

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

DATE: September 13, 2018

TO: Dennis Walsh, Regional Director
Region 4

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: ZUFFA, LLC d/b/a Ultimate Fighting
Championship
Case 04-CA-219498

524-0167-1000
524-0167-5000
524-0183-3333
524-0183-6700
524-0183-6712
524-0183-6725
524-0183-6775

This case was submitted for advice as to whether: (1) the Charging Party and other mixed-martial-arts fighters under contract with UFC are statutory employees within the meaning of the Act or independent contractors; and (2) UFC unlawfully discriminated against the Charging Party by failing to renew (b) (6) fight contract in violation of Section 8(a)(3). As to the second issue, we conclude, under *Wright Line*,¹ that there is insufficient evidence to establish a prima facie case of unlawful discrimination and significant evidence suggesting that the breakdown in contract negotiations occurred for nondiscriminatory reasons related to the Charging Party's demands. As to the first issue, because we find there was no unlawful conduct, it is unnecessary to reach the issue of whether the Charging Party and fighters are statutory employees. Accordingly, further proceedings are unwarranted and, absent withdrawal, the charge should be dismissed.

FACTS

Zuffa, LLC d/b/a Ultimate Fighting Championship ("UFC") is a promoter of professional mixed-martial-arts ("MMA") fights. It is headquartered in Las Vegas, Nevada, but promotes fights all over the world. UFC contracts with approximately 600 male and female professional MMA fighters and categorizes them into nine weight classes. UFC organizes all fights, including the individuals matched up to fight on a particular night and the order of the fights, arranges the venue, and

¹ 251 NLRB 1083, 1089 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981).

contracts with various media networks to broadcast the fights. The week leading up to scheduled fights is referred to as “fight week” and includes various media events and a mandatory “weigh-in” for all participating fighters.

Professionals fighting under the UFC banner must each sign a Promotional and Ancillary Rights contract (“PARC”), which governs their relationship with UFC. Fighters may negotiate aspects of the PARC with UFC, including the number of fights, or “bouts,” that the contract will cover; how much the fighter will earn per fight (the “fighter’s purse”); and how much additional the fighter will be paid if (b) (6) wins (the “win bonus”). Among other provisions, the PARC outlines what travel expenses UFC will cover for individual fighters and their team (e.g., coaches, trainers) during fight week. In addition to the PARC, UFC fighters enter into a “Bout Agreement” prior to each fight, which outlines issues and obligations specific to the particular fight.²

The Charging Party signed (b) (6) first PARC with UFC in April 2014 and (b) (6) second on March 27, 2016. The March 2016 PARC’s term was for four fights or for 20 months following the Charging Party’s first fight, whichever occurred sooner. Article 3.2 of the PARC states that UFC fulfills its obligation with regard to each of the four fights if it offers the Charging Party a fight and (b) (6) refuses to take the fight. Article 4.3 then states that UFC may extend the term of the PARC to provide the Charging Party with the minimum four bouts. Article 6.1 sets the Charging Party’s fight purse and win bonus at \$25,000 each. For each subsequent win, the fight purse and win bonus increase by \$3,000, with the maximum fight purse and win bonus each being \$34,000. Article 7 outlines “incidentals” that UFC will pay for: the Charging Party’s transportation, lodging, meals, and bout tickets during fight week. Specifically, the Charging Party was entitled to two hotel rooms and two round-trip economy-class airline tickets for the Charging Party and one of (b) (6) affiliates (e.g., trainer or manager). When the PARC’s term is set to expire, Article 12.1 provides UFC with the right of first negotiation for an extension of the term or renewal. If the parties fail to reach an agreement, Articles 12.1 and 12.2 give UFC the right to match any of the Charging Party’s offers from third-party promoters.

The Charging Party’s first fight under the March 2016 PARC was on May 14, 2016.³ During an interview with an MMA publication about the fight, the Charging

² It appears that the ability to negotiate provisions is directly related to the individual fighter’s popularity and proficiency.

³ Accordingly, the PARC was set to expire by its terms no more than 20 months later—January 14, 2018.

