*United States Government*
***National Labor Relations Board***
**OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

DATE: March 28, 2016

TO: Margaret J. Diaz, Regional Director
Region 12

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Argos Ready Mix, LLC
Case 12-CA-158467

524-0150-2500-0000
524-5029-3767-0000
524-6708-6200-0000
524-6710-5000-0000

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(3) and (1) of the Act by increasing its safety bonus for nonunion employees but not for newly unionized employees. We conclude that the Employer did violate Section 8(a)(3) and (1) because the evidence demonstrates that it acted with an unlawful motive.

## FACTS

Argos Ready Mix, LLC ("the Employer") operates a regional ready mix concrete company with sixty-nine facilities, including one in Naples, Florida and one in Fort Myers, Florida that are about forty miles apart. In March 2015,[1] the Employer implemented a new pay-by-load compensation plan for all its truck drivers that included a $25 weekly safety bonus incentive plan.

In April, Construction and Craftworkers Local Union 1652 ("the Union"), affiliated with the Laborers International Union of North America, began its efforts to organize the 15 drivers working at the Employer's Naples facility. On April 13, the Employer issued a memorandum from its Florida Area Manager to all of its Florida employees regarding "Union Activity" that discussed union authorization cards and urged employees not to sign anything unless they knew both sides of the story. The Employer's memorandum stated, among other things, that the Union's authorization card was a "little card" but could be "big trouble."

[1] All dates are in 2015 unless otherwise indicated.

The Employer asserts that in May 2015, its drivers at various locations throughout Florida approached their local managers with requests for additional compensation for attending mandatory monthly safety meetings. These concerns were shared with the Florida Area Manager during a management call in late May 2015.

On June 8, the Union filed a petition seeking to represent the drivers at the Employer's Naples facility, and the Region scheduled an election for June 26. In the weeks leading up to the election, the Employer held multiple meetings with its Naples employees about the Union. At one of these meetings, the Employer's Human Resources Director and its Naples Operations Manager told employees that it was not going to be able to hire any more drivers or make any other changes to the pay system at Naples because of the Union campaign.[2] On June 26, the Union won the election.[3]

On June 30, the Employer's Florida Area Manager sent an email to the Employer's Human Resources staff. In the text of the email, the Area Manager asked the Employer's time and attendance specialist whether it was possible to maintain the $25 per week safety bonus for the Naples drivers and implement a $30 per week safety bonus for all other Florida employees. The Area Manager also attached a draft of the notice that would announce the change to the employees. The draft notice stated that the Employer would continue to evaluate the weekly results of the pay-by-load system, along with employee input for improvement to the compensation plan. It stated, among other things, that the Employer had heard that employees perceived they were not being paid for safety meetings. The draft notice explained that the pay-by-load system took into consideration the time spent at monthly safety meetings but that as a resolution to the issue, the Employer would increase the safety bonus by $5 per week to a total of $30 per week. The draft notice then stated:

> This change will be effective June 29th for all employees eligible for the Safety Bonus program, with the exception of the Naples RM [ready mix] Drivers. The Naples RM Drivers will remain at the $25 level for weekly Safety Bonus.

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[2] The Region has determined that this statement was an unlawful threat in violation of Section 8(a)(1).

[3] On July 8, the Region certified the Union as the Section 9(a) representative of the Naples ready mix drivers.

On the same day, the Human Resources Manager replied to the Area Manager's email and told him to consider ending the notice with the following text:

> This change will be effective June 29th for all employees eligible for the Safety Bonus program, with the exception of the Naples RM Drivers. Merit or bonuses [sic] increases not negotiated with the Union constitutes "direct dealing" and a unilateral change in working conditions; therefore they will remain at the $25 level.

The Human Resources Director then replied to this email and stated:

> [Florida Area Manager], I love your solution to employees complaint about not being paid for the Safety Meeting. I agree with the way you originally stated it. Although I understand [the Human Resources Manager]'s point, I don't want to use the word Union. Employees will know why.

Later on June 30, the Florida Area Manager distributed the notice, with the original text and without the additional language suggested by the Human Resources Manager. The Employer posted the notice on the bulletin boards in its Florida facilities. The Employer did not communicate with the Union about the increase to the safety bonus.

