Final Brief **Oral Argument Not Yet Scheduled**

Nos. 15-1113, 15-1143

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ARC BRIDGES, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

(A) Parties and Amici: Arc Bridges, Inc. ("the Employer"), petitioner/cross-respondent herein, was a respondent in the case before the Board. The Board is the respondent/cross-petitioner herein, and the Board's General Counsel was a party in the case before the Board. The American Federation of Professionals ("the Union") was the charging party before the Board.

(B) Ruling Under Review: This case involves a petition for review and a cross-application for enforcement of the Board's Supplemental Decision and Order in Case No. 13-CA-044627, issued on March 31, 2015, and reported at 362 NLRB No. 56. The Board seeks enforcement of that order against the Employer.

(C) Related Cases: This case was previously before the Court in *Arc Bridges, Inc. v. NLRB*, Nos. 10-1330, 10-1360, and reported at 662 F.3d 1235 (D.C. Cir. 2011). Board counsel are unaware of any related cases currently pending before, or about to be presented before, this Court or any other court.

s/Linda Dreeben
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Dated at Washington, DC
this 30th day of September, 2015

TABLE OF CONTENTS

Headings **Page(s)**

Statement of subject matter and appellate jurisdiction 1

Statement of the issue presented 2

Relevant statutory and regulatory provisions 3

Statement of the case 3

I. Procedural history 3

II. The Board's findings of fact 5

A. The Union is certified as the bargaining representative of two units of employees over the Employer's opposition 5

B. The Employer is granted authorization for a 3-percent across-the-board wage increase; the Employer rejects the Union's wage proposal and makes no written counteroffer 6

C. The Employer tells unit employees that the Union is the reason they would not receive raises and that employees would be rewarded for opposing the Union 7

D. The Employer grants the authorized 3-percent wage increase only to non-unionized employees; several months later, the Employer offers in bargaining a smaller wage increase for Union-represented employees 8

III. The Board's supplemental decision and order on remand 9

Summary of argument 10

Standard of review 12

TABLE OF CONTENTS

Headings –Cont'd **Page(s)**

Argument 14

Substantial evidence supports the Board's finding that the Employer violated Section 8(a)(3) and (1) of the Act by discriminatorily withholding the wage increase only from represented employees.....14

A. An Employer violates the Act by discriminating in a term of employment because of employees' union activity 14

B. The Employer was motivated by Union animus to withhold the raise from the represented employees.....16

1. The Employer would have given the employees a raise if they were not represented by the Union 17

2. The Employer encouraged the represented employees to blame the Union 18

3. The Employer proffered two pretextual reasons for withholding the wage increase 20

4. The Employer delayed the wage increase until near the end of the certification year for one bargaining unit and then withheld it from the unit employees.....22

5. The Board properly rejected the Employer's additional arguments as to the General Counsel's burden under *Wright Line* 23

TABLE OF CONTENTS

Headings –Cont'd **Page(s)**

C. The Employer failed to carry its burden to show that it would have withheld the raise even in the absence of the employees' Union representation; the Employer could not lawfully treat the Union – represented employees differently because its disparate treatment was discriminatorily motivated 26

1. The Employer failed to meet its burden under *Wright Line* 27

2. The Employer was not privileged to treat its represented employees differently as a bargaining strategy because its motivation was discriminatory 31

Conclusion 35

TABLE OF AUTHORITIES

Cases **Page(s)**

Acme Die Casting v. NLRB,
26 F.3d 162 (D.C. Cir. 1994)..... 16, 17, 18, 19

Aluminum Casting & Eng'g Co.,
328 NLRB 8 (1999), *enforced in relevant part*,
230 F.3d 286 (7th Cir. 2001) 19

Amer. Gardens Mgmt. Co.,
338 NLRB 644 (2002) 24

American Girl Place,
355 NLRB 479 (2010) 19

Arc Bridges, Inc.,
355 NLRB 1222 (2010) 3

Arc Bridges, Inc. v. NLRB,
662 F.3d 1235 (D.C. Cir. 2011)..... 3, 15, 30, 31

Bally's Park Place, Inc. v. NLRB,
646 F.3d 929 (D.C. Cir. 2011)..... 12, 15, 27

B.F. Goodrich Co.,
195 NLRB 914 (1972) 33

Brockton Hosp. v. NLRB,
294 F.3d 100 (D.C. Cir. 2002)..... 13

Brooks v. NLRB,
348 U.S. 96 (1954)..... 6

Children's Serv. Int'l,
347 NLRB 67 (2006) 26

TABLE OF AUTHORITIES

Cases –Cont'd **Page(s)**

Citizens Inv. Serv. Corp. v. NLRB,
430 F.3d 1195 (D.C. Cir. 2005)..... 15

Inova Health System v. NLRB,
2015 WL 4490275 (D.C. Cir. 2015)..... 12, 24

Int'l Transp. Servs. v. NLRB,
449 F.3d 160 (D.C. Cir. 2006)..... 13

Laro Maint. Corp. v. NLRB,
56 F.3d 224 (D.C. Cir. 1995)..... 13

Local 702, Int'l Bhd. of Elec. Workers v. NLRB,
215 F.3d 11 (D.C. Cir. 2000)..... 13

Metropolitan Edison Co. v. NLRB,
460 U.S. 693 (1983)..... 14

NLRB v. Fleetwood Trailer Co.,
389 U.S. 375 (1967)..... 14

NLRB v. Teamsters Local 449,
353 U.S. 87 (1957)..... 13

NLRB v. Transp. Mgmt. Corp.,
462 U.S. 393 (1983)..... 4, 15, 27

NLRB v. Weingarten, Inc.,
420 U.S. 251 (1975)..... 13

Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. NLRB,
547 F.2d 575 (D.C. Cir. 1976)..... 25

