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

Advice Memorandum

DATE: September 18, 2015

TO: Olivia Garcia, Regional Director
Region 21

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

SUBJECT: Tesoro Refining & Marketing Co.
Case 21-CA-146968

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The Region submitted this case for advice as to whether the Employer violated Section 8(a)(1) and (3) of the Act by unlawfully denying striking employees a contractual Incentive Compensation Program ("ICP") bonus.[1] We conclude that the Employer violated the Act under the Board's *Texaco* framework, given that the ICP bonus had accrued, the Employer denied it on the basis of the strike, and the Employer has not presented a legitimate and substantial business justification for its denial. We further conclude, in the alternative, that the Employer's denial of the ICP bonus was "inherently destructive" of employees' Section 7 rights, and thus was unlawful regardless of any proffered business justification. We also conclude that the Employer independently violated Section 8(a)(1) by threatening employees that they would lose the ICP bonus if they did not abandon the strike. Finally, we conclude that the Employer violated Section 8(a)(5) by modifying the ICP contract, because it cannot establish a "sound arguable basis" for its interpretation of the contract, and even if it can, the Employer reached its interpretation in bad faith.[2]

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[1] Region 19 is investigating a parallel charge stemming from the same underlying labor dispute in Case 19-CA-147090, involving the Employer's denial of the ICP bonus to striking employees at its facility in Anacortes, Washington. Region 19 will continue processing that charge following the Division of Advice's determination in the present case.

[2] Although the Region did not submit the Section 8(a)(5) allegation for advice, we address the issue because it is intertwined with the other allegations.

FACTS

The Employer, Tesoro Refining & Marketing Co., operates oil refineries in Alaska, California, Hawaii, North Dakota, Utah, and Washington. The present case involves the Employer's facility in Carson, California, which the Employer took over in 2012 as a successor to British Petroleum. The Union, the United Steelworkers, represents employees at a number of the Employer's facilities, including a unit of about 800 production and maintenance employees at the Carson facility. The parties have historically participated in bargaining through the National Oil Bargaining program, which involves bargaining between the Union (representing all of its local unions) and a designated lead employer (representing all participating industry employers), for industry-wide terms and conditions of employment. Between late 2014 and early 2015, national bargaining took place between the Union and the lead employer, Shell Oil Co.

In addition to the industry-wide terms negotiated on a national level, subsequent bargaining takes place at the local level over additional terms. For more than ten years, the Employer and its predecessors at the Carson facility have participated in a contractual Incentive Compensation Program ("ICP"), which grants employees a year-end bonus as a percentage of their salary based on the Employer's financial performance and the individual employee's work record in the preceding year. The terms of this bonus are memorialized in an ICP Memorandum of Understanding ("ICP contract") that is renewed each year. The 2014 ICP contract specifies that the percentage of the target payout that individual employees receive will be based on their hours worked in the preceding calendar year. The 2014 ICP contract contains the following eligibility provision:

> [T]o be eligible to receive a payment an employee must be on the active payroll and available for work on the date payment is made ("available" for work includes absence due to [short-term disability], Jury Duty, Funeral Leave or other similar short term absence). Employees who retire prior to July 1, 2014 are not eligible to receive a bonus payout.

The parties agree that past practice and the ICP contract permit the Employer to unilaterally set the date on which the ICP bonus is paid, which usually falls in the spring of each year.

On February 1, 2015, upon the expiration of the existing collective-bargaining agreement, the Union called a national strike in support of its ongoing bargaining. Employees at a number of the Employer's facilities joined the national strike as of February 1, including employees at its Carson facility, who are represented by Steelworkers Local 675. The Employer had not paid the 2014 ICP bonus or announced a payment date as of February 1, when the Union went on strike.

On February 3, two days after the employees went on strike at the Carson facility, the Employer sent a letter to employees stating it was "disappointed that your union has selected you and this site for strike action," and announcing for the first time that employees on strike "will not receive 2014 incentive compensation." On February 17, the Employer posted a "negotiations update" on its official website that stated in part: "An employee on strike at the date of the payout is *not* 'available for work' and will not receive a [bonus] payout. An hourly employee at Carson who has returned to work and is 'available for work' on the date of the payout *will* receive the ICP."[3] On February 20, the Employer announced to all employees via its employee self-service website that the date for the payment of the 2014 ICP bonus would be March 6.[4] In a February 23 letter to employees posted on its official website, the Employer again stressed: "From a high level, if someone chooses to come back to work before the strike is formally settled, our role is simple: make sure our employees have taken the appropriate steps, do our absolute best to make sure they are not subject to inappropriate or hostile actions, sign them up for payroll / benefits / ICP, and welcome our employees back." Once again, on March 2, the Employer posted a letter to employees on its website stating that it had been "the best year in the company's history" from a financial standpoint, and that "[t]his week those of us at work and eligible will receive the monetary recognition of our 2014 efforts in the form of the ICP [bonus]," but that "many of our hourly employees have decided not to participate in the 2014 recognition."

