

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

June 16, 2015

**DECISION AND ORDER**

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA  
AND JOHNSON

On September 28, 2012, the Board issued a Decision and Order in this proceeding, which is reported at 358 NLRB 1715. The Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, and the General Counsel filed a cross-application for enforcement.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. The court of appeals then vacated the Board’s Decision and Order and remanded this case for further proceedings consistent with the Supreme Court’s decision.

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

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the judge’s decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order, and we agree with the rationale it sets forth for the reasons explained below. Accordingly, we affirm the judge’s rulings, findings, and conclusions and adopt the judge’s recommended Order to the extent and for the reasons stated in the Decision and Order reported at 358 NLRB 1715, which we incorporate here by reference. The Order, as further modified herein, is set forth in full below.<sup>1</sup>

<sup>1</sup> There are no exceptions to the judge’s dismissal of the impression-of-surveillance allegation.

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

Consistent with our decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), we shall modify the judge’s recommended Order to require the Respondent to reimburse the discriminatees 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 to the appropriate calendar quarters.

I. BACKGROUND

The Respondent, which transports bulk petroleum products, maintains facilities in California, Washington, Oregon, Nevada, and Arizona. Until the events at issue here, none of the Respondent’s approximately 7200 employees were represented by a union.

The Respondent does not grant regular periodic across-the-board wage increases. In 2005, during an economic boom when the Respondent had difficulty retaining drivers, the Respondent implemented a wage increase of about \$3 per hour. In December 2009, faced with an economic downturn, the Respondent reduced wages by about \$1.90 per hour for most employees. At that time, Doug Allen, the Respondent’s business unit leader, announced that “[n]o wage increases will be given in 2010.”

After the wage reduction, the employees at the Respondent’s southern California terminals began to seek union representation. In February 2010,<sup>2</sup> the Respondent learned that the Miscellaneous Warehousemen Drivers and Helpers, Local 986, International Brotherhood of Teamsters (the Union) was mounting an organizing drive among the drivers.

On March 16, Bruce Blaise, the Respondent’s executive vice president, sent an email to Allen with the subject line “S. California Issues.” The email stated that Blaise planned to fly to southern California the next morning because the Respondent’s CEO “wants us to make sure we are moving quickly on the situation” there. Under “[p]oints to make,” the email stated: “Our full intention is to keep moving forward and if by late summer we feel confident we have weathered the storm and are on more solid footing, we plan to make positive adjustment in pay. . . .”<sup>3</sup> The Respondent also began the

We shall also substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB 694 (2014).

<sup>2</sup> All dates are in 2010, unless stated otherwise.

<sup>3</sup> The email stated in full:

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

Points to make:

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

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

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

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

We have rolled PCT in to try gain additional savings.

process of adjusting its pricing with customers in order to cover the anticipated wage increase.

On July 2, the Union filed a petition to represent drivers, mechanics, and polishers at the Respondent's terminals in southern California. An election was held on August 13 and 16, which the Union won. No objections were filed, and the Union was certified on August 25.

In a memo dated August 24, the Respondent announced and granted a system wide wage increase to all of its unrepresented employees in northern and southern California, Arizona, and Nevada. The wage increases ranged from \$1 to \$2.07 an hour, depending on location and driver classification. The parties stipulated that the announcement was "posted, displayed, and/or otherwise announced and disseminated at all of the Respondent's bargaining unit locations in Southern California . . . as well as at all the non-union locations in Northern California, Arizona, and Nevada." The newly represented southern California employees, however, were not mentioned in the announcement and did not receive a wage increase.

## II. THE JUDGE'S DECISION

The complaint alleges, and the judge found, that the Respondent violated Section 8(a)(3) and (1) by discriminatorily denying the August 2010 wage increases to the represented employees. Applying *Wright Line*,<sup>4</sup> the judge found that the union activity of the southern California drivers motivated the Respondent to withhold the wage increases from those employees while granting the increases to unrepresented employees. In doing so, the judge emphasized the timing of the increase. He discredited the testimony from the Respondent's witnesses that the Respondent's abrupt change in plans—from stating that there would be no increases in 2010 to stating that it planned to make "positive adjustments" in pay—was due to an improving economic situation. The judge also discredited, as "entirely self-serving and unconvincing," the Respondent's witnesses' testimony that the decision to withhold the wage increases from the represented employees was based on advice of counsel.