TABLE OF AUTHORITIES

Cases –Cont'd **Page(s)**

Orval Kent Food Co.,
278 NLRB 402 (1986) 19, 20

Peabody Coal Co. v. NLRB,
725 F.2d 357 (6th Cir. 1984) 32

Phelps Dodge Min. Co. v. NLRB,
22 F.3d 1493 (10th Cir. 1994) 32

S. Maryland Hosp. Ctr. v. NLRB,
801 F.2d 666 (4th Cir. 1986) 25, 26

Shell Oil Co.,
77 NLRB 1306 (1948) 16, 29, 31, 32, 33

Stephens Media, LLC v. NLRB,
677 F.3d 1241 (D.C. Cir. 2012) 12

Structural Finishing, Inc.,
284 NLRB 981, 1003 (1987), *enforced*,
No. 8707492 (9th Cir. 1988) 19

Sun Transp., Inc.,
340 NLRB 70 (2003) 16, 32, 33

Sw. Merch. Corp. v. NLRB,
53 F.3d 1334 (D.C. Cir. 1995) 20

The TM Group, Inc.,
357 NLRB No. 98 (2011). 23

UFCW, Local 204 v. NLRB,
506 F.3d 1078 (D.C. Cir. 2007) 12

Universal Camera Corp. v. NLRB,
340 U.S. 474 (1951) 12

TABLE OF AUTHORITIES

Cases –Cont'd **Page(s)**

USPS,
261 NLRB 505 (1982) 32

Vincent Indust. Plastics, Inc. v. NLRB,
209 F.3d 727 (D.C. Cir. 2000) 13

Winn-Dixie Raleigh, Inc.,
267 NLRB 231 (1983) 33

Wright Line, Inc.,
251 NLRB 1083 (1980), *enforced on other grounds*,
662 F.2d 899 (1st Cir. 1981) 3, 4, 9, 15, 16, 23, 24, 27, 31, 34

Statutes: **Page(s)**

National Labor Relations Act, as amended
(29 U.S.C. §151, et seq.)

29 U.S.C. §§ 151, 160(a) 2
29 U.S.C. § 157 ..... 14, 15
29 U.S.C § 158(a)(1) 2, 3, 4, 9, 14, 19
29 U.S.C. § 158(a)(3) 2, 3, 4, 9,14, 16, 17, 29, 32, 33
29 U.S.C. § 158(a)(5) 28, 29
29 U.S.C. § 158(c) 25
29 U.S.C. § 160(e) 2, 12
29 U.S.C. § 160(f) 2

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FOR ENFORCEMENT OF AN ORDER OF
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BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Arc Bridges, Inc. ("the Employer") to review, and on the cross-application of the National Labor Relations

Board ("the Board") to enforce, a Board Order issued against the Employer on March 31, 2015, and reported at 362 NLRB No. 56. (A 10.)[1]

The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). The Board's Order is final with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act (29 U.S.C. § 160(f)), which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e) (29 U.S.C. § 160(e)), which allows the Board, in those circumstances, to cross-apply for enforcement. The Employer filed its petition for review on April 23, 2015. The Board filed its cross-application for enforcement on May 18. Both filings were timely; the Act places no limit on the time for filing actions to review or enforce Board orders.

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board's finding that the Employer violated Section 8(a)(3) and (1) of the Act by discriminatorily withholding a wage increase only from union-represented employees.

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[1] Citations are to the joint appendix filed on September 25, 2015. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant sections of the National Labor Relations Act are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

The Supplemental Decision and Order under review results from the Board's reconsideration of this case following the Court's remand in *Arc Bridges, Inc. v. NLRB*, 662 F.3d 1235 (D.C. Cir. 2011). In that opinion, the Court granted the Employer's petition for review and denied the Board's cross-application for enforcement of an order that the Board issued against the Employer. In its prior decision, the Board found that the Employer violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) because the withholding of an expected wage increase from unionized employees was inherently destructive of their Section 7 rights. *See Arc Bridges, Inc.*, 355 NLRB 1222 (2010). (A 24-35.) The Court determined that substantial evidence did not support the Board's finding that the Employer had established annual wage increases as a term of employment and, therefore, granted the petition for review and denied the cross-application for enforcement. 662 F.3d at 1238. The Court remanded the case for further proceedings "in light of the Board's decision to reserve judgment on the *Wright*

Line theory." 662 F.3d at 1240.[2] Following remand, the Board's General Counsel and the Employer accepted the Board's invitation to submit a statement of position concerning the question raised in the Court's decision.

Consistent with the Court's remand, the Board engaged in a *Wright Line* analysis to evaluate the lawfulness of the Employer's disparate treatment of the represented employees. The Board concluded that the Employer's decision was unlawfully motivated by antiunion animus and that the Employer failed to meet its burden of showing that it would have withheld the wage increase from the unionized employees in the absence of their union activity. Ultimately, the Board reaffirmed its prior conclusion that the Employer violated Section 8(a)(3) and (1) of the Act by withholding the wage increase only from the represented employees. The facts relevant to the Board's finding are detailed below, followed by a summary of the Board's Supplemental Decision and Order on remand.

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[2] *Wright Line*, 251 NLRB 1083 (1080), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), and approved by the Supreme Court in *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983). As explained below, the Board applies *Wright Line*'s burden-shifting analysis to determine whether actions are discriminatorily motivated under the Act.

II. THE BOARD'S FINDINGS OF FACT

A. The Union Is Certified as the Bargaining Representative of Two Units of Employees Over the Employer's Opposition

The Employer is an organization that provides services for developmentally disabled adults in northwest Indiana. The American Federation of Professionals ("the Union") won Board-conducted elections in two separate bargaining units of employees: the Day Services unit and Residential Supportive Living unit. On November 15, 2006, and February 22, 2007, respectively, the Board certified the Union as the collective-bargaining agent of the Day Services and Residential Supportive Living units. The Union represents approximately 260 employees in the two units; about 120 individuals, including managers, supervisors, and support staff are not unionized. (A 10; 61, 162-63, 170-71, 256.) The parties began collective bargaining for the Day Services and Residential Supportive Living units in December 2006 and March 2007, respectively. (A 11; 61.)

The Employer actively opposed union representation for its employees. In January 2007, prior to the election in the Residential Supportive Living unit, Director of Community Services Dorothy Shawver sent a note to those employees stating, in relevant part: "During the union campaign, many people have said to me 'don't take it personally.' I do take this personally." (A 10; 53-54, 106.)

