

Nos. 18-2336, 18-2426

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UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

and

1199 SEIU UNITED HEALTHCARE WORKERS EAST

Intervenor

v.

800 RIVER ROAD OPERATING COMPANY, LLC,  
D/B/A WOODCREST HEALTH CARE CENTER

Respondent/Cross-Petitioner

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ON APPLICATION FOR ENFORCEMENT AND  
CROSS-PETITION FOR REVIEW OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD

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**BRIEF FOR  
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**STATEMENT OF SUBJECT MATTER AND  
APPELLATE JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) for enforcement, and the cross-petition of 800 River Road Operating Company, LLC, d/b/a Woodcrest Health Care Center (“the Center”) for review, of a Board Supplemental Decision and Order issued against the Center on April 26, 2018, and reported at 366 NLRB No. 70. (A. 29-37.)<sup>1</sup> 1199 SEIU United Healthcare Workers East (“the Union”), the charging party below, has intervened on behalf of the Board.

The Board had jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (“the Act”). 29 U.S.C. § 151, 160(a). The Court has jurisdiction over this proceeding under Section 10(e) and (f) of the Act. 29 U.S.C. § 160(e) and (f). Venue is proper because the unfair labor practices occurred in New Jersey. The application and cross-petition were timely because the Act places no limit on the initiation of enforcement or review proceedings.

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<sup>1</sup> “A.” references are to the joint appendix and “Br.” references are to the Center’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

## STATEMENT OF THE ISSUE

Whether the Board reasonably found that the Center violated Section 8(a)(1) and (3) of the Act by announcing and implementing improvements in healthcare benefits for all employees except those eligible to vote in a representation election.

## STATEMENT OF RELATED CASES AND PROCEEDINGS

This case previously was before the Court. *See 800 River Rd. Operating Co., LLC v. NLRB*, 784 F.3d 902 (3d Cir. 2015) (“*Woodcrest*”), *enforcing in part and vacating and remanding in part Woodcrest Health Care Ctr.*, 360 NLRB 415 (2014). In *Woodcrest*, the Court affirmed the Board’s findings that the Center violated the Act by unlawfully interrogating an employee and by creating an impression of surveillance during the Union’s election campaign; it made no decision as to two other interrogation violations because they were cumulative. *Woodcrest*, 784 F.3d at 914-15, 917. The Court, however, vacated and remanded the portion of the Board’s order related to the unfair labor practice at issue in the present proceeding. *Id.* at 905, 907-10, 918.

Because the Union garnered a majority of votes in a March 2012 election, the Board certified the Union in a separate proceeding as the collective-bargaining representative of a unit of Center employees. *Woodcrest Health Care Ctr.*, 361 NLRB 1014 (2014). Subsequently, the Board found that the Center violated the Act by refusing to bargain with, or provide information to, the Union, and ordered

the Center to remedy those unfair labor practices. *Woodcrest Health Care Ctr.*, 362 NLRB No. 114, 2015 WL 3758355 (June 15, 2015). The Court of Appeals for the District of Columbia Circuit enforced that order. *800 River Rd. Operating Co., LLC v. NLRB*, 846 F.3d 378, 381 (D.C. Cir. 2017).

### STATEMENT OF THE CASE

In *Woodcrest*, the Court vacated the Board's finding that the Center violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. § 158(a)(1) and (3), by announcing and implementing improvements in healthcare benefits for all employees except those eligible to vote in the representation election, and remanded that portion of the case to the Board for further consideration in light of the Court's opinion. 784 F.3d at 907-11. The Court identified the Supreme Court's decision in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), as setting forth the applicable analytical framework. It faulted the Board for failing to apply that framework and, especially, for failing to make specific findings as to the Center's motive for withholding the benefit improvements from election-eligible employees or as to the withholding's effect on employee rights. *Woodcrest*, 784 F.3d at 910, 918.

On remand, in the Supplemental Decision and Order before this Court, the Board accepted the Court's *Woodcrest* opinion as law of the case. Consistent with that opinion, the Board reexamined the Center's discriminatory benefit announcement and implementation under the *Great Dane* analytical framework

and again found them unlawful. The facts supporting the Board's findings are set forth below, followed by summaries of the Board's prior decision, the Court's opinion, and the Board's Supplemental Decision and Order.

## **I. STATEMENT OF FACTS**

### **A. Background: the Center's Operations; Changes to the Healthcare Plan at Woodcrest; the Representation Petition**

The Center operates Woodcrest Health Care Center ("Woodcrest"), a rehabilitation and nursing facility in New Jersey. 784 F.3d at 905. It employs HealthBridge Management, LLC ("HealthBridge"), to manage Woodcrest. HealthBridge provides the healthcare plan that the Center offers its employees, a common plan that also covers three other, similar facilities in New Jersey. On January 1, 2012, HealthBridge made changes to the common plan, resulting in reduced benefits and increased costs. *Id.* at 907. On January 23, the Union filed a petition seeking to represent a unit of approximately 200 of the Center's Woodcrest employees ("unit employees"). The representation election was set for March 9. *Id.* at 905. (A. 29; A. 124 ¶ 1.)

### **B. The Center Announces and Implements Improvements to Its Healthcare Plan for All Employees Except Those Eligible To Vote in the Representation Election**

In response to employee dissatisfaction and complaints, HealthBridge decided to make improvements to the common healthcare plan, including reductions to premiums and copays, retroactive to January 1, 2012. *Id.* at 907.

(A. 29; A. 124 ¶¶ 3-4.) On March 5, four days before the representation election, Woodcrest's administrator issued a memorandum announcing the various benefit improvements. The Center distributed the memorandum in envelopes to all employees except unit employees. *Id.* (A. 29; A. 123, 124 ¶ 5.) The election was held on March 9, with the Union garnering a majority of votes, and the Center filed post-election objections seeking a new election. *Id.* at 905. On March 23, while the objections were still pending, the Center implemented the promised improvements to the healthcare plan for all employees except unit employees. (A. 29; A. 123, 124 ¶ 4.)