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

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

The judge acknowledged that under *Shell Oil Co.*, 77 NLRB 1306, 1310 (1948), an employer is not required to provide represented employees with the same wages and benefits as unrepresented employees, as long as the employer does not act with an unlawful motive. The judge found *Shell Oil* inapplicable, however, because he concluded that the Respondent did, in fact, act with an unlawful motive.

## III. DISCUSSION

We affirm the judge's finding that the Respondent violated Section 8(a)(3) and (1) by discriminatorily withholding the wage increase from unit employees. To begin, because the alleged violation turns on the Respondent's motive, we agree with the judge that *Wright Line* is the appropriate analytical framework and that the General Counsel carried his initial burden. Union activity and employer knowledge are undisputed, and the record supports a finding of antiunion animus for the following reasons.

First, the timing of the Respondent's actions strongly supports a finding that the Respondent was motivated by antiunion animus. See generally *Masland Industries*, 311 NLRB 184, 197 (1993) ("Timing alone may suggest anti-union animus as a motivating factor in an employer's action.") (quoting *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984)).<sup>5</sup> In December 2009, the Respondent reduced wages for economic reasons and informed employees that there would be no wage increases in 2010. In February 2010, the Respondent learned that employees were organizing. The very next month, the Respondent prepared to implement a wage increase—an about-face from its December 2009 position. The March 16 email stated that the Respondent needed to begin "moving quickly on the situation in southern California," an obvious reference to the organizing campaign. The email then referred to plans for a "positive adjustment in pay" in late summer.<sup>6</sup> In early

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<sup>5</sup> Accord: *Schaeff, Inc.*, 321 NLRB 202, 217 (1996) (noting, among other factors, that the discriminatees were terminated within days of meeting with a workers' rights organization and that timing alone may suggest animus as a motivating factor; acknowledging the absence of any "unlawful antiunion statements"), enfd. 113 F.3d 264 (D.C. Cir. 1997); *Cell Agricultural Mfg. Co.*, 311 NLRB 1228, 1232 (1993) (relying on timing to find mass layoffs unlawful, despite the absence of "unlawful conduct [or] expressions of animus" prior to the layoffs; noting that timing alone may suggest animus as a motivating factor), enfd. in relevant part 41 F.3d 989 (8th Cir. 1994).

<sup>6</sup> The dissent notes that an employer "may lawfully inform employees" that it wants a chance "to right previous wrongs," citing *Noah's New York Bagels*, 324 NLRB 266, 267 (1997), and *National Micro-netics*, 277 NLRB 993 (1985). In those cases, the Board addressed whether employer statements to employees constituted unlawful promises of benefits. Even assuming those cases are relevant to this case, in which the email was from one manager to another and the question is

August, shortly before the election, the Respondent decided to grant a wage increase to its unrepresented employees but to exclude the bargaining unit employees. Thus, from March through August, when it granted the wage increase, the Respondent's decisionmaking with respect to the increase was driven by the union campaign.<sup>7</sup>

Second, the Respondent disseminated its August 24 memo announcing the wage increase for unrepresented employees at facilities where the unit employees worked, but made no contemporaneous announcement to unit employees that it intended to bargain over implementation of a wage increase for them. That silence, when contrasted with the Respondent's communication with its unrepresented employees, further indicates that the Respondent's actions were motivated by animus toward the unit employees for having selected the Union as their bargaining representative. The difference in the Respondent's conduct before and after the election is telling: while the campaign was ongoing and the southern California employees had not yet voted to unionize, the Respondent took pains to communicate with them, even sending a high-level executive to visit the facilities, meet with the drivers, and offer reassurance that a wage increase was possible that summer. After the employees voted for the Union, the Respondent's behavior changed: it announced a wage increase for its other employees, posted the announcement in the newly represented employees' workplace, and said nothing to reassure those employees that their own opportunity to receive an increase would be the subject of bargaining.<sup>8</sup>

