) for Prohl's decision to withhold the increase from them. Gronendyke's aforementioned statement to Bullock does so explicitly. In addition, supervisor Teso told employee Pendleton that \$56,000 that had been budgeted for the represented employees now had "to go to pay for the lawyers." See *Structural Finishing, Inc.*, 284 NLRB 981, 1003 (1987), *enfd.* No. 87-07492 (9th Cir. April 29, 1988) (employer unlawfully blamed the Union for the withholding of a wage increase).

Third, the record evidence undermines two of the Respondent's attempts to establish a legitimate business justification for its decision. Prohl's testimony that she believed that granting the represented employees a 3-percent increase would have made the employees "very unhappy" and more likely to strike, because it was a smaller increase than the Union was seeking, is undermined by her decision to offer those employees an even smaller 1.5-percent wage increase during bargaining subsequent to the vote authorizing a strike. Prohl's additional claim that she provided the wage increase to unrepresented personnel in order to address the high turnover rate among managers and supervisors is implausible in light of the fact that the Respondent granted a wage increase to *all* unrepresented personnel, most of whom

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grant any merit increases after the union's certification because of the ongoing contract negotiations and that, had the union not come into the shop, he would have granted merit increases to his crew or at least to some of them. *Id.* The Board specifically noted that "the [r]espondent had proposed both merit and general wage increases at the negotiating sessions with the [union]" and that "the [u]nion did not accept that proposal." *Id.* at 402, 403. Here, in contrast, the Respondent never proposed the 3-percent wage increase to the Union.

Our colleague also asserts that Gronendyke's statement is "obviously incorrect" because the elections took place 4 to 7 months *before* the board of directors had authorized Prohl to grant the increase. But by narrowly focusing on Gronendyke's use of the word "until," our colleague interprets her statement too literally. Under our colleague's interpretation, Gronendyke's statement would indeed be "obviously incorrect"; in fact, it would not have made sense. The more plausible interpretation of Gronendyke's statement is that Prohl would have granted the increase had the employees not voted to unionize.

<sup>15</sup> *Sun Transport*, 340 NLRB at 72 (emphasis added), citing *Shell Oil*, 77 NLRB at 1310.

<sup>12</sup> 251 NLRB at 1089.

<sup>13</sup> *Flamingo Las Vegas Operating Co.*, 360 NLRB 243, 244 (2014) (internal citations omitted). Contrary to our colleague's suggestion, *Wright Line* does not require the General Counsel to show particularized animus towards the employee's own protected activity or to demonstrate some additional "link" or "nexus" between the protected activity and the adverse action. See *Libertyville Toyota*, 360 NLRB 1298, 1301 fn. 10 (2014). The facts here, however, do indicate such a nexus, as explained below.

<sup>14</sup> Our dissenting colleague asserts that Gronendyke's statement that Prohl "was going to give [employees] a raise until [they] voted the Union in" did not evidence discriminatory motive because "the Board has found a similar remark 'merely a realistic statement of the effects of the bargaining obligation which the [r]espondent incurred when the [u]nion was certified.'" (Quoting *Orval Kent Food Co.*, 278 NLRB 402, 403 (1986)). But *Orval Kent* is inapposite. The quoted language referred to testimony of the employer's superintendent that he did not

were neither managers nor supervisors. It seems clear that the Respondent's main criterion for determining which employees would receive the wage increase was not the employees' managerial status, but rather their unrepresented status. "[E]vidence that [an] employer's purported reasons for [an] action were pretextual—that is, either false or not in fact relied upon"—supports a finding that the action at issue was discriminatorily motivated. *Approved Electric Corp.*, 356 NLRB 238, 240 (2010); accord: *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966), enf. 151 NLRB 1328 (1965); *Pro-Spec Painting, Inc.*, 339 NLRB 946, 949 (2003).

Finally, the evidence shows that the Respondent's decision to delay, and eventually withhold, the 3-percent wage increase for represented employees was motivated by the approaching end of the certification year for the DS unit. In every year during which the Respondent granted an across-the-board wage increase to employees, it did so in July. Indeed, in June of 2007, the Respondent's board of directors authorized Prohl to grant a 3-percent wage increase to all staff in July. Despite this, the Respondent waited until mid-October to grant the increase to its unrepresented employees, although making it retroactive to July. Unrepresented employees, therefore, received a raise and a lump-sum payment shortly before the expiration of the DS unit's certification year. That this unprecedented delay was motivated by union animus is reflected in Teso's statement to Pendleton in May that "the Union would be gone in November."<sup>16</sup>

Our dissenting colleague argues that our reliance on Teso's statements has a "chronology problem" because Teso made the statements before Prohl's October decision to withhold the increase. But we disagree with our colleague's suggestion that statements made a few months before an adverse employment decision cannot demonstrate motive for the decision. Rather, we agree with the General Counsel that Teso's statement in May conveyed his belief that no contract would be agreed upon by November and that the Respondent planned "to oust the Union after a year of unsuccessful bargaining." Teso's statement in August—that Prohl had planned to give a raise in June, but the \$56,000 was now going to the lawyers—is probative of the Respondent's plans with respect to the wage increase at that time. In October, Prohl followed through on those plans when she withheld

<sup>16</sup> We agree with the judge that the only reasonable interpretation to attach to Teso's statement that "the Union would be gone in November" is that he expected the Union's departure to be concurrent with the end of the certification year for the DS unit, which had been certified on November 15, 2006.

the increase from represented employees. Based on all of the foregoing evidence, we find that the General Counsel met his *Wright Line* burden by showing that protected activity was a motivating factor in the Respondent's decision to withhold the 3-percent wage increase from employees represented by the Union.

