

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES**

**MERCK, SHARP & DOHME CORP.,**

**and**

**Case No. 06-CA-163815**

**UNITED STEEL, PAPER AND FORESTRY, RUBBER,  
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL  
AND SERVICE WORKERS INTERNATIONAL UNION,  
LOCAL 10-580, AFL-CIO, CLC.**

**MERCK, SHARP & DOHME CORP.,**

**and**

**Case No. 05-CA-168541**

**LOCAL 94C, INTERNATIONAL CHEMICAL WORKERS  
COUNCIL OF THE UNITED FOOD AND COMMERCIAL  
WORKERS INTERNATIONAL UNION, AFL-CIO.**

**MERCK, SHARP & DOHME CORP.,**

**and**

**Case No. 22-CA-168483**

**UNITED STEEL, PAPER AND FORESTRY, RUBBER,  
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL  
AND SERVICE WORKERS INTERNATIONAL UNION,  
LOCAL 4-575, AFL-CIO, CLC.**

**DECISION and RECOMMENDED ORDER**

**DAVID I. GOLDMAN  
Administrative Law Judge**

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**Table of Contents**

	Page
Decision .....	1
Statement of the Case .....	1
Jurisdiction .....	2
Unfair Labor Practices .....	2
Findings of Fact .....	2
Introduction .....	2
The origins of appreciation day .....	3
The July 28 announcement of appreciation day .....	3
Employee and Merck responses to the announcement .....	5
Riverside Plant Manager Killen learns why Merck excluded union-represented employees .....	5
The local union officials' allegations .....	6
Merck carries through with its plan to exclude union-represented employees from appreciation day .....	8
Analysis .....	8
I. Section 8(a)(3) .....	8
A. The <i>Wright Line</i> standard .....	8
B. Application of <i>Wright Line</i> .....	9
1. The General Counsel's affirmative case .....	9
a. The Respondent's admitted motive was discriminatory .....	9

**Table of Contents (continued)**

Page

b. The July 28 announcement effectively blames the employees’ union status for the exclusion from appreciation day ..... 13

c. The Respondent’s unilateral-action rationale is a pretext..... 13

2. The Respondent’s *Wright Line* rebuttal ..... 15

    a. Bargaining strategy as a defense ..... 15

    b. The 8(d) defense ..... 16

C. The allegations relied upon to find the violation are closely-related to the pleadings and fully litigated ..... 19

II. Section 8(a)(1) ..... 19

Conclusions of Law ..... 20

Remedy ..... 21

Order ..... 22

Appendix

## DECISION

5           DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. This case involves a pharmaceutical manufacturer that employs approximately 67,000 people worldwide, with roughly 23,000 employed in the United States. Of these U.S. employees approximately 2700 are union-represented and covered by collectively-bargained agreements.

10           In late July 2015, at a “global town hall” video meeting for employees, the employer’s CEO announced that in appreciation for their work and the company’s performance employees worldwide would receive an “appreciation day”—a paid day off on September 4, 2015. The day off was for employees worldwide, with one exception: the employer stated that the paid day off “[d]oes not apply to those in U.S. who are covered by [a] collective bargaining agreement.”

15           The announcement was not well-received by U.S. union-represented employees. Local union officials appealed to the employer to include the union employees in appreciation day. The employer refused and on September 4 the paid day off was provided to most employees worldwide except for U.S. union-represented employees (with an exception, as described below, for one group of union employees who were deemed contractually entitled to any benefits given to the nonunion employees at their plant).

20           The government alleges that the refusal to provide the union-represented employees the appreciation day was unlawfully motivated and in violation of Section 8(a)(3) and (1) of the National Labor Relations Act (Act). I agree, based on several factors, the chief one being the admission, mooted at trial and attributed to the manager who recommended the union employees’ exclusion, that the exclusion was in retaliation for the unions’ past refusal to entertain midterm contractual changes sought by the employer. Contrary to the contentions of the employer, I find that this motive represents straightforward punishment of union employees in retaliation for past protected activity under the Act. I also find that a plant manager’s admitted statement to one of the union presidents that this unlawful motive was the rationale for excluding union employees constitutes unlawful coercion, an independent violation of Section 8(a)(1) of the Act.

## STATEMENT OF THE CASE

35           On November 9, 2015, Local 10-580 of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (Local 10-580) filed an unfair labor practice charge alleging violations of the Act by Merck, Sharp & Dohme Corp. (Merck). Region 6 of the National Labor Relations Board (Board) docketed this charge as Case 06-CA-163815. Local 10-580 filed an amended charge in the case on  
40           December 28, 2015, a second amended charge on January 29, 2016, and a third amended charge on March 10, 2016.

45           On January 27, 2016, Local 94C, the International Chemical Workers Council of the United Food and Commercial Workers International Union, AFL-CIO (Local 94C) filed an unfair labor practice charge against Merck alleging violations of the Act, docketed by Region 5 of the Board as Case 05-CA-168541. Local 94C filed an amended charge on February 9, 2016, and a second amended charge on March 10, 2016.

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On January 25, 2016, Local 4-575 of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (Local 4-575) filed an unfair labor practice charge against Merck docketed by Region 22 of the Board as Case 22-CA-168483. A first amended charge was filed in the case on February 22, 2016, and a second amended charge filed March 10, 2016.

Based on an investigation into these unfair labor practice cases, on June 30, 2016, the Board's General Counsel, by the Regional Director for Region 6 of the Board, issued an order consolidating these cases, and a consolidated complaint and notice of hearing alleging that Merck had violated the Act. On July 27, 2016, Merck filed an answer denying all alleged violations of the Act. The General Counsel issued an amendment to the consolidated complaint on September 19, 2016, to which Merck filed an answer on September 30, 2016.

A trial in these cases was conducted on October 4 and 5, 2016, in Bloomsburg, Pennsylvania. Counsel for the General Counsel, the Respondent, and the Charging Parties filed post-trial briefs in support of their positions by December 2, 2016.

On the entire record, I make the following findings, conclusions of law, and recommendations.

**Jurisdiction**

Merck is a corporation with offices and place of business in Riverside, Pennsylvania, Elkton, Virginia, and Rahway, New Jersey. Its facilities at these locations have been engaged in the manufacture and nonretail sale of pharmaceutical products. At all material times, Merck has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. At all material times, Local 10-580, Local 94C, and Local 4-575 have been labor organizations within the meaning of Section 2(5) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

**UNFAIR LABOR PRACTICES**

**Findings of Fact**

Introduction

Merck manufactures and sells pharmaceuticals and employs approximately 67,000 worldwide. Approximately 23,000 are employed in the United States. Of those 23,000 employees, approximately 2700 are union-represented, whose terms and conditions of employment are covered by collectively-bargained agreements.

Merck's U.S. union-represented employees work in nine bargaining units, each with their own labor agreement and local union. The record does not speak with any precision to the definition of the bargaining units and it is immaterial for the purposes of these cases. There are two units at the Rahway, New Jersey facility. One is represented by Charging Party Local 4-575, the other by Local 68 of the International Union of Operating Engineers. Charging Party Local 2-0580 represents employees at Merck's Riverside, Pennsylvania plant (also called the Danville or the Cherokee plant). The West Point, New Jersey facility employees are organized into three bargaining units. One is represented by the International Brotherhood of Teamsters, Local 107, one by Charging Party 10-0086, and one by the Office and Professional Employees International

Union, Local 1937. There are two bargaining units at the Elkton, Virginia plant, one represented by Charging Party Local 94, and the other by Workers United, Local 1398. District 15, Lodge 315 of the International Association of Machinists represents a bargaining unit at the Kenilworth, New Jersey facility.

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#### The origins of appreciation day

On September 4, 2015, Merck provided a paid “appreciation day” off for most of its workforce both in the U.S. and worldwide. Union-represented U.S. employees did not receive this extra day off. The exception was the Kenilworth, New Jersey facility unit employees because Merck determined that Kenilworth’s bargaining agreement mandated that the unit employees receive benefits received by nonunit employees at the plant.