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one of motive, they are easily distinguishable. The Board emphasized in both cases that the employer made only "generalized expressions" asking for "another chance." See *Noah's*, 324 NLRB at 267 (employer made "no specific promise" about "any particular matter"); *National Micronetics*, 277 NLRB at 993 (employer's statement was "vague" and merely "indicated a general desire to make things better"). Here, the email referred specifically to a pay increase.

In part because the email predated the actual wage increase by 5 months, our colleague also questions how it could be evidence of motive for withholding the increase. In our view, the connection is clear: the email, prepared at a time when the Respondent was attempting to stave off unionization, specifically contemplated granting an increase in "late summer." The Respondent then did exactly that—but excluded those employees who had just voted to unionize.

<sup>7</sup> The Respondent did not announce or implement the increase until August 24, the day before the Union was certified. The judge rejected, on credibility grounds, the Respondent's argument that the delay was based on advice of counsel to avoid the appearance of trying to influence the election. Contrary to the dissent, we find no basis in the record to overturn the judge's credibility determinations. See *Standard Dry Wall*, supra.

<sup>8</sup> The dissent finds the absence of reassurance understandable, noting that the parties' relationship was "barely established" and the union was not certified until August 25, the day after the wage increase was announced. But the election took place on August 13 and 16, and no

In sum, the circumstances as a whole support the judge's finding that the Respondent's withholding of the wage increase from unit employees was discriminatorily motivated. The Respondent's March 16 email shows that, from the beginning, the decision to grant the pay increase was linked to employee sentiment about the Union. When the southern California employees made their sentiments clear by voting to unionize, the Respondent proceeded to treat them less favorably than those who remained unrepresented. Because we find the evidence sufficient to support an inference that the Respondent's decision was motivated by its opposition to the unionization effort, we conclude that the General Counsel met his initial burden under *Wright Line*.<sup>9</sup>

We also agree with the judge, for the reasons stated in his decision, that the Respondent did not meet its rebuttal burden under *Wright Line* to prove that the wage increase would have been withheld from unit employees notwithstanding their union activity. In doing so, we observe that the judge discredited the Respondent's witnesses' testimony regarding their reasons both for implementing the wage increase for unrepresented employees and for withholding it from unit employees.<sup>10</sup> Other than discredited testimony, the Respondent has put forth no evidence to rebut the inference of discriminatory motive. Accordingly, we affirm the judge's finding that the Respondent violated Section 8(a)(3) and (1) by discriminatorily withholding the wage increase from employees because they selected the Union as their bargaining representative.

#### ORDER

The National Labor Relations Board orders that the Respondent, KAG-West, LLC, Los Angeles, California, its officers, agents, successors, and assigns, shall

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objections were filed. The Respondent would have known by August 24 that the Board's certification of the Union was imminent.

<sup>9</sup> In finding unlawful motive, we find it unnecessary to rely on the Respondent's draft letter (quoted in the judge's recitation of facts) in which the Respondent described itself as "historically . . . a union-free environment."

<sup>10</sup> The judge also relied on *Aluminum Casting & Engineering Co.*, 328 NLRB 8, 16 (1999), enfd. in relevant part and remanded 230 F.3d 286 (7th Cir. 2000). The Respondent correctly observes that *Aluminum Casting* is factually distinguishable: there, the employer had a regular practice of granting wage increases, but withheld the wage increase that it would otherwise have implemented during the union organizing campaign and expressly cast the blame for its decision on the union. Nevertheless, the underlying principle of *Aluminum Casting*—that employers may not punish employees for selecting union representation by denying them planned increases—is applicable here. Thus, the withholding of granted increases from represented employees for discriminatory reasons is unlawful. *Shell Oil*, supra. See generally *Sun Transport, Inc.*, 340 NLRB 70 (2003); *Empire Pacific Industries*, 257 NLRB 1425 (1981); *B.F. Goodrich Co.*, 195 NLRB 914 (1972).

