

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

MERCK SHARP & DOHME CORP.

and

Case 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 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 22-CA-168483

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

**RESPONDENT MERCK SHARP & DOHME CORPORATION'S REPLY
BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW
JUDGE'S DECISION AND RECOMMENDED ORDER**

I. Introduction

Merck Sharp & Dohme Corp. ("Merck" or the "Company") submits the following Reply Brief in support of its Exceptions to Administrative Law Judge David I. Goldman's (the "ALJ") December 20, 2016 Decision and Recommended Order (the "D&RO"). The Opposition Briefs

from the Charging Parties and Counsel for the General Counsel (the “General Counsel”) do nothing to undermine the Company’s Exceptions or its argument that the ALJ erred in finding Merck in violation of Sections 8(a)(3) and 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §§ 151-169 (the “Act”).

As discussed more fully below, the General Counsel and Charging Parties concede the main legal underpinnings of Merck’s arguments. However, in their zeal to defend the ALJ’s unprecedented decision, both the General Counsel and the Charging Parties resort to mischaracterization, and in some cases, pure misrepresentation, of the record. Finally, in an odd and Kafkaesque twist, the General Counsel and the Charging Parties rely heavily on the lack of “more” record evidence corroborating Mr. Zingales’ testimony about his bargaining strategy to prove that he did not have one. The simple truth is that if the General Counsel had pled and litigated the theory of violation the ALJ adopted, the Company would have had a reason, and the opportunity, to expand what is already a sufficient record in this regard. It is beyond the pale for the General Counsel and the Charging Parties to oppose the Company’s due process arguments, and at the same time, use the fruits of that violation as the basis to uphold the ALJ’s erroneous findings.

II. Argument

A. The General Counsel and Charging Parties Concede the Main Legal and Factual Underpinnings of the Company’s Position.

In their Opposition Briefs, the General Counsel and the Charging Parties concede and/or fail to take issue with the following foundational pillars of the Company’s position:

1. A violation of Section 8(a)(3) requires evidence of anti-union animus, *i.e.*, that the employer operated with an intent or purpose to discourage union membership.
2. The duty to bargain exists throughout the term of a collective bargaining agreement.

3. Section 8(d) of the Act “does not compel either party to agree to a proposal or require the making of a concession . . . [and] the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.”
4. It is unlawful for an employer to unilaterally, *i.e.*, without notice and an opportunity to collectively bargain, grant a benefit to union represented employees.
5. An employer is not obligated under the Act to offer union represented employees the same benefits made available to unrepresented employees, and thus “discrimination” between represented and unrepresented employees is only unlawful if there is proof that the decision was taken “in order to discourage support for the union.”
6. The ALJ is not permitted to pass on the desirability of a party’s substantive proposals or dictate a party’s bargaining strategy.
7. There is nothing inherently unlawful about a “tit-for-tat” bargaining strategy.
8. An employer is entitled to maintain and execute a bargaining strategy to deal with multiple mature union relationships that differentiates between how it treats employees who are and are not covered by collective bargaining agreements.
9. There is no record evidence of any union organizing activity at the Company’s facilities or first contract bargaining with the Company’s unions during the time in question.
10. The *R.E.C. Corp.*, 296 NLRB 1293 (1989) decision that the ALJ principally relies upon to find Merck’s consideration of the unions’ prior bargaining positions on mid-term modifications to be unlawful, was not decided under Section 8(a)(3), is not analogous to the facts in this case and has never been cited in any subsequent decision to support the kind of theory articulated by the ALJ in his D&RO.
11. The General Counsel failed to prove the case that he pled and litigated, *i.e.*, that the Company’s decision not to grant the one time paid day off to employees covered by collective bargaining agreements was taken to punish two local unions which engaged in protected activity, specifically, grievance filing, requesting information during collective bargaining negotiations and advocating their views on the meaning of recently negotiated contract terms.

12. The record is devoid of any evidence that the Company's decision not to provide the paid day off to employees covered by a collective bargaining agreement was motivated by a desire to discourage union membership.
13. Mr. Vallo denied hearing the statements from Mr. Killen that the ALJ found to be coercive and an independent violation of Section 8(a)(1).

In light of these concessions, the General Counsel's and Charging Parties' arguments in support of the ALJ's decision fall flat. As established in the Company's Brief in Support of its exceptions, the ALJ's unprecedented decision is not supported by the record evidence and is wrong as a matter of law.