Party spoke about creating a fighters' association to improve UFC-fighters' terms and conditions. After hearing (b) (6) comments in the media, a UFC-employed commentator told the Charging Party that if (b) (6) wants to stay with UFC, then (b) (6) should not openly discuss unionizing.⁴

Around August 11, 2016, the Charging Party took part in a YouTube promotional video advocating for the Mixed Martial Arts Fighters Association.⁵ On August 19, 2016, the Charging Party was interviewed about a burgeoning group, the Professional Fighters Association, and stated in (b) (6) video that (b) (6) wanted to show fighters that (b) (6) could openly talk about unionizing and not be kicked out of UFC. On November 29, 2016, following an information leak that contained the names of fighters who had signed authorization cards with the Professional Fighters' Association, the Charging Party wrote an open letter, via (b) (6) social media pages, to UFC fighters and apologized for the information leak. (b) (6) stated that (b) (6) next steps were to cut ties with the Professional Fighters Association and explore creating (b) (6) own fighters' union.

The Charging Party's second fight under the March 2016 PARC took place on December 17, 2016.

In May 2017, approximately 300 UFC fighters and officials, including the Charging Party, took part in a fighters' retreat. During the retreat there was a speaker panel that included a UFC owner. When the panel opened for questions from the audience, the Charging Party stepped up to a microphone set up for audience questions and talked about the need for fighters to unionize. Soon after, the moderator, who was hired by UFC, told fighters that there would be no more questions and the microphone for audience questions was being turned off.

On July 16, 2017, the Charging Party completed (b) (6) third fight under the March 2016 PARC.

⁴ The Region has already determined that the UFC-employed commentator is not a Section 2(11) supervisor.

⁵ A prior unionization effort by the Teamsters Union and Culinary Workers Union, in which the Charging Party was not involved, occurred in 2014 and 2015. In response, UFC sent a letter to its fighters outlining specific points they should consider about signing an authorization card and urging fighters to reject unionization. In addition, there is some uncorroborated hearsay in a media interview in October 2016 that attributes to a UFC official a statement encouraging a fighter not to pursue unionization.

In early September 2017, UFC offered the Charging Party (b) (6) fourth fight, which would take place in December. However, the Charging Party initially declined the fight, saying (b) (6) would consider UFC's match-up if it offered (b) (6) a new four-to-six-bout contract and \$100,000 per fight.⁶ UFC declined and later sent a letter to the Charging Party stating that "[a]s a result [of] your rejection to compete in a Bout . . . and in accordance with Article's [sic] 3.1 and 4.3 of your Agreement, [UFC] may elect to extend the Term of your Agreement for the period required to designate another opponent or for a period of six (6) months[.]"

On December 25, 2017, the Charging Party accepted a fight match-up proposed by UFC that would take place at a to-be-determined date in 2018.

Also in late December 2017, the Charging Party contacted UFC seeking a meeting to discuss (b) (6) questions concerning UFC's recent updates to its promotional guidelines, which were to take effect on January 1, 2018. UFC responded, scheduled a meeting for December 27, and asked the Charging Party to submit a list of specific questions. Prior to the meeting, the Charging Party sent UFC (b) (6) questions, which focused on the Charging Party's concern for how the policies, rules, and regulations contained in the promotional guidelines would, *inter alia*, affect UFC fighters' pay, their behavior in between bouts, sponsorship opportunities, and sanctions for violating the guidelines. The Charging Party showed up for the meeting, but UFC cancelled it.

On January 3, 2018,⁷ UFC sent the Charging Party a letter notifying (b) (6) that (b) (6) PARC had been extended because (b) (6) accepted a bout in Atlantic City, New Jersey that was scheduled for April 21; the new contract termination date was May 14.

Also in early January, UFC's chief counsel invited the Charging Party to meet to discuss (b) (6) questions about the updated promotional guidelines. The Charging Party responded, saying (b) (6) would follow up to schedule the meeting. It is unclear whether the Charging Party did follow up but, in any event, the meeting never materialized.

⁶ It is unclear whether the request was for a \$50,000 fight purse and a \$50,000 win bonus, so that the Charging Party could make up to \$100,000 per fight, or if the Charging Party was asking for \$100,000 in each the fight purse and the win bonus.

⁷ All dates hereinafter are in 2018, unless otherwise stated.

In February, the Charging Party initiated a campaign to promote Project Spearhead, an organization (b) (6) created to solicit and collect union authorization cards to form a union of UFC fighters, and to promote collective action among UFC fighters to improve their terms and conditions of employment. The Charging Party promoted Project Spearhead on (b) (6) social media platforms, and (b) (6) efforts to launch the organization were covered by several MMA-focused media outlets, receiving print, video, audio, and online coverage.