On May 7, during an employment interview, supervisor Raymond Teso told Teresa Pendleton that "the Union would be gone in November." This date

corresponded with the end of the certification year for the Day Services unit, which Pendleton would be a part of when she was hired.[3] (A 11, 33; 48.)

B. The Employer is Granted Authorization for a 3-Percent Across-the-Board Wage Increase; The Employer Rejects the Union's Wage Proposal and Makes No Written Counteroffer

The Employer's fiscal year extends from July 1 to June 30. For eight consecutive years, the Employer reviewed its finances in June as part of its budget process and, when financially feasible, granted across-the-board wage increases, also referred to as "cost-of-living adjustments," in July. (A 11, 30; 116, 190-91, 214-15, 257, 264.) In accordance with the Employer's annual wage review process, Executive Director Kris Prohl prepared the Employer's budget for the board of directors in June 2007, and received budget authority to increase wages by 3-percent. (A 11; 194, 212-13.) Though the Employer "could have given a three percent increase" to all staff, including managers and supervisors, Prohl decided not to grant any increase in July "because the situation was not clear to us to be able to expect what was going to happen." (A 11; 194, 207.) Prohl was

[3] The "certification year" is the one-year period following a union's official Board certification as employees' exclusive bargaining representative. During that year, 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 provides the parties an opportunity to negotiate a collective-bargaining agreement without the union needing to defend against possible decertification. (A 11 n.9.) *See Brooks v. NLRB*, 348 U.S. 96 (1954).

referring to the uncertainty of collective-bargaining negotiations with the Union. (A 11.)

On July 10, 2007, the Union made its initial economic proposals for both units, including seeking a 50-percent wage increase over three years. (A 11; 63, 66, 117-56.) At the following bargaining session on July 12, the Employer rejected the proposals on the grounds that it could not afford the Union's demands. The Employer gave the Union several documents showing its projected income for 2007 and the cost to the Employer of the Union's wage proposal. (A 11; 157, 174-75.) The Employer's chief negotiator told the Union that its demands were unrealistic, requested that the Union "narrow its focus," and took the position that wages and benefits would be frozen. The Employer presented no written counterproposals. (A 11, 30; 72-73, 157, 175.)

C. The Employer Tells Unit Employees that the Union is the Reason They Would Not Receive Raises and that Employees Would Be Rewarded for Opposing the Union

Near the end of July 2007, Residential Department Area Manager Bonnie Gronendyke spoke by phone with Shirley Bullock, one of her supervisees in the Residential Supportive Living unit. (A 11; 54-57, 185-88.) Bullock asked about raises. Gronendyke told Bullock that Executive Director Prohl "was going to give us a raise until we voted the Union in." (A 11; 55.)

In August, before the parties held another negotiation session, the Union sent an announcement to bargaining-unit employees explaining the status of negotiations and calling for a "strike vote." (A 11; 158-59.) In response to the Union's announcement, supervisor Teso held a meeting with bargaining-unit employees under his supervision, including Teresa Pendleton. At the meeting, he stated that the Employer only had $56,000 budgeted to spend on raises for unit employees, and now that money was going to pay the Employer's lawyers. (A 11; 40-41, 45.) In a separate conversation, Teso urged Pendleton to speak to other employees about voting against a strike and opposing the Union, saying that Prohl "would pat [them] on the back" for doing so. (A 11; 39.)

In late August, the Union held the "strike vote." Though unit employees voted to authorize a strike, none was ever announced or instituted. (A 11; 80-81, 160.)

D. The Employer Grants the Authorized 3-Percent Wage Increase Only to Non-Unionized Employees; Several Months Later, the Employer Offers in Bargaining a Smaller Wage Increase for Union-Represented Employees

On October 12, 2007, Prohl granted unrepresented employees including management a 3-percent wage increase, retroactive to July. Union-represented employees received no increase. (A 11; 195, 256.) This was the first retroactive wage that the Employer has ever granted. (A 13; 179-80, 213, 257.) Prohl distributed a memo to supervisors announcing the raise for unrepresented

employees and asking supervisors not to share this information with represented employees unless they asked. (A 31; 210, 262-63.)

In March 2008, the Employer made its first wage proposal in bargaining, offering the Union 1.5-percent and 2-percent wage increases, retroactive to July, for unit employees. It never offered the full 3-percent increase because, according to Prohl, "subsequently there have been significantly more costs . . . and less income." (A 11, 31; 90, 176, 224.)

III. THE BOARD'S SUPPLEMENTAL DECISION AND ORDER ON REMAND

On remand, the Board (Chairman Pearce and Member Hirozawa, Member Miscimarra dissenting) found that the Employer violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discriminatorily withholding a wage increase from bargaining-unit employees on and after October 12, 2007, because of their support for the Union. (A 14.) The Board reached its conclusion by analyzing the record evidence under *Wright Line*. (A 11-14.)

The Board's Order requires the Employer to cease and desist from withholding wage increases or otherwise discriminating against bargaining-unit employees because of their support for the Union or any other labor organization. (A 14.) Affirmatively, the Order requires the Employer to make whole the unit employees for any loss of earnings and other benefits due to the Employer's

discriminatory action. (A 14-15.) The Employer must also physically and electronically post copies of a remedial notice at its facilities. (A 15.)

SUMMARY OF ARGUMENT

Following two contested union elections that led to certification of the Union as the representative of two units of employees, the Employer discriminatorily withheld a 3-percent cost-of-living wage increase only from the represented employees. The Employer did not do so simply as a bargaining strategy, but rather out of animus toward the employees' decision to choose the Union as their bargaining representative and otherwise engage in protected union activity. The Board reasonably found that evidence of animus in the record included the Employer's intention to give the raise to all employees if not for the presence of the Union as well as statements encouraging employees to blame the Union (or particularly those who voted for the Union) for not getting a raise. Additionally, the Board found that two of the Employer's claims of a legitimate business justification—that the 3-percent increase would make unit employees "very unhappy" and that high turnover among non-unit employees motivated the increase only for them—were undermined by record evidence and thus pretextual. The Board also found that the Employer gave an unprecedented retroactive raise one month prior to the end of the protected certification year for one of the units.