Although the memorandum was not issued to unit employees, they learned of the withheld benefit improvements. *Id.* at 907. For instance, certified nursing assistant Jeffrey Jimenez found a copy of the memorandum in a break room right before the election. (A. 30; A. 70.) At a general monthly meeting after the election, one of the 40 or 50 assembled employees asked about the memorandum, inquiring whether unit employees could have their healthcare plan examined and if the plan might be changed. Woodcrest's administrator asserted "we cannot negotiate your contract, your benefits, and your insurance because right now you are in the critical period with the Union." *Id.* (A. 30, 47; A. 71-72.) And when, at a communications meeting, a unit employee said that she had heard about the improvements and wanted to know how they would affect her, a lawyer for the

Center told the unit employee and the audience that “we [are] not allowed to discuss that matter at this time.” *Id.* (A. 47; A. 76-77, 125 ¶ 7.)

## II. THE BOARD’S PRIOR DECISION

Following a hearing, an administrative law judge found that the Center violated Section 8(a)(1) and (3) of the Act by announcing and implementing the improved healthcare benefits for all employees except those eligible to vote in the representation election. (A. 47-48.) In finding that the Center unlawfully withheld the announced benefit improvements from unit employees, the judge relied on the principle that, in deciding whether to grant a wage or benefit increase prior to an election, an employer must proceed as if the union were not in the picture. (A. 47 (citing *Great Atl. & Pac. Tea Co., Inc.*, 166 NLRB 27, 29 n.1 (1967), *enforced in relevant part*, 409 F.2d 296 (5th Cir. 1969)).) The judge found that instead of proceeding as though there was no ongoing union campaign, the Center had granted benefit improvements to certain employees “because they were not involved in a representation campaign” and failed to grant them to others “specifically because they were involved in such a campaign.” (*Id.*) In other words, the judge explained, the Center “did not proceed, as the law required it to do, as though there was no ongoing union campaign.” (*Id.*)

The judge acknowledged that Board law provides a safe harbor whereby an employer may lawfully postpone, rather than cancel, an adjustment in wages or

benefits. But to take advantage of that safe harbor, the employer must “make[] clear” to the affected employees “that the adjustment would occur whether or not they select a union, and that the ‘sole purpose’ of the adjustment’s postponement is to avoid the appearance of influencing the election’s outcome.” (*Id.* (quoting *KMST-TV Channel 46*, 302 NLRB 381, 382 (1991)).) The judge found that the Center did not qualify for the safe harbor because it failed to inform unit employees that the withholding was temporary and that the benefits would be provided retroactively. (*Id.*) Consequently, unit employees were left with the “clear impression” that they were being deprived of the system-wide benefit improvements because of their protected union activity. (*Id.*) The Board adopted the judge’s findings and conclusions without modification.<sup>2</sup> (A. 38.)

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<sup>2</sup> The Board also found that the Center violated Section 8(a)(1) of the Act on multiple occasions by coercively interrogating employees and by creating the impression that it was surveilling employees’ union and protected concerted activities. (A. 38.) The Court affirmed the Board’s findings that the Center unlawfully interrogated an employee and created an impression of surveillance; it made no decision as to two other interrogation violations because they were cumulative. *Woodcrest*, 784 F.3d at 914-15, 917.

### III. THE COURT'S OPINION IN *WOODCREST*

The Center filed a petition for review challenging the Board's unfair-labor-practice findings, the Board cross-applied for enforcement of its Order, and the Union intervened. The Court (Circuit Judges Rendell, Smith, and Krause) vacated the Board's finding that the Center violated Section 8(a)(1) and (3) of the Act by announcing and implementing improvements in healthcare benefits for all employees except those eligible to vote in the representation election. *Woodcrest*, 784 F.3d at 918. Citing Supreme Court and circuit precedent, the Court held that in order to find such a violation, "consideration must be given to the employer's motive." *Id.* at 908, 909 n.4. The Court acknowledged, however, that specific proof of an employer's improper motivation may be unnecessary in certain circumstances because the requisite motivation can be inferred from the employer's discriminatory conduct. *Id.* at 909 (citing *Great Dane*, 388 U.S. at 33-34). The Court proceeded to describe the burden shifting framework the Supreme Court established in *Great Dane* for analyzing such cases. *Id.* at 909-10.

In light of *Great Dane*, the Court determined that "[t]he Board's failure to make a finding as to the nature of the effect on employee rights or the reason for, or purpose of, [the Center's] different treatment of the election-eligible employees cannot be reconciled with what the Supreme Court has instructed the ALJ and the Board to do." *Id.* at 910. The Board, the Court found, had instead treated the

“inquiry as a ‘but for’ test—i.e., asking only whether the employees would have received benefits but for the Union’s presence . . . .” *Id.* at 910. Accordingly, the Court remanded the case for the Board to consider “in the first instance” the issues identified in the Court’s opinion and “to modify its longstanding mode of analysis in order to comply with the Supreme Court’s equally longstanding precedent to the contrary.” *Id.* at 910.