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The origins of the September 4 appreciation day were described in testimony provided by Jeff Geller, Merck’s vice-president of global compensation and benefits. Geller testified that in the spring of 2015, his manager, who was the chief HR officer for Merck, approached Geller and asked him to think about some ideas for Merck to show appreciation to Merck employees “for the strong business results that we were seeing so far that year in 2015.” After consultation with his HR management team, and with colleagues outside the U.S., Geller determined that an extra paid day off would be “the right signal to our employees.” Geller forwarded the proposal to his manager and ultimately the decision to move forward was made by CEO Ken Frazier. According to Geller, shortly after the July 4 holiday the decision was made by Merck to move forward with a paid day off on September 4, 2015, the Friday before the Labor Day holiday in the United States.

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The exclusion from appreciation day of the U.S. union-represented employees was prompted by the advice and direction to Geller of (then) Executive Director of U.S. Labor Relations Tony Zingales. Zeller testified that he “relied solely on [Zingales’] judgment as it relates to employees covered under the collective-bargaining agreement.” According to Zeller, Zingales’ “take” was that “you can’t do this unilaterally” and “it should not apply to those under collective bargaining agreement.” Zeller testified that “Tony [Zingales] explained to me that employees in the U.S. are covered by a collective bargaining agreement, and you can’t unilaterally provide an automatic day.” Zeller testified that he and the rest of the company took Zingales’ guidance and advice on this. Zingales did not tell Geller that the employees should not get the benefit because of labor relations issues. He did not tell Geller that providing the appreciation day benefit to union-represented employees would run counter to Zingales’ “bargaining strategy” or “philosophy.”<sup>1</sup>

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#### The July 28 announcement of appreciation day

Merck periodically conducts “global town hall” business briefings for its employees, during which, through webcast or dial-up, or in person, the entire worldwide workforce is provided an update on the company’s performance. The global town halls are led by Merck CEO Ken Frazier.

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<sup>1</sup>Zingales testified that he told Geller that one group of union employees should receive the day off—the unit employees at the Kenilworth facility. Their collective-bargaining agreement contained a “maintenance of standards provision” that, according to Zingales, “required us to provide benefits to the bargaining unit employees that were provided to salary employees.”

5 A global town hall briefing was conducted July 28, 2015. Toward the end, Frazier announced that there would be a worldwide appreciation day on September 4, 2015, in which operations would cease and employees would have the day as a paid day off. The slides for Frazier's presentation, which were shown in the meeting, stated because "[y]ou and your  
 10 colleagues give so much time and energy to our company . . . . [Merck] [w]anted to provide this 'special' recognition and 'thank you' for great performance we're seeing at this mid point of 2015." (emphasis in original). Another slide highlighting the day off stated around the border of a picture of a globe of the world: "You give so much of your time . . . We want to give some back." (All capitalized in original). Across the middle of the globe in large font it stated "Thank You."

15 The slide indicated that Merck's operations would be closed September 4, 2015. However, the slide also indicated that this global shutdown "Does not apply those in US who are covered by a collective bargaining agreement."

20 An announcement "[f]ollowing up on Ken [Frazier's] announcement" was sent out later that day July 28. It stated "Enjoy an additional day off in 2015." The announcement stated that "the company is providing you with an additional day off in recognition of the company's performance through the midpoint of 2015." The announcement explained:

25 Merck and MSD operations will close on Friday, Sept. 4. Please note the following:

- 30 • This applies globally where business operations and local practices/laws permit, and, as required, subject to consultation with employee representatives or works councils.
- 35 • In countries or sites where Sept. 4 is already a day off or it is not otherwise possible to close operations on that particular day, your local managing directors or site leads will select another day and communicate this information to you soon.
- 40 • If you have already scheduled Sept. 4 as a vacation day or your site requires you to work on that day to meet business needs, please use the additional day off at another time and coordinate with your manager.
- 45 • This additional day off does not apply to those in the U.S. who are covered by a collective bargaining agreement.

50 By all evidence, plant managers and employees were not made aware of the new benefit until July 28, when it was announced during the global town hall. According to Geller, the matter was kept "pretty hush within human resources and global communications" in an effort to keep it a surprise for the July 28 briefing.

#### Employee and Merck responses to the announcement

55 The announced intention to exclude the union-represented employees from receipt of appreciation day caused something of a furor in the unionized plants. There were intimations that union employees would not cooperate with an upcoming safety survey and cease participating in voluntary emergency service groups, which were important for plant operations. Merck's intranet comments board received many posts and commentaries from excluded employees and union  
 60 officials. The local union president for the West Point plant, Daniel Bangert, wrote an open letter to CEO Frazier objecting to the exclusion of union employees.

5 Frazier, and then Elisabeth Goggin, who is Merck's global head of labor relations, responded with email and an intranet posting, respectively, that stressed and asserted the inability of Merck to unilaterally provide an extra day off to employees covered under a collective-bargaining agreement.

10 On August 21, the local union presidents wrote a joint letter to CEO Frazier requesting that unit employees be included in the benefit, expressing concern over the announcement, referencing past instances where company-wide benefits had been offered to union-represented employees, and disavowing any suggestion from Merck that the unions would file a grievance or charge if the unit employees were given the appreciation day benefit.

15 **Riverside Plant Manager Killen learns why  
Merck excluded union-represented employees**

15 The July 28 announcement prompted Riverside Plant Manager Brian Killen to request a conference call with Zingales and the HR department. Killen testified that in a conference call with the other excluded plant managers and Zingales and his HR group on August 3, Killen and other managers asked why their plants were excluded and whether there was an intention to negotiate with the unions about it.

20 Zingales told them that the benefit is not in the labor contracts "and we can't unilaterally give the day." Killen knew that answer was inadequate. As he testified, "clearly I knew that wouldn't be a sufficient response for my own information and I needed more information to go back to the site." Killen asked whether Merck was going "to have some kind of bargaining or what is our path forward." When told no, that "there was no intent to bargain further," Killen "and other plant managers asked about the reason." The "feedback that we got was that . . . in the previous couple of years that the company had made changes to the non-CBA employees . . . , relatively simple changes" such as "how they administer payroll and 401(k) and how they complete year end holidays." Zingales explained to Killen and the managers that these changes were made for nonunion employees but when "they tried to discuss them with the union outside of contract negotiations . . . the fee[edback] from the union was . . . wait until contract negotiations." Killen agreed that Zingales told him that the union's refusal to cooperate in agreeing to these "minor changes" in recent years was the reason that "Merck was not inclined to approach the union in offering the appreciation day" or to "just give it to the unions."

35 I note that while Killen was, and was known to be, in disagreement with Merck's decision to exclude the union-represented employees—particularly those under his supervision—Killen was and is an agent of and aligned with the Respondent. This only adds to the credibility of Killen's account of Zingales' stated explanation for the motive for refusing to offer appreciation day to the union-represented employees. Moreover, Killen's account is indirectly corroborated by Zingales, who, in his testimony about appreciation day, made the point—without directly adopting it as a motive for excluding union employees—that there were "changes in benefits levels or administrative cha[n]ges or practices that were applied to non-union employees or salary employees that didn't apply to the unionized groups with the exception of the Kenilworth unit." He referenced the issue in a manner suggestive of the belief that if the unions didn't have to take the bad they are not entitled to the good, a plausible, but, as discussed below, unacceptable motivation under the circumstances.

Thus, the motives for excluding union employees that Zingales shared with Killen and the plant managers was (1) that it would be illegal to unilaterally provide these employees with appreciation day and (2) that he was not going to offer it to them through the unions in retaliation for the unions' past unwillingness to make "minor changes" requested of them by Merck. As an evidentiary matter, Killen's account of Zingales' comments is an admission and I credit it. Apart from his status as a witness for and aligned with the Respondent, I found Killen to be a highly credible witness, both in his demeanor and his forthright and plausible account of events, and I credit his testimony for that reason as well.<sup>2</sup>

#### The local union officials' allegations

In my view, Killen's credibility extends to his account of his conversations with Riverside union officials about appreciation day. Killen testified that he told Riverside local union president Ed Vallo the substance of Zingales' remarks as to the appreciation day: i.e., that Merck's position was that the benefit could not unilaterally be provided to union employees and that Merck did not intend to discuss it because of the unions' previous refusal to discuss payroll administration, 401(k) administration, and year end holiday changes that Merck had sought to change mid-contract.