Having found such a discriminatory motive, the Board then assessed the Employer's proffered justifications for its actions and found them insufficient to meet its burden of showing that it would have denied the unit employees the raise absent their union activity. Crucially, the Employer never expressly argued that it would have withheld the wage increase from the employees if they were unrepresented. Moreover, the Employer's testimony as to concerns about its bargaining leverage and fear of the Union filing an unfair labor practice charge for a unilateral change (if the increase had been given) was not credited by the judge, who at no point found those facts to be true. Finally, the Board rejected the Employer's claim of being in a no-win situation with respect to unilaterally granting or withholding the wage increase because, if its disparate treatment were not unlawfully motivated, the Employer could have treated its represented employees differently without violating the Act.

Because the Employer acted out of animus, the Employer's attempts to hide behind the shield of case law permitting disparate treatment of represented and unrepresented employees fail. The Board properly applied its precedent stating that an employer can *only* treat its represented and unrepresented employees differently *absent* a discriminatory motive.

STANDARD OF REVIEW

This Court will uphold a decision of the Board "unless it relied upon findings that are not supported by substantial evidence, failed to apply the proper legal standard, or departed from its precedent without providing a reasoned justification for doing so." *Inova Health Sys. v. NLRB*, __ F.3d ___, 2015 WL 4490275, at *7 (D.C. Cir. 2015) (internal quotation omitted). The Board's findings of fact are "conclusive" when supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e). Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). A reviewing court may not displace the Board's choice between two fairly conflicting views, even if the court "would justifiably have made a different choice had the matter been before it *de novo*." *Id.* at 488; *accord UFCW, Local 204 v. NLRB*, 506 F.3d 1078, 1080 (D.C. Cir. 2007). "Indeed, the Board is to be reversed only when the record is so compelling that no reasonable fact finder could fail to find to the contrary." *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011). Finally, this Court will accept all credibility determinations made by the judge and adopted by the Board unless those determinations are "hopelessly incredible, self-contradictory, or patently unsupportable." *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (internal quotation omitted).

Further, "motive is a question of fact that may be inferred from direct or circumstantial evidence." *Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995). As this Court recognizes, "[d]rawing such inferences from the evidence to assess an employer's [] motive invokes the expertise of the Board, and consequently, the court gives substantial deference to inferences the Board has drawn from the facts, including inferences of impermissible motive." *Id.* (internal quotations omitted); *see also Vincent Indust. Plastics, Inc. v. NLRB*, 209 F.3d 727, 734 (D.C. Cir. 2000) (this Court is "even more deferential when reviewing the Board's conclusions regarding discriminatory motive, because most evidence of motive is circumstantial").

The Board's legal determinations under the Act are entitled to deference, and this Court will uphold them so long as they are neither arbitrary nor contrary to law. *Int'l Transp. Servs. v. NLRB*, 449 F.3d 160, 163 (D.C. Cir. 2006). Furthermore, the Court will "abide [the Board's] interpretation of the Act if it is reasonable and consistent with controlling precedent." *Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002) (citing *Local 702, Int'l Bhd. of Elec. Workers v. NLRB*, 215 F.3d 11, 15 (D.C. Cir. 2000)). When the Board engages in "'the difficult and delicate responsibility' of reconciling conflicting interests of labor and management . . . the balance struck by the Board is 'subject to limited judicial review.'" *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 267 (1975) (quoting *NLRB v.*

Teamsters Local 449, 353 U.S. 87, 96 (1957)). For "[i]t is the primary responsibility of the Board and not of the courts 'to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.'" *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967), and cases cited.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE EMPLOYER VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCRIMINATORILY WITHHOLDING THE WAGE INCREASE ONLY FROM REPRESENTED EMPLOYEES

A. An Employer Violates the Act by Discriminating in a Term of Employment Because of Employees' Union Activity

Section 7 of the Act guarantees employees "the right to engage in . . . concerted activities for the purpose of . . . mutual aid or protection . . . ." 29 U.S.C. § 157. Section 8(a)(3) of the Act makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."[4] 29 U.S.C. § 158(a)(3).

In evaluating the lawfulness of a discriminatory action that interferes with

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[4] Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7." 29 U.S.C § 158(a)(1). A violation of Section 8(a)(3) constitutes a derivative violation of Section 8(a)(1). *See generally Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

employees' rights to engage in protected activity, the Board applies the well-established test from *Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), and approved by the Supreme Court in *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 395, 397-403 (1983). This Court remanded this case to the Board specifically for the purpose of applying the *Wright Line* test to the facts of this case. *Arc Bridges, Inc. v. NLRB*, 662 F.3d 1235, 1240 (D.C. Cir. 2011).

Under *Wright Line*, the legality of an employer's adverse action depends on its motivation. To meet the initial burden under *Wright Line*, the General Counsel for the Board must demonstrate that (i) the employee was engaged in an activity protected by Section 7 of the Act (29 U.S.C. § 157), (ii) the employer was aware of that protected activity, and (iii) "the protected activity was a motivating factor in the employer's decision to take adverse action[.]" *Citizens Inv. Serv. Corp. v. NLRB*, 430 F.3d 1195, 1198 (D.C. Cir. 2005). If substantial evidence supports the Board's finding that union activities were a motivating factor in the discriminatory treatment, the employer's action violates the Act unless the employer proves that it would have taken the same action even in the absence of those activities. *Transp. Mgmt. Corp.*, 462 U.S. at 395; *Wright Line*, 251 NLRB at 1089; *accord Bally's Park Place*, 646 F.3d at 935.

In some situations, an employer "may offer different benefits to represented and unrepresented groups of employees as part of its bargaining strategy." *Sun Transp., Inc.*, 340 NLRB 70, 72 (2003) (citing *Shell Oil Co.*, 77 NLRB 1306, 1310 (1948)). Such action will not violate Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) as long as the employer's disparate treatment of represented and unrepresented employees is not unlawfully motivated. *Shell Oil*, 77 NLRB at 1310. Accordingly, here, the *Wright Line* analysis applies to determine whether the employer's disparate treatment was the result of discriminatory motivation and violates Section 8(a)(3). *See Acme Die Casting v. NLRB*, 26 F.3d 162, 166-67 (D.C. Cir. 1994).