In addition to these written statements, the Employer also emphasized the loss of the ICP bonus to individual employees. The Employer displayed a banner in view of the Union picket line directing employees to visit the Employer's website, which contained the information about the ineligibility of striking employees to receive the ICP bonus as discussed above. On at least one occasion, the Carson (b) (6), (b) (7)(C) spoke with an employee on the picket line and told [redacted] to visit the w "discussion" of the ICP bonus. According to Union representatives, numerous employees reported similar incidents of management officials visiting the picket line and explaining that employees who remained on strike would not receive the bonus. On at least two occasions—one involving an employee at the Employer's Carson facility, and another involving an employee at the Employer's Anacortes facility—the

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[3] The message continued by noting that it had been a "very successful year in every respect," including earnings, and by emphasizing: "What I want more than anything is for us to *celebrate our 2014 success together*" (emphasis in original).

[4] Around this time, at least one striking employee called an Employer hotline to verify [redacted] employment status and was assured that [redacted] remained an "active employee on strike."

Employer's supervisors called individual employees at home and attempted to convince them to abandon the strike in order to receive the bonus. The Union estimates that at least 20 employees at the Carson facility ultimately crossed the picket line in order to receive the bonus. The Union has also provided evidence of at least one employee who resigned [redacted] Union membership in order to cross the picket line and receive the bonus.

On March 6, the Employer paid the 2014 ICP bonus to its nonstriking employees. Consistent with past practice, the Employer also paid the bonus to qualifying retirees. The amount of the 2014 bonus ended up being approximately 10% of each employee's salary—the record contains the bonus paycheck of one employee who received $12,383 prior to taxes.

In mid-March, the Union and Shell Oil resolved the national bargaining issues. The Employer and Steelworkers Local 675 then negotiated a strike settlement agreement resolving additional local issues, which the Local membership ratified on March 22. However, the Employer refused to pay the ICP bonus to returning strikers as part of the strike settlement agreement, and although additional unfair labor practice charges were withdrawn as part of the settlement, the present charge was specifically excepted. After the Union objected, the Employer later agreed to pay the ICP bonus to one striking employee who had attended a scheduled safety training on the date of the payout, March 6.

On March 23, former striking employees began returning to work. The Employer held reorientation programs for the returning strikers during which it announced that they would not be receiving their 2014 ICP bonuses, and one of its managers suggested that it was because they had not been "active employees" on the date of payment.

ACTION

We conclude that the Employer violated the Act under the Board's *Texaco* framework, given that the ICP bonus had accrued, the Employer denied it on the basis of the strike, and the Employer has not presented a legitimate and substantial business justification for its denial. We further conclude that the Employer's denial of the ICP bonus was "inherently destructive" of employees' Section 7 rights, and thus was unlawful regardless of any proffered business justification. We also conclude that the Employer independently violated Section 8(a)(1) by threatening employees that they would lose the ICP bonus if they did not abandon the strike. Finally, the Employer violated Section 8(a)(5) by modifying the ICP contract because it cannot establish a "sound arguable basis" for its interpretation of the contract, but even assuming it could, the Employer reached its interpretation in bad faith.

A. The Employer Violated Section 8(a)(3) by Denying Striking Employees the ICP Bonus on the Basis of Their Strike.

In *Texaco, Inc.*, the Board outlined its test for determining whether the denial of a benefit to striking employees violates Section 8(a)(3).[5] The General Counsel has the "*prima facie* burden of proving at least some adverse effect on employee rights . . . by showing that (1) the benefit was accrued and (2) the benefit was withheld on the apparent basis of a strike."[6] A benefit is "accrued" when it is "due and payable on the date on which the employer denied it."[7] Once the General Counsel makes that initial showing, the burden shifts to the employer to show proof of a "legitimate and substantial business justification" for its denial of the benefit, which can be satisfied either by proving that the collective-bargaining representative clearly and unmistakably waived the employees' statutory right to be free of such discrimination, or by proving its reliance on a "*nondiscriminatory* contract interpretation that is 'reasonable and . . . arguably correct.'"[8] However, even if the employer proves a sufficient business justification, the Board may nevertheless find a violation if the denial of the benefit is demonstrated to be "inherently destructive" of important employee rights, or motivated by antiunion intent.[9] We conclude that the Employer violated Section 8(a)(3) under the two-part test in *Texaco* and, further, because its conduct was "inherently destructive" of employee Section 7 rights.

1. The Employer Violated Section 8(a)(3) by Denying the ICP Bonus Because it Had Accrued, the Employer Denied it on the Basis of the Strike, and the Employer Cannot Prove a Legitimate and Substantial Business Justification.

In the present case, it is clear that the ICP bonus had accrued and that the Employer denied it on the basis of the strike. Regarding accrual, the purpose of this *Texaco* requirement is to ensure that an employer is not required to pay "wages or similar expenses dependent on the continuing performance of services for the

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[5] 285 NLRB 241, 243-46 (1987) (relying on *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967)).