#### **IV. THE BOARD’S SUPPLEMENTAL DECISION AND ORDER**

The Board accepted the Court’s remand and invited the parties to file position statements. (A. 29 & n.1.) On April 26, 2018, the Board (Members Pearce, McFerran, and Kaplan) issued the Supplemental Decision and Order before the Court. (A. 29-37.) The Board first found that the Center’s “withholding of improved healthcare benefits from employees in the stipulated unit while announcing an intent to grant those benefits to other employees was ‘discriminatory conduct that could have adversely affected employee rights to some extent.’” (A. 32 (quoting *Great Dane*, 388 U.S. at 34).) The burden thus shifted to the Center, under *Great Dane*, to demonstrate that its conduct was motivated by a “substantial and legitimate business justification.” (A. 34.) The Board found, however, that the Center “failed to establish or even assert such a justification, and since no evidence of a proper justification appears in the record, it is unnecessary to determine whether the record contains independent evidence of

improper motivation.” (*Id.*) Accordingly, the Board found that the Center violated Section 8(a)(1) and (3) of the Act by announcing and implementing improvements in healthcare benefits for all employees except unit employees. (*Id.*)

The Board’s Order requires the Center to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, 29 U.S.C. § 157. Affirmatively, the Order requires that, upon request and to the extent it has not already done so, the Center implement the withheld improvements in healthcare benefits for unit employees who were eligible to vote in the March 9, 2012 representation election and were specifically excluded from receiving those benefits. The Order also requires the Center to make current and former employees whole for any losses resulting from that unlawful exclusion. Finally, the Center must post a remedial notice. (A. 35.)

### **STANDARD OF REVIEW**

This Court “afford[s] considerable deference to the Board.” *Woodcrest*, 784 F.3d at 906 (quoting *Grane Health Care v. NLRB*, 712 F.3d 145, 149 (3d Cir. 2013)). The Board’s findings of fact are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951); *Allegheny Ludlum Corp. v. NLRB*, 301 F.3d 167, 175 (3d Cir. 2002). Further, the Board’s factual inferences are not to be

disturbed, even if the Court would have made a contrary determination had the matter been before it de novo. *Woodcrest*, 784 F.3d at 907; *Allegheny Ludlum*, 301 F.3d at 175.

As emphasized by the Supreme Court, “the [Board] has the primary responsibility for developing and applying national labor policy.” *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990)); accord *Woodcrest*, 784 F.3d at 906. Accordingly, this Court “will uphold the Board’s interpretation of the [Act] ‘as long as it is rational and consistent with the Act.’” *Woodcrest*, 784 F.3d at 906 (quoting *Curtin Matheson*, 494 U.S. at 787); see also *Allegheny Ludlum*, 301 F.3d at 175 (the Court will uphold Board’s construction of Act if it is “reasonably defensible”).

### **SUMMARY OF ARGUMENT**

Applying *Great Dane*, as the Court instructed in *Woodcrest*, the Board reasonably concluded that the Center’s conduct in announcing and implementing healthcare benefit improvements for all employees except those eligible to vote in the representation election violated Section 8(a)(1) and (3) of the Act. There is no question that, as the Board found, the Center’s conduct was discriminatory because it granted improvements to non-unit employees because they were not involved in the representation campaign, and failed to grant improvements to the unit employees specifically because they were participating in the campaign and would

be deciding the issue of representation in the upcoming election. The evidence further amply supports the Board's finding that the Center's conduct could have adversely affected employees' future exercise of their Section 7 rights by sending the unmistakable message that they were being punished for their support of the Union and to discourage them and others from supporting the Union in the future. Consistent with *Great Dane*, the Board therefore appropriately found that the record evidence gave rise to an inference of an unlawful motive. The Center's challenges to that inference confound different aspects of the *Great Dane* analysis and misconstrue this Court's instructions in *Woodcrest*.

The Board next reasonably found that the Center failed to carry its burden under *Great Dane* of establishing its defense that a substantial and legitimate business justification motivated its conduct. The Center asserts that it implemented the benefit improvements to protect the viability of its healthcare plan, and it withheld them from unit employees to protect the integrity of the election (by maintaining the status quo) and to avoid exposure to unfair-labor-practice charges. However, as the Board found, the record is devoid of evidence demonstrating that the Center's asserted justification *actually* motivated its conduct. And the Board acted well within its discretion in declining further, extraordinary evidentiary proceedings. The Center—which never formally moved to reopen the record—did not claim to have new arguments or proffer probative

evidence, nor does it do so in its appellate brief. Although the Center claims that the Court in *Woodcrest* required the Board to reopen the record, a fair reading of that decision provides no support for that contention.

Finally, even if the Center had presented evidence of its asserted justifications, the Board reasonably found that it would have rejected them as illegitimate. As the Board has repeatedly held, due to the coercive effect of withholding benefits from eligible voters while granting them to others, an employer is required to proceed in the same manner as it would absent the presence of a union. Similarly fatal to the Center's asserted justifications, the Board also has long held that system-wide benefits grants are free of improper considerations given their uniform treatment of all employees. The Center could have acted in accordance with those settled legal principles, but chose not to do so.

**ARGUMENT****THE BOARD REASONABLY FOUND THAT THE CENTER VIOLATED SECTION 8(a)(1) AND (3) OF THE ACT BY ANNOUNCING AND IMPLEMENTING IMPROVED HEALTHCARE BENEFITS FOR ALL EMPLOYEES EXCEPT UNIT EMPLOYEES**

Consistent with the Court's instruction in *Woodcrest*, the Board applied *Great Dane* and reexamined whether the Center violated Section 8(a)(1) and (3) of the Act by announcing and implementing healthcare benefit improvements for all employees except those eligible to vote in the representation election. (A. 31-34.) As shown below, the Board reasonably found that the Center's conduct violated the Act.

**A. The Board May Infer Unlawful Motive if an Employer's Conduct Is Discriminatory and Could Have Adversely Affected Employee Rights; the Employer Then Has the Burden To Establish Lawful Motive**

Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157. To safeguard those rights, the Act makes unlawful certain employer conduct. Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to "to interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights. 29 U.S.C. § 158(a)(1). And Section 8(a)(3) prohibits

employer “discrimination in regard to . . . any term or condition of employment to encourage or discourage membership in any labor organization.” 29 U.S.C.

§ 158(a)(3).