Moreover, Killen convincingly denied union president Vallo's and union steward James Little's contention that in a meeting within "a few days after the announcement" Killen told them that Merck refused to include the union plants in appreciation day because "there were serious labor issues at other sites," particularly safety issues, and that it was "despicable" what was going on at the Rahway site—referring to unspecified labor issues—given that "they had just finished up contract negotiations" and that "Merck was not "going to reward bad behavior."<sup>3</sup>

Vallo and Little testified that this conversation occurred at the old plant manager's office in building 117, and that HR representative Janelle Patton was present. Patton denied attending a meeting with Vallo and/or Little about issues around appreciation day until late September, weeks after the early August discussion referenced by Little. While Vallo and Little both testified that

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<sup>2</sup>I note that there was no objection to this testimony. To the contrary, the Respondent adopts it on brief. See. R. Br. at 13-14. In any event, pursuant to Federal Rules of Evidence 805 and 801(d)(2)(D), neither Zingales' statement to Killen nor Killen's' recounting of it to Vallo (or on the witness stand, for that matter) constitutes hearsay. Both Zingales and Killen were admitted agents of the Respondent and acting in the scope of their employment when the statements were made. See, *United States v. Gibson*, 409 F.3d 325, 337 (6th Cir. 2005).

<sup>3</sup>Contrary to the arguments of the counsel for the General Counsel, I found Killen convincing in both demeanor and with regard to his recollection. Contrary to counsel for the General Counsel, I found the instances where Killen could not recall something, for instance, a location of a meeting or whether HR representative Patten was present at a particular meeting, to be honest attempts to answer. By all evidence, there were many meetings, formal and informal, attended by some combination of Patten, Killen, Vallo, and Little. I note that contrary to the claim of the counsel for the General Counsel on brief, Killen was *not* unsure and did *not* profess lack of recollection as to whether he told Vallo and/or Little that labor issues at other sites, regarding safety, and particularly at Rahway, motivated Merck to exclude union employees from appreciation day. Rather, he (convincingly, to my mind) denied this.

Patton's usual practice was to take notes at the meetings she attended with them and Killen, no notes of this meeting were produced.<sup>4</sup>

5 This is not a particularly easy credibility resolution, as Vallo and Little appeared to me to  
 be testifying honestly. I believe that in their many "free flowing" (as Little and Killen both  
 described their) conversations in the days and months after the appreciation day announcement,  
 there was discussion of many issues, including problems at other plants. However, Vallo and  
 Little were vague and uncertain on many details, and on the time frame of the meeting in which  
 10 the statement was allegedly made that Rahway and West Point's issues were the *reasons* for  
 exclusion of all union-represented employees from appreciation day.<sup>5</sup> There was also confusion  
 about the dates and timeline for Vallo/Little's discussions with Killen about a proposal for seven  
 hours of leave that appears to have been conducted in September or even October, not in August  
 as suggested by Vallo. In the face of the convincing denials by Killen and Patten, I do not credit  
 15 Vallo and Little's claim that Killen told them that these issues were the reason that all union-  
 represented employees were excluded from the appreciation day.<sup>6</sup>

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<sup>4</sup>Contrary to counsel for the General Counsel, I did not find Patton's testimony suspect. She testified that, as an HR representative, she would prefer to be involved with all discussions with the union representatives, but that Killen, as plant manager, did not involve her in every meeting he had with Vallo. In particular, while she almost always attended the recurring weekly meetings Killen conducted with Vallo, she was seldom part of the frequent "ad hoc" meetings that Killen held with Vallo. In my view, this appeared to be part of the normal push/pull between HR and plant operations—not an effort to hide her presence at meetings from the tribunal.

<sup>5</sup>Vallo testified that at Rahway there were "ongoing" "labor issues that came up after negotiations that were impacting the site," but asked if he had any specifics he said "not really."

<sup>6</sup>I note further the lack of support for the truth of the claim Vallo and Little attributed to Killen. It weighs against the conclusion that it was said. There was extensive testimony about recent contract negotiations at Rahway, conflicting views of the application of a new overtime provision, grievance filing activity, and the union's concern over the steady erosion of the bargaining unit over many years. All of these are serious issues, but none that seems obvious as a basis for retaliation by Merck against the unions generally. Moreover, the contention that Killen attributed Merck's decision to any of these issues, or safety concerns, or ongoing "bad behavior" at Rahway and West Point, is undermined by the lack of evidence that Killen had direct knowledge of any of this. Based on his testimony, the bulk of his information about other plants' relationships with Merck came from Vallo, not from Merck. There is just no evidence, other than the alleged comments attributed to Killen, that these were the source of the appreciation day exclusion, much less that Merck officials told Killen this. As to Killen's version of what he testified that he told Vallo—that union-represented employees were not going to be offered appreciation day because of past union refusals to entertain midterm contract changes—this was alluded to by Zingales in his testimony, thus, providing corroboration. Moreover, as noted earlier, Killen's testimony of what Zingales told him constitutes an admission from Zingales. Thus, Killen's testimony provides direct evidence of what he was told by Merck about why union employees were denied the appreciation day off. I believe he was told that and this makes it plausible that he would convey what he was told and not something there is no evidence that he knew.

Merck carries through with its plan to exclude  
union-represented employees from appreciation day

5 Between August 3 and August 20, Killen spoke with Vallo and Little and they discussed  
whether some kind of recognition of plant employees could be made in lieu of appreciation day.  
During this period, Killen testified that while Zingales and his office had ruled out agreeing to give  
the union employees the appreciation day holiday, they had not ruled out specific site-by-site  
adjustments that could be made at plant managers' request. Discussions with Vallo, often  
10 accompanied by Little, were undertaken by Killen at his (and Vallo and Little's) initiative in this  
regard, but nothing was agreed to by upper management. By August 20, Killen was informed by  
his immediate boss, Dan Hoey, that senior level Merck management had determined that "there  
would be no further discussions on appreciation day in terms of potential to bargain for it locally or  
change directions." This was confirmed to Killen the next day in a conference call with plant  
managers and Zingales and with Zingales' immediate boss Elisabeth Goggin. On this call it was  
15 stated that the issue was closed, "[t]here's no intent to bargain further." However, Killen was  
reminded during this call, by Goggin, that as plant managers, Merck provided them with "authority  
to recognize people for a job well done at our own sites." With this authority, Killen continued to  
pursue discussions with Vallo about some kind of recognition for Riverside employees, but those  
discussions were not successful and abandoned in early October.

20 Appreciation day occurred as scheduled, on September 4, 2015. In the U.S., the federal  
holiday of Labor Day was celebrated September 7, creating a four day weekend for Merck  
employees receiving the appreciation day off. Merck's union-represented employees did not  
receive appreciation day off, with the exception of the employees in the Kenilworth bargaining  
25 unit.

### Analysis

30 The General Counsel contends that Merck's failure to provide appreciation day to the  
union-represented employees was unlawfully motivated in violation of Section 8(a)(3) and (1) of  
the Act.<sup>7</sup> He also contends that Killen's explanation of the motive to Vallo independently violated  
Section 8(a)(1) of the Act.

#### I. Section 8(a)(3)

35 A. The *Wright Line* standard

The Respondent and the General Counsel agree that *Wright Line*, 251 NLRB 1083  
(1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), provides the  
40 appropriate analytical standard for assessing the alleged 8(a)(3) violation.<sup>8</sup>

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<sup>7</sup>Any conduct found to be a violation of Sec. 8(a)(3) would also discourage employees' Sec. 7 rights, and thus, is also a derivative violation of Sec. 8(a)(1) of the Act. *Chinese Daily News*, 346 NLRB 906, 934 (2006), enfd. 224 Fed. Appx. 6 (2007).