[6] *Id.* at 245.

[7] *Id.* (citation omitted).

[8] *Id.* at 246 (emphasis in original) (citation omitted).

[9] *Id.* (citing *Great Dane*, 388 U.S. at 33).

employer" during a strike.[10] In contrast, even if an employer can demonstrate a lawful reason for finding striking employees ineligible to receive a benefit, the benefit has nonetheless accrued if it is payable "based on past performance with no further work required."[11] Thus, although the Employer contests whether the bonus had accrued based on the "available for work" eligibility requirement in the ICP contract, there is a distinction between the accrual of a benefit and the employees' eligibility to receive it. The Employer's own statements in its letters to the employees demonstrate that the ICP bonus was meant to reward employees for their work during the preceding calendar year—that is, work which already had been performed by February 1, 2015. Indeed, in its March 2 letter, the Employer stated that the ICP bonus represented "monetary recognition of our 2014 efforts" and that the strikers had decided "not to participate in the 2014 recognition." Similarly, the ICP contract conditions the amount of the bonus primarily on the number of hours employees had worked in 2014, and the bonus is paid to retirees and employees away from work on short-term absences.[12] Thus, the ICP bonus had already been earned by past performance and the benefit was accrued. Regarding the second element of the General Counsel's *prima facie* case, it is uncontested that the Employer denied the ICP bonus on the basis of the employees' strike and their resulting absence from work.[13]

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[10] *Texaco*, 285 NLRB at 245 (emphasis added).

[11] *Bil-Mar Foods, Inc.*, 286 NLRB 786, 788 (1987) (finding that vacation benefits had accrued, but that employer's denial of such benefits was lawful based on a nondiscriminatory interpretation of the contract's requirements for receipt); *see also Advertiser's Mfg. Co.*, 294 NLRB 740, 743 (1989) (finding that holiday benefits had accrued, but employer lawfully relied on interpretation making striking employees absent from work ineligible to receive such benefits).

[12] Under the terms of the ICP contract, an employee who retired or went on short-term disability on the date that the Union began its strike, and who performed no further work for the Employer before the date of payment, would have received the ICP bonus. It is thus beyond dispute that the benefit had accrued within the meaning of *Texaco*. *Cf. National Football League*, 309 NLRB 78, 85-86 & n.38 (1992) (finding that injury benefit had accrued where it was payable upon a player's death or a severe injury preventing him from even engaging in rehabilitation, as the benefit thus required no further performance for the employer).

[13] *See, e.g.*, *Swift Adhesives*, 320 NLRB 215, 216 (1995) ("[B]ut for their participation in the strike, the Respondent would have deemed these strikers eligible to receive these benefits."), *enforced*, 110 F.3d 632 (8th Cir. 1997).

Having established a *prima facie* case under *Texaco*, the Board will therefore find a Section 8(a)(3) violation unless the Employer can prove a legitimate and substantial business justification for its denial of the ICP bonus. Here, there is no claim that the Union waived the employees' right to be free from discrimination, and indeed the ICP contract is silent on the issue of a strike.[14] Rather, the Employer asserts solely that it was privileged to withhold the bonus based on a nondiscriminatory contract interpretation that is reasonable and arguably correct. It relies on the contractual language stating that "to be eligible to receive a payment an employee must be on the active payroll and available for work on the date payment is made." The Employer contends that it reasonably interpreted "available for work" as excluding employees who were on strike and who did not report for work on the date it chose to pay the bonus, March 6.[15]

However, we conclude that the Employer's contract interpretation is neither reasonable nor arguably correct, and that even assuming it were arguably correct, its interpretation is not nondiscriminatory, and thus fails to provide a legitimate and substantial business justification under *Texaco*. As to the Employer's argument that

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[14] *E.g.*, *Johnson-Bateman Co.*, 295 NLRB 180, 184-85 (1989) (finding waiver must be clear and unmistakable, and must specifically address to the right allegedly waived).

[15] In its position statement, the Employer also suggests that the striking employees were not "on the active payroll." The Board has rejected similar interpretive arguments due to the Act's statutory mandate that striking workers remain "employees." *See, e.g.*, *Bil-Mar Foods*, 286 NLRB at 788 ("[T]he contractual reference to 'on the employer's payroll' must be construed in light of the retention of statutory employee status by economic strikers"). Moreover, the Employer's contemporaneous statements to employees at the time it denied the bonus indicated that it was relying solely upon the "available for work" language, not the "on the active payroll" language. For example, the February 17 negotiations update that the Employer posted on its website stated that, "an employee must be active and 'available for work' on the date the payout is made." The Employer went on to specify that an "employee on strike at the date of the payout is *not* 'available for work' and will not receive a payout." Similarly, the Employer's March 2 letter to employees stated, "*those of us at work and eligible* will receive the monetary recognition of our 2014 efforts. . ." (emphasis added). Although one management representative stated that the returning strikers had not been "active employees" in explaining at the reorientation programs for the returning strikers why they would not receive bonuses, that was after the strike had ended and was not clearly in reference to the "on the active payroll" language. Furthermore, an Employer representative had previously assured an employee who had inquired during the strike that (b) (6), (b) remained an "active employee on strike."