1. Cease and desist from

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

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

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

(a) Make the employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the judge's decision.

(b) Compensate employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(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 backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at all its facilities in California, Arizona, and Nevada, copies of the attached notice marked "Appendix."<sup>11</sup> Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees em-

<sup>11</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."

ployed by the Respondent at any time since August 24, 2010.

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

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

MEMBER JOHNSON, dissenting.

My colleagues adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) by discriminatorily withholding a wage increase from unit employees that was granted to nonrepresented employees.<sup>1</sup> Because I find, contrary to my colleagues, that the Acting General Counsel failed to meet his initial burden for the violation, I would dismiss the complaint.

It is well established that employers may treat represented and nonrepresented employees differently when implementing new benefits, so long as the disparate treatment is not unlawfully motivated. See *Shell Oil Co.*, 77 NLRB 1306 (1948); accord: *Sun Transport, Inc.*, 340 NLRB 70, 72 (2003); *Empire Pacific Industries*, 257 NLRB 1425, 1426 (1981). To determine whether an adverse action was, in fact, motivated by unlawful intent, the Board applies the causation test set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). The three elements of that test are: (1) employee engagement in protected activity, (2) employer knowledge of that protected activity, and (3) employer animus toward the protected activity. Here, it is clear that the Acting General Counsel has met his burden with regard to the first two factors. Where my colleagues and I part ways, however, is with regard to the third factor.

My colleagues' finding of antiunion animus hangs on the timing of the Respondent's August 24 wage increase announcement. In support of their position that the timing of this announcement evinces antiunion animus, the majority notes that in December 2009, the Respondent reduced wages for economic reasons and announced that there would be no wage increase in 2010. They further note that, in March, contemporaneous with the union

<sup>1</sup> On July 2, 2010, the Union, Miscellaneous Warehousemen Drivers and Helpers, Local 986, International Brotherhood of Teamsters, filed its petition to represent drivers, mechanics, and polishers at the Respondent's terminals in southern California. The election was held on August 13 and 16, the Union's victory in the election was acknowledged on August 17, and the Union was certified on August 25. The Respondent announced the wage increase at issue on August 24. All dates are in 2010 unless otherwise indicated.

campaign among the southern California employees, the Respondent prepared to implement a wage increase in late summer. Indeed, a March 16 email between two of the Respondent's managers reflected this, and, on August 24, the Respondent announced its wage increase for its unrepresented employees to all its employees.

With that background in place, my colleagues cite Board precedent that “[t]iming alone may suggest anti-union animus as a motivating factor in an employer’s action.” *Masland Industries*, 311 NLRB 184, 197 (1993) (quoting *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984)). What my colleagues fail to consider, however, is that in *Rain-Ware*, and all the cases cited therein, the respondents engaged in *other unlawful conduct* that supported antiunion animus as *suggested* by timing.<sup>2</sup> Further, although the Board may infer animus from timing, it need not invariably do so. The Board has recognized that the timing of an action in relation to a representation election may amount to a coincidence that, “at best, raises a suspicion. However, ‘mere suspicion cannot substitute for proof’ of unlawful motivation.” *Frierson Building Supply Co.*, 328 NLRB 1023, 1024 (1999) (citing *Lasell Junior College*, 230 NLRB 1076 (1977)).

Here, there is no evidence that the Respondent engaged in independent acts of coercive conduct. In my view, absent any supporting evidence of animus, the timing alone is not sufficient to satisfy the General Counsel’s burden of proof. See generally *St. John’s Community Services—New Jersey*, 355 NLRB 414, 417 (2010) (Member Schaumber, dissenting) (timing alone is not

sufficient to establish antiunion animus under *Rain-Ware*).