<sup>8</sup>I note that there is no allegation that the Respondent's refusal to provide union-represented employees appreciation day was "inherently destructive of Section 7 rights." See *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967). Accordingly, I do not consider the issue.

*Wright Line* is the Supreme Court-approved analysis in 8(a)(1) and (3) cases turning on employer motivation. See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983) (approving *Wright Line* analysis). In *Wright Line*, the Board determined that the General Counsel carries his burden by persuading by a preponderance of the evidence that union or other protected conduct was a motivating factor (in whole or in part) for the employer's adverse employment action. Proof of such unlawful motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), enfd. 184 Fed. Appx. 476 (6th Cir. 2006); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

Under the *Wright Line* framework, as subsequently developed by the Board, the elements required in order for the General Counsel to satisfy his burden to show that protected activity was a motivating factor in an employer's adverse action are union or protected activity, employer knowledge of that activity, and union animus on the part of the employer. *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 6 (2016); *Libertyville Toyota*, 360 NLRB No. 141, slip op. at 4 (2014); enfd. 801 F.3d 767 (7th Cir. 2015).

Such showing proves a violation of the Act subject to the following affirmative defense: the employer, even if it fails to meet or neutralize the General Counsel's showing, can avoid the finding that it violated the Act by "demonstrat[ing] that the same action would have taken place in the absence of the protected conduct." *Wright Line*, supra at 1089.

#### B. Application of *Wright Line*

##### 1. The General Counsel's affirmative case

##### a. The Respondent's admitted motive was discriminatory

In the complaint, and at trial, the General Counsel contended that the Respondent's motive for refusing to provide appreciation day for union-represented employees, and Killen's explanation for Merck's motive for this, revolved around "labor troubles." Specifically, it was alleged that Killen told the union representatives that Merck's decision was based on safety problems and labor-related activities at Rahway and West Point.

I have found that, contrary to the General Counsel's claim, Killen did not tell union representatives Vallo or Little that labor problems at Rahway or West Point, or safety problems, were the reason that union-represented employees were excluded from the appreciation day. And I do not find that there is evidence to support the claim that it was the reason.

Rather, I have found that Zingales, the individual who effectively recommended the exclusion of the union-represented employees from appreciation day, admitted that Merck's motive was that it could not provide the benefit unilaterally and that it would not offer the unions the benefit because in recent years the unions had refused to accommodate Merck's mid-contract requests for "minor changes" in payroll and 401(k) administration and holiday issues. Killen also testified that he told Vallo this.<sup>9</sup>

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<sup>9</sup>I note that the Respondent admits that Zingales told Killen this was the rationale for not offering the benefit to employees, and admits that Killen told this to Vallo. See R. Br. at 13-14.

5 This latter admitted motive proves a violation under *Wright Line*. Clearly the unions’ refusal to accede to the employer’s request for midterm changes was protected activity. *R.E.C. Corp.*, 296 NLRB 1293, 1293 (1989) (“The employees’ conduct in refusing to reopen the contract was clearly protected”; finding employer violated Act by “laying off employees because they refused to reopen the parties’ collective-bargaining agreement and agree to midterm modification”). The Respondent obviously knew about it, as Zingales raised it. The credited evidence shows that Merck refused to offer union employees the day off because of and in retaliation for the unions’ protected activity of refusing to bargain midterm contractual changes desired by the Respondent. And, as discussed below, Zingales’ explanation that appreciation day could not be offered unilaterally is not a convincing or accurate explanation for not offering the benefit.

15 To be clear, absent an unlawful motivation, there is no requirement that an employer provide represented and unrepresented employees with the same benefits. At the same time, offering or providing of differing benefits may be a violation of Section 8(a)(3) and (1) of the Act, if such conduct is motivated by antiunion considerations.

20 Under *Shell Oil Co.*, 77 NLRB 1306, 1310 (1948) and its progeny, “an employer may, during the course of collective-bargaining negotiations, treat represented and unrepresented employees differently when providing new benefits, so long as the disparate treatment is not unlawfully motivated.” *Arc Bridges, Inc.*, 362 NLRB No. 56, slip op. at 2 (2015). For instance, in *Sun Transport Inc.*, 340 NLRB 70, 72 & fn. 12 (2003), the Board dismissed an 8(a)(3) allegation based on an employer offering less severance pay to union-represented employees during collective bargaining than it was offering to unrepresented employees. The Board explained that

25 the mere fact that different offers are made or that different benefits are provided does not, standing alone, demonstrate unlawful motive. Although an employer is not free to discriminatorily afford represented employees less benefits than unrepresented employees, i.e., in order to discourage support for the union, the record does not establish that the Respondent engaged in such conduct here. . . . Rather, the Respondent’s offer was made in an effort to induce concessions as part of the give-and-take during negotiations over a comprehensive successor agreement.

35 See also, *B.F. Goodrich Co.*, 195 NLRB 914, 915 (1972) (“Thus, in the absence of discriminatory motives in withholding a benefit from these employees in order to encourage or discourage their membership in or representation by a union, we find no merit in the General Counsel’s contention that Respondent violated Section 8(a)(3) by granting the profit-sharing benefit only to unrepresented employees”).

40 The issue then, is whether the Respondent’s decision not to provide the day off to its represented employees (except to those it felt it contractually required to provide it to) was unlawfully motivated. In other words, was the decision not to provide appreciation day because of the unions’ past refusal to accommodate the employer’s midterm demands for changes retaliation for union activity?

45 The Respondent, while admitting (R. Br. at 13–14) this as a “rationale,” calls it part of a “bargaining strategy,” of the kind permitted by the Board in *Sun Transport*, supra, and points to Zingales’ testimony that he did not think it “a good bargaining strategy to give away [a] holiday.” But the Respondent’s decision and actions manifestly were not a bargaining strategy, at least not one that the Board legitimates. Indeed, appreciation day, and the decision not to provide the

appreciation day off to the represented employees, was not made during or as part of collective bargaining. It was not refused as part of an ongoing effort “to force concessions in other areas.” *Sun Transport*, supra at 72. To the contrary, the decision was made in direct and admitted retaliation for the union’s past lawful refusal to bargain midterm changes to the collective-bargaining agreement. In other words, the evidence shows that the employer, by its own admission, decided to maintain its position of withholding a new benefit that it was providing worldwide to all nonrepresented employees (and even represented employees outside of the U.S.) in direct response to the unions’ past collective-bargaining strategy of refusing to entertain midterm contractual changes. (There is, of course, no claim by Merck that union employees were less deserving of appreciation than other employees in terms of the work performed or job done at Merck.)

To call this a “bargaining strategy” does not avoid the fact that its motivation is discrimination against the union-represented employees for the purpose of penalizing them because of the union’s (lawful) refusal to accept previous and unrelated employer-offered terms and conditions of employment. Calling it a “bargaining strategy” insulates the conduct from the proscriptions of the Act no more than would the layoff of a group of employees in retaliation for their refusal to entertain midterm contractual changes. *R.E.C. Corp.*, 296 NLRB at 1293.

The difference between the Respondent’s motives here, and the situation where an employer is motivated by a lawful “bargaining strategy,” is plainly demonstrated by comparing the instant situation to that in *Sun Transport*, supra—a case relied upon by the Respondent.