Days prior to fight week for the April 21 fight, the Charging Party sent UFC a picture of the mouth guard (b) (6) planned to use during the fight, per UFC's promotional guidelines. Typically, UFC does not permit any non-approved logos to be visible during a fight, and the Charging Party's mouth guard prominently displayed Project Spearhead's logo. The pictures were reviewed by UFC's Senior Vice President of Global Consumer Products and its Director of Equipment. In reviewing the pictures via email, these UFC managers were advised by another UFC employee that Project Spearhead is "a group of athletes who are seeking to be legally classified as UFC employees, rather than contractors." Despite its strict logo guidelines, UFC approved the Charging Party's Project Spearhead-branded mouth guard for use during (b) (6) April 21 fight.

During fight week, the Charging Party contacted UFC with (b) (6) concern that it did not pay for (b) (6) luggage expenses as part of fight week travel costs. (b) (6) also noted that UFC's policies did not include a per diem payment for the final day of fight week. The issue was routed to UFC's chief legal officer, who replied by email to the Charging Party, stating that "it is important to me, as well as our organization, that you feel fully mentally and physically prepared to compete . . . I instructed our finance department to send you a discretionary bonus . . . for an additional \$500 . . . that I hope will assist you in focusing your attention on the fight ahead of you[.]"

On April 20, the day before the fight, the Charging Party and (b) (6) fight opponent attended the required weigh-in to ensure that each fighter was within the 135-pound Bantam-weight category. The weight category provides for a one-pound variance. The Charging Party was within the required weight limit, but (b) (6) opponent missed the weight limit by 1.8 pounds. Per the Bout Agreement for that fight, this gave the Charging Party the option to fight and be entitled to 20% of (b) (6) opponent's fight purse in addition to (b) (6) own, or the Charging Party could choose not to fight. The Charging Party then discussed (b) (6) options with (b) (6) coaches and (b) (6) agent. A news reporter asked the Charging Party what (b) (6) was planning to do; the Charging Party stated that (b) (6) felt this was an opportunity to negotiate to extend (b) (6) contract and ask for

\$100,000 for two more fights. The reporter tweeted the Charging Party's comments, and other MMA news outlets picked up the statement.⁸

Shortly after the failed weigh-in, the Charging Party asked (b) (6) agent to contact UFC to try to negotiate a new fight contract. The agent informed UFC that the Charging Party would not fight (b) (6) opponent unless UFC gave (b) (6) more money and added an additional two fights to (b) (6) contract. UFC responded that it understood that the Charging Party wanted \$100,000 per fight for the two additional fights, and that (b) (6) request was unacceptable.⁹ The agent responded that he needed to confirm with the Charging Party whether that was indeed (b) (6) demand or whether (b) (6) wanted "100 flat." UFC then said that it was not interested in negotiating with the Charging Party. The agent asked the UFC representative whether it was not interested in negotiating "at this time or ever." According to the Charging Party's agent, the UFC representative advised that UFC was "not interested at this time." UFC further advised that it would pay the Charging Party (b) (6) fight purse *and* win bonus—approximately \$62,000—in satisfaction of (b) (6) contract, despite (b) (6) not actually fighting. The agent later responded to UFC, saying that the Charging Party had changed (b) (6) mind and would like to fight despite (b) (6) opponent not making weight, but that (b) (6) wanted to still receive (b) (6) fight purse and win bonus, as well as one additional fight. UFC declined and stated that it was too late to hold the fight because it had already informed the opponent that the Charging Party refused the fight.

Shortly thereafter, on April 20, UFC emailed a letter to the Charging Party affirmatively stating that it was not exercising its "Right of First Negotiation" or "Right to Match any Fighter Offers" under sections 12.1 and 12.2 of the Charging Party's PARC. At that point, the Charging Party was no longer under contract with UFC and soon after was removed from UFC's active fighter rankings. There were no further communications between the Charging Party and UFC concerning a new PARC.

⁸ Again, it is unclear whether the Charging Party's comments meant that (b) (6) was asking for a \$50,000 fight purse and a \$50,000 win bonus for each fight, a \$100,000 fight purse and \$100,000 win bonus for each fight, or a \$100,000 purse for competing in both fights. Various interpretations of what the Charging Party was requesting were reported in the MMA press.

⁹ The Charging Party stated in an interview that (b) (6) was aware of UFC's understanding but chose not to correct any misunderstanding that may have existed.