Consistent with the foregoing statutory scheme, an employer’s grant or withholding of benefits in proximity to a representation election may interfere with or coerce employees’ Section 7-protected freedom of choice for or against union representation, in violation of Section 8(a)(1). *See NLRB v. Exchange Parts Co.*, 375 U.S. 405, 408-09 (1964); *Care One at Madison Ave., LLC v. NLRB*, 832 F.3d 351, 357 (D.C. Cir. 2016). Similarly, an employer’s decision to grant or withhold benefits based on union or protected activity, or which applies differently to unit and non-unit employees, may violate Section 8(a)(3)’s ban on discriminatory conduct to discourage union activity. *See Great Dane*, 388 U.S. at 32; *Care One*, 832 F.3d at 358; *NLRB v. Great Atl. & Pac. Tea Co.*, 409 F.2d 296, 298 (5th Cir. 1969).

In the specific context of evaluating the lawfulness of an employer’s benefit decision made in proximity to a representation election, both Section 8(a)(1) and Section 8(a)(3) normally require a showing of improper (*i.e.* antiunion)

motivation.<sup>3</sup> *Woodcrest*, 784 F.3d at 908-09 & n.4 (citing cases). In *Great Dane*, however, the Supreme Court concluded that specific proof of an employer's improper motivation may be unnecessary in certain circumstances where the requisite motivation can be inferred from the employer's discriminatory conduct itself. *Great Dane*, 388 U.S. at 33-34. Surveying its jurisprudence, the Supreme Court articulated a burden-shifting framework for analyzing such cases. *Id.* at 33-34; *see also Woodcrest*, 784 F.3d at 909-10 (describing the framework).

On the one hand, “[s]ome conduct . . . is so ‘inherently destructive of employee interests’ that it may be deemed proscribed without need for proof of an underlying improper motive.” *Great Dane*, 388 U.S. at 33 (quoting *NLRB v. Brown*, 380 U.S. 278, 287 (1965)). Conduct is inherently destructive, the Supreme Court explained, when it “carries with it ‘unavoidable consequences which the employer not only foresaw but which he must have intended’ and thus bears ‘its own indicia of intent.’” *Id.* (quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228, 231 (1963)). If challenged conduct qualifies as “inherently destructive,” then “no proof of an antiunion motivation is needed” to find an unfair labor practice,

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<sup>3</sup> In determining whether an employer's conduct violates Section 8(a)(1) outside of that particular context, the Board normally only examines whether, objectively viewed, the conduct “reasonably tends to interfere with, restrain, or coerce” employees' exercise of their rights. *See Hanlon & Wilson Co. v. NLRB*, 738 F.2d 606, 613 (3d Cir. 1984).

“even if the employer introduces evidence that the conduct was motivated by business considerations.” *Id.* at 34; *accord Woodcrest*, 784 F.3d at 909. “On the other hand,” the Supreme Court held, when “the adverse effect of the [employer’s] discriminatory conduct on employee rights is ‘comparatively slight,’ an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.” *Great Dane*, 388 U.S. at 34; *accord Woodcrest*, 784 F.3d at 909-10. In other words, if the employer fails to establish that it was motivated by a legitimate objective, “the conduct constitutes an unfair labor practice ‘without reference to intent.’” *Woodcrest*, 784 F.3d at 909 (quoting *NLRB v. Hudson Transit Lines, Inc.*, 429 F.2d 1223, 1228 (3d Cir. 1970)).

Thus, as this Court explained, unfair labor practices falling within the “two categories” described in *Great Dane* “do not require *proof* of motive.” *Id.* (referencing conduct “inherently destructive” of and adversely affecting employee rights) (quoting *Hudson Transit*, 429 F.2d at 1229). “[I]n either situation,” the Supreme Court concluded *Great Dane* by reiterating, “once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to

establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.” *Great Dane*, 388 U.S. at 34.<sup>4</sup>

**B. The Board Reasonably Inferred Unlawful Motive from the Center’s Targeted Withholding of Benefits from Unit Employees While Providing Them to Non-Unit Employees**

The Board reasonably found that the Center’s “withholding of improved healthcare benefits from employees in the stipulated unit while announcing an intent to grant those benefits to other employees was ‘discriminatory conduct which could have adversely affected employee rights to some extent.’” (A. 32 (quoting *Great Dane*, 388 U.S. at 34).) Pursuant to *Great Dane*’s analysis, and consistent with other Board and court cases, the Board therefore appropriately found that the record evidence gave rise to an inference of an unlawful motive, and found that the burden shifted to the Center to establish a substantial and legitimate business justification for its conduct. (*Id.*) As will be discussed, the Center misconstrues *Great Dane*, *Woodcrest*, and the Board’s decision in challenging the legal and factual underpinnings of that inference.

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<sup>4</sup> It is unclear what the Center relies on when characterizing the Supreme Court’s own restatement of a key aspect of its standard as an “alternate test” that does not apply in this case. (Br. 28.)

**1. The Center's withholding of benefits from unit employees was both discriminatory and likely to adversely affect employee rights**

As to whether the Center's conduct was discriminatory, there is, as the Board found, "no dispute" that the Center "would have extended the benefit improvements to the employees in the stipulated unit were it not for their protected activity." (A. 32; A. 124-25.) The Center specifically stipulated that the withheld benefit improvements "applied to all employees except those involved in a union representation campaign" (A. 124 ¶ 4), and it repeatedly admits that it decided to withhold the improvements from unit employees because of their participation in the election (Br. 27, 30, 31). In other words, as the Board found, the Center "granted the improvements to certain employees 'because they were not involved in a representation campaign,' and failed to grant the improvements to others 'specifically because they were involved in such a campaign.'" (A. 32 (quoting A. 47).) By targeting the benefit improvement based solely on employees' (lack of) participation in protected activity, the Center undeniably engaged in the type of

discriminatory conduct contemplated by *Great Dane*.<sup>5</sup> 388 U.S. at 32 (“There is little question but that the result of the company’s refusal to pay vacation benefits to strikers was discrimination in its simplest form.”); accord *NLRB v. Frick Co.*, 397 F.2d 956, 961 (3d Cir. 1968) (granting benefit to non-strikers but withholding it from strikers was discriminatory).