B. The Employer Was Motivated by Union Animus to Withhold the Raise from the Represented Employees

Substantial evidence shows that the Employer withheld the wage increase from only the represented employees because of an unlawful motivation. No one disputes, nor could they, that the Employer knew the employees voted for union representation, were actively seeking a contract by engaging in collective bargaining, and voted to authorize a strike. (A 12.) Additionally, the Board reasonably found (A 12) that the General Counsel met his burden of showing that the Employer's decision to withhold the wage increase from represented employees was motivated by antiunion animus. The Board relied on record evidence that the Employer would have given the raise to all employees if not for

their union representation, that employees were encouraged to blame the Union for not getting the wage increase, that certain reasons proffered by the Employer were pretextual, and that the Employer was motivated by the approaching end of the certification year for one of the units.

1. The Employer would have given the employees a raise if they were not represented by the Union

First, as the Board found (A 12), the record indicates that Prohl intended to give all employees a raise 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." (A 12; 55.) Thus, the Board concluded (A 12) that the Employer withheld the wage increase "because the employees selected the Union as their bargaining representative." As the Board noted (A 12), "such motivation is unlawful" notwithstanding an employer's engagement in collective-bargaining negotiations. This Court has likewise stated that "[i]rrespective of whether the failure to increase wages constituted a [failure to bargain] violation, it constituted a [Section] 8(a)(3) violation if [an employer's] decision was motivated by antiunion animus." *Acme Die Casting*, 26 F.3d at 166-67 (although remanding on other grounds, determining Board reasonably found employer violated Section 8(a)(3) by discriminatorily withholding wage increase only from represented employees).

2. The Employer encouraged the represented employees to blame the Union

Second, the Board found that managers "encouraged employees to blame the Union (or those employees who voted for the Union)" for Prohl's decision to withhold the wage increase. (A 12.) Gronendyke did so "explicitly" in her aforementioned statement to Bullock. (A 12.) Similarly, this Court has upheld a finding of unlawful motivation where employees were warned if they "bothered" with the union, there would be no raise and were told, "You want the [u]nion, go to the [u]nion." *See id.* at 167.

In addition, here, supervisor Teso told employee Pendleton that $56,000 budgeted for raises now would "go to pay for the lawyers" that the Employer needed because of the Union.[5] (A 12; 45.) *See id.* (finding evidence of animus where employer failed to grant wage increase to represented employees and told them that it could not be granted because of pending litigation with the union). It is well settled that an employer violates the Act by attributing its failure to grant

[5] The Employer attempts (Br. 43) to counteract the weight of Pendleton's testimony by asserting that it is unclear whether Teso told Pendleton that the money for raises was going to pay for lawyers in May or August 2007. But there is no such confusion in the actual record. Pendleton testified that Teso spoke with her by her desk on August 21 at "a quarter to 4:00" and that Teso referenced in the conversation Prohl's June 2007 decision not to give raises. (A 13; 42, 45.)

promised wages and benefits to the presence of the union.[6] *See id.*; *Aluminum Casting & Eng'g Co.*, 328 NLRB 8, 16 (1999) (finding unlawful discrimination where employer "explicitly blamed the [u]nion ('the UE stuck its nose in') for the failure to grant the wage increase" during campaign), *enforced in relevant part*, 230 F.3d 286 (7th Cir. 2001); *Structural Finishing, Inc.*, 284 NLRB 981, 1003 (1987) (finding supervisor statement that there would be no raises because of the union was "unquestionably" unlawful), *enforced*, No. 87-07492 (9th Cir. 1988); *see also American Girl Place*, 355 NLRB 479, 488 (2010) (where an employer blames a union for its failure to give a wage increase through "disparaging or undermining the union by creating the impression [that the union] impeded the granting of the adjustment," the employer violates the Act).

The Employer's reliance (Br. 44-45) on *Orval Kent Food Co.*, 278 NLRB 402 (1986), to argue that Gronendyke's statement is not evidence of animus, is misplaced. In *Orval Kent*, the Board found a superintendent's statement that he did not grant any merit increases after union certification because of ongoing negotiations to be a "statement of the effects of the bargaining obligation which the [employer] incurred." *Id.* at 403. As the Board recognized (A 12 n.14), the employer in *Orval Kent* did more than just make a statement about withholding

[6] The issue of whether the statements discussed here are independent violations of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) was not before the Board. Rather, the Board relied on these statements as evidence of the Employer's antiunion animus.

merit increases from employees. Unlike here, the *Orval Kent* employer also "proposed both merit and general wage increases at the negotiating sessions" and the union rejected those proposals. The Employer here never proposed the 3-percent increase to the Union, nor any increase for at least 5 months after all the unrepresented employees received their retroactive raise in October 2007. Instead, the Employer told employees that the Union was to blame for them getting nothing.[7]

3. The Employer proffered two pretextual reasons for withholding the wage increase

Third, the Board found that two of the Employer's attempts to establish a legitimate business justification for its decision are undermined by the record and, thus, are pretextual. (A 12-13.) Evidence that an employer's purported reasons for a decision are pretextual supports a finding that the decision was discriminatorily motivated. *See Sw. Merch. Corp. v. NLRB*, 53 F.3d 1334, 1344 (D.C. Cir. 1995) (Board's finding of discriminatory intent gained "additional support" from finding that an employer's action was taken "for pretextual reasons").

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[7] The Employer complains (Br. 45) that the Board did not acknowledge the Union's economic proposals that amounted to more than a 3-percent wage increase. The Board's role here is not to evaluate the reasonableness of the Union's, or any party's, wish list in bargaining nor the likely success of its strategy, but rather to determine the Employer's motivation in withholding the wage increase. It is this motivation that is reflected in management's statements to the employees as well as the Employer's failure to offer the Union anything in October 2007 when all other employees were given a raise.