Moreover, although the Respondent does not expressly argue that it would have withheld the wage increase from represented employees even in the absence of their protected activity, we further find that the Respondent has failed to meet its *Wright Line* rebuttal burden. In doing so, we rely on our finding, explained above, that the reasons proffered by the Respondent for its decision were, in fact, pretextual.

Our colleague contends that the judge's credibility findings establish that the Respondent proved that it would have withheld the increase even in the absence of the unit employees' protected activity. Specifically, he argues that the judge "implicitly" credited "at least some" of Prohl's testimony that the Respondent would have foregone a wage increase in any event based on a concern that the increase would deprive the Respondent of bargaining leverage and a belief that if the increase were granted unilaterally the Union would respond by filing an 8(a)(5) charge.

The judge, however, made no such credibility findings. As our colleague acknowledges, the judge never stated that he credited Prohl's testimony. In fact, the judge neither credited nor discredited Prohl's testimony in its entirety. Accordingly, the Board must distinguish between the judge's recitation of Prohl's testimony and his reliance on certain testimony to find particular facts. Only the latter can be deemed "implicitly" credited by the judge.

The judge did not credit (explicitly or implicitly) Prohl's testimony on either of the subjects cited by our colleague. The judge merely recited Prohl's testimony that she withheld the increase to maintain bargaining leverage and to avoid an 8(a)(5) charge; at no point did he find those facts to be true.<sup>17</sup>

<sup>17</sup> Our colleague also contends that the judge implicitly credited Prohl's testimony when the judge stated that "the Respondent's asserted rationale is also feasible as a legitimate bargaining strategy." But, as our colleague acknowledges, the judge, in the immediately preceding sentence, also found that "given the record evidence of Respondent's general antiunion bias as well as Shawver's adverse personal reaction to the employees' selection of the Union, and coupled with the Respondent's past practice of giving a wage increase to all employees in July of each year, such a discriminatory intent is clearly plausible." In sum, finding Prohl's claimed motive "feasible" and a discriminatory motive "plausible" does not amount to a crediting of Prohl.

Moreover, contrary to our colleague's assertion, it is not clear that the court treated Prohl's claimed motive as "established fact." Instead, the court observed that, in the judge's view, "the evidence did not clear-

Finally, we find no merit in our colleague's contention that the Respondent's conduct was justified by Prohl's concern that the Respondent might have been subjected to a refusal-to-bargain charge under Section 8(a)(5) if it had unilaterally granted the wage increase to represented employees. That argument implies that the Respondent was in a no-win situation: withhold the increase and risk 8(a)(3) charges, or grant the increase and risk 8(a)(5) charges. But the Respondent was faced with no such dilemma. Withholding the increase would not, on its own, establish an 8(a)(3) violation. As explained above, an employer may treat represented and unrepresented employees differently during the course of collective-bargaining negotiations without violating Section 8(a)(3), provided that the disparate treatment is not unlawfully motivated.<sup>18</sup> See *Shell Oil*, 77 NLRB at 1310. Here, the evidence demonstrates an unlawful motive.

Given the evidence of animus described above, and the Respondent's admission that it would have given the same wage increase to *all* of its employees if the Union had not been representing some of them, we find that the Respondent's withholding of the October 12 wage increase from represented employees was unlawfully motivated. Accordingly, we find that the Respondent's conduct violated Section 8(a)(3) and (1).

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By discriminatorily withholding a wage increase from bargaining unit employees on and after October 12, 2007, because of their support for the Union, the Respondent violated Section 8(a)(3) and (1) of the Act.
4. The unfair labor practice found above affects commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in an unfair labor practice, we shall order it to cease and desist and to take certain affirmative action designed to effectuate

the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(3) and (1) by unilaterally withholding from its union-represented employees a 3-percent annual wage increase that it would have given them but for its discrimination, we shall order that it reimburse each of the affected employees for the increase they would have received on October 12, 2007, retroactive to July 2007, by payment to them of the difference between their actual wages and the wages they would have received had the increase been granted to them in the manner that it was granted to the Respondent's unrepresented employees. The make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, we shall order the Respondent to compensate the affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters. See *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).

#### ORDER

The National Labor Relations Board orders that the Respondent, Arc Bridges, Inc., Gary, Indiana, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Withholding wage increases or otherwise discriminating against bargaining unit employees because of their support for the American Federation of Professionals, or any other labor organization.

(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 whole employees in the following appropriate collective-bargaining units for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision. The appropriate units are:

All full-time and regular part-time entry level Day Services Employees including Assistant Trainer, Community Connections Specialist, COTA (Certified Occupational Therapy Assistant), DSP (Direct Support Professional), Aquatics Manager, DSP Follow Along, DSP H & S (Health & Safety) Technician, DSP Job Coach, DSP Lead Trainer, DSP Recreation Manager, DSP SIP (Social Integration Program) Technician, DSP Trainer,

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ly rule out" Prohl's explanation. 662 F.3d at 1237. Had the court viewed Prohl's explanation as "established fact," there would have been no reason to remand for an analysis of the Respondent's motive.

<sup>18</sup> Moreover, to the extent that the Respondent is arguing that it *had* to withhold the increase to avoid violating Sec. 8(a)(5), there is no merit in that position either. Had the Respondent wanted to give its represented employees the same 3-percent increase that it gave the unrepresented employees, it could have simply asked the Union for permission. If the Union consented, the Respondent could have granted the increase without violating Sec. 8(a)(5).