B. The Charging Parties Egregiously Mischaracterize and in Some Cases Misrepresent the Record.

There is no question that a party is entitled to vigorously advocate for its position. However, that advocacy, to be legitimate, must be tethered to the record evidence in the case. On multiple occasions, the General Counsel's and Charging Parties' Opposition arguments rely on facts that are not of record, or seriously mischaracterize the record, to support their position.

These tactics are most glaringly apparent in the Charging Parties' assertion that the Company's decision not to provide the one time paid day off to employees covered by a collective bargaining agreement departed from the Company's settled past practice of unilaterally, and "on its own initiative," providing similar benefits to all of its employees, including those covered by collective bargaining agreements. (*See* Charging Parties' Brief at pp. 4-5.)¹ Indeed, the Charging Parties go so far as to allege that "Merck had *always* offered any Company-wide additional day off or other similar benefit, such as stock options, to covered and non-covered employees alike. Now for the first time in its history, it excluded covered employees from an additional day off." (*Id.* at p. 18) (emphasis in original). The Charging

¹ *See* Section II.B. of the Charging Parties' Brief at pp. 4-5, noting instances in 1990 and 1991 involving stock grants; an instance in 1999 involving a one-time paid day off; an instance in 2006 involving Martin Luther King day; and another instance in 2009 involving Martin Luther King Day.

Parties grossly misrepresent the actual record in this regard, and use their invented facts to make the argument that the Company's articulated reason for not granting the paid day off is "a deviation from its past practice" and therefore a "pretext." From that, the Charging Parties argue that evidence of anti-union animus can be presumed, and the ALJ's failure to identify any actual anti-union animus can be disregarded.

The fact of the matter is that the record contains no evidence to support a conclusion that anything close to a legally cognizable past practice existed in this case. Even if one were to credit the Charging Parties' version of prior benefit grants, they amount at best to four (4) distinct and different situations (two of which are unsupported by any competent testimony) over the course of twenty-six (26) years.² Much more than a few isolated and chronologically separate occasions are required to establish a legally cognizable past practice. *See Exxon Shipping Co.*, 291 NLRB 489 (1998) Here, there is no record evidence of a past practice, and the Charging Parties' outrageous effort to establish otherwise rests entirely on a record that does not exist.

² The actual record provides the following with regard to each instance the Charging Parties cite: (1) there is no competent evidence regarding the circumstances of the 1990 and 1991 stock option grants, as the only testimony came from Mr. Vallo who was not the union president at the time and was not in a position to know if any collective bargaining took place (Tr. Vol. I at pp. 61-62); (2) the record evidence regarding the circumstances of the January 2, 1999 day off also comes from Mr. Vallo who testified that he was not in office at the time and was "not aware" of whether the union bargained for the day (Tr. Vol. I, pp. 36:25-37:1-11); (3) the record evidence involving the 2006 Martin Luther King day off demonstrates that, unlike the 2015 "Appreciation Day," it had been the subject of formal collective bargaining negotiations through the Merck Inter-Union Council for many years before the Company granted the day (Tr. Vol. I at pp. 65:1-66:11); and (4) the record evidence regarding the Company's grant of the 2009 Martin Luther King day off shows that it was made pursuant to individual agreements with each of the various unions "subject to all relevant contract provisions and with the understanding that this day is being added on a one time, non-precedent basis." (Exhibits R-6 and R-8). The ALJ himself recognized that the instances that the Charging Parties point to are not "evidence of an official past practice...." D&RO at p.14, n.11.

C. The General Counsel and the Charging Parties Cannot Rely on the Lack of More Record Evidence from Merck Regarding Its Bargaining Strategy When the Case the General Counsel Pled and Litigated was Focused on Specific “Labor Problems” at the Rahway and West Point Plants.

Both General Counsel and the Charging Parties focus their Opposition Briefs on the notion that the record does not contain enough support for Merck’s position that its decision not to grant the one time paid day off to employees covered by a collective bargaining agreement was part of Mr. Zingales’ bargaining strategy not to deal with the Company’s unions as a group or provide additional benefits to employees covered by collective bargaining agreements during the term of those agreements. This argument fails for two reasons: (1) it is at odds with the record evidence supporting the existence of a bargaining strategy, and (2) the lack of more evidence on the point is a direct result of the fact that the case the General Counsel pled and litigated was not focused on that issue.