Initially, Prohl testified that she believed granting a 3-percent wage increase to the represented employees would make them "very unhappy" and could precipitate a strike because the Union had sought more money. (A 12; 223.) However, as the Board found (A 12), Prohl's proffered explanation is undermined by her decision to offer those same employees an even smaller 1.5-percent wage increase after the employees had already voted to authorize a strike.

Likewise, the Board found that Prohl's additional claim—that she gave the wage increase to unrepresented employees to address high turnover among managers and supervisors—was "implausible in light of the fact that the [Employer] granted a wage increase to *all* unrepresented personnel, most of whom were neither managers nor supervisors." (A 12-13 (emphasis in original)). As the Board stated (A 13), the Employer's "main criterion for determining which employees would receive the wage increase was not the employees' managerial status, but rather their represented status."

The Employer's contention (Br. 52) that the Board ignored Prohl's testimony about rising turnover among the managerial and supervisory subset of the exempt employees is really a complaint about the weight that the Board gave her testimony. As indicated above, the Board found (A 12-13) Prohl's explanation implausible. As noted, projected 40-percent annual turnover rate based on one calendar quarter of employee retention data somehow compelled her to act whereas

an estimated 34-percent, and climbing, turnover rate among unit employees induced no action other than withholding the wage increase entirely. (A 31 n.6; 225-26.)

4. The Employer delayed the wage increase until near the end of the certification year for one bargaining unit and then withheld it from the unit employees

Finally, the Employer's decision to delay, and eventually withhold, the raise from represented employees was motivated by the approaching November 2007 end of the certification year for the Day Services unit. (A 13.) Rather than granting the 3-percent increase in July 2007 as authorized by the board of directors in June, the Employer simply waited until October, but made the increase retroactive to July. This "unprecedented delay" meant that unrepresented employees got both a raise and a lump-sum payment shortly before the expiration of the Day Services unit's certification year when the Union would no longer be insulated from a challenge to its representative status.[8] (A 13.) The Employer's motive in making this decision is reflected in Teso's statement to Pendleton that "the Union would be gone in November." (A 13; 48.) As the Board stated (A 13), Teso's statement conveyed his belief that "no contract would be agreed upon by

[8] According to the Employer (Br. 26), the raise was not given in July because of a "lack of clarity" as to revenue and expenses. The Employer fails to explain how this situation had resolved in October 2007 when the raise was given to all employees except those represented by the Union.

November and that the [Employer] planned to oust the Union after a year of unsuccessful bargaining."

5. The Board properly rejected the Employer's additional arguments as to the General Counsel's burden under *Wright Line*

In the face of the above-described evidence of animus, the Employer attempts (Br. 46-47) to insert an additional requirement into the General Counsel's burden under the *Wright Line* test—that there be a "motivational link" or "causal nexus" between the employees' protected activity (including presumably their vote to unionize) and the withholding of the wage increase. However, there is no mention of such a "nexus" to be found in the *Wright Line* decision or in the Supreme Court's decision approving the *Wright Line* framework. As the Board indicated (A 12 n.13), the *Wright Line* test "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 The TM Group, Inc.*, 357 NLRB No. 98, slip op. at 1 fn. 2 (2011) ("a 'nexus' is not an element of the General Counsel's initial burden"). In contrast with the Board's unequivocal statement that there is no additional requirement, the Employer cites a case where the Board remanded to the judge the question of whether two employees were discriminatorily discharged where the judge did not engage in a *Wright Line* analysis, nor did he cite *Wright Line*. *See*

Amer. Gardens Mgmt. Co., 338 NLRB 644, 645 (2002). Also, in this Court's recent enforcement of a Board order, the Court recited the General Counsel's *Wright Line* burden without a nexus requirement. *See Inova Health Sys. v. NLRB*, __ F.3d ___, 2015 WL 4490275, at *8 (D.C. Cir. 2015).

In any event, as the Board found (A 12 n.13), the record in this case "do[es] indicate such a nexus" between the employees' choice of the Union as their representative for collective-bargaining and the Employer's decision to withhold the wage increase. This nexus is evidenced by, for example, supervisory statements to employees that Prohl would have given the raise if employees had not voted for the Union and that money budgeted for raises was now being used to pay lawyers because of the Union.

The Board also correctly applied the *Wright Line* test to find that the General Counsel met his burden. As the Board found (A 13), there is no "chronology problem" (Br. 42-44) here. Supervisors made statements demonstrative of animus before Prohl's decision to withhold the wage increase in October. As the Board explained (A 13), statements "made a few months before an adverse employment decision" can shed light on an employer's motivation when the employer ultimately arrives at a decision. Thus, Teso's belief in May that no contract would be agreed upon before the end of the certification year, as well as his statement in

August that money for raises was going to the lawyers, were probative of the employer's plans with respect to the wage increase at that time.[9]

Additionally, despite the Employer's protest (Br. 47-49), its supervisors' and managers' statements, which the Board did not "misattribute[] to Prohl," reflect that motivation.[10] As this Court has affirmed, an employer is liable for supervisory statements. *See Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. NLRB*, 547 F.2d 575, 585 (D.C. Cir. 1976). Furthermore, the animus demonstrated by the supervisory statements in the record here is directly related to, and indeed explains, Prohl's motivation in making her decision to withhold the increase. Therefore, the Employer's citation (Br. 47-49) to cases where the evidence of animus was not instructive of an employer's motivation does nothing to undermine the evidence here. For example, the Employer relies on the factually distinguishable result in *S. Maryland Hosp. Ctr. v. NLRB*, 801 F.2d 666 (4th Cir. 1986), where a reviewing

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[9] Similarly, the Board rejected the Employer's assertion (Br. 43) that Gronendyke's statement—that Prohl was going to give the raise to unit employees until they voted for the Union—is incorrect because the Union was already certified in October. As the Board found (A 12 n.14), the "more plausible interpretation" of Gronendyke's statement is that Prohl "would have granted the increase had the employees not voted to unionize" at all.