The Board next reasonably found that the Center’s conduct “could have adversely affected employee rights to some extent.” (A. 32 (quoting *Great Dane*, 388 U.S. at 34).) Generally, as the Supreme Court has explained, “[t]he danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.” *Exchange Parts*, 375 U.S. at 409. The Board and courts have recognized that this rationale applies to cases involving a grant—or withholding—of benefits in proximity to a representation election, as were the Center’s announcement and implementation. (A. 33 (citing cases).) *See*,

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<sup>5</sup> The Board’s finding that targeting unit employees constitutes discriminatory conduct under *Great Dane* is not, as the Center asserts (Br. 23, *see also* 19, 34, 42), “a thinly veiled version” of the so-called “but for” test. It is the first of two elements that determine whether conduct satisfies what this Court identified as the “threshold” for applying *Great Dane*. *Woodcrest*, 784 F.3d at 909. As the supplemental decision shows, the Board applied each element of the *Great Dane* framework in finding that the Center’s withholding was unlawfully motivated. (*See* A. 30-33.)

*e.g.*, *Care One*, 832 F.3d at 357. And a *targeted* withholding of otherwise universally granted benefits at such a critical time, which discriminates based on participation in the election, amplifies that adverse effect. As the Supreme Court stated in *Great Dane*, “[t]he act of paying accrued benefits to one group of employees while announcing the extinction of the same benefits for another group of employees who are distinguishable only by their participation in protected concerted activity surely may have a discouraging effect on either present or future concerted activity.” 388 U.S. at 32.

As the Board found, the record evidence established that “employees in the stipulated unit became aware before the election that they were being denied the benefit improvements” granted to others. (A. 32; A. 70.) *See Woodcrest*, 784 F.3d at 907 (“Election-eligible employees discovered that their coworkers were receiving these improvements . . . .”). The evidence demonstrated, moreover, that when unit employees asked about the withheld benefits shortly after the election, the Center “placed the onus for the denial squarely on the Union” by way of statements such as “we cannot negotiate your contract, your benefits, and your insurance because right now you are in the critical period with the Union.” (A. 32; A. 71-72.) *See Woodcrest*, 784 F.3d at 907 (describing officials’ statements).

Given unit employees’ awareness that they were specifically excluded from the benefit improvements because of the representation election, the Board

reasonably found that the “foreseeable effect of the Center’s conduct was to discourage the future exercise of Section 7 rights.”<sup>6</sup> (A. 32.) As the Board explained, the Center’s announcement and targeted withholding of benefits sent “an unmistakable message to the employees in the stipulated unit that they were being punished for their support of the Union.” (*Id.*) It also served “to warn them and others—including those who received the benefit improvements—that they cannot engage in organizational activity without jeopardizing their eligibility for benefits and risking detriment to their terms and conditions of employment.” (*Id.*) *See also Great Dane Trailers, Inc.*, 150 NLRB 438, 443 (1964) (targeted withholding’s “natural and foreseeable consequence” was discouraging union support), *enforcement denied*, 363 F.2d 130 (5th Cir. 1966), *rev’d*, 388 U.S. 26 (1967); *Frick*, 397 F.2d at 962-63 (that discriminatory withholding “tends to discourage” union support “can hardly be doubted”).

Not only does the Board’s finding rest on sound legal and factual grounds, but it is also consistent with a recent decision by the D.C. Circuit, which enforced a

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<sup>6</sup> Contrary to the Center’s arguments (Br. 36, 38, 39), the foreseeability of employees *learning of* the targeted withholding, as opposed to being affected by that knowledge, is not a part of the Board’s adverse-effect analysis. As just discussed, the Board relied instead on unit employees’ actual knowledge of the withholding. (A. 32.) As discussed below (p. 30), the Board addressed the foreseeability of such knowledge in rejecting the Center’s asserted justification for the withholding. (*See* A. 34 & n.14.)

Board order finding that an employer violated Section 8(a)(3) under very similar circumstances. In *Care One*, the employer made changes to a company-wide health plan in January, reducing benefits and increasing costs. 832 F.3d at 355. The employer then reversed course, deciding to restore certain benefits. *Id.* In the interim, however, a union had filed an election petition. *Id.* Three weeks before the representation election, the employer issued a memorandum—which it distributed only to employees not eligible to vote in the election—announcing the benefit improvements. *Id.* Election-eligible employees saw the memorandum when an administrator posted it, and they asked about the benefits. *Id.* The administrator refused to discuss the matter—unlike here, he did not reference the union or election in doing so. *Id.*; *Care One at Madison Ave.*, 361 NLRB 1462, 1474 (2014). Applying *Great Dane*, the D.C. Circuit agreed with the Board that the employer’s conduct was discriminatory and could have adversely affected employee rights to some extent, shifting the burden regarding motivation to the employer. *Care One*, 832 F.3d at 358. Under comparable circumstances, the Board here appropriately inferred that the Center’s targeted benefit withholding was unlawfully motivated and shifted the burden to the Center to establish that it was motivated by substantial and legitimate business objectives. (A. 32.)

## 2. The Board correctly applied *Great Dane*

The Center's challenges to the Board's inference of unlawful motivation miss the mark because *Great Dane* framed the Board's analysis on remand, consistent with this Court's instructions. As will be discussed, the Board's decision is faithful to *Great Dane* and the Center's objections misperceive both the governing standard and the Board's rationale.