As for the first reason, the record is replete with evidence indicating the existence of Mr. Zingales’ company-wide strategy for dealing with Merck’s nine (9) separate labor unions spread across its multiple United States facilities. Examples include:

1. Mr. Zingales’ testimony on direct examination. (Tr. Vol. I at pp. 176:18-178:22)
2. Mr. Zingales’ testimony on cross-examination. (Tr. Vol. I at pp. 195-196; pp. 197-198; pp. 199-204)
3. Mr. Frasier’s written communications to employees. (Jt. Ex. 3)
4. Ms. Goggin’s written communications to employees. (Jt. Ex. 5)
5. Mr. Geller’s testimony that he deferred to Mr. Zingales on union issues. (Tr. Vol. I at p. 153:14-21; 155:5-156:3)
6. Mr. Killen’s testimony on direct examination. (Tr. Vol. I at pp. 30:8-31:22)
7. Mr. Killen’s testimony on cross-examination. (Tr. Vol. I at pp. 58:4-61:8)

The record contains no contradictory testimonial or documentary evidence from the General Counsel's witnesses. In fact, the only record "evidence" the General Counsel and the Charging Parties point to is Mr. Zingales' testimony that he did not discuss with Mr. Geller the specific collective bargaining considerations underlying his view that it would not be prudent to grant the paid day off to employees covered by a collective bargaining agreement. According to the General Counsel and the Charging Parties, this testimony demonstrates that Mr. Zingales' testimony about his bargaining strategy, articulated "for the first time" during the hearing, was untrue. Again, the General counsel and the Charging Parties blatantly mischaracterize the record and draw tortured and unwarranted inferences from the evidence.

The actual record demonstrates that Mr. Geller deferred to Mr. Zingales, the U.S. Head of Labor Relations, on labor strategy issues. (Tr. Vol. I at p. 153:14-21; 155:5-156:3) Mr. Geller's responsibility was limited to development of the paid day off, and he deferred to others on the question of which groups of employees would or would not be receiving it. (*Id.*; Tr. Vol. I at pp. 144:10-20; p. 149:9-23) Responsibility for determining whether union represented employees in the United States should receive the day off rested with Mr. Zingales, who determined that they should not. (Tr. Vol. I at p. 155:15-24) Mr. Zingales spoke with Mr. Geller and informed him that "employees that are covered under the CBA are covered by a contract with stipulations and, again, you can't do this unilaterally, and it should not apply to those under collective bargaining agreement." (Tr. Vol. I at 153). Mr. Geller, and the other Merck executives involved, took Mr. Zingales' guidance and advice on the issue. (*Id.*) Under these circumstances, it is utterly unremarkable that Mr. Zingales did not discuss the underlying motivations and details of his bargaining strategy with Mr. Geller who had no need or reason to know about them.³

³ Mr. Zingales' view, which he testified he did not share with Mr. Geller, was as follows: "I don't think that coming off of a significant labor negotiations in Elkton and then Rahway – they are long, drawn out process and difficult

The record also establishes that both Mr. Frazier's and Ms. Goggin's written communications to Company employees noted that the decision was driven by the terms of existing collective bargaining agreements, all of which had provisions covering the topic of paid days off.⁴ These communications quite clearly evidence the existence of a collective bargaining strategy to avoid mid-term improvements to the terms of unexpired collective bargaining agreements. Finally, Mr. Killen testified directly that during a conference call in August, 2015, Mr. Zingales discussed the strategic bargaining rationale for the decision, and gave examples of past mid-term bargaining positions the unions had taken which informed the Company's own bargaining position.⁵ (Tr. Vol. II at pp. 30-31, 58, 62) The call was contemporaneous with the decision not to grant the day off to employees covered by a collective bargaining agreement and many months before the hearing. It is simply untrue to say that "the first time" Mr. Zingales discussed his bargaining strategy was during his testimony at the hearing.