ACTION

We assume, without deciding, that the Charging Party is a statutory employee and conclude that, under the *Wright Line* analytical framework, there is insufficient evidence to establish a prima facie case of unlawful discrimination under Section 8(a)(3). Accordingly, the charge should be dismissed, absent withdrawal.

The Board applies the analytical framework set out in *Wright Line*¹⁰ to determine whether an employer's adverse employment action was unlawfully motivated by the employee's union or protected concerted activities, as opposed to legitimate business reasons.¹¹ To establish a violation, the General Counsel has the initial burden of showing that the employee's union or protected concerted activities were "a motivating factor" for the employer's adverse action against (b) (6).¹² To satisfy this initial burden, the General Counsel must make out a prima facie case by showing that the employee was engaged in union or protected concerted activities, the employer had knowledge of those activities, and the employer exhibited animus or hostility toward those activities.¹³ Once the General Counsel makes that initial showing, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in the absence of the employee's protected activities.¹⁴

It is well established that direct evidence of anti-union animus is not required and the General Counsel may use circumstantial evidence to infer an employer's unlawful motive.¹⁵ Factors to consider when inferring unlawful motive include: (1) the timing of the adverse employment action in relation to the employee's protected concerted activity; (2) the contradictory nature of the employer's words and deeds at the time of the adverse action; (3) the absence of a cogent reason for the employer's adverse action; and (4) employer behavior that is inconsistent with past practice.¹⁶

¹⁰ 251 NLRB at 1089.

¹¹ See, e.g., *Lucky Cab Co.*, 360 NLRB 271, 273–74 (2014).

¹² *Wright Line*, 251 NLRB at 1089.

¹³ See, e.g., *Lucky Cab Co.*, 360 NLRB at 273–74.

¹⁴ *Id.* at 1089.

¹⁵ *Tubular Corp. of America*, 337 NLRB 99, 99 (2001).

¹⁶ See *id.* at 99 (inferring unlawful motive based on, *inter alia*, suspicious timing, absence of cogent reason, and inconsistent behavior by employer); *Pincus Elevator &*

While circumstantial evidence may be used, the General Counsel still has the burden to “persuasively establish” a prima facie case of unlawful employee discrimination.¹⁷

A prima facie case of unlawful discrimination may not be made in the absence of sufficient evidence to infer animus or if the evidence negates animus. For example, in *New Otani Hotel & Garden*, the Board affirmed the ALJ’s finding that there was insufficient evidence to infer animus where the ostensible animus evidence was “too equivocal” or “quite innocuous.”¹⁸ Specifically, the ALJ determined that it “strain[ed] credulity” to cite a supervisor’s comments to a union supporter that (b) (6) should “be careful” as substantial evidence of animus concerning the employer’s decision to terminate (b) (6) and two other union supporters.¹⁹ The ALJ further noted that, in any event, the fact that the comments were made approximately eight months prior to the employee’s termination rendered them too “temporally remote” for the General Counsel to rely on as proof of antiunion animus.²⁰

Similarly, in *Alexian Bros. Medical Center*, the Board reversed the ALJ’s inference of anti-union animus because, although the employer instructed a supervisor to redo an evaluation that led to the charging party’s termination, the employer made no mention of the union and the ALJ’s inference of animus was mere speculation.²¹ The Board stated, “[i]f the unlawful motive is not present or cannot be inferred as a matter of law, there is no violation of the Act, even if the employer’s

Electric Co., 308 NLRB 684, 693–94 (1992) (inferring unlawful motive based on, *inter alia*, timing of employee discharges and contradictory nature of employer’s words and deeds at time of terminations), *enforced mem.*, 998 F.2d 1004 (3d Cir. 1993).

¹⁷ *C. Factotum, Inc.*, 334 NLRB 189, 193–94 (2001) (although ample undisputed evidence of employee protected concerted activity and employer knowledge, no evidence of animus). See *Pincus Elevator*, 308 NLRB at 693 (General Counsel needs to provide “persuasive proof” of employer’s antiunion animus).

¹⁸ 325 NLRB 928, 928 n.2, 939 (1998).

¹⁹ *Id.* at 939, 941.

²⁰ *Id.* at 939. See *Amcast Automotive of Indiana, Inc.*, 348 NLRB 836, 838 (2006) (finding two-year gap between employee’s prounion activity and discharge too great to support conclusion that it was motivating factor in employer’s decision).