[10] The Employer mentions (Br. 42) and defends Director of Community Services Dorothy Shawver's comments to employees about the union elections as protected by Section 8(c) of the Act (29 U.S.C. § 158(c)). However, at the same time, the Employer also fully recognizes that the Board did not rely on those comments as evidence of animus.

court found insufficient evidence of antiunion animus. There, the evidence of antiunion animus consisted of one supervisor's statement that constituted "a cryptic response to a confidential question" and another answer to an employee question where the court was "struck by the casual and isolated nature of [the] particular conversation." *Id.* at 671. *Cf. Children's Serv. Int'l*, 347 NLRB 67, 69 (2006) (finding insufficient evidence of animus where it was "unreasonable to attribute [owner's] long-past expression of opinion concerning the [u]nion to those of [employer's] officials who [two years later] made the layoff decision"). The Board reasonably found that the evidence of animus here—the intention to give the wage increase but for the Union, statements that blamed the Union for the withholding of the wage increase, Prohl's pretextual reasons for failing to grant it, and to do so near the end of the certification year for one of the units—supported a finding that Prohl's decision was discriminatorily motivated.

C. The Employer Failed to Carry Its Burden to Show that It Would Have Withheld the Raise Even in the Absence of the Employees' Union Representation; the Employer Could Not Lawfully Treat the Union-Represented Employees Differently Because Its Disparate Treatment was Discriminatorily Motivated

There is no dispute that if the employees had not voted for the Union, were not negotiating for a contract, and/or had not voted to authorize a strike, they would have gotten the raise. As discussed above, the Employer's reason for the disparate treatment of employees engaged in protected union activity was

antiunion animus. Under *Wright Line*, the burden therefore shifted to the Employer to show that it would have withheld the wage increase for a legitimate business reason even in the absence of its animus. *See Transp. Mgmt. Corp.*, 462 U.S. at 395; *Wright Line*, 251 NLRB at 1089; *accord Bally's Park Place*, 646 F.3d at 935. The Employer failed to show that it would have withheld the wage increase from the unit employees if they had not been represented by the Union and engaged in other protected activity. Furthermore, the Employer could not, due to its discriminatory motive, avail itself of Board law permitting an employer to treat represented and unrepresented employees differently during the course of collective-bargaining negotiations. Thus, the Employer's reliance on the Board's *Shell Oil* line of cases is inapposite.

1. The Employer failed to meet its burden under *Wright Line*

For three reasons, the Board reasonably found that the Employer did not show that it would have taken the same action absent the employees' union activity. First, the Board noted (A 13) that the Employer did not expressly contend before the Board, nor does it now, that it would have withheld the wage increase from the represented employees in the absence of their protected activity.[11]

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[11] Before this Court, the Employer attempts (Br. 26) to characterize the record as indicating Prohl had authorization to increase "labor costs" rather than wages by 3-percent. However, the Employer's citation to the record (A 194) reveals only that Prohl testified the "amount of money that's available to me to establish wages is

Second, as discussed above, the Board found, based on substantial evidence, that certain reasons proffered by the Employer for its decision to withhold the raise were pretextual. (A 13.) The Board relied on those findings to conclude that the pretextual reasons (the fear of making a low offer to the employees and the turnover rate among a minority of the unrepresented employees) did not carry the Employer's burden. Finally, as discussed below, the Board rejected the Employer's additional explanations for its decision as being both uncredited by the judge and without merit.

The Board found (A 13) that certain testimony of Prohl's proffering further justifications for her decision was not explicitly credited by the judge. Specifically, the Board found that Prohl's stated concern over losing bargaining leverage by giving the 3-percent wage increase and her belief that granting the increase could lead to the Union filing a charge under Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) for making a unilateral change were not credited testimony. Because the judge did not credit or discredit Prohl's testimony in its entirety, the Board distinguished (A 13) between the judge's recitation of Prohl's

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part of the budget" and "the Board has budget authority for the anticipated expense of the organization, 72 percent of which is staff salaries . . .[s]o there is budget authority given to me at the time the budget is approved." There is no discussion of "labor costs." In any event, the distinction between labor costs and wages is ultimately irrelevant because there is no dispute that the non-unionized employees received a 3-percent *wage* increase. The Employer's failure to extend that wage increase to the unionized employees is the unfair labor practice that violates the Act.

testimony and his reliance on certain testimony to find particular facts. The Board noted (A 13) that only the specific testimony relied on for the judge's fact finding was "implicitly" credited. As to the subjects above (bargaining leverage and a possible unlawful bargaining charge), the judge did not credit Prohl's testimony but merely recited it.

The Board did not, as the Employer asserts (Br. 30), "discard" Prohl's testimony that she was afraid of a unfair labor practice charge for violating Section 8(a)(5) of the Act by making a unilateral change during bargaining. To the contrary, it addressed (A 14) the Employer's contention that Prohl's conduct was justified by such a concern and determined such a claim was without merit. The Board found (A 14) that Prohl's professed rationale with respect to avoiding an unfair labor practice charge implied that the Employer was faced with a dilemma of withholding the increase and facing a Section 8(a)(3) charge or granting the increase and risking a Section 8(a)(5) charge. However, the implication is false. The Employer would not face a Section 8(a)(3) charge for merely withholding the increase from represented employees during negotiations. *See Shell Oil*, 77 NLRB at 1310. Rather, an employer violates the Act only when it is unlawfully motivated to treat represented and unrepresented employees differently during the course of collective-bargaining negotiations. There would be no unlawful conduct here

without the evidence of unlawful motive—that is a problem the Employer created for itself rather than a no-win situation.

In any event, if the Employer was actually concerned about a charge for making a unilateral change, Prohl or the bargaining committee could simply have asked the Union for its position on the 3-percent wage increase. Indeed, as the Board found (A 14 n.18), there is no merit to the Employer's argument (Br. 28) that it *had* to withhold the raise to avoid violating the Act because if the Employer had sought the Union's permission and the Union consented, there would have been no question that the Employer acted lawfully.