The Employer stated that it instructed the Naples Operations Manager to explain to Naples drivers, if asked, that it was required to negotiate as part of the collective-bargaining process over any discretionary changes to their compensation. A number of employees stated that they did not have any conversations with managers or supervisors about the change. The Union did not request to bargain about the increase to the safety bonus, but filed the Section 8(a)(3) charge in the current case on August 21 alleging that the increase of the safety bonus for all employees except for the Union-represented employees at the Naples facility was discriminatory.

The Employer asserts that the Florida Area Manager made the change to the safety bonus in consultation with the Human Resources department solely because (b) (6), (b) [redacted] wanted to address concerns raised by numerous drivers and not for any discriminatory reason. Further, it asserts that the Florida Area Manager was specifically advised that the Employer could not unilaterally increase the safety bonus for the Naples drivers as it was obligated to bargain prior to implementation.[4] The Employer also asserts that at the parties' first negotiation session on September 17, it attempted to address the safety bonus issue but the Union representatives attending that meeting said that they did not have authority to negotiate the issue. The

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[4] The Employer has not specified who advised the Florida Area Manager.

Employer stated that it has since reiterated its willingness to negotiate over the increase as part of the bargaining process.

On August 21, the Union filed a separate charge in Case 12-CA-158463 alleging that the Employer violated Section 8(a)(3) by reducing the size of its unionized workforce in Naples while increasing the size of its nonunionized workforce at the nearby Fort Myers facility in retaliation for the Naples drivers' Union support. The Region found that between late June and mid-July the Employer hired three drivers at its Fort Myers facility and no new drivers at its Naples facility. The Employer also increased the use of Fort Myers drivers to service its Naples market, which consistently has more business than the Fort Myers area. In light of these facts, the Region concluded that the Employer violated Section 8(a)(3) as alleged.

## ACTION

We conclude that the Employer violated Section 8(a)(3) and (1) by increasing its safety bonus for nonunion employees but not for newly unionized employees because the evidence demonstrates that the Employer acted with an unlawful motive.

Under *Shell Oil Co.*, an employer is privileged to grant increases in wages and benefits to its unrepresented employees without providing the same increases to its represented employees.[5] However, an employer may exercise that privilege only if it does not have an unlawful motive.[6] The Board has held that where an employer's disparate treatment of represented and unrepresented employees is motivated by anti-union animus, it is unlawful discrimination that violates Section 8(a)(3) and the *Shell Oil Co.* privilege does not apply.[7]

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[5] 77 NLRB 1306, 1310 (1948).

[6] *Id. See, e.g.*, *Sun Transport, Inc.*, 340 NLRB 70, 72 (2003) (finding no anti-union animus and therefore no violation where employer offered lower severance pay to its union-represented employees in negotiations around the time of divestiture than to its unrepresented employees); *United States Postal Service*, 261 NLRB 505, 507 (1982) (absent evidence of animus or of contemporaneous unlawful conduct, the employer had no duty to notify the union of the wage increases to non-bargaining unit employees, or to bargain with the union about, or grant, the wage increases to unit employees).

[7] *KAG-West, LLC*, 362 NLRB No. 121, slip op. at 2 (June 16, 2015); *Arc Bridges, Inc.*, 362 NLRB No. 56, slip op. at 2-3 (Mar. 31, 2015); *Phelps Dodge Mining Co.,* 308 NLRB 985, 995 (1992), *enforcement denied*, 22 F.3d 1493 (10th Cir. 1994); *South Shore Hospital*, 245 NLRB 848, 860-62 (1979), *enforced*, 630 F.2d 40 (1st Cir. 1980).

In determining whether disparate treatment is unlawfully motivated, the Board applies the test set forth in *Wright Line*.[8] Under *Wright Line*, the General Counsel bears the initial burden of establishing by a preponderance of the evidence that protected activity was a motivating factor for the adverse employment action.[9] If the General Counsel makes a showing of discriminatory motivation by proving the existence of protected activity, the employer's knowledge of the activity, and animus toward the protected activity, the burden of persuasion shifts to the employer to show that it would have taken the same action even in the absence of the employee's protected activity.[10]

Here, the evidence demonstrates that the Employer's implementation of an increased safety bonus for unrepresented employees but not for newly represented employees at its Naples facility was unlawfully motivated. The Employer does not dispute that its Naples employees engaged in Union activity, or that it was aware of that Union activity. Moreover, there are several indicia of the Employer's anti-Union motive. Initially, the presence of other unfair labor practices and the timing of the bonus announcement provide substantial evidence of animus. In the critical period before the Union election, the Employer is alleged to have violated Section 8(a)(1) when its Human Resources Director and Naples Operations Manager unlawfully threatened during employee meetings that the Employer would not make any changes to compensation or hire new employees at Naples because of their Union activities.[11] The Employer's withholding of the increased safety bonus from those

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[8] 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). *See also KAG-West, LLC*, 362 NLRB No. 121, slip op. at 2; *Arc Bridges, Inc.*, 362 NLRB No. 56, slip op. at 2-3.