Employment Specialist, and Substitute Trainer, employed by the Respondent at its facilities currently located at 2650 West 35th Avenue, Gary, Indiana, 2660 West 35th Avenue, Gary Indiana, 2395 West Old Ridge Road, Hobart, Indiana, 550 East Burrell Drive, Crown Point, Indiana, and 9600 Kennedy Avenue, Highland, Indiana; but excluding all Residential Services employees, all Supported Living Services employees, temporary employees, volunteers, clients on the payroll, managerial employees, confidential employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

All full-time and regular part-time Direct Support Professionals (DSP's), Lead DSP's and Medical/Residential Drivers employed by the Respondent at its Residential and Supported Living facilities currently located in Lake and Porter Counties, Indiana; but excluding all other employees, Day Services employees, temporary employees, volunteers, clients on the payroll, managerial employees, confidential employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

(b) Compensate the affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, in the manner set forth in the remedy section of this decision, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(c) 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 reimbursement due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facilities in Gary, Indiana, and any other facilities in Lake and Porter Counties where unit employees are regularly employed, copies of the attached notice marked "Appendix."<sup>19</sup> Copies of the notice, on forms provided by the Regional Director for Region 13, 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, 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. If the Respondent has gone out of business or closed the facilities 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 October 12, 2007.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 13 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.

MEMBER MISCIMARRA, dissenting.

I dissent in this case because I believe the Respondent engaged in lawful conduct: while engaged in bargaining that remained incomplete, the Respondent refrained from unilaterally giving represented employees a wage increase. Although my colleagues find the employer violated the Act by *not* granting the increase, the judge disagreed, as did the D.C. Circuit when it set aside an earlier Board decision in this case that found the same violation. On the facts presented here, I believe the Respondent would have violated the Act had it unilaterally implemented the wage increase for represented employees. I do not believe the Act can reasonably be interpreted to find a party in violation of the Act regardless of what it does. I agree with the judge and the D.C. Circuit, and would dismiss the complaint.

In October 2007, the Respondent gave its unrepresented employees a 3-percent wage increase, and it had to decide whether to give the same increase to its represented employees as well. At that time, the Respondent and the Union were negotiating for initial collective-bargaining agreements (covering employees in two units). The Respondent's statutory duty was to leave unchanged unit employees' established terms and conditions of employment until it bargained with the Union to agreement or impasse.<sup>1</sup> The first time this case was before the Board, the Board found that annual across-the-board wage increases "if sufficient funds existed" were

<sup>19</sup> 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."

<sup>1</sup> *NLRB v. Katz*, 369 U.S. 736 (1962).

an established condition of employment.<sup>2</sup> The D.C. Circuit rejected that finding, reasoning that Board decisions must be based “on the record considered as a whole,” and stating that “[h]ad the Board done so here, it could not possibly have concluded that annual across-the-board wage increases were an established condition of employment.”<sup>3</sup> Thus, under the law of the case (which I believe also has the benefit of being correct), granting the increase would have changed the status quo—and the parties had not reached agreement or impasse. Accordingly, had the Respondent *granted* the increase to its represented employees unilaterally, it would have violated Section 8(a)(5). Yet, my colleagues now find that the Respondent violated Section 8(a)(3) by *withholding* the increase.

My colleagues rely on a different rationale from that previously articulated for the Board’s earlier finding that the Respondent violated the Act. Now, rather than arguing that the Respondent had an established practice of granting annual across-the-board increases, my colleagues conclude that the Respondent acted unlawfully by withholding its wage increase because the Respondent had an unlawful antiunion motivation. In my view, however, the evidence manifestly fails to support an inference of unlawful motivation. My colleagues rely on a few statements from which an unlawful motive for withholding the increase cannot logically be inferred, made moreover by individuals not shown to have had any role in the decision; a pretext analysis that rejects testimony the administrative law judge credited—as the Board itself acknowledged in the underlying decision—and the D.C. Circuit accepted as fact; and speculation based on coincidental timing. To say that the General Counsel failed to sustain his initial burden under *Wright Line*<sup>4</sup> would be an understatement; the case for inferring an unlawful motive is barely even colorable. But even assuming otherwise, the Respondent showed—by testimony the judge credited and the D.C. Circuit accepted as fact—that it would have withheld the increase in any event for legitimate, nondiscriminatory reasons: to preserve bargaining leverage, prevent a strike, and avoid an 8(a)(5) charge. The Respondent did not violate Section 8(a)(3); therefore, I respectfully dissent from my colleagues’ contrary finding.

<sup>2</sup> *Arc Bridges, Inc.*, 355 NLRB 1222, 1223–1224 (2010), enf. denied 662 F.3d 1235 (D.C. Cir. 2011).

<sup>3</sup> *Arc Bridges, Inc. v. NLRB*, 662 F.3d 1235, 1239 (D.C. Cir. 2011).

<sup>4</sup> 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

## Background

In November 2006 and February 2007, the Board certified the Union as the collective-bargaining representative of the Respondent’s employees in two bargaining units: the day services (DS) unit and the residential supportive living (RSL) unit. Collective bargaining for contracts covering the DS and RSL units began in December 2006 and March 2007, respectively. Although the parties bargained separately for contracts covering each unit, the issues discussed were identical in all respects material to this case.