As an initial matter, there is no merit to the Center's argument that the Board "misapplied the legal standard," and ignored this Court's directive, by not determining whether the Center's targeted withholding was "inherently destructive" or instead had a "comparatively slight" impact on employee rights. (Br. 26, 28.) As just discussed, the Board found that the Center's discriminatory conduct could have adversely affected employee rights to some extent, which is sufficient to infer unlawful motive and shift the burden of proof to the Center. *See Great Dane*, 388 U.S. at 34; *Woodcrest*, 784 F.3d at 909 (citing *Hudson Transit*, 429 F.2d at 1228)). The *Great Dane* framework for the two categories of conduct adversely affecting employee rights diverges only if the employer supplies evidence establishing a substantial and legitimate business justification for its conduct. Because the Board found (A. 32) that the Center failed to satisfy its burden, as discussed below (pp. 28-37), the Board reasonably declined, like the Supreme Court in *Great Dane*, to make an unnecessary determination as to the

degree of adverse effect. *See Great Dane*, 388 U.S. at 34; *see also Care One*, 832 F.3d at 358-59 (upholding violation on same basis). That this Court characterized as a “threshold matter” the question of whether an employer’s discriminatory conduct could have “to *some extent*” adversely affected employee rights does not, as the Center asserts (Br. 26-28), require the Board to make a further qualitative determination immaterial to resolution of the unfair labor practice before it. *Woodcrest*, 784 F.3d at 909.

Nor is there any merit to the Center’s other challenges to the Board’s inference of unlawful motive at the first step of *Great Dane*, which boil down to an assertion that the Board cannot find unlawful motive without “specific evidence” (Br. 34, 42) or “actual evidence” (Br. 38) of the Center’s intent. (*See also, e.g.*, Br. 30, 38, 40.) As the Court made plain in *Woodcrest*, “actual proof” of an employer’s improper motivation is unnecessary under the *Great Dane* framework if the Board initially infers the requisite motivation from the employer’s discriminatory conduct’s likelihood of affecting employee rights and the employer does not prove it acted pursuant to an alternative, lawful motivation. *Woodcrest*, 784 F.3d at 909 (citing *Great Dane*, 388 U.S. at 33-34). The Center cannot avoid its obligation to provide evidence demonstrating its purported substantial and legitimate business justifications by focusing on the lack of evidence to rebut the showing it never made. (Br. 26-27, 30, 42.) The Center does not, moreover,

advance its argument by relying on cases applying *Wright Line*, the Board's separate test for determining motivation in mixed-motive discrimination cases involving adverse actions such as discipline or discharge. (Br. 24-25, 30.) The Court instructed the Board to apply *Great Dane*, not *Wright Line*.

The Center's blanket assertion that there can be no inference of an unlawful motive where it did not specifically inform unit employees about the withheld benefit improvements (*i.e.* from "silence"), is also mistaken. (Br. 36-39.) Once again, this argument confounds the initial step of *Great Dane*, which infers motive based on the potential adverse effect of discriminatory conduct on employee rights, with the subsequent steps which examine how specific evidence of motive may affect that inference. As described (pp. 6-7, 22-23), the present case is not one where employees remained in the dark as to their employer's discriminatory treatment of them. The Center may label it "specious" and "inconsequential" (Br. 36), but the uncontradicted testimonial evidence (including from one of its own witnesses) demonstrates unit employees' awareness that they were excluded from the benefit improvements for reasons related to the representation election. Indeed, during a meeting attended by unit employees shortly after the election, the Center's official publicly acknowledged the withholding and placed the onus for it on the Union. Given the foregoing evidence, it was reasonable for the Board to find that the withholding could have adversely affected employee rights to some

extent, and the Center cites no case to support its claim that employees' knowledge of the discriminatory withholding is not probative absent evidence as to *how* employees learned of the withholding. (Br. 36-37.)

**C. The Center Failed To Establish that Substantial and Legitimate Business Objectives Motivated Its Conduct**

An employer fails to establish a substantial and legitimate business motivation under *Great Dane* where it merely asserts, without evidentiary support, that its discriminatory conduct was lawfully motivated. *Frick*, 397 F.2d at 961-62. The Center claims (Br. 27, 29-34, 38, 40) that it implemented the benefit improvements to protect the viability of its healthcare plan, and that it withheld them from unit employees to protect the integrity of the election (by maintaining the status quo) and to avoid exposing itself to unfair-labor-practice charges. As the Board found, however, the Center "offered no evidence" of its "actual" motives and, even if it had, those motives were not legitimate. (A. 32.)

**1. The Center failed to cite proof of its alleged legitimate motivations, or proffer facts warranting further evidentiary proceedings**

The Board reasonably found that the Center failed to carry its burden with respect to its targeted withholding of benefit improvements from unit employees. (A. 32-33.) First, as the Board emphasized, the Center presented no testimony from the officials who made the benefits decision or other evidence "establishing how, when, or why the decision was made." (A. 32.) As the Board noted, the only

testimony about the benefit improvements related to how they were communicated to employees. (A. 32 n.9.) Specifically, the Center’s acting nursing director recounted that she had observed supervisors distributing the memorandum announcing the benefit improvement to eligible non-unit employees in envelopes, and that an official declined to discuss the improvements “at this time” when a unit employee inquired about them. (A. 77-79.) Her testimony did not address why the benefits were implemented when they were, or why they were withheld from unit employees.

The remaining evidence is equally sparse and off-point. While the parties stipulated that “some employees” had dropped *or* changed their coverage due to prior reductions in the relevant benefits, those facts do not come close to suggesting that the viability of the plan was at risk, much less imminent risk. (A. 124 ¶¶ 3-4.) The parties’ further stipulation, that the improvements were made in “response to complaints” about the prior reductions, provides only a glimpse of a motivation, and not one necessarily related to maintaining “viability” or that would explain the timing so close to the election. (*Id.*) As the Board found, there was no evidence (or claim) that the timing was “compelled by exigency or external factors.” (A. 34.)

With respect to the withholding decision, the most the record reveals is that the Center may have (unsuccessfully) attempted to conceal the benefit

improvements from unit employees once it had—for unknown reasons—decided to grant them in proximity to the representation election. In this regard, although the Center relies on the fact it distributed the announcement memorandum to non-unit employees in “sealed envelopes” as proof of its asserted motive of protecting electoral integrity (Br. 41), the evidence simply shows it distributed the announcement in envelopes along with non-unit employees’ paychecks. (A. 78-79.) It does not indicate why the Center chose that method or whether distributing information to employees in that manner was a special measure rather than its typical practice. Nor does it show that the Center informed employees receiving the information that it was sensitive or should be kept confidential.