[9] *Arc Bridges, Inc.,* 362 NLRB No. 56, slip op. at 3.

[10] *Id.*

[11] *See e.g.*, *Richardson Bros. Co.*, 312 NLRB 534, 534 (1993) (finding employer violated Section 8(a)(3) by refusing to rehire union activist where its anti-union motive was established by, among other things, presence of other unfair labor practices, including unlawful threats); *Peabody Coal Co.*, 265 NLRB 93, 99-100 (1982) (finding employer had anti-union motive for withholding various benefits from employees where its mine superintendent had history of violating Section 8(a)(1) and he told unit employee that new benefits were withheld because the employees were "trying to get into the Union"), *enforced in relevant in part*, 725 F.2d 357, 366 (6th Cir. 1984). *See also Arc Bridges, Inc.,* 362 NLRB No. 56, slip op. at 3 (finding employer had anti-union motive for denying represented employees wage increase based, in

employees is the precise implementation of that unlawful threat. The timing of the Employer's decision to grant an increased bonus only to its unrepresented employees and immediate implementation, just four days after the Union election, further supports a finding of animus towards the Naples employees for selecting a Union.[12] Moreover, the Employer also implemented the second part of its unlawful, pre-election threat by refusing to hire employees at its newly Unionized facility. Although the Employer has a higher volume of business at its Naples facility, it is hiring drivers at the nearby, non-union Fort Myers facility and using those drivers to perform work at Naples. Thus, this alleged Section 8(a)(3) violation is further evidence of the Employer's anti-Union motive for its disparate treatment of the Naples drivers.

Second, the process by which the Employer decided to communicate its new safety bonus policy indicates that the Employer was motivated by anti-Union animus. The Employer's HR Manager advised the Florida Area Manager to explain that the Naples drivers were not getting the increased safety bonus because merit or bonus increases had to be negotiated with the Union. However, the Florida Area Manager rejected that advice. Instead, he decided to follow the advice of the HR Director, who allegedly threatened the unit employees shortly before the election. The HR Director advised the Florida Area Manager to not explain the disparate treatment and stated "[e]mployees will know why." When read in context with the Employer's unlawful, pre-election threat not to make changes to the Naples employees' wages or benefits

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part, on managers' statements blaming union for withholding of wage increase); *Kurdziel Iron of Wauseon*, 327 NLRB 155, 155 (1998) (finding employer violated Section 8(a)(3) by withholding yearly wage increase from unit employees where employer's conduct also violated Section 8(a)(5) and animus finding supported by plant superintendent stating that unit employees would receive routine increase granted to non-union employees if they voted to decertify the union in pending election), *enforced*, 208 F.3d 214 (6th Cir. 2000) (unpublished decision).

[12] *See KAG-West, LLC*, 362 NLRB No. 121, slip op. at 2-3 (following initial announcement that there would be no wage increases due to economic reasons, employer's decision to grant a wage increase to unrepresented employees but not bargaining unit employees shortly before union election and the implementation approximately ten days after employees voted for union representation strongly supported the conclusion that the employer was motivated by anti-union animus). *See generally Masland Industries*, 311 NLRB 184, 197 (1993) ("Timing alone may suggest anti-union animus as a motivating factor in an employer's action.") (*quoting NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984)).

because of their organizing campaign, the HR Director's statement and the Florida Area Manager's decision to follow his advice strongly support the reasonable inference that they intended Unionized employees to understand the denial of the bonus increase was retaliation for selecting the Union.[13] The Employer's lack of explanation in the June 30 notice for why it denied the increase to Unionized employees also stands in stark contrast to the Employer's direct and consistent communication to employees regarding its Union opposition before the election.[14]