On July 10, 2007,<sup>5</sup> the Union presented its economic proposals. Among these were proposals that would have required the Respondent to significantly increase its expenditures for health insurance and paid vacation. In addition, the Union proposed wage increases of 20 percent in year 1 of the contract, another 20 percent in year 2, and 10 percent in year 3—50 percent over 3 years. At the next bargaining session on July 12, the Respondent presented the Union with documents showing that its projected net income for 2007 was a little over \$53,000, and that in the first year of the contract alone, the Union’s proposals, if implemented, would increase the Respondent’s expenditures by more than \$4.3 million. The Respondent told the Union that it was “time to bring a healthy dose of reality to these negotiations,” and asked it to “narrow its focus” and identify the issues it deemed most important. The Union did not alter its bargaining demands. Also in July, Executive Director Kris Prohl had to decide whether to implement a staff-wide 3-percent wage increase authorized by the Respondent’s board of directors the previous month. Prohl decided not to grant the increase at that time. In prior years, the Respondent had sometimes given an across-the-board wage increase, sometimes given merit-based increases, and sometimes given no increase at all.<sup>6</sup>

In August, the unit employees voted to authorize a strike. In September, the Respondent proposed to the Union that money available to the Respondent through a grant be distributed to the unit employees as a bonus. The grant had an expiration date, after which the money would no longer be available, and the Respondent communicated that fact to the Union and asked for a prompt response. The Union did not timely respond, and the grant expired. In October, Prohl granted a 3-percent increase to all nonunit employees retroactive to July 1.

Asked why she did not grant the wage increase to the unit employees, Prohl testified to several reasons. First, if she gave the increase unilaterally, she thought it likely

<sup>5</sup> All subsequent dates are in 2007, unless otherwise stated.

<sup>6</sup> See *Arc Bridges*, supra, 662 F.3d at 1239.

that the Union would file an unfair labor practice charge.<sup>7</sup> Second, she did not want to lose bargaining leverage. The Union was demanding a 50-percent increase over 3 years, in addition to costly changes in health insurance and paid vacation. As Prohl put it, “once we said this [the funds needed for a 3-percent increase] is all the money we have and we agreed to use it for this purpose, there’s nothing left. . . . [I]f I gave them the three percent, what was I going to be left to bargain with?” Third, the Union’s apparent indifference to the Respondent’s proposal to use grant money for unit-employee bonuses convinced Prohl that the Union would similarly disregard an offer to increase wages a mere 3 percent, when the Union was proposing 50 percent. Fourth, the unit employees had voted to authorize a strike, and Prohl believed that a “little three percent” increase compared to the Union’s 50-percent proposal would make the employees “very unhappy” and might provoke a strike.

Prohl also explained two other matters. Asked why she granted the 3-percent increase to the unrepresented employees in October (when the board of directors authorized the increase in June), Prohl testified that turnover had increased in that part of the workforce during the first quarter of fiscal 2008 (i.e., July-September 2007), and she was attempting to counteract that trend. Later, in contract negotiations, the Respondent offered a 1.5-percent and then a 2-percent increase, both retroactive to July. Asked why the Respondent offered less than the 3 percent the nonunion employees received in October, Prohl testified that in the interim, costs had increased and income had declined.

In 2007, several agents of the Respondent made union-related statements. In January, before the election in the RSL unit, Director of Community Services Dorothy Shawver sent a note to employees that read in part: “During the union campaign, many people have said to me ‘don’t take it personally.’ I do take this personally. If you were in my position I think you’d take it personally too. I have worked at Arc Bridges for 22 years. I have built wonderful working relationships with many of you. It saddens me to think that all of that could change in the

<sup>7</sup> The judge pressed Prohl on this point, asking why she did not approach the Union and ask if it “would be agreeable to the three percent.” Prohl expressed doubt that the Union would have agreed, and the judge followed up: “No, no, let’s just assume that the [U]nion agreed to the three percent. Now if the [U]nion agreed the [U]nion has no basis to file a charge if they agreed to it.” Prohl responded by saying that if the Union rejected the offer, she feared it would report it to the unit employees and provoke a strike, and if the Union accepted the offer, the Respondent would lose bargaining leverage: “[O]nce we gave the three percent, we write the checks, we go on, we still needed to bargain to a contract. So I have nothing left to bargain with.”

coming weeks.” Shawver’s note then urged employees to vote “no.” On May 7, Supervisor Raymond Teso told Teresa Pendleton at Pendleton’s job interview that “the Union would be gone in November.” On unspecified dates thereafter, but no later than August, Teso told Pendleton that Prohl had intended to give the employees raises in June, and that \$56,000 the Company had for the employees was going to the Company’s lawyers.<sup>8</sup> In late July or early August, Area Manager Bonnie Gronendyke told employee Shirley Bullock that Prohl “was going to give us a raise until we voted the Union in.”<sup>9</sup>

The judge found “clearly plausible” the General Counsel’s theory that the Respondent chose not to give represented employees a raise “in order to punish and retaliate against the employees for bringing in the Union.”<sup>10</sup> He based this finding on Teso’s comments to Pendleton and Shawver’s note to employees,<sup>11</sup> “coupled with the Respondent’s past practice of giving a wage increase to all employees in July of each year.”<sup>12</sup> However, implicitly crediting Prohl’s testimony, the judge found that “the Respondent’s asserted rationale is also feasible as a legitimate bargaining strategy,” and that it had not been shown that the Respondent’s rationale “was advanced merely as a pretext to mask discriminatory behavior.”<sup>13</sup> Concluding his analysis, the judge found that the General Counsel failed to sustain his initial *Wright Line* burden, and even assuming otherwise, the Respondent met its burden of showing that it “would have taken the identical action for legitimate, nondiscriminatory reasons.”<sup>14</sup>