²¹ 307 NLRB 389, 389 (1992).

conduct is deemed unjustified or unfair.”²² In *W. R. Case & Sons Cutlery Co.*, the Board affirmed the ALJ’s dismissal of the complaint where there was insufficient evidence of animus in the employer’s refusal to hire three union activists; rather, the fact that the employer had hired a majority of the predecessor-employer’s union officers and stewards, and readily recognized the union, belied any anti-union intent.²³ The Board also stated that “it is not for the Board to second-guess” an employer’s legitimate business judgments.²⁴

Charging Party claims that UFC’s failure to continue to negotiate and enter into a new PARC with (b) (6) was an adverse employment action. While we note that a failure to renew an employment contract can be an adverse employment action akin to discharge in certain circumstances,²⁵ that is not what occurred here. Here, the Charging Party’s PARC expired by its terms and the parties failed to reach an understanding on a new agreement. Twice, the Charging Party requested a new contract, demanding \$100,000 per bout, and twice UFC rejected that demand. The discussion of terms ended because UFC was not interested in continuing to negotiate while the Charging Party was seeking to leverage (b) (6) decision whether to fight the next day. Thereafter, neither party made any counter offers or demands that modified its or (b) (6) original bargaining position. In addition, neither party refused to communicate with the other party concerning a new contract. The negotiations simply stopped. The Act does not require any party to enter into a contractual agreement or to offer any specific terms in a contract or renewal of a contract. Thus, it is not clear that UFC took any adverse employment action concerning the Charging Party by not making additional offers to (b) (6) or by failing to enter into a new PARC with (b) (6).

²² *Id.* (citing *NLRB v. Brown Food Store*, 380 U.S. 278, 286–87 (1965)). See *Raysel-IDE, Inc.*, 284 NLRB 879, 880 (1987) (weakness of employer’s reason for terminating employee, standing alone, is not sufficient to infer unlawful motive).

²³ 307 NLRB 1457, 1463–64 (1992). See *C. Factotum, Inc.*, 334 NLRB at 193–94 (no evidence of animus; instead, evidence negated animus where employer told employees at time of hire that they would have to join union, made necessary paycheck deductions of union dues, and accommodated impromptu union meetings on jobsite).

²⁴ *W. R. Case & Sons*, 307 NLRB at 1464 (noting that avoidance of overly qualified or previously higher paid employees is a generally accepted hiring practice).

²⁵ See *David Saxe Productions, LLC*, 364 NLRB No. 100, slip op. at 1 (Aug. 26, 2016) (employer’s failure to renew dancer’s contract effectively discharged (b) (6) from production), *enforcement denied on other grounds*, 888 F.3d 1305 (D.C. Cir. 2018).

Even assuming that the failure to enter into a new contract with the Charging Party could be considered an adverse action in this case, we cannot establish a prima facie case under *Wright Line* of a violation of the Act by UFC because there is insufficient evidence that the Charging Party's protected concerted activities were a motivating factor in UFC's decision to discontinue negotiations with (b) (6).

The Charging Party has established that (b) (6) was engaged in protected concerted activity through (b) (6) work with fighters' associations and (b) (6) creation and promotion of Project Spearhead. And, although there is no direct evidence of UFC's knowledge of Charging Party's Project Spearhead activities, and publicity of those activities in the MMA media alone is not sufficient to show knowledge on the part of UFC, it could be argued that there is sufficient circumstantial evidence of knowledge to meet this *Wright Line* factor.²⁶

However, there is insufficient evidence of animus to infer that the Charging Party's protected concerted activities were a motivating factor in UFC's decision not to renew (b) (6) PARC. First, UFC's letter to fighters in 2014 regarding the Culinary Workers' unionization attempt is too remote in time and was wholly independent of and unconnected from the Charging Party's protected concerted activities in 2017 and 2018. Second, the comments made by a UFC-employed commentator in May 2016, stating that the Charging Party should not pursue unionization, cannot be ascribed to UFC, because there is no evidence that the commentator was a UFC agent and the Region has determined that he was not a statutory supervisor. Third, the allegation that an unnamed UFC official at the May 2017 UFC retreat and panel turned off the microphone and ended audience participation is too speculative to support a finding of animus. Fourth, the hearsay statement of a UFC official in October 2016 to a UFC fighter about unionization is also too remote in time, uncorroborated, and unconnected to the Charging Party's activities. Finally, the timing and circumstances of UFC's failure to renew the Charging Party's contract or make a counteroffer in April 2018 is not sufficient to infer an unlawful motivation, considering that this was the second time the Charging Party attempted to use (b) (6) rejection of a fight as leverage to negotiate an extended contract and the second time that (b) (6) had

²⁶ We note, however, that the only direct evidence of knowledge are the email exchanges regarding the Charging Party's request to use a Project Spearhead mouth guard for the April 21 fight; and the UFC's position regarding whether it would agree to pay the Charging Party \$100,000 per fight was established well before those email exchanges took place. In any case, as noted above, use of the mouth guard with the logo was approved.

demanded some iteration of \$100,000 for additional fights,²⁷ which was as much as a 222% increase per fight from (b) (6) then current contract.