In *Sun Transport*, in late 1996, the employer began successor negotiations with its employees’ union for a new labor agreement. In March 1997, the employer decided to divest itself of the business and thereafter the successor agreement negotiations also encompassed the issue of a severance package. At the same time, the employer offered to its unrepresented employees a severance package more lucrative than what it was offering at the bargaining table to the union for the unionized employees. In April or May 1997, a tentative agreement was reached on the severance and the successor contract, both of which were voted down by the union’s membership. Subsequent negotiations focused mostly on severance, as the sale was underway. The employer refused the union’s offer that the same severance provided the unrepresented employees be provided. The unit employees again rejected a tentative severance package that was inferior to that provided the unrepresented employees, and ultimately the union-represented employees received no severance for their jobs. In a November 1997 letter to the union, the employer’s vice-president Fretz explained that in formulating its severance proposal the employer “had considered how responsive the ‘represented group’ had been to the Respondent’s efforts to contain costs and improve its competitive position,” noting that in the recent negotiations “the parties had failed to reach agreement on some of the Respondent’s proposals, and this resulted in continued high, uncompetitive costs” which was a factor “when we determine whether we are willing to offer severance packages to a given group of employees, as well as having some impact on our evaluation of the total additional costs we are willing to sustain.” *Sun Transport*, supra at 71.

The administrative law judge in *Sun Transport* found that the employer’s position constituted an admission that the Respondent retaliated against the Union for its bargaining positions. The Board reversed, but did so with reasoning that makes clear that Merck’s motives here are unlawful.

In *Sun Transport*, the Board rejected the judge’s conclusion that the employer had offered less severance pay to represented employees in retaliation for the union’s bargaining positions,

because the Board found that the employer's motive for offering less to the union employees was the cost of bargaining positions taken by the union in negotiations. Specifically, the Board in *Sun Transport* rested its conclusion on its finding that the employer attributed its "high, uncompetitive costs" and "uncompetitive situation" to the union bargaining positions, and

5 those high costs, in turn, were a factor considered by the Respondent in formulating its severance proposal. Thus, we cannot say that the [union's] bargaining position itself was the basis for the severance pay offer.

10 Further, even if the severance pay offer was based upon the Union's bargaining position during the negotiations for a successor contract, we would still find no violation of the Act. With respect to this Union, the matter of severance pay arose during comprehensive bargaining for a new contract. The Respondent sought concessions in late 1996 and continued to seek them in 1997. And, in 1997, this  
15 bargaining was intertwined with the bargaining over severance pay. The Respondent sought to use the severance pay issue to force concessions in other areas. More particularly, the Respondent, as it explained in the November 17 Fretz letter, was tying its position on severance to the Union's refusal "during the entire period" (i.e., during the negotiations in 1996 and 1997 for a successor  
20 collective-bargaining agreement) to make concessions in other areas.

25 . . . . The Respondent's severance offer was but one element of the "competing forces and counteracting pressures" inherent in the collective-bargaining process. Consequently, the Respondent's consideration of the Union's bargaining positions does not demonstrate antiunion animus. [citations omitted.]

30 Merck's motive for refusing to provide the appreciation day off to represented employees does not square with the rationale that saved the employer in *Sun Transport*. Unlike in *Sun Transport*, here there is no evidence that Merck's position was based on "costs" or "uncompetitiveness" that resulted from the unions' refusal to grant what Killen described as "minor changes" during the contract term. Thus, directly contrary to the distinction drawn by the Board in *Sun Transport*, here, the unions' position on the midterm changes—not the costs that Merck incurred because of them—was the basis for failing to give the appreciation day off. "Thus," unlike in *Sun Transport*, here "we [can] say that the [union's] bargaining position itself was  
35 the basis for the [employer's] offer."

40 Moreover, the Board's second rationale in *Sun Transport* for finding no violation is also inapposite here. Unlike in *Sun Transport*, the failure to include the union-represented employees in appreciation day was not "intertwined" with ongoing bargaining. Unlike in *Sun Transport*, Merck was not using the appreciation day "issue to force concessions in other areas." To the contrary, Merck sought and gained nothing from its position of not providing appreciation day off to the union-represented employees. In a very real sense, it consciously *refused* to use appreciation day as a bargaining chip with the unions. Merck's position on appreciation day was not "but one element of the 'competing forces and counteracting pressures' inherent in the  
45 collective-bargaining process." Rather, this was pure retaliation for the unions' positions taken in the recent past, and bargaining was neither sought nor granted by Merck over appreciation day.

50 In short, in this case Merck's motivations bear none of the indicia relied upon by the Board in *Sun Transport* to find the discrimination between represented and nonrepresented employees to be merely a part of a lawful bargaining strategy. Merck's admitted and credited motive for not

providing union-represented employees the appreciation day benefit constitutes straightforward evidence of discriminatory motive under the Act.

- 5                   b. The July 28 announcement effectively blames the  
employees' union status for the exclusion from appreciation day

10                   There is, however, more. The July 28 announcement to employees, by itself, adds to the weight of the discriminatory inference. While announcing that appreciation day "applies globally where" permitted "and, as required, subject to consultation with employee representatives," the announcement adds the condition that "[t]his additional day off does not apply to those in the U.S. who are covered by a collective bargaining agreement."

15                   Thus, while appreciation day covers employees, even when it requires "consultation with employee representatives," the only employees who are excluded from receiving the benefit are (U.S.) employees who are union-represented and covered by a collective-bargaining agreement. This explanation "essentially encouraged employees to blame" the union and their union status for the failure to receive the benefit and is an independent indicia of discriminatory motive. *Arc Bridges*, 362 NLRB No. 56, slip op. at 3 (finding this to be an indicia of discriminatory motive).<sup>10</sup>

- 20                   c. The Respondent's unilateral-action rationale is a pretext

25                   The strength of the General Counsel's *Wright Line* case is also increased by the transparently pretextual nature of the Respondent's claim that it did not provide the paid day off to union employees because it would violate the law to do so unilaterally without consulting with the employees' union.

30                   Zingales testified that it was his belief that it would be a violation of the law to unilaterally provide appreciation day to employees with a collective-bargaining agreement. He told Geller this was the grounds for excluding union-represented employees from appreciation day. Merck executives Goggin and Frazier reiterated this after July 28, when they issued statements trying to calm the anger over the union employees' exclusion, but reiterating the exclusion of union employees from the benefit.

35                   However, I reject as meritless, and untrue, the Respondent's contention that a motive for failing to provide the appreciation day to union-represented employees was the belief that it would violate the Act to do so unilaterally. If *that* were its motivation for not providing the benefit, it would have offered it to the unions as a proposal for the unions to consider, and—as the local union presidents indicated they would—accept. Indeed, remarkably, in view of Merck's argument, its July 28 announcement of appreciation day stated that the benefit "applies globally where business operations and local practices/laws permit, *and, as required, subject to consultation with employee representatives or works councils.*" (Emphasis added.) Thus, as Merck itself recognized, any concern with granting the benefit unilaterally to union-represented employee would (and easily could) be overcome by "consultation with employee representatives." As the Board has explained it:

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<sup>10</sup>I note that although unalleged in this case, "it is settled that it is a violation of Section 8(a)(1) for an employer to tell employees that they will be losing a benefit because their status as union represented makes them ineligible for the benefit." *Covanta Energy Corp.*, 356 NLRB 706, 714 (2011); *Niagara Wires, Inc.*, 240 NLRB 1326, 1327 (1979) (it is a per se violation of Section 8(a)(1) for employer to maintain a pension plan that by its terms excludes from coverage employees who are 'subject to the terms of a collective bargaining agreement.'")

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

*Arc Bridges*, 362 NLRB No. 56, slip op. at 5 fn. 18 (Board’s emphasis.)

Merck’s argument that the benefit could not be provided unilaterally is a flimsy, unbelievable, and nonresponsive excuse for its unwillingness to offer the benefit. It is a purported rationale contradicted by its own notice explaining how it will provide appreciation day in instances where “local practices/laws” require consultation with a union. Thus, Merck’s “unilateral action” defense does nothing to explain why it maintained that the benefit would not “apply to those in the U.S. who are covered by a collective bargaining agreement.”