The Employer further asserts (Br. 52, 55) that this Court "accepted as fact" in its 2011 decision certain testimony of Prohl on these issues. However, there were no credibility issues before the Court at that time and, therefore, the Court did not and would not have resolved them. Even the Employer merely claims (Br. 4) that Prohl's statements as to her motivation were "arguably" accepted by this Court. As the Board recognized (A 14 n.17), if this Court had viewed Prohl's explanation as to her reasons as "'established fact,' there would have been no reason to remand for an analysis of the [Employer's] motive." Furthermore, the Employer's rationale for withholding the wage increase was not at issue when this case was previously before this Court and, thus, the Court did not need to determine whether the Employer's motivation was lawful. *See Arc Bridges*, 662

F.3d at 1237-39 (discussing the Board's rationale in its prior decision in this case). The Court recognized, in remanding for a determination under *Wright Line*, that this was properly the province of the Board in the first instance. *Id.* at 1240.

The Employer admitted "that it would have given the same wage increase to *all* of its employees if the Union had not been representing some of them." (A 14.) Given that the Employer thereafter failed to prove that it would have withheld the wage increase even in the absence of the employees' protected activity, the Board properly concluded that the Employer violated the Act when it discriminatorily chose to freeze the unit employees out of the 3-percent retroactive raise.

2. The Employer was not privileged to treat its represented employees differently as a bargaining strategy because its motivation was discriminatory

Despite the evidence of discriminatory motivation in this case, the Employer relies (Br. 30-37) on *Shell Oil Co.*, 77 NLRB 1306 (1948), and its progeny as privileging its withholding of the wage increase because the Employer was negotiating with the Union for a contract. However, the Employer repeatedly glosses over the reason why those cases are inapposite—the employers in those cases were not motivated by antiunion animus. The Employer recognizes (Br. 32), and indeed has highlighted for this Court, the fact that *Shell Oil* itself is premised on the absence of unlawful motivation: "**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." 77 NLRB at 1310 (emphasis at Br. 32). As all of the Employer's additional citations show, *Shell Oil* is only applicable if disparate treatment occurs in the absence of a discriminatory motive. *See, e.g.*, *Phelps Dodge Min. Co. v. NLRB*, 22 F.3d 1493, 1498-99 (10th Cir. 1994) (if the granting of benefits is "accompanied by statements encouraging the employees to abandon collective representation in order to secure the benefit[s], for example, we would have clear evidence of unlawful [Section] 8(a)(3) motivation"); *Peabody Coal Co. v. NLRB*, 725 F.2d 357, 367 (6th Cir. 1984) (granting benefits to only unrepresented workers "violate[s] the law only if it stems from improper motives").

The Employer's additional citations fare no better as support for its position. In *USPS*, as the Employer notes (Br. 33), the parties stipulated that the only reason for the disparate treatment of unit employees was that the parties were bargaining. 261 NLRB 505, 505 (1982). Therefore, the Board found "absent evidence of animus" that the employer had "no duty to . . . grant, the wage increases to unit employees." *Id.* at 507. In *Sun Transport*, the Board found no violation where the employer granted no severance benefits only to represented employees. 340 NLRB 70, 73 (2003). As the Employer acknowledges (Br. 40), the Board found that a letter from the employer to employees, stating that many employees did not accept job offers with the successor employer, was not evidence of animus and,

thus, there was an absence of animus as a motivating factor in the employer's decision. *Id.* In *B.F. Goodrich Co.*, the Board found no violation where the employer granted new profit-sharing benefits to unrepresented employees only "in the absence of discriminatory motives in withholding a benefit from these [unit] employees in order to encourage or discourage their membership." 195 NLRB 914, 915 (1972).

As to *Winn-Dixie Raleigh, Inc.*, the Employer fails (Br. 35-36) to note that the Board principally relied on the lack of evidence of antiunion motive to find no violation of Section 8(a)(3) where the employer granted annual across-the-board wage increases but denied an increase to unionized employees during negotiations. 267 NLRB 231, 235 (1983). In direct contrast to the substantial evidence of animus here, the Board stated that "[t]here is nothing in this case that would indicate that [the employer] was illegally motivated." *Id.* Furthermore, in *Winn-Dixie*, the employer made a different wage proposal to the union and it was accepted whereas here, no proposal was made until months after the unrepresented employees had received their retroactive raises.

Despite the Employer's attempts to place this case under the *Shell Oil* line of cases, the Board correctly determined (A 12) that it simply does not belong there because the Employer acted with an unlawful motivation. Based on substantial evidence in the record as a whole, for the reasons described above, the Board

reasonably found (A 13) that the General Counsel met his burden under *Wright Line* by "showing that protected activity was a motivating factor in the [Employer's] decision to withhold the 3-percent wage increase from employees represented by the Union."

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the Employer's petition for review and enforcing the Board's Order in full.

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National Labor Relations Board

September 2015

STATUTORY ADDENDUM

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

Section 7 (29 U.S.C. § 157):

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

Section 8(a)(1) (29 U.S.C. § 158(a)(1)):

It shall be an unfair labor practice for an employer –
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

Section 8(a)(3) (29 U.S.C. § 158(a)(3)):

It shall be an unfair labor practice for an employer –
(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

Section 8(a)(5) (29 U.S.C. § 158(a)(5)):

It shall be an unfair labor practice for an employer –
(5) to refuse to bargain collectively with the representatives of his employees . . . .

Section 8(c) (29 U.S.C. § 158(c)):

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

Section 10(e) (29 U.S.C. § 160(e)):

The Board shall have power to petition any court of appeals of the United States . . . wherein the unfair labor practice occurred or wherein such person resides or transacts business, for the enforcement of such order . . . No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive . . . .

Section 10(f) (29 U.S.C. § 160(f)):

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia . . . .

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ARC BRIDGES, INC.	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 15-1113 & 15-1143
	)	
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	13-CA-044627
	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 7,925 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

s/Linda Dreeben
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Dated at Washington, DC
this 30th day of September, 2015

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ARC BRIDGES, INC.	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 15-1113 & 15-1143
	)	
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	13-CA-044627
	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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Dated at Washington, DC
this 30th day of September, 2015