Indeed, UFC's actions at key moments appear to have benefited the Charging Party so as to belie anti-union motivation. First, UFC arguably could have ended its relationship with the Charging Party in September 2017 but instead extended (b) (6) contract twice. These renewals occurred after (b) (6) May 2017 statements about unionization. Section 3.2 of the Charging Party's PARC states that "[UFC] shall be deemed to have complied with its obligation to promote any Bout if [UFC] shall have made an offer to Fighter to promote a Bout . . . and Fighter shall have refused to participate." After the Charging Party rejected in September 2017 a fight that was to occur in December 2017, UFC extended (b) (6) contract beyond January 2018 for six months for the purpose of finding (b) (6) a different bout and fight opponent. UFC was not obligated to extend (b) (6) agreement. Thus, notwithstanding that UFC knew that the Charging Party was a vocal proponent of unionization, UFC extended the Charging Party's contract and offered (b) (6) a fourth bout when the Charging Party refused UFC's offer in September 2017 and then another fight three months later. Further, even if UFC was not contractually privileged to terminate its relationship with the Charging Party in September 2017, the PARC's term was scheduled to end on January 14, 2018. Rather than letting the PARC expire, UFC instead offered the Charging Party another fight and extended (b) (6) contract for an additional four months.

Second, following the Charging Party's submission of questions regarding UFC's updated promotional guidelines in December 2017 and, more importantly, the creation of Project Spearhead in February 2018, UFC approved the Charging Party's Project Spearhead-branded mouth guard for (b) (6) April 21 fight. Had the fight taken place, the Project Spearhead logo, situated at the front of the mouth guard, would have been visible on national television anytime the Charging Party opened (b) (6) mouth with the guard in place. Considering that UFC maintains heavy restrictions on the display of third-party logos, it was to the Charging Party's benefit that UFC approved (b) (6) mouth guard at a time when it could have stifled a major opportunity for national exposure of (b) (6) organization.

Third, just prior to the April 21 fight, UFC provided the Charging Party with a discretionary allotment of \$500 when (b) (6) expressed (b) (6) concern that (b) (6) travel

²⁷ Whether the Charging Party's request was for a \$50,000 fight purse and a \$50,000 win bonus or for \$100,000 for each fight purse is unclear. Nevertheless, either of these demands were a significant increase over (b) (6) then current contract and was as much as a 222% increase per fight.

expenses were not sufficiently covered. According to an email from UFC, the money was provided because it was “important to . . . [UFC] that [the Charging Party] feel fully mentally and physically prepared to compete . . .” and that the money “will assist [the Charging Party] in focusing (b)(6) attention on the fight ahead of (b)(6) instead of concerning [herself] with luggage and per diem matters.” UFC was not contractually required to provide the discretionary payment and could have instead withheld the money or simply ignored the Charging Party’s request if it had indeed harbored any animus against (b)(6) or (b)(6) protected activities.

Finally, it is clear based both on UFC’s and the Charging Party’s statements to each other and in the media that negotiations broke down over the public manner in which the Charging Party conducted the negotiation of (b)(6) contract and in (b)(6) demands for bout purses representing as much as a 222% increase over (b)(6) then current contract. It is not the proper role of the Regional Director or the Board, in the absence of evidence pointing to animus or pretext, to second-guess UFC’s business decision not to continue to negotiate or renew the Charging Party’s contract in response to these kinds of demands.

Because there is insufficient evidence to establish a prima facie case under *Wright Line* of an unlawful adverse employment action and, instead, there is evidence that directly contradicts a finding of any unlawful action, no further analysis concerning the Charging Party’s employment status is necessary. Accordingly, for the foregoing reasons, the charge alleging that UFC violated Section 8(a)(3) should be dismissed, absent withdrawal.

/s/
J.L.S.