The truth is, its July 28 announcement notwithstanding, Merck never intended to consult with its U.S. “employee representatives” so that the benefit could be provided to U.S. union-represented employees. Killen was told this directly by Zingales on August 3, just days after the announcement, and he was told why: the unions’ past bargaining position. And on August 21, Merck conclusively informed its plant managers that there would be no bargaining over the matter. The purported restriction on the unilateral grant of benefits was not the reason for the decision not to offer union-represented employees appreciation day. For all these reasons, Zingales’ testimony that it was the reason is not credible. Notably, as Killen testified, upon hearing this “unilateral action” rationale on August 3, he immediately recognized that “clearly I knew that wouldn’t be a sufficient response” . . . to go [take] back to the site.” He knew that dog wouldn’t hunt. And I agree. It begs the question, which is to say it is an obvious pretext.

While I do not reach or adopt the General Counsel’s argument that Merck had what amounted to a past practice of passing on to union-represented employees benefits given to nonrepresented employees, the past instances in the record of offering new benefits to union employees demonstrate that Merck knew how to provide union employees a new benefit when it wanted to do so.<sup>11</sup>

Merck’s refusal to offer appreciation day to union-represented employees had nothing at all to do with and was not hindered by any alleged belief that it would be unlawful to provide the benefit unilaterally. The pretextual nature of this claim, repeated by Zingales, Goggin, and Frazier, adds to the strength of the General Counsel’s prima facie case of discrimination. *El Paso*

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<sup>11</sup>Thus, on January 2, 1998, Merck gave represented and unrepresented employees the day off in addition to the scheduled holidays off. In 2009, Merck again decided to make January 2, a company holiday and it reached an agreement with Local 4-575 to include the union-represented employees. R. Exh. 6. In 2006, after contract negotiations had concluded with a multi-union council that bargained as a group with Merck at that time, Merck decided to make Martin Luther King Jr.’s birthday a company holiday. The then-director of labor relations, Glen Guior, called Vallo and said, “Ed, I want you to officially ask me as the Merck Inter-union council to have a Martin Luther King’s birthday as an additional holiday for all the sites represented by the council.” Vallo at first thought that Merck was not being serious, but, assured he was, Vallo asked and Guior agreed, and the union employees thereafter received the holiday along with Merck unrepresented employees. I cite these examples, not as evidence of an official past practice, but as evidence that if Merck wanted to provide a benefit to union employees, it knew how to do so.

*Electric Co.*, 355 NLRB 428, 428 fn. 3 (2010) (finding of pretext raises an inference of discriminatory motive and negates rebuttal argument that it would have taken the same action in the absence of protected activities); *All Pro Vending, Inc.*, 350 NLRB 503, 508 (2007); *Rood Trucking Co.*, 342 NLRB 895, 897-898 (2004), citing *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995) ("When the employer presents a legitimate basis for its actions which the factfinder concludes is pretextual . . . the factfinder may not only properly infer that there is some other motive, but that the motive is one that the employer desires to conceal—an unlawful motive . . .") (internal quotation omitted).

Accordingly, I find that the General Counsel has more than met his prima facie case and proven that discriminatory animus motivated the Respondent's decision not to provide appreciation day for the union-represented employees.

## 2. The Respondent's *Wright Line* rebuttal

The remaining issue under *Wright Line* is whether the Respondent has demonstrated that it would have denied union-represented employees appreciation day even in the absence of the protected union conduct that motivated its actions. Under the circumstances, it is not a serious claim. I have already concluded, for the reasons discussed above, that the Respondent's claim that it could not unilaterally provide the benefit was a pretext. Notably where "the evidence establishes that the proffered reasons for the employer's action are pretextual—i.e., either false or not actually relied upon—the employer fails by definition to show that it would have taken the same action for those reasons, regardless of the protected conduct." *David Saxe Productions*, 364 NLRB No. 100, slip op. at 4 (2016); *Rood Trucking*, 342 NLRB at 898, quoting *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003). However, the Respondent raises some additional arguments that I address below.

### a. Bargaining strategy as a defense

Zingales testified that, "in addition" to the unilateral-action issue, he believed that it was "not consistent with bargaining strategy" to provide the union-represented employees additional benefits that were not in their labor agreement. Zingales had a preference for dealing with the unions at the different Merck locations individually, and felt that "master bargaining is not in the best interest of the company and not effective on a location-by-location basis." In 2014, under Zingales' leadership, Merck ended the remnants of multi-union bargaining "master" bargaining—already by that time reduced to two locations from five or six—and Zingales was resistant to any type of group bargaining with the unions. Moreover, Zingales explained, "I don't think that coming off a significant labor negotiations in Elkton and then Rahway"—negotiations he described as "long drawn out" and "difficult,"—and with the West Point contract expiring in nine months on April 30, "that it was a good bargaining strategy to give away [a] holiday."

The Respondent suggests that, even absent its unlawful motive, it would not have offered the union employees the day off because it might smack of the multiunion coordinated bargaining that Zingales opposed and that Merck had moved away from. This is unconvincing. Merck did not need to engage in multiunion bargaining in order to offer the unions the day off. An email or phone call to each union would have sufficed if Merck was worried that offering the day off en masse would be misinterpreted as a revival of multiunion bargaining—a concern that, frankly, seems contrived. Appreciation day was to show appreciation to the employees by providing an unplanned paid day off. Union-represented employees were left out of this—not because Merck says they were unappreciated. But rather, to "pay back" the unions for a lack of cooperation in recent years. It is highly implausible, and entirely unproven, that union-represented employees

were left out of appreciation day so that Merck could avoid any implication that it was violating its principles against multi-union bargaining.

5 Similarly, I reject as untrue the general suggestion of Zingales that his “philosophy” or  
 “bargaining strategy” precluded any changes for union employees during the term of a contract.  
 Indeed, we know that Zingales had requested midcontractual changes from the unions and was  
 unhappy that the unions refused. Thus, it appears that this asserted live-and-die-by-the-contract  
 “strategy” emerged only in response to and in retaliation for the unions’ previous rebuff of Merck’s  
 10 entreaties. That would taint it, were it true. However, I do not believe it. Notably, Zingales did  
 not offer this as a contemporary explanation for Merck’s actions to Killen, to Geller, or to anyone  
 else, as far as the record shows. The first time the explanation was offered was at the hearing in  
 a description by Zingales of his internal thinking on the matter. This type of unverifiable assertion  
 is not the most compelling evidence. All the less so because it appears to be a transparent effort  
 15 to track cases in which the Board permits the employer leeway to grant or deny new benefits as  
 part of a “bargaining strategy.” I do not believe it.

The Respondent’s motivation for not providing, for not offering—for not permitting—union-  
 represented employees to have appreciation day off was because the unions failed to accede to  
 the Respondent’s will and make midterm changes to the contract requested in the past. The  
 20 Respondent has failed to demonstrate that it would have taken this action in the absence of the  
 past protected activities of the unions.

b. The 8(d) defense

25 The Respondent also argues that it cannot be found to have discriminated for not giving  
 union-represented employees the day off because the benefit is not in the collectively-bargained  
 agreements. Obviously, the contracts do not provide for appreciation day, it not having been  
 contemplated at the time the contracts were negotiated. The Respondent contends (R. Br. at 24)  
 that it may

30 rest on its rights under Section 8(d) [of the Act] not to be required “to discuss or  
 agree to any modification of the terms and conditions contained in a contract for a  
 fixed period . . .” See 20 U.S.C. 158(d). Similar to the strategy of Merck’s unions  
 not to consider negative adjustments to their contractual terms and conditions of  
 35 employment until negotiations for new agreements were underway, the Company’s  
 strategy was to wait until negotiations to consider proposing additional days off.

40 Doubling down on this view, the Respondent devotes an entire subsection of its brief (R.  
 Br. at 29–30) to the argument that Section 8(d) provides “a statutory right” not to bargain over the  
 appreciation day benefit and that

45 to find a Section 8(a)(3) violation based on an employer’s refusal to discuss a mid-  
 term modification would essentially read Section 8(d) out of the Act. An employer  
 either has a right under Section 8(d) to rest on its contractual rights or it does not.