Moreover, even if the Center had demonstrated that the distribution method was selected to shield the unit employees, the effort was inadequate under the circumstances. As the Board found, given that the earlier benefit cuts were “extremely unpopular,” it was “foreseeable that their rescission would become known” to unit employees (as it did). (A. 34.) The Center’s purported efforts to avoid that result were predictably unsuccessful and, as discussed (pp. 6-7, 22-23), its response once the unit employees learned of their exclusion did nothing to lessen the adverse effect on employee rights.

Based on the record before it, the Board reasonably found that the Center’s “bald assertion unaccompanied by any proof or offer of proof does not fulfill its

obligation to ‘come forward with evidence of legitimate and substantial business justifications’ for its conduct.” (A. 32-33 (quoting *Great Dane*, 388 U.S. at 34).) *See also Frick*, 397 F.2d at 962 (employer failed to establish rule-based justification where record contained no evidence how rule previously was applied except for official’s “bald statement” it would apply to any employee). Because, on remand, the Center asserted that the Board could not find an unfair labor practice without reopening the record (A. 188), the Board also considered whether further evidentiary proceedings were necessary and determined that they were not. (A. 32 n.8.)

The Board’s decision not to reopen the record was well within its broad discretion. *See NLRB v. Boyer Bros.*, 448 F.2d 555, 565 (3d Cir. 1971) (decision whether to reopen record reviewed for abuse of discretion); *see also Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1285 n.10 (D.C. Cir. 1999) (same). Under Board regulations, a party requesting to reopen the record “must state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result.” 29 C.F.R. § 102.48(c)(1). In declining to reopen the record, the Board found it especially significant that, despite the Board’s invitation to file a position statement regarding the issues raised by the remand, the Center did not claim to have new arguments to advance or identify any relevant evidence that it might present if the record were

reopened. (A. 32 n.8; A. 168-89.)<sup>7</sup> The Center, moreover, did not claim that it had been prevented from introducing relevant evidence at the original hearing (based on how the case was litigated). (A. 32; A. 168-89.)

To the contrary, as the Board found, the material facts were either stipulated or undisputed, and the *Great Dane* framework is “not a novel standard” in evaluating discriminatory withholdings. (A. 32 n.8.) *Cf. Frick*, 397 F.2d at 963-64 (declining employer’s request to remand and reopen record so it could present evidence supporting its asserted business justification). Moreover, the Center did not even formally move to reopen the record, as required by Board regulation. *See* 29 C.F.R. § 102.48(c). And because the existing record supported its finding, the Board had no reason to reopen the record of its own accord, contrary to the Center’s suggestion. (Br. 43-44 (citing 29 C.F.R. § 102.48(b)(1)).) The Board therefore reasonably exercised its discretion not to reopen the record.

Indeed, the Center does not argue otherwise—while it maintains that the Board “should” have reopened the record (Br. 45) and that doing so would be within the Board’s discretion (Br. 43), it does not claim that the Board’s decision not to open the record was an abuse of discretion. Instead, the Center insists that

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<sup>7</sup> The only specific (albeit irrelevant) evidence the Center proposed to submit was proof that all employees have had the same healthcare benefits since January 2013. (A. 179 n.1.)

the Court “instructed,” “directed,” if not “mandated,” the Board to reopen the record. (Br. 43-45.) A fair reading of *Woodcrest*, however, provides no support for that assertion. In *Woodcrest*, the Court discussed its disagreement with the Board’s ostensible but-for “test” and went on to state that “[t]his test is inconsistent with what the Board was required to do, and the record was not developed regarding the issues that should have been determinative.” *Woodcrest*, 784 F.3d at 910. The Court then expressly remanded the case to the Board for it to modify its analysis to conform with *Great Dane*. *Id.* As shown, the Board on remand abided by that instruction. Given that the Board’s supplemental decision articulates the facts and reasoning supporting the violations found, it provides a sufficient basis for judicial review. *Cf. NLRB v. W. & S. Life Ins. Co.*, 391 F.2d 119, 120 (3d Cir. 1968) (rejecting claim Supreme Court had ordered Board to reopen record on remand; although record not reopened, supplemental Board decision describing supporting evidence and articulating rationale provided adequate basis for judicial review).

The Center points to the Court’s use of the phrase “the record was not developed,” but that is too thin a reed on which to conclude that the *Woodcrest* decision ordered the Board to reopen the record. (Br. 43, 45.) Where courts require the Board to reopen the record, they indicate as much. *See, e.g., Vitek Elecs., Inc. v. NLRB*, 763 F.2d 561, 567 (3d Cir. 1985) (faulting Board for not

abiding by “explicit and unambiguous” direction in prior remand that Regional Director conduct a new certification hearing). The Center does not advance its claim by citing (Br. 44) *Kurz-Kasch, Inc. v. NLRB*, 865 F.2d 757 (6th Cir. 1989). In that case, the court did not direct the Board to reopen the record on remand when considering overlooked evidence; instead, it left that decision fully within the Board’s discretion. *Id.* at 761.<sup>8</sup> Here it appears that, as the Center posits, the Court “contemplated that [the Center] . . . could [proffer a substantial and legitimate business justification] if given the opportunity to do so when the factual record was further developed.” (Br. 29.) That does not require the Board to open the record, contrary to its regulations and precedent, when the Center utterly failed to suggest any relevant additional evidence it might adduce to meet its burden under *Great Dane*.