its contract interpretation is arguably correct, its assertion that striking employees are not "available for work" within the meaning of the contract is contrary to both the contractual language and past practice. The contract defines "available for work" as including employees who are absent from work "due to [short-term disability], Jury Duty, Funeral Leave *or other similar short term absence*" (emphasis added). The "similar short term absence" catchall provision would appear to encompass employees who are temporarily absent from work due to a strike—indeed, employees on strike are no less readily *available* for work than incapacitated employees on short-term disability, or employees legally required to attend jury duty[16]—yet the Employer has presented no explanation for reading this catchall provision to exclude striking employees. In addition, the Employer's consistent past practice has been to pay the ICP bonus to retirees, who are clearly not "available for work on the date payment is made."[17] We therefore do not find the Employer's reading of "available for work" to be either reasonable or arguably correct.

Furthermore, beside the requirement, not met here, that the Employer's contract interpretation be reasonable and arguably correct, *Texaco* requires the Employer to present a *nondiscriminatory* reading of the contract in order to overcome the inference of discriminatory intent established by the General Counsel's *prima facie* case.[18] The Board has found that an employer satisfies this burden by relying on objective contract language that the employer historically has applied uniformly to all employees, such as a contract interpretation based on a "longstanding past practice of uniformly deferring vacation pay for any employee not actively working for any

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[16] The *Oxford English Dictionary* defines "available" as: "*Capable* of being employed with advantage or turned to account; hence, *capable* of being made use of, at one's disposal, within one's reach." *Oxford English Dictionary*, http://www.oed.com (emphasis added). Although the striking employees were choosing to withhold their services by not reporting for work, they were clearly "available" and *capable* of returning to work at any moment pending resolution or abandonment of the strike—unlike terminated employees, employees on long-term disability, or the employees covered by the enumerated contractual exceptions (employees away on short-term disability, jury duty, funeral leave, or similar absences). The contract does not state that employees must either be "at work" or "report to work" on the date in question.

[17] The only reference to retirees in the 2014 ICP contract is the clarification that employees "who retire prior to July 1, 2014 are not eligible to receive a bonus payment." As recently as the 2013 ICP contract, there was no mention of retirees whatsoever, yet the "available for work" eligibility requirement was the same.

[18] *Texaco*, 285 NLRB at 246.

reason, on the date when vacation checks were issued."[19] In contrast, here the Employer's decision to deny employees the ICP bonus was based on its interpretation of a contractual provision that was, at best, ambiguous, and which had not previously been applied to deny the bonus to similarly-situated nonstriking employees. The Employer pays the bonus to a wide range of employees who are not physically at work on the date of payment—including retirees, who are no longer even employed—and the Employer has presented no business considerations explaining its exclusion of striking employees or clarifying its reading of the contract.[20] As a result, the evidence shows that the Employer has discretionarily chosen to exclude striking employees while paying the bonus to other absent employees and retirees, and its interpretation thus fails as a nondiscriminatory justification.[21] Therefore, we conclude that the Employer violated Section 8(a)(1) and (3) by withholding the bonus only from strikers.

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[19] *Bil-Mar Foods*, 286 NLRB at 788; *see also Advertiser's Mfg. Co.*, 294 NLRB at 743-44 (finding that employer lawfully relied on unambiguous contract provision denying holiday pay to employees not at work on specified days for any reason without express approval by management); *Green Fleet Systems, Inc.*, Case 21-CA-131830, Advice Memorandum dated March 10, 2015, pp. 6-8 (finding that employer presented legitimate business justification for denying holiday pay to striking employees where it relied on longstanding policy of denying holiday pay to employees absent from work for any reason without pre-approval or a doctor's note).

[20] *See Lourdes Health Systems*, 316 NLRB 284, 291 (1995) (noting that employer's proffered business reason for exclusionary policy did not apply to employees on strike, and that employer "presented no further business reason" for excluding striking employees from receiving benefit), *order modified by* 320 NLRB 97 (1995).

[21] *See, e.g.*, *Glover Bottled Gas Corp.*, 292 NLRB 873, 881-82 (1989) ("To deny strikers benefits that Respondent would make available to other employees not actively working, such as employees on sick leave, is necessarily to discriminate against them for having engaged in activity protected by the Act."), *enforced on other grounds*, 905 F.2d 681 (2d Cir. 1990); *Vesuvius Crucible Co.*, 252 NLRB 1279, 1281 (1980) ("[A]n employer may not equate strike time with other forms of unexcused absence to deny strikers their accrued benefits. To do so would impermissibly penalize employees for engaging in protected activity."), *enforcement denied*, 668 F.2d 162 (3d Cir. 1981); *cf. Forest Products Co.*, 286 NLRB 1336, 1338 (1987) ("Because the denial of benefits here is not consistent with its previous applications of the active work requirement, the Respondent cannot rely on past practice to advance the business justification argument."), *enforcement denied*, 888 F.2d 72 (10th Cir. 1989).