Finally, the Employer's anti-Union motive for denying the increased bonus to the Naples drivers is established because the evidence shows that its alleged non-discriminatory reasons for the disparate treatment are a pretext.[15] The Employer asserts that it implemented the safety bonus increase solely in response to employee complaints and only for unrepresented employees because to do otherwise would have violated its good-faith bargaining obligation under the law. However, the Employer's asserted reason for the disparate treatment is undermined by the way it implemented the bonus increase. The Employer could have simply asked the Union's permission to implement the increase for the Unionized employees. If the Union had consented, the Employer could have granted the increase without violating any bargaining obligations.[16] Yet, the Employer did not contact the Union to explore this option.[17]

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[13] *KAG-West, LLC*, 362 NLRB No. 121, slip op. at 3 (relying on the employer's failure to inform unit employees that it would bargain over a wage increase for them when it announced a wage increase for unrepresented employees as evidence of anti-union motive for the disparate treatment).

[14] *Id.* (relying on the difference in the employer's conduct toward the unit employees before and after the election as evidence of anti-union animus; before the election, the employer "took pains to communicate with its employees" about a possible wage increase, and after the election, when it announced a wage increase for unrepresented employees, it said "nothing to reassure [the newly represented] employees that their own opportunity to receive an increase would be the subject of bargaining").

[15] *See, e.g., Lucky Cab Co.,* 360 NLRB No. 43, slip op. at 4 (2014); *Shattuck Denn Mining Corp. v. NLRB*, 362 NLRB 466, 470 (9th Cir. 1966) (where a stated motive is found to be a pretext, the trier of fact may infer that the respondent is seeking to conceal its true, unlawful motive).

[16] *See Arc Bridges, Inc.,* 362 NLRB No. 56, slip op. at 5, n.18 (finding no merit to the employer defense that it had to withhold a wage increase from its unionized employees to avoid violating Section 8(a)(5) because had the employer wanted to give those employees the same increase granted to unrepresented employees, "it could

While the Employer claims that it attempted to talk to the Union about the safety bonus at the first negotiation session, that occurred almost three months after implementation and one month after the Union had filed its charge. Moreover, as stated above, the Employer had the opportunity to explain in the notice announcing the change that it was not implementing the increase for represented employees because of its bargaining obligation. Instead, the Employer intentionally decided to leave the unit employees with the impression that they were denied the increase because they had selected the Union as their collective-bargaining representative. In short, the pretextual reasons the Employer provided for its conduct not only support a finding of anti-Union motive, but also undermine any potential defense by the Employer that it would have taken the same action absent its employees' Union activity.[18]

The substantial evidence of animus here and the Employer's inability to meet its *Wright Line* burden demonstrate that the Employer's disparate treatment of represented and unrepresented employees was unlawfully motivated. Therefore, the Employer may not rely on the *Shell Oil Co.* privilege, and its withholding of the safety bonus increase from its represented employees violates the Act.[19]

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have simply asked the union for permission"); *KAG-West, LLC*, 358 NLRB 1715, 1718-19 (2012) (ALJ rejecting employer's *Wright Line* defense that it was required to withhold its wage increase from union employees because it was required to bargain with the union), *incorporated by* 362 NLRB No. 121, slip op. at 3 & n.10 (agreeing with ALJ that employer did not meet its rebuttal burden under *Wright Line*).

[17] *Cf. Shell Oil Co.*, 77 NLRB at 1309 (employer notified the union of its desire to make the beneficial change that it implemented with respect to its unorganized employees, but rejected condition that union put on giving consent to the change).

[18] *See, e.g., Wright Line*, 251 NLRB at 1090-91 (first relying, in part, on evidence of disparate treatment to find the General Counsel had satisfied his initial burden of showing that the employer had an anti-union motive, and then relying on the same evidence to reject the employer's asserted defense).

[19] Thus, the authorities relied on by the Employer, such as *Winn-Dixie Raleigh, Inc.,* 267 NLRB 231, 235-36 (1983), *Empire Pacific Industries, Inc.* 257 NLRB 1425, 1426 (1981), and *Sands Casino Resort Bethlehem*, Case 04-CA-064792, Advice Memorandum dated March 13, 2012, are inapposite because in those cases, there was no indication that the employer was motivated by anti-union animus.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(3) and (1) when it discriminatorily increased its safety bonus by five dollars per week for its unrepresented employees but withheld the increase from its Unionized employees.

/s/
B.J.K.

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