With regard to the second reason, the General Counsel and Charging Party, rather than dealing head on with this record, argue that the Company must produce more corroborating evidence to prove the truth of Mr. Zingales' testimony about his bargaining strategy. They make this argument despite the fact that none of the parties to the hearing had any notice that the existence and legality of Mr. Zingales' bargaining strategy would be an issue in the case. There is no dispute that the focus of the hearing was on whether the Company made the decision not to grant the day off to the Charging Parties to punish them for engaging in specific union activity at the Company's Rahway and West Point facilities. Neither the General Counsel nor the ALJ ever

negotiations and then leading up to a significant negotiation in West Point that it was a good bargaining strategy to give away [a] holiday." (Tr. Vol. I at 178)

⁴ The IAM Agreement contained provisions for paid holidays, but also had a "most favored nations" clause which required that bargaining unit employees receive the same benefit improvements granted to other Company employees. Consistent with the "most favored nations" clause, IAM represented employees received the paid day off despite being "covered by a collective bargaining agreement."

⁵ The ALJ found Mr. Killen to be a credible witness, and neither the General Counsel nor the Union's took any exception to the ALJ's conclusion in this regard.

indicated during the pre-hearing procedures, or at the hearing itself, that the case would be focused on the legality of Mr. Zingales' consideration of prior union bargaining positions. The existence, genesis and contours of Mr. Zingales' bargaining strategy was not something that any of the parties could have anticipated would be challenged or require the production of multiple corroborating witnesses or documents.⁶ It is fundamentally unfair, and a clear violation of due process, to use the lack of "more" evidence on a topic that no party had any notice would be an issue in the case as a basis to conclude that the Company's explanation for its action is "untrue."⁷ The General Counsel's and the Charging Party's approach also has the effect of shifting the ultimate burden of proof away from the General Counsel and onto the Company.

As demonstrated in the Company's Brief in Support of its Exceptions, Mr. Zingales' differential treatment of employees that were and were not covered by a collective bargaining agreements was driven by his strategy to avoid bargaining with Merck's unions as a group and granting mid-term improvements to the terms of unexpired collective bargaining agreements unless required to do so by the terms of the agreements themselves. Mr. Zingales' strategy is sanctioned under Section 8(d) of the Act, and one that he testified without contradiction was, in his view, best suited to advance the Company's overall labor relations interests.

⁶ This is particularly true given that the General Counsel had an Affidavit from Mr. Killen in which he detailed Mr. Zingales' discussion during the August, 2015 conference call and noted Mr. Zingales' reference to his bargaining strategy and his consideration of the unions' prior bargaining position on mid-term modifications. If the General Counsel had concerns about the legality of Mr. Zingales' motivations, he could and should have pled it in his Complaint or argued it during his *prima facie* case. This would have permitted the Company to provide additional witnesses and documents to corroborate Mr. Zingales' testimony.

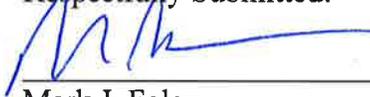
⁷ It seems more than a little odd that the General Counsel and the Charging Parties demand more evidence to establish the existence of a bargaining strategy that they believe is unlawful because it takes into account the unions' prior "protected activity" of resting on their rights under Section 8(d).

Where there is no evidence of anti-union animus, as is the case here, it is well-settled that such differential treatment cannot violate Section 8(a)(3).⁸ See *Sun Transport, Inc.*, 340 NLRB 70 (2003) (citing *Shell Oil*, 77 NLRB 1306 (1948)); *Power Services Co.*, 2006 WL 721474 (NLRB 2006); *B.F. Goodrich*, 195 NLRB 914 (1972). Accordingly, the ALJ's contrary conclusion is wrong.

III. Conclusion

The ALJ's D&RO finds no support in the law or the record in this case. The General Counsel's and the Charging Parties' Opposition Briefs fail to alter that conclusion. For these reasons, and the reasons set forth in its Brief in Support of its Exceptions, the Company respectfully requests that the Amended Complaint be dismissed.

Respectfully Submitted:



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⁸ As discussed in detail in Merck's Brief in Support of Its Exceptions, an employer's consideration of and response to a union's bargaining position is not, *ipso facto*, evidence of unlawful "anti-union animus" under Section 8(a)(3). To hold otherwise would do violence to the Act's intentional balancing of mutual rights and interests and turn collective bargaining on its head.

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that a true and correct copy of Respondent Merck, Sharp & Dohme Corp.'s **REPLY BRIEF** was served by electronic mail on April 13, 2017, upon:

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Executed on April 13, 2017

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