2. The Employer's Denial of the ICP Bonus Was Inherently Destructive of Employees' Section 7 Rights.

As the Board stated in *Texaco*, "under *Great Dane*, even if the employer proves business justification, the Board may nevertheless find that the employer has committed an unfair labor practice if the conduct is demonstrated to be 'inherently destructive' of important employee rights."[22] The Supreme Court has described inherently destructive conduct as that which carries with it "unavoidable consequences which the employer not only foresaw but which he must have intended," and which thus bears "its own indicia of intent."[23] In *International Paper Co.*, the Board outlined four "guiding principles" for determining whether an employer has engaged in inherently destructive conduct: (1) the severity of harm to employees' Section 7 rights; (2) the temporal impact of the employer's conduct and whether it "creates visible and continuing obstacles to the future exercise of employee rights"; (3) the employer's hostility to the collective-bargaining process as opposed to the substance of bargaining; and (4) whether the conduct "discourages collective bargaining in the sense of making it seem a futile exercise in the eyes of employees."[24] However, there is "no requirement that conduct exhibit all four characteristics in order to be considered inherently destructive."[25] Applying these principles, we conclude, in the alternative, that the Employer's denial of the ICP bonus was inherently destructive of employees' statutory right to strike.

First, we note that the Employer's denial of the ICP bonus substantially harmed both the employees' protected conduct and the individual employees engaging in such conduct. The Employer's conduct coerced approximately 20 employees at the Carson facility into abandoning the strike in order to receive the ICP bonus, and at least one employee resigned [redacted] Union membership as a direct result of the Employer's ultimatum. The impact on individual employees for exercising their rights was even more severe, as the lost ICP bonus amounted to a significant portion of the employees' expected yearly salary—roughly 10% of the employees' pre-bonus salary, and in the pre-tax range of $12,000 for some employees. In contrast to cases where the Board has found the denial of benefits to striking employees to not be inherently destructive

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[22] *Texaco*, 285 NLRB at 246 (citing *Great Dane*, 388 U.S. at 33-34).

[23] *Great Dane*, 388 U.S. at 33 (quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228 (1963)).

[24] 319 NLRB 1253, 1269-70 (1995) (citations omitted), *enforcement denied*, 115 F.3d 1045 (D.C. Cir. 1997).

[25] *Id.* at 1270 n.37.

conduct,[26] the Board has repeatedly found employer conduct negatively affecting employees' wages to be inherently destructive.[27] We find that the Employer's denial of the yearly ICP bonus had an impact on employees more similar to the withholding of wages than to the temporary denial of periodic benefits such as vacation pay, and that the magnitude of the harm caused to hundreds of employees shows that the Employer clearly "foresaw" and indeed "must have intended" the effect of discouraging employees from striking.[28]

Second, we note that the impact of the Employer's decision to withhold the ICP bonus from striking employees had a continuing impact on the exercise of employee rights beyond the one-time denial in March 2015. Both parties concede that past practice and the terms of the ICP contract grant the Employer the sole discretion to establish the payment date for the yearly bonus. Accordingly, the Employer now

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[26] *Noel Foods Div. of Noel Corp.*, 315 NLRB 905, 912 (1994) (finding that denial of vacation pay to striking employees was not inherently destructive where employer had policy of not providing vacation pay in lieu of vacation benefits and where denial was only temporary), *enforced in part on other grounds*, 82 F.3d 1113 (D.C. Cir. 1996); *Johns-Manville Sales Corp.*, 289 NLRB 358, 364-65 (1988) (finding that denial of vacation pay to striking employees was not inherently destructive where employer had already granted some vacation pay to striking employees and had denied vacation pay to nonstriking employees), *enforcement denied on other grounds*, 906 F.2d 1428 (10th Cir. 1990); *Amoco Oil Co.*, 285 NLRB 918, 920 (1987) (finding that suspension of disability benefits during strike was not inherently destructive where employer had an established past practice of suspending benefits based on nondiscriminatory eligibility requirements).

[27] *Arc Bridges, Inc.*, 355 NLRB 1222, 1224-25 (2010) (finding employer's withholding of 3% wage increase only from bargaining unit employees after they had chosen union representation to be inherently destructive), *enforcement denied on other grounds*, 662 F.3d 1235 (D.C. Cir. 2011); *Eastern Maine Medical Center*, 253 NLRB 224, 242 (1980) (finding employer's withholding of annual wage increase due to negotiations with union to be inherently destructive), *enforced on other grounds*, 658 F.2d 1, 10 (1st Cir. 1981) (declining to pass judgment on inherently-destructive theory); *United Aircraft Corp.*, 199 NLRB 658, 662 (1972) (finding employer's withholding of scheduled wage increase due to negotiations with union to be inherently destructive), *enforced in relevant part*, 490 F.2d 1105, 1110 (2d Cir. 1973).