<sup>8</sup> Pendleton testified to additional statements Teso made to her, including that Prohl would “pat us on the back” if Pendleton spoke to other employees about “not voting for the Union” or “not standing for the Union.” Whether the judge credited this testimony is unclear, however. On one hand, he appears to find that Teso made the “pat on the back” statement. *Arc Bridges*, 355 NLRB at 1230. On the other, citing “difficulties with Pendleton’s testimony,” the judge found that Teso made only the three statements related in the text. *Id.*

With respect to Teso’s statement that “the Union would be gone in November,” i.e., at the end of the certification year for the DS unit, the judge found that it “simply indicate[d] that [Teso] believed that no contract would be negotiated.” Accordingly, he found that the statement was not probative of a discriminatory motive for withholding the wage increase. *Id.* at 1232 fn. 14.

<sup>9</sup> The judge found Gronendyke’s comment added no weight to a showing of discriminatory motive because it may equally be viewed “as an admission of discriminatory intent or as an abbreviated and imperfect summary of the rationale readily admitted to by the Respondent.” *Id.*

<sup>10</sup> *Id.* at 1232.

<sup>11</sup> Although the judge also mentioned Gronendyke’s comment to Bullock, again, he found it added no weight to the General Counsel’s case. See *supra* fn. 9.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* The judge nowhere expressly stated that he credited Prohl’s testimony. Nevertheless, he necessarily did so. As my colleagues

As noted previously, the Board reversed, but not under *Wright Line*. It found that the Respondent “had a practice of reviewing its finances each June and then granting nonmerit-based, across-the-board wage increases to employees each July, if sufficient funds existed,” and it “agree[d] with the judge that the described pattern amounted to an established condition of employment.”<sup>15</sup> Based on these findings, the Board found that withholding the wage increase from its union employees only “was inherently destructive of their Section 7 rights, even without specific proof of antiunion motivation.”<sup>16</sup> On this basis, the Board found that the Respondent violated Section 8(a)(3) and (1).<sup>17</sup> The Board recognized, however, that the judge had credited Prohl’s testimony,<sup>18</sup> and it found no basis for reversing the judge’s credibility findings.<sup>19</sup>

The Respondent petitioned for review in the United States Court of Appeals for the District of Columbia Circuit, and the court granted review, set aside the Board’s finding of a violation, and remanded the case since the Board did not rule on the judge’s finding in the Respondent’s favor regarding potential antiunion motivation. First, the court found that the Board had “sustained the ALJ’s factual findings,”<sup>20</sup> and accordingly it relied on the credited testimony of Executive Director Prohl as to her reasons for withholding the wage increase from the unit employees:

Prohl feared that the significant disparity between the three percent increase and the union’s much larger demand would provoke a strike. She was also concerned that implementing the increase would leave Arc Bridges without any funds to meet the union’s remaining demands. And she believed that a unilateral wage in-

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observe, “the Board must distinguish between the judge’s recitation of Prohl’s testimony and his reliance on certain testimony to find particular facts. Only the latter can be deemed ‘implicitly’ credited by the judge.” Prohl’s testimony furnished the *only* evidence of the Respondent’s legitimate, nondiscriminatory reasons for withholding the increase. And as stated above, the judge found that even assuming the General Counsel met his initial burden under *Wright Line*, the Respondent would have withheld the increase “for legitimate, nondiscriminatory reasons.” Since the judge had only Prohl’s testimony upon which to base that finding, he must have credited at least some of Prohl’s stated reasons for withholding the increase.

<sup>15</sup> Id. at 1223–1224.

<sup>16</sup> Id. at 1225.

<sup>17</sup> The Board also suggested that an 8(a)(3) violation might also be found on a *Wright Line* analysis, but it did not rest its decision on *Wright Line*. Id. at 1225 fn. 9.

<sup>18</sup> Id. at 1224 (referring to “Executive Director Prohl’s own credited testimony”).

<sup>19</sup> Id. at 1222 fn. 1.

<sup>20</sup> *Arc Bridges*, 662 F.3d at 1237.

crease would expose Arc Bridges to a refusal to bargain charge.<sup>21</sup>

The court also accepted Prohl’s credited testimony as to why she granted an increase to nonunion employees in October:

Turnover among the non-union employees had recently been unusually high. In an effort to stem that trend, Prohl decided to grant the non-union employees the planned three percent wage increase in October 2007, retroactive to July of that year.<sup>22</sup>

And the court also noted that the Respondent “later offered union employees a retroactive two percent wage increase,” and “justified the reduced amount on the ground that revenues had declined and costs had increased since October 2007”<sup>23</sup>—a justification based, once again, on Prohl’s credited testimony.

However, the court rejected as “arbitrary and unsupported by substantial evidence” the Board’s finding that annual across-the-board wage increases were an established condition of employment.<sup>24</sup> Since the Board’s conclusion that withholding the wage increase was inherently destructive of employee rights rested on that rejected finding, the court remanded the case to the Board “for further proceedings, in light of the Board’s decision to reserve judgment on the *Wright Line* theory.”<sup>25</sup>

#### Analysis

To prove a violation of Section 8(a)(3) under *Wright Line*, the General Counsel must make an initial showing “sufficient to support the inference that protected conduct was a ‘motivating factor’ in the employer’s decision. If the General Counsel makes that showing, the burden would then shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.”<sup>26</sup> Under the Board’s prevailing but mistaken view, the General Counsel sustains his initial *Wright Line* burden by showing (1) union activity by employees, (2) employer knowledge of that activity, and (3) employer antiunion animus.<sup>27</sup> But generalized antiunion animus does not satisfy the General Counsel’s initial *Wright Line* burden absent evidence that the challenged adverse action was motivated by antiunion animus. In other words, the General Counsel “must estab-

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<sup>21</sup> Id. at 1236.