**2. None of the Center’s “proof” establishes actual motivation sufficient to overcome the inference of unlawful motivation created by its conduct**

The Center spills much ink asserting to no avail that, on the existing record, it carried its burden under *Great Dane* of establishing that it was motivated by substantial and legitimate business justifications. (Br. 26-27, 29-35.) For instance,

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<sup>8</sup> Unlike here, the Board in that case determined that it could not perform the analysis required on remand without an additional hearing. *Kurz-Kasch, Inc.*, 301 NLRB 946, 946, 948 (1991).

the Center contends that “ample” (Br. 32) and “detailed” (Br. 34) record evidence proves that it withheld the benefit improvements “to protect the integrity of the upcoming election” (Br. 27, *see also* 29, 32). But the evidence it relies on—its answer to the amended complaint and the parties’ joint stipulation (Br. 32-33)—fails to show that a concern over impacting the election actually motivated its decision. As described above, the joint stipulation does not address *why* the Center withheld the benefits from unit employees, only *what* actions it took before and after the election. (A. 124-25.) The answer proves only that the Center asserted a legitimate and substantial justification as an affirmative defense once the complaint against it was filed, but it does not independently or contemporaneously substantiate that defense. (A. 118-21.) And, in any event, the answer speaks generally of a legal “obligation” to refrain from announcing or implementing changes due to the election (A. 120), not that the Center *in fact* withheld the benefits to protect electoral integrity—as phrased, it arguably suggests the type of legal-interpretation defense this Court found unmeritorious, *see Woodcrest*, 784 F.3d at 910 n.5, and the Center denies asserting (Br. 29).

Similarly, the Center gains no ground by citing (Br. 33-34, *see also* 12-13, 18, 21) a charge filed by the Union in August 2017—almost five years *after* the benefit-withholding at issue here—as proof that it acted to avoid unfair-labor-

practice charges.<sup>9</sup> (A. 134-37.) The charge does not show that such alleged fear actually motivated the Center's decisions five years earlier. In any event, the August 2017 charge shows only the Union's assertion of unlawfulness, not an adjudication of liability. Moreover, the charge alleges, in relevant part, a violation of a wholly different provision of the Act, one dependent on the duty to bargain with a certified union, and it concerns the Center's ostensible unilateral changes to unit employees' healthcare in 2013.

Given the dearth of supporting evidence for the Center's "justifications," there is no merit to the Center's claim the Board made a "false finding," unsupported by substantial evidence, that the Center offered no evidence showing its asserted justifications motivated the withholding decision. (Br. 26-27, *see also* 31, 34.) The cases cited by the Center (Br. 34-35) not only fail to advance its position but serve to reinforce the Board's assessment that the Center did not provide evidence substantiating its asserted substantial and legitimate motivations. In one case, the court agreed that the employer had established a substantial and legitimate business-necessity objective for its decision to announce a wage increase before a rerun election. *NLRB v. Gotham Indus., Inc.*, 406 F.2d 1306, 1311-13 (1st Cir. 1969). To support that justification, the employer had offered

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<sup>9</sup> The charge itself is not a part of the administrative record in this case as set forth in the certified list (A. 49-54) and, therefore, is not properly before the Court.

undisputed testimonial evidence, including statistical evidence through an officer manager, that it faced increasing staffing difficulties and high turnover due to a tight labor market, a significant number of employees had threatened to quit if wages were not increased, and two employees quit without waiting for the increase. *Id.* In another case, this Court agreed that the employer had established substantial and legitimate business objectives for its refusal to pay vacation benefits to both striking and non-striking employees based on its good-faith reading of the expired collective-bargaining agreement. *Vesuvius Crucible Co. v. NLRB*, 668 F.2d 162, 166-69 (3d Cir. 1981). The evidence in that case included not only the agreement, but a contemporaneous letter from the employer to the union relying on the agreement’s language to justify its refusal, as well as testimony from a company official about the letter and the employer’s reliance on the agreement’s language. *Id.* at 164; *Vesuvius Crucible Co.*, 252 NLRB 1279, 1282 n.16 (1980), *enforcement denied*, 668 F.2d 162 (3d Cir. 1981). The evidence in those cases illustrates by contrast the absence of evidence here.

**3. Even if established, the Center’s asserted justification is not legitimate**

As the Board further found, “even if the record supported” the Center’s asserted justification (Br. 27, 29-34, 38, 40-41) for the withholding—some combination of maintaining the status quo to avoid impacting the election, and exposing itself to unfair-labor-practice charges—that justification would not

qualify as “legitimate.” (A. 33.) Under established law, the concerns professed by the Center to justify its targeted withholding of benefits should instead have counseled it to grant the benefit improvements to all employees, assuming that the timing of the improvements was unrelated to the representation campaign and election, as the Center asserts (Br. 27, 29-32).

As the Board explained, “due to the coercive effect of withholding benefits from eligible voters while granting them to others, an employer is required to proceed in the same manner as it would absent the presence of the union.” (A. 33 (citing cases).) *See, e.g., Care One*, 361 NLRB at 1474, *enforced*, 832 F.3d 351 (D.C. Cir. 2016). By proceeding in a union-blind manner, the employer, “in fact, maintains the status quo, in accordance with the rationale of *Exchange Parts*,” where the Supreme Court warned of the danger inherent in a well-timed benefit decision and the “suggestion of a fist inside the velvet glove.” *Id.* at 1475 (quoting *Exchange Parts*, 375 U.S. at 409). (A. 33.) Furthermore, where, as here, a company or system-wide benefit adjustment was at issue and the employer would have granted the benefits for reasons unrelated to a union campaign, which the Center claims to be the case, then “the grant of those benefits would not have violated the Act.” (A. 33 (citing cases).) *See, e.g., Associated Milk Producers, Inc.*, 255 NLRB 750, 755 (1981) (system-wide grant “provides the evidence

necessary to demonstrate that the increase was given free from union or other prohibited considerations”).

Under the foregoing precedent—and accepting for purposes of argument the Center’s claim that the timing of the grant of benefits was unrelated to the Union or