[28] *See Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1019 (2006) (emphasizing that "the severity (or lack thereof) of loss sustained by employees as a result of their employer's conduct" must be taken into account, and finding employer's conduct not inherently destructive where employees only suffered a loss of pay for 8 hours or less).

wields a yearly trump card that it can use to discourage strike activity or break an ongoing strike by announcing that employees must return to work on a given date in order to receive the substantial bonus.[29] Given the importance of the yearly ICP bonus to employees' expected compensation, and given the message conveyed by the denial of such bonus to striking employees in 2015, the Employer's decision "creates visible and continuing obstacles to the future exercise of employee rights."[30]

Third, we note that the nature of the employees' strike and the Employer's response support a finding of inherently destructive conduct under the final two *International Paper* factors. The primary impetus for the strike at issue, which was part of a national strike called by the Union, was the ongoing industry-wide bargaining between the Union and the lead employer representative, Shell Oil. As such, neither the Employer nor the local unions representing the Employer's employees were directly involved with the substance of the national bargaining. This undercuts any notion that the Employer's discriminatory treatment of employees on strike was connected to a "substantive bargaining position in a particular contract negotiation," and instead strongly supports the inference that the Employer wished to retaliate against its employees for the mere fact that they were exercising their right to strike, indicating a hostility toward process rather than substance.[31] When the

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[29] Although the Union could in theory attempt to preclude the Employer from doing so by bargaining over the language contained in subsequent ICP agreements, this possibility does not alter the inherently destructive character of the Employer's existing conduct in the status quo.

[30] *International Paper*, 319 NLRB at 1269 (citation omitted). Furthermore, given the substantial size of the bonus denied to employees who remained on strike—and, conversely, granted to those employees who abandoned the strike—the Employer's conduct would inevitably tend to create animosity and "cleavage" between bargaining unit members, and to therefore "divide the bargaining unit long after the strike ended." *Cf. Roosevelt Memorial Medical Center*, 348 NLRB at 1020.

[31] *See International Paper*, 319 NLRB at 1269-70 (citations omitted). Although the national strike was called in support of the national bargaining, and although both parties in the present case had a substantial interest in the outcome of the national bargaining, the substance-versus-process reasoning in *International Paper* and the cases it cites weigh in favor of a violation where the employer alleged to have engaged in inherently destructive conduct was not actually at the bargaining table negotiating substantive terms. We also stress that the Employer here was not merely exerting lawful economic pressure, such as the lockout at issue in *American Ship Building Co. v. NLRB*, 380 U.S. 300, 309 (1965), but was instead discriminating against employees for exercising their rights. *Cf. International Paper*, 319 NLRB at 1269-70 (noting that

Union called off the national strike and the local union negotiated a strike settlement with the Employer, the Employer refused to pay the ICP bonuses as part of the settlement. The uncompensated loss suffered by the Employer's employees would thus tend to discourage future protected conduct by "making it seem a futile exercise in the eyes of employees."[32]

In sum, we conclude that the Employer's denial of the ICP bonus had a severe impact on employees which was so unavoidable that the Employer must have foreseen, and indeed "must have intended," the resulting discriminatory impact on employees' exercise of their right to remain on strike. As such, the Employer's conduct was "inherently destructive" and thus violated Section 8(a)(1) and (3).

B. The Employer Violated Section 8(a)(1) by Threatening Employees with the Loss of the ICP Bonus if They Continued Their Strike.

Section 8(c) of the Act permits employers to express views, arguments, or opinions concerning the potential lawful consequences of employees' decision to engage in protected activities.[33] However, as the Supreme Court clarified in *NLRB v. Gissel Packing Co.*, an employer may not coerce employees in the exercise of their Section 7 rights by expressing a "threat of reprisal or force or promise of benefit."[34] Thus, an employer violates Section 8(a)(1) by threatening employees with negative consequences or the loss of existing benefits in retaliation for exercising their protected right to strike.[35] Where an employer discriminatorily denies contractual benefits to striking employees, the employer's prior threat to deny such benefits also

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the third factor depends in part on whether an employer "respects the employees' right to engage in concerted activity" (citation omitted)).

[32] *International Paper*, 319 NLRB at 1270 (citation omitted). In the present case, the denial of the ICP bonus sent "a signal to employees that despite their diligent efforts" in supporting the national strike, *id.* (citation omitted), the Employer could discriminatorily deny them thousands of dollars in compensation for refusing to abandon the strike, with no subsequent recompense relative to Union employees at other employers who also went on strike in support of the national bargaining.

[33] 29 U.S.C. § 158(c).

[34] 395 U.S. 575, 618 (1969).