50 The Respondent’s contention is wrong. Section 8(d) of the Act, by its terms, defines what  
 it means to “bargain collectively,” the refusal to do so being an unfair labor practice pursuant to  
 Section 8(a)(5) of the Act. But nothing in Section 8(d) or Section 8(a)(5) speaks to whether an  
 employer’s actions violate Section 8(a)(3)—which is what is at issue here—or whether the  
 employer is acting “by discrimination in regard to . . . any term or condition of employment to  
 encourage or discourage membership in any labor organization.” The Respondent’s contention

that Section 8(d) immunizes it from discrimination claims is without support in law or logic. Employees working under a collective-bargaining agreement can be discriminated against without regard to whether an employer's actions also violate a bargaining obligation, or, for that matter, contractual obligations. The statutory duty to bargain and the statutory duty not to discriminate are distinct and independent obligations under the Act.<sup>12</sup>

I note that under the Respondent's theory of 8(a)(5) and 8(d) immunity for discriminatory conduct, an employer would be free to announce to employees that, for the express purpose of encouraging union-represented employees to decertify their unions, it will provide \$1000 to each of its unorganized employees, and not to any of its union-represented employees working under a collective-bargaining agreement. The difference between this hypothetical case and Merck's actions is one of degree not kind. Both cases turn on an assessment of the motives for not providing the benefit to union-represented employees. In both cases a violation of 8(a)(3) is the correct conclusion if the employers' actions were unlawfully motivated. The existence of a contract does not shield the employer from liability for antiunion discrimination.

Critical to its error is Merck's assumption of equivalence between the unions' past refusal to accede to requests for mid-contract changes, and Merck's refusal to offer the appreciation day. The comparison is specious, and goes to the heart of Merck's misreading of its obligations under the Act. Respondent's suggestion of "tit-for-tat" does not permit it to discriminate. What we have here is a decision to exclude union-represented employees from a day off offered to all other employees *because* of their unions' previous lawful bargaining conduct. Section 8(a)(3) proscribes an employer from making discriminatory decisions about employee terms and conditions that are motivated by employees' union affiliation. By contrast, the union conduct for

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<sup>12</sup>While uncommon, instances of a discriminatory application of benefits by an employer during a collective-bargaining agreement that do not violate the Section 8(a)(5) bargaining obligation do arise. See, e.g., *Reebie Storage and Moving Co.*, 313 NLRB 510 (1993) (employer did not violate 8(a)(5) by failing to apply contract to all eligible unit members but only to union members, but "identical" conduct violated Section 8(a)(3) based on unlawful discrimination of providing greater remuneration and superior benefits to union employees than to nonunion employees); enft. denied on other grounds 44 F.3d 605 (7th Cir. 1995); *Esmark, Inc.*, 315 NLRB 763 (1994) (Board does not find factual basis to pierce veil and hold parent of employer liable for 8(a)(5) bargaining violation for abrogation of contract but finds parent liable under 8(a)(3) for same sham closing and reopening of facility). More commonly, but also illustrative of the point, are cases in which both an 8(a)(5) and an 8(a)(3) violation is found based on the same or similar conduct, but the violations are separately analyzed and independent of one another. See, e.g., *Covanta Energy Corp.*, 356 NLRB 706 (2011) (elimination of corporate bonus and recommended annual wage increase separately analyzed and independently found to be violation of 8(a)(3) and 8(a)(5)); *Phelps Dodge Mining Co.*, 308 NLRB 985 (1992) (separate analysis of 8(a)(3) and 8(a)(5)), enft. denied 22 F.3d 1493 (10th Cir. 1994). Alternatively, sometimes the Board finds it unnecessary to reach an 8(a)(3) allegation because, having found the same conduct to have been an 8(a)(5) violation, an additional violation would not materially affect the remedy. See, e.g., *Alamo Rent-A-Car*, 362 NLRB No. 135, slip op. at 3 fn. 8 (2015), 831 F.3d 534 (D.C. Cir. 2016); *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1007 fn. 4 (1996). And vice-versa. See, e.g., *Advanced Life Systems*, 364 NLRB No. 117, slip op. at 3 fn. 8 (2016) (Board does not reach 8(a)(5), because, having found the same conduct to have been an 8(a)(3), additional violation would not materially affect the remedy. *Sutter Roseville Medical Center*, 348 NLRB 637, 637 fn. 7 (2006) (same). But in no case does the Board hold that the lack of finding of an 8(a)(5) violation precludes the finding of an 8(a)(3) violation.

which Merck is retaliating is free of any suggestion of discrimination, or even any statutory basis for condemning such discrimination against an employer were it proved.

5 Whether or not the General Counsel should have or could have mounted an 8(a)(5) case against Merck does not implicate the issue of whether the Respondent engaged in unlawfully motivated discrimination by refusing to provide the day to employees. Indeed, the Respondent concedes as much by agreeing (R. Br. at 18; R. Exh. 1 at 3), correctly, that *Wright Line* and its assessment of the Respondent's motivation is the appropriate basis for deciding this case.

10 In short, employers are not required to engage in mid-contract bargaining (over matters waived in a collectively-bargained agreements). But an employer cannot refuse to do so for unlawful reasons, in this case, in admitted retaliation for a union's previous bargaining conduct.<sup>13</sup>

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<sup>13</sup>Respondent's position is meritless without regard to its premise that it had no duty to bargain about appreciation day and did not violate the Act by refusing to bargain about this new appreciation day. However, I note that even this premise is in question and unproven. No bargaining violation is alleged, but Merck's assumption that it could not have been is far from certain. It rests on the untested and nonevident claim that because the unions' contracts with Merck contain other holidays, the unions have clearly and unmistakably waived the right to bargain about appreciation day (which is not a holiday in the contract). However, waiver is not lightly inferred and must be "clear and unmistakable." See *Metropolitan Edison v. NLRB*, 460 U.S. 693, 708 (1983). The party asserting waiver must establish that the parties "unequivocally and specifically express[ed] their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007). As the Board explained in *Empire Pacific Industries*, 257 NLRB 1425, 1425 (1981):

As further set forth in *B. F. Goodrich*, an employer is under a duty to bargain during the existence of a collective-bargaining agreement concerning any mandatory subject of bargaining which has not been specifically covered in the contract and which the union has not clearly and unmistakably waived. [Footnote omitted.] Thus, where an employer grants a benefit to a group of unrepresented employees, if the benefit is a mandatory subject of bargaining which is not specifically covered by the represented employees' collective-bargaining agreement and has not been clearly and unmistakably waived by the union, the employer is obligated to bargain with the union concerning the implementation of this benefit for the represented employees. In such a situation, the failure to bargain in good faith with the union over the benefit granted constitutes a violation of Section 8(a)(5) and (1) of the Act. *L.M. Berry and Company*, 254 NLRB 42 (1981) and *B. F. Goodrich, supra*. Furthermore, implementing such a benefit for unrepresented employees while refusing to bargain with the union over the benefit is also a violation of Section 8(a)(1).

See also *B.F. Goodrich*, 195 NLRB at 915 ("As found by the Trial Examiner, the Union did not waive its right to be consulted about the institution of this type of benefit during the parties' negotiation of the existing collective-bargaining agreement. By thereafter instituting the plan for its unorganized employees while unlawfully refusing to bargain with the Union as the statutory representative of its warehouse employees, Respondent deprived the latter employees of their right to bargain collectively with respect to obtaining this additional benefit. As such conduct interferes with, restrains, and coerces the unit employees in the exercise of their right to bargain collectively through representatives of their own choosing, we conclude that Respondent thereby further violated Section 8(a)(1)").