<sup>22</sup> Id. at 1236–1237.

<sup>23</sup> Id. at 1237 fn. 1.

<sup>24</sup> Id. at 1238.

<sup>25</sup> Id. at 1240.

<sup>26</sup> *Wright Line*, 251 NLRB at 1089.

<sup>27</sup> E.g., *Mesker Door, Inc.*, 357 NLRB 591, 592 (2011).

lish a motivational link, or nexus, between the employee's protected activity and the adverse employment action."<sup>28</sup> More generally, the Board's task in all cases that turn on motivation "is to determine whether a causal relationship existed between employees engaging in union or other protected activities and actions on the part of the employer which detrimentally affect" their employment.<sup>29</sup>

It is also important to recognize that it is not unlawful "antiunion motivation" under the Act when an employer desires to be more successful in union negotiations. The Act requires good-faith bargaining, but parties are permitted to take actions that improve their leverage in bargaining. This can include not volunteering wage increases for represented employees that predictably will then provide a higher floor for further negotiation. Thus, "the Board has long held that employers may offer different benefits to represented and unrepresented groups of employees as part of its bargaining strategy."<sup>30</sup> As the Board explained over 60 years ago:

*Absent an unlawful motive*, an employer is privileged to give wage increases to his unorganized employees, at a time when his other employees are seeking to bargain collectively through a statutory representative. Likewise, an employer is under no obligation under the Act to make such wage increases applicable to union members, in the face of collective bargaining negotiations involving much higher stakes.<sup>31</sup>

Thus, the issue before the Board is whether, notwithstanding the Respondent's duty to maintain without change unit employees' terms and conditions of employment during negotiations for collective-bargaining agreements, the evidence demonstrates that the Respondent's decision not to grant unit employees a wage increase in October 2007 was motivated by a desire to retaliate against them for choosing union representation.

It is undisputed that the Respondent's employees in the DS and RSL units engaged in union activity when they selected the Union as their bargaining representative, and that the Respondent knew as much. It is also undisputed that those employees suffered an adverse employment action when the Respondent granted nonunion employees a 3-percent wage increase but decided against granting an increase to employees in the DS and RSL units while collective bargaining for initial contracts was ongoing. But under *Shell Oil* and its progeny, the Re-

spondent was privileged to act in this way, provided the decision to withhold the increase from the unit employees was not unlawfully motivated. As I will show, the evidence fails to establish an unlawful motive for the Respondent's decision.

As stated above, the record contains several union-related statements made by managers and supervisors in 2007. It is not entirely clear which of these statements my colleagues rely on to support the inference they draw of discriminatory motive. They mention six statements in the "Discussion" section of their opinion, but they apparently rely on only three: (1) Area Manager Gronendyke's statement to employee Bullock that Prohl "was going to give us a raise until we voted the Union in," (2) Supervisor Teso's statement to employee Pendleton that \$56,000 the Company had for the employees was going to the Company's lawyers, and (3) Teso's statement to Pendleton at Pendleton's May 7 job interview that the Union would be gone in November.<sup>32</sup> However, in my view, none of these statements supports a reasonable inference of unlawful antiunion motivation.

1. As to Gronendyke's statement, my colleagues fail to acknowledge, let alone explain why they reject, the judge's finding that Gronendyke's statement to Bullock—Prohl "was going to give us a raise until we voted the Union in"—fails to evidence discriminatory motive because it may be viewed "as an abbreviated and imperfect summary of the rationale readily admitted to by the Respondent,"<sup>33</sup> which the judge found legitimate and nondiscriminatory.<sup>34</sup> The Board has found a similar remark "merely a realistic statement of the effects of the

<sup>32</sup> These are the three statements my colleagues refer to *after* they say that they find "the following evidence" establishes an unlawful motive. *Before* that, but still in the "Discussion" section of their opinion, they mention three other statements: Dorothy Shawver's note to employees saying that she took "this"—i.e., the union organizing drive—personally, Teso's request that Pendleton speak to other employees about voting against a strike, and Teso's statement to Pendleton that Prohl would "pat [employees] on the back" for voting against a strike. I agree with my colleagues' apparent decision not to rely on these statements as evidence of Prohl's motive for her October decision to withhold the wage increase from the unit employees. First, Shawver merely expressed sadness at the prospect that her working relationships with employees might change if they decided to unionize, and who can doubt that they would? See *Tri-Cast, Inc.*, 274 NLRB 377 (1985) ("Section 9(a) . . . contemplates a change in the manner in which employer and employee deal with each other."). Moreover, Shawver wrote this note in January, *nine months* before Prohl made the decision at issue. Second, it is self-evident that *any* employer will prefer that employees not go on strike; expressing that preference does not evidence a motive to retaliate against employees for choosing union representation. Third, Prohl testified that she made the wage decision, and there is no evidence that either Shawver or Teso played any role whatsoever in Prohl's decision.

<sup>33</sup> *Arc Bridges*, 355 NLRB at 1232 fn. 14.

<sup>34</sup> *Id.* at 1232.

<sup>28</sup> *American Gardens Management Co.*, 338 NLRB 644, 645 (2002).

<sup>29</sup> *Wright Line*, 251 NLRB at 1089.

<sup>30</sup> *Sun Transport, Inc.*, 340 NLRB 70, 72 (2003).

<sup>31</sup> *Shell Oil Co.*, 77 NLRB 1306, 1310 (1948) (emphasis in original).

bargaining obligation which the [r]espondent incurred when the [u]nion was certified.”<sup>35</sup> Moreover, the statement is obviously incorrect. The employees “voted the Union in” in November 2006 (the DS unit) and February 2007 (the RSL unit). The wage increase was not authorized by the Respondent’s board of directors until June 2007. Nonetheless, my colleagues rely on Gronendyke’s transparently mistaken claim to infer that “Prohl intended to give employees a 3 percent wage increase until they voted for the Union”—votes that were cast anywhere from 4 to 7 months *before* Prohl had even been authorized to give a 3-percent increase.

2. As to Teso’s statement that \$56,000 the Company had for the employees was going to the Company’s lawyers, it could come as no surprise to Pendleton or anyone else that unionizing entails legal costs for employers, and that money spent on legal fees is money that cannot be spent on wages or benefits. But setting that aside, again, the majority’s rationale has a chronology problem. My colleagues say that Teso’s statement “encouraged employees to blame the Union . . . for Prohl’s decision to withhold the increase from them.” Teso made the statement sometime between May and August; Prohl made the decision in October. Teso could not have been encouraging Pendleton to blame the Union for a decision that had not yet been made.

3. This leaves my colleagues’ reliance on Teso’s statement that “the Union would be gone in November,” which they characterize as evidence that union animus motivated Prohl’s decision to give a raise to nonunion employees in October. I believe this reasoning suffers from several defects. Prohl testified that the timing of the October raise was prompted by an increase in turnover during the first quarter of fiscal 2008 (July–September 2007). The judge credited Prohl’s testimony, and the court of appeals treated the substance of that testimony *as established fact*.<sup>36</sup> Moreover, the Board recognized that the judge credited Prohl’s testimony,<sup>37</sup> and it rejected all exceptions to the judge’s credibility determinations.<sup>38</sup> Inconsistently, the Board also *discredited* her testimony as to why she decided to give the raise in October, just as the majority does here.<sup>39</sup> That Board did not explain the inconsistency, and neither do my col-

leagues. Finally, and once again, the majority’s reasoning has a chronology problem. Pendleton testified that Teso made this statement—“the Union would be gone in November”—at Pendleton’s employment interview on May 7, a month before the board of directors authorized Prohl to give a wage increase, and 5 months before Prohl decided to give it. To accept the majority’s finding that Teso’s statement supports an inference that the timing of Prohl’s decision was motivated by union animus, one would have to believe that Teso peered into the future and foresaw (i) that the board of directors would authorize an increase, (ii) that Prohl would give an increase only to the nonunion employees, and (iii) that Prohl would do so in October, relatively close in time to the expiration of the certification year in the DS unit.

My colleagues also find pretextual one of Prohl’s stated reasons for deciding not to grant unit employees a wage increase—i.e., that she feared a 3-percent raise, when the Union was asking for 20 percent the first year and 50 percent over 3 years, might provoke a strike. My colleagues conclude this explanation was pretextual because Prohl offered an even smaller raise in subsequent bargaining.<sup>40</sup> However, one cannot reasonably fault Prohl for offering *something* in bargaining, since wages are a mandatory subject of bargaining, and the Board often regards a refusal to offer *any* wage or benefit improvements as evidence of an absence of good faith (especially when the employer had given wage increases to unrepresented employees).<sup>41</sup> And Prohl explained why her subsequent offers were for less than 3 percent: in the interim, revenues had declined and costs had increased. The judge credited Prohl’s testimony, the Board acknowledged as much and rejected all exceptions to the judge’s credibility findings, and the D.C. Circuit accepted Prohl’s explanation. Moreover, Prohl credibly testified to additional reasons for deciding to withhold the

<sup>35</sup> *Orval Kent Food Co.*, 278 NLRB 402, 403 (1986).

<sup>36</sup> Again, the D.C. Circuit *found* that “[t]urnover among the nonunion employees had recently been unusually high. In an effort to stem that trend, Prohl decided to grant the nonunion employees the planned three percent wage increase in October 2007, retroactive to July of that year.” *Arc Bridges*, 662 F.3d at 1236–1237.

<sup>37</sup> *Arc Bridges*, 355 NLRB at 1224 (referring to “Executive Director Prohl’s own credited testimony”).

<sup>38</sup> *Id.* at 1222 fn. 1.

<sup>39</sup> *Id.* at 1225 fn. 9.

<sup>40</sup> They also find pretextual her explanation for the October timing of the increase given to nonunion employees, and they use that finding to support an inference that the decision at issue here—i.e., to withhold the increase from unit employees—was discriminatorily motivated. But those were *different decisions*. Even assuming Prohl’s explanation for the timing of the increase given to nonunion employees is rejected, that cannot logically support an inference as to her motives concerning the different decision *not* to give an increase to union employees. In any event, Prohl’s explanation for the timing of the increase given to nonunion employees—to stem a rising turnover tide—was credited by the judge (whose credibility determinations were upheld by the Board) and taken as established fact by the D.C. Circuit.

<sup>41</sup> The Act requires that bargaining be conducted “in good faith,” but it does not require a party “to agree to a proposal or . . . mak[e] . . . a concession.” Sec. 8(d). The absence of any concessions, however, is often regarded as evidence of bad faith. See, e.g., *Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991, 994 (9th Cir. 1992) (upholding Board determination that the employer’s bad faith was supported, in part, by the fact that it “failed to compromise in its negotiations”).

increase besides strike avoidance—to retain bargaining leverage and to avoid an 8(a)(5) charge—and the majority does not contend that those were pretextual. Accordingly, those reasons stand unchallenged by my colleagues. And even assuming that Prohl was not concerned about provoking a strike, stating a false reason for an employment action *may* support a finding that the real reason is an unlawful one, but by no means does it compel such a finding. Whether stating a false reason supports a reasonable inference that the real reason is an unlawful one depends on the rest of the relevant evidence. Here, there is virtually *no* other evidence that supports a reasonable inference of unlawful motive, and substantial credited evidence that refutes it.

Finally, my colleagues infer an unlawful motive from the October timing of the wage increase given the nonunion employees, 1 month before the end of the DS unit's certification year. To the extent they base that inference on Teso's May 7 comment that "the Union would be gone in November," I have already explained why their analysis fails. To the extent they base it on timing alone, again, Prohl explained the timing, the judge credited her testimony, the Board upheld the judge's credibility findings, and the court accepted her explanation as fact.

The unavoidable conclusion to be drawn from the foregoing is that the General Counsel failed to show that animus against the employees' decision to choose union representation was a motivating factor in the Respondent's decision not to give unit employees a 3-percent wage increase in October 2007. But even assuming otherwise, the Respondent demonstrated, based on Prohl's credited testimony, that it would have foregone a wage increase in any event for reasons that had nothing to do with union animus, including Prohl's concern that the increase, if given, would (in the court's words) "leave Arc Bridges without any funds to meet the [U]nion's remaining demands"<sup>42</sup> and deprive the Respondent of bargaining leverage, and Prohl's belief that if the increase were granted unilaterally, the Union would respond by filing an 8(a)(5) charge.

That last point—avoiding an unfair labor practice charge—brings me to my final point. As I said in the introduction, the Respondent's legal duty was to maintain the status quo unchanged while it bargained in good faith with the Union to agreement or impasse. Annual wage increases were *not* the status quo, as the D.C. Circuit has made clear. Thus, refraining from giving unit employees a wage increase in October 2007, while bargaining was ongoing, was what the Respondent was *supposed* to do. Otherwise, the Respondent would have

violated Section 8(a)(5). Especially in this context, before deciding that the withholding of a wage increase violates Section 8(a)(3), the Board must require strong and convincing evidence sufficient to *prove* unlawful motivation. Otherwise, parties would run the risk of violating the Act whenever they exercise their legal right—and their legal obligation—to refrain from automatically giving represented employees whatever increases are granted to other employees.<sup>43</sup> The practical effect of the majority's decision in this case is to put the Respondent in a no-win situation. The Board cannot reasonably adopt standards that cause parties to be in violation of the Act regardless of the actions they take. See, e.g., *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 678–679 (1981) (a party must have "certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice").

Accordingly, I respectfully dissent.

#### 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 or otherwise discriminate against you because of your support for the American Federation of Professionals (AFP) or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

<sup>43</sup> See, e.g., *Shell Oil Co.*, supra, 77 NLRB at 1310 ("Absent an unlawful motive, an employer is privileged to give wage increases to his unorganized employees, at a time when his other employees are seeking to bargain collectively through a statutory representative. Likewise, an employer is under no obligation under the Act to make such wage increases applicable to union members, in the face of collective bargaining negotiations involving much higher stakes.") (emphasis in original).

<sup>42</sup> *Arc Bridges*, 662 F.3d at 1236.

WE WILL make whole employees in the following appropriate collective-bargaining units for any loss of earnings or other benefits suffered as a result of our unlawful failure to grant them the wage increase granted to unrepresented employees on October 12, 2007, plus interest. The appropriate units are:

All full-time and regular part-time entry level Day Services Employees including Assistant Trainer, Community Connections Specialist, COTA (Certified Occupational Therapy Assistant), DSP (Direct Support Professional), Aquatics Manager, DSP Follow Along, DSP H & S (Health & Safety) Technician, DSP Job Coach, DSP Lead Trainer, DSP Recreation Manager, DSP SIP (Social Integration Program) Technician, DSP Trainer, Employment Specialist, and Substitute Trainer, employed by the Respondent at its facilities currently located at 2650 West 35th Avenue, Gary, Indiana, 2660 West 35th Avenue, Gary Indiana, 2395 West Old Ridge Road, Hobart, Indiana, 550 East Burrell Drive, Crown Point, Indiana, and 9600 Kennedy Avenue, Highland, Indiana; but excluding all Residential Services employees, all Supported Living Services employees, temporary employees, volunteers, clients on the payroll, managerial employees, confidential employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

All full-time and regular part-time Direct Support Professionals (DSP's), Lead DSP's and Medical/Residential Drivers employed by the Respondent at its Residential and Supported Living facilities currently

located in Lake and Porter Counties, Indiana; but excluding all other employees, Day Services employees, temporary employees, volunteers, clients on the payroll, managerial employees, confidential employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

WE WILL compensate the affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

ARC BRIDGES, INC.

The Board's decision can be found at [www.nlr.gov/case/13-CA-044627](http://www.nlr.gov/case/13-CA-044627) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