[35] *See, e.g.*, *PRC Recording Co.*, 280 NLRB 615, 615 n.2 (1986) (finding that employer unlawfully threatened to retract last contract offer if employees went on strike), *enforced*, 836 F.2d 289 (7th Cir. 1987).

interferes with the employees' Section 7 rights and therefore constitutes an independent violation of Section 8(a)(1).[36]

Here, the Employer did not simply deny employees the ICP bonus due to their strike, it also actively threatened employees with the loss of the bonus in an attempt to coerce them into abandoning the strike. On February 3, two days after the commencement of the strike, the Employer sent a letter to employees stating that it was "disappointed that your union has selected you and this site for strike action," and warning that employees on strike "will not receive 2014 incentive compensation." Two weeks later, the Employer sent a "negotiations update" stating: "An employee on strike at the date of the payout is *not* 'available for work' and will not receive a [bonus] payout. An hourly employee at Carson who has returned to work and is 'available for work' on the date of the payout *will* receive the ICP."[37] In a February 23 letter, the Employer again stressed: "From a high level, if someone chooses to come back to work before the strike is formally settled, our role is simple: . . . sign them up for payroll/benefits/ICP, and welcome our employees back." Once again, on March 2, the Employer implied that it had been "the best year in the company's history" from a financial standpoint, and attempted to lure employees back from the strike by threatening them with the loss of a sizable ICP bonus, stating that "[t]his week those of us at work and eligible will receive the monetary recognition of our 2014 efforts in the form of ICP," but that "many of our hourly employees have decided not to participate in the 2014 recognition."

The record also contains evidence of multiple instances of supervisory employees calling striking employees at home and trying to convince them to cross the picket line in order to not lose the ICP bonus. An employee on strike at the Carson facility received such a call in early March, and Region 19's separate investigation into the Anacortes facility revealed a similar call made to an employee on strike there. Similarly, affidavit testimony—currently hearsay evidence—indicates that numerous other striking employees at the Carson facility reported to Union representatives about management officials approaching the picket line and trying to convince employees to abandon the strike in order to receive the bonus. In addition, the Employer displayed a banner in view of the picket line with the address of a website that contained information stating in part that striking employees would only receive the ICP bonus if they returned to work by March 6. On at least one occasion, the Carson (b) (6), (b) (7)(C) visited the picket line to point out this banner to striking employees, and specifically told at least one employee to look at the website for a

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[36] *E.g.*, *Texaco, Inc.*, 291 NLRB 508, 510 (1988).

[37] The message continued by noting that it had been a "very successful year in every respect," including earnings, and by emphasizing: "What I want more than anything is for us to *celebrate our 2014 success together*" (emphasis in original).

"discussion" of the ICP bonus. In sum, we conclude that the Employer independently violated Section 8(a)(1) on numerous occasions by threatening employees with the loss of the expected ICP bonus as a result of their protected decision to remain on strike.

C. The Employer Violated Section 8(a)(5) by Adopting a Bad Faith Interpretation of the ICP Contract in an Attempt to Undermine the Union.

The present case also involves the alleged midterm modification of the parties' 2014 ICP contract through the Employer's decision to make employees on strike ineligible to receive the bonus.[38] In *Bath Iron Works Corp.*, the Board distinguished between "unilateral change" cases and Section 8(d) "contract modification" cases, and it clarified that the appropriate standard for analyzing an unfair labor practice allegation in the latter context is whether the "employer has a 'sound arguable basis' for its interpretation of a contract *and is not 'motivated by union animus or . . . acting in bad faith*.'"[39] This is consistent with the Board's longstanding position that it will not second-guess an employer's interpretation of a contract where the employer has a sound arguable basis for its interpretation, but *only if* there is "no showing that the employer[,] in interpreting the contract as he did, was motivated by union animus or was acting in bad faith."[40] Where a preponderance of the evidence indicates that an employer's otherwise reasonable interpretation of a contract was motivated by bad

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[38] We find that, since the parties' 2014 ICP contract did not specify an expiration date, and instead constituted a standalone memorandum of understanding governing the one-time payment of the 2014 calendar year bonus, the contract remained in effect as of February and March 2015. Neither party has presented an alternative understanding or argued that the ICP contract had expired. Thus, we proceed with a midterm modification analysis under Section 8(d). In any event, since we find that the Employer violated the Act under the more stringent sound arguable basis standard, a violation would also lie under the alternative clear and unequivocal waiver standard applicable to a unilateral change theory of violation.

[39] 345 NLRB 499, 502 (2005) (citations omitted) (emphasis added), *enforced sub nom.*, *Bath Marine Draftsmen's Association v. NLRB*, 475 F.3d 14 (1st Cir. 2007).