C. The allegations relied upon to find the violation are closely-related to the pleadings and fully litigated

5 While the General Counsel argues on brief (as I have found) “that even Killen’s own  
 version of his conversation with [union] officials demonstrates that Merck’s decision to exclude  
 was unlawfully motivated” (GC Br. at 23 fn. 12) (citation omitted), I recognize that the General  
 Counsel chiefly argued that the “labor troubles” at Rahway and West Point were the motivation  
 for the Respondent’s unlawful conduct. This was based on the alleged comments of Killen to  
 Vallo and Little that I have not credited. More formally, the complaint (GC Exh. 1(u) at para. 9)  
 10 attributed Merck’s actions generally to “concerted activities” of employees represented by the  
 charging party unions, an allegation that covers Zingales’ credited admission of Merck’s  
 motivation for excluding union employees from appreciation day, which Killen then conveyed to  
 Vallo. While the credited motivation is different from that primarily advanced by the General  
 Counsel at trial, it is within the scope of the pled allegation. (See GC Exh. 1(u) at para. 9). Thus,  
 15 there is no due process issue, as the complaint alleged, and, indeed, the trial focused on whether  
 the Respondent’s motivation for its failure to provide union-represented employees with the  
 appreciation day violated Section 8(a)(3) of the Act. That is to say, the finding of unlawful  
 motivation “is closely connected to the subject matter of the complaint and has been fully  
 litigated.” *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir.  
 20 1990); *Casino Ready Mix, Inc.*, 335 NLRB 463, 464 (2001), enfd. 321 F.3d 1190 (D.C. Cir.  
 2003). And that is particularly so here, where “the finding of a violation is established by  
 testimonial admissions of the Respondent’s own witnesses.” *Id.* The Respondent, on direct  
 examination of its own witness, supplied the answer to the question of the motive for its actions  
 and proved the unlawful motivation. There was no objection to the relevant evidence; indeed, it  
 25 was repeated and reaffirmed on cross-examination (Tr. 265) and reasserted in the Respondent’s  
 brief. See R. Br. at 13-14. It is no defense to an allegation of unlawfully motivated conduct to  
 admit to a (slightly) different unlawful motive for the conduct.

30 I find that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily failing  
 to provide appreciation day to union-represented employees.

## II. Section 8(a)(1)

35 The Board will find a supervisory statement to violate Section 8(a)(1) of the Act where it  
 “would reasonably tend to interfere with, threaten, or coerce employees in the exercise of their  
 rights under Section 7 of the Act.” *Waste Stream Management*, 315 NLRB 1099, 1100 (1994).

40 It is well-settled that in evaluating the remarks, the Board does not consider either the  
 motivation behind the remarks or their actual effect. *Miller Electric Pump & Plumbing*, 334 NLRB  
 824, 825 (2001); *Joy Recovery Technology Corp.*, 320 NLRB 356, 365 (1995), enfd. 134 F.3d  
 1307 (7th Cir. 1998). Rather, “the basic test for evaluating whether there has been a violation of  
 Section 8(a)(1) is an objective test, i.e., whether the conduct in question would reasonably have a  
 tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights,  
 45 and not a subjective test having to do with whether the employee in question *was actually*  
*intimidated.*” *Multi-Ad Services*, 331 NLRB 1226, 1227–1228 (2000) (Board’s emphasis), enfd.  
 255 F.3d 363 (7th Cir. 2001).

50 Killen’s explanation to Vallo about why Merck refused to provide the union employees with  
 appreciation day was, by all evidence, offered in good faith, without his endorsement, and in an  
 effort to answer Vallo’s questions about Merck’s motives for a decision with which Killen

disagreed. It might seem counterintuitive to condemn as a separate violation of the Act a manager’s frank discussion with a union representative about an employer’s motives for an adverse decision, all the more so when it reveals an otherwise hidden and unlawful motive. Yet, Killen’s intentions aside, as they must be put, the message would have reasonable tendency to interfere with Vallo’s protected activity. Specifically, his decisionmaking in his representative capacity when next approached by management seeking midterm concessions. His participation as local union president is core Section 7 activity, and there is a reasonable tendency that informing an employee that these decisions have led to retaliation against bargaining unit members will interfere, threaten, and coerce. I recognize that it does not appear that Vallo (or Little) recalls Killen saying this—they testified to a different allegedly unlawful explanation by Killen—but under the objective test employed by the Board, that is not the relevant inquiry. I believe Killen. I believe he said it and accurately reported what he was told by Zingales. In doing so, he violated the Act. *Alamo Rent-A-Car*, 362 NLRB No. 135, slip op. at 2 fn. 3 (managers’ statements to unit employees that they were losing STD benefits “because of their union contract” but that nonunion employees would retain a form of the benefit violates 8(a)(1)); *Goya Foods of Florida*, 347 NLRB 1118, 1131 (2006) (comment that employees would be unable to participate in the company’s pension plan if they were union members violates 8(a)(1)).<sup>14</sup>

**CONCLUSIONS OF LAW**

1. The Respondent, Merck, Sharp & Dohme Corp., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily denying union-represented employees a paid day off in retaliation for union activity protected by the Act.
3. The Respondent violated Section 8(a)(1) of the Act by informing employees that the Respondent was denying union-represented employees a paid day off in retaliation for union activity protected by the Act.
4. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

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<sup>14</sup>While Killen’s statement differed from the one alleged by the General Counsel, it occurred in the same time frame, concerned the same subject (i.e., the Respondent’s motive for excluding union-represented employees from appreciation day), was made by the same supervisor to the same union representative, and came into evidence during Killen’s direct testimony through his admission. The matter “is closely connected to the subject matter of the complaint and has been fully litigated.” *Pergament United Sales, Inc.*, 296 NLRB at 334; *Casino Ready Mix, Inc.*, 335 NLRB at 464.

**REMEDY**

5           Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

10           The Respondent shall make whole the union-represented employees for any losses of earnings and other benefits they suffered as a result of its discriminatory denial to them of the paid day off known as appreciation day.

15           The make-whole remedy shall be computed in accordance with *Ogle Protective Service*, 183 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), the Respondent shall compensate any employees adversely affected by the unlawful conduct for the adverse tax consequences, if any, of receiving lump sum backpay awards, and in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the  
20           Respondent shall, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, file with the Regional Director for Region 6 a report allocating backpay to the appropriate calendar year for each employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

25           The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted at all of the Respondent's facilities employing union-represented employees who were denied appreciation day, and at such facilities shall be posted wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices  
30           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. In the event that, during the pendency of these proceedings the Respondent has gone out of business or closed a 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  
35           employees employed by the Respondent at any time since September 4, 2015. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 6 of the Board what action it will take with respect to this decision.

40           On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>15</sup>

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<sup>15</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

**ORDER**

The Respondent Merck, Sharp & Dohme Corp., Kenilworth, New Jersey, its officers, agents, successors, and assigns, shall

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1. Cease and desist from:
  - (a) Informing employees that it is denying union-represented employees a paid day off in retaliation for union activity protected by the Act.
  - (b) Discriminatorily denying union-represented employees a paid day off in retaliation for union activity protected by the Act.
  - (c) 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 union-represented employees who were denied the paid day off known as appreciation day whole for any losses 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 decision in these cases.
  - (b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
  - (c) Within 14 days after service by the Region, post at its facilities where any union-represented employee was denied the paid day off known as appreciation day copies of the attached notice marked "Appendix."<sup>16</sup> Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of

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<sup>16</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."

5 these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 4, 2015.

- 10 (d) Within 21 days after service by the Region, file with the Regional Director for Region 6 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.

Dated, Washington, D.C. December 20, 2016

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David I. Goldman  
U.S. Administrative Law Judge

**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 tell you that we are denying union-represented employees a paid day off in retaliation for union activity protected by the Act.

WE WILL NOT discriminatorily deny union-represented employees a paid day off in retaliation for union activity protected by the Act.

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 union-represented employees to whom we discriminatorily denied the paid day off known as appreciation day whole, with interest, for any loss of earnings or other benefits suffered as a result of our discrimination against them.

MERCK, SHARP & DOHME CORP.

\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

William S. Moorhead Federal Building, Room 904, Pittsburgh, PA 15222-4111  
(412) 395-4400, Hours: 8:30 a.m. to 5 p.m

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/06-CA-16315](http://www.nlr.gov/case/06-CA-16315) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (612) 802-1770.