Further, my colleagues err in focusing on select phrases contained in a March 16 email between two managers. Certainly, it is true that the email vaguely referenced “the situation in southern California” and reflected that the Respondent was considering making “positive adjustments in pay.” But my colleagues fail to consider these phrases in the context of the entire email, which listed specific losses sustained by the Respondent’s business as well as the Respondent’s efforts to counter these by cost-saving endeavors and business expansion. The email then stated:

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

In my view, the timing of this March email was as much driven by the Respondent’s improved economic circumstances—and prediction of improvements to come—as by the union campaign.<sup>3</sup> In particular, I note that the email suggests that any future pay adjustments, and other changes, are conditioned on the continued improvement of its economic situation. Accordingly, even if one assumes that the “situation in southern California” is a reference to the union campaign, the overall context of the email does not establish that the Respondent’s eventual granting of a pay adjustment to its unrepresented employees approximately *5 months later* was driven by antiunion animus.<sup>4</sup>

<sup>2</sup> See also *Bally’s Atlantic City*, 355 NLRB 1319, 1321 (2010) (“The judge also found that the General Counsel established the requisite union animus through the timing of Justiniano’s discharge and the [r]espondent’s two violations of Section 8(a)(1), both of which were directed at Justiniano.”), *enfd.* 646 F.3d 929 (D.C. Cir. 2011). Similarly, in two additional cases cited by my colleagues—*Schaeff, Inc.*, 321 NLRB 202 (1996) and *Cell Agricultural Mfg. Co.*, 311 NLRB 1228 (1993), *enfd.* in relevant part 41 F.3d 989 (8th Cir. 1994)—the Board did not find animus based on timing alone. In *Schaeff*, the Board relied on several factors, including the abruptness of the discriminatees’ discharges as well as the fact that “all three employees [who had met with the union organizer] were terminated, a factor which, of itself, tends to ‘give rise to an inference of violative discrimination.’” *Schaeff*, 321 NLRB at 217 (quoting *NLRB v. First National Bank of Pueblo*, 623 F.2d 686, 692 (10th Cir. 1980)). In *Cell Agricultural*, the Board found that the respondent committed a “hallmark” violation by a “precipitate, unlawful mass layoff of the entire bargaining unit,” which occurred just 2 days after the initial meeting between employees and the union. The judge’s finding of animus, which the Board did not expressly address, was not based solely on timing; the judge relied on the additional facts that “[t]he circumstances of the mass layoff differed from those of prior layoffs” and that each employee was required to undergo an individual interview, at which they were “told to be satisfied with [r]espondent’s employment terms,” as “a condition precedent to being rehired.” *Cell Agricultural*, 311 NLRB at 1232.

<sup>3</sup> The discussion set forth in the subject email seems to amount to a generalized intention that the Respondent will work to correct ways in which its employees had been negatively affected by its prior actions. Although not directly analogous, I note that the Board has recognized that employers may lawfully inform employees that they wish to have the opportunity to right previous wrongs. For example, in *Noah’s New York Bagels*, 324 NLRB 266, 267 (1997), the Board dismissed an 8(a)(1) violation based on an employer’s statement, made the day before an election, that it had made mistakes and was asking for a “second chance” to fix its mistakes. *Accord: National Micronetics*, 277 NLRB 993 (1985) (finding employer’s statements asking for a second chance or for more time to improve conditions were neither unlawful under the Act or objectionable promises of benefits).

<sup>4</sup> My colleagues take issue with this position, finding the connection “clear” where the email at issue was “prepared at a time when the Respondent was attempting to stave off unionization.” But this begs the

Indeed, even if this email could be interpreted solely as the Respondent's recognition of, and reflection upon, generalized employee discontent in Southern California—discontent that was fueling the union campaign—that still does not make it evidence of animus *against* the Union. At most, this email constitutes an implicit concession that the Union had a point that Respondent's wages were too low, and that the Respondent might want to do something about that in the future. Because the Respondent did something about that months later, but only *after* the election was over, and *without bypassing the Union's legal right to bargain for union-represented employees*, I cannot see how this is anti-union animus. The Respondent's email, even if it is considered wholly reactive to employee discontent, simply is the reaction of a reality-based employer and nothing more.<sup>5</sup>

Further, I do not find persuasive my colleagues' conclusion that the August 24 memo announcing the wage increase in and of itself constitutes evidence of antiunion

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question. As I have explained, read in its entirety, the letter does not support a finding that the Respondent was acting with such a motive. It is therefore circular reasoning to find that the unlawful motivation existed in the first place based on actions taken five months later that do not appear to be unlawfully motivated.