[40] *Vickers, Inc.*, 153 NLRB 561, 570 (1965) (citation omitted); *see also, e.g.*, *Atwood & Morrill Co.*, 289 NLRB 794, 795 (1988) (noting that Board will not seek to determine which of two equally plausible contract interpretations is correct if "there is no evidence of animus, bad faith, or an intent to undermine the Union").

faith rather than a bona fide dispute over the correct interpretation of the contract, the Board will find a Section 8(a)(5) violation.[41]

For the same reasons that we have found the Employer's interpretation of the ICP contract to be neither reasonable nor arguably correct, we conclude that the Employer did not have a sound arguable basis for its interpretation.[42] In addition, the Employer has not presented any business-related considerations explaining its interpretation of the contract, or the need to exclude striking employees from receiving a substantial year-end bonus for not being physically at work on a single arbitrarily-chosen date. Indeed, the Employer's interpretation of the contract is entirely implausible because it reduces the eligibility requirement to a frivolous exercise that appears to have no purpose other than to penalize striking employees. For example, the Employer asserts in its position statement that "all employees would have had to do is suspend the strike for the single day of the bonus pay out" in order to have received the bonus. The Employer does not explain the substantive purpose of such a formality. Similarly, after the Union objected, the Employer subsequently agreed to pay the bonus to a single striking employee who, by a stroke of luck, had attended a scheduled safety training on March 6. For the above reasons, and because the Employer has failed to justify the implausible result that employees forfeit a substantial year-end bonus tied to past performance by being physically absent on a single day chosen by the Employer, we conclude that the Employer's contract interpretation lacks a sound arguable basis in violation of Section 8(a)(5).[43]

Furthermore, even were the Employer's contract interpretation to have met the Board's sound arguable basis standard, the evidence here shows that the Employer reached its interpretation in bad faith and thereby violated the Act. As noted, the Employer's interpretation is not reasonable and, in any event, is not compelled by the language of the ICP contract. Thus, in announcing for the first time in the history of the ten-year program that employees on strike would not receive the bonus, at a

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[41] *Cf. J. Picini Flooring*, 355 NLRB 606, 610-11 (2010) (finding that three out of four employers acted in good faith pursuant to a reasonable interpretation of the parties' 8(f) agreement in refusing to grant 9(a) recognition to the union, but concluding that the fourth employer's reliance on the same interpretation of the agreement was motivated by bad faith and thus violated the Act), *enforced sub nom.*, *Painter & Allied Trades, Local 149 v. J&R Flooring, Inc.*, 656 F.3d 860 (9th Cir. 2011).

[42] *See* Section A.1., pp. 7-8, *supra.*

[43] *See Hospital San Carlos Borromeo*, 355 NLRB 153, 153 & n.5 (2010) (finding that employer did not satisfy sound arguable basis standard where employer's contract interpretation was "implausible").

minimum the Employer was exercising discretion in choosing between competing interpretations of the contractual language. We find no support for the Employer's argument that its chosen interpretation was reached in good faith out of a bona fide dispute over the meaning of the contract, and instead find that a preponderance of the evidence supports a finding of bad faith. Indeed, the Employer's distinction between employees absent from work due to a strike and employees absent from work due to short-term disability ("or other similar short term absence"), with no further explanation justifying such a distinction, appears to be drawn solely "along Section 7 lines."[44]

Moreover, the evidence establishes that the Employer opportunistically utilized its chosen interpretation of the contract in an attempt to break the strike and coerce employees into crossing the picket line. As discussed above in the context of the Employer's unlawful threats, beginning just two days after the commencement of the strike the Employer posted numerous letters to employees warning them that they would lose the ICP bonus—tied to "the best year in the company's history" financially—if they did not abandon the strike. Management officials carried the same message to employees on the picket line, emphasizing the danger of losing the ICP bonus to individual employees and directing employees to visit the Employer's website for information about the impact of the strike on the employees' expected bonus. The Employer's supervisors even called employees at home and attempted to coerce them into abandoning the strike in order to receive the bonus.

In sum, we conclude that a preponderance of the evidence demonstrates the Employer did not reach its interpretation of the ICP contract in good faith as part of a bona fide dispute over the meaning of the contractual language, but instead reached its interpretation in bad faith and in an opportunistic attempt to undermine the Union and to punish employees who remained on strike. As such, regardless of whether the Employer can demonstrate a "sound arguable basis" for its contract

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[44] *Cf. Register Guard*, 351 NLRB 1110, 1118 (2007) (finding that, with respect to solicitation rules, employers may not draw a line between permitted and prohibited activities solely on Section 7 grounds), *enforced in relevant part*, 571 F.3d 53 (D.C. Cir. 2009), *overruled in part on other grounds*, *Purple Communications, Inc.*, 361 NLRB No. 126 (Dec. 11, 2014). Assuming that the Employer was choosing between two plausible interpretations of the contract, we also find it more indicative of bad faith than not that the Employer chose the one interpretation permitting it to engage in discrimination that would otherwise be unlawful under the Act, while providing no further business explanation for that choice. *Cf. Vesuvius Crucible Co.*, 252 NLRB at 1281 (noting that in the absence of a contractual provision an employer cannot "lawfully require the employees to be at work—and forego their strike—in order for them to receive benefits which they had already accrued").

interpretation, the Employer nonetheless violated Section 8(a)(5) and (1) by modifying the terms of the ICP contract in bad faith.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1), (3), and (5) for the above reasons.

/s/
B.J.K.

ADV.21-CA-146968.Response.TesoroRefining.[redacted]