<sup>5</sup> My colleagues' decision appears to rely in substantial part on the credibility determinations of the judge, particularly in the judge's rejection of the Respondent's uncontroverted testimony that the decision to withhold the wage increase until after the election, and, thereafter, to withhold the increase from its represented employees so as not to run afoul of Sec. 8(a)(5) and (1) of the Act, was based on the advice of counsel rather than driven by antiunion animus. I find the judge's analysis of this evidence deeply concerning. Certainly, it seems reasonable that a company's labor attorney would, in fact, counsel the company: first, not to grant employees any unscheduled wage increase during the critical period leading up to an election; and, second, not to grant any unscheduled wage increase to any bargaining unit employees once they have voted to be represented by a union. Indeed, that is what any good labor attorney would do, since, in the first scenario, there are severe legal risks with granting unscheduled or unplanned benefits, and, in the second scenario, once the union becomes the relevant employees' bargaining representative, a unilateral wage increase is usually a violation of law. It is not clear to me that the judge's rejection of the Respondent's testimony on this point was based on any express demeanor-based credibility determinations. Rather, the judge's findings seem to turn on some kind of contempt for the fact that Manager Blaise, "sounding like a broken record, repeatedly invoked the advice of counsel defense." However, being asked the same question should repeatedly give rise to the same answer, assuming that the witness is truthful.

Unfortunately, my colleagues' reliance on this type of "credibility determination" essentially strikes down the entire advice-of-counsel defense. It also underscores the no-win situation into which their ultimate ruling places the Respondent and any other employer faced with general employee discontent giving rise to a union campaign. The employer's consultation of counsel in doing its best to determine a lawful course of action should not be held against it. To this point, I echo Member Miscimarra's view of the Act. *Arc Bridges*, 362 NLRB No. 56 (2014), slip op. at 6–7 (Miscimarra, dissenting) ("I do not believe the Act can reasonably be interpreted to find a party in violation of the Act regardless of what it does."), on remand from 662 F.3d 1235 (D.C. Cir. 2011).

animus. Specifically, my colleagues place significant weight on the Respondent's failure to include in that memo a "contemporaneous announcement to unit employees that it intended to bargain over implementation of a wage increase for them." What they fail to note, however, is that the Union was not even certified until August 25, the day after the Respondent made the wage announcement. In my view, the Respondent's "silence" in this regard was more an oversight at a time when the Respondent's relationship with its newly represented employees was barely established; to find antiunion animus based on a mere failure to express every one of Respondent's intentions, at this early stage, seems to me to be a bridge too far.<sup>6</sup>

Simply put, the Acting General Counsel has failed to meet his initial *Wright Line* burden in this matter to establish that the Respondent's decision to implement a wage correction on August 24 for its nonrepresented employees was motivated by antiunion animus. Accordingly, I would dismiss the complaint.

#### APPENDIX

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

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

#### FEDERAL LAW GIVES YOU THE RIGHT TO

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

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

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<sup>6</sup> The saying hearkens to the well-intentioned but ultimately failed 1944 attempt by the western Allied armies to knock Germany out of World War II early by seizing three consecutive bridges by a daring, simultaneous paratroop assault to then use them as the corridor for a lightning armored offensive over the Rhine. Despite heroic sacrifices, while the first two bridges were captured, the third bridge at Arnhem could not be held until relief came. See, e.g., Cornelius Ryan, *A Bridge Too Far* (Simon & Schuster, 1995 ed.)

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

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

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

KAG-WEST LLC

The Board's decision can be found at [www.nlr.gov/case/21-CA-039488](http://www.nlr.gov/case/21-CA-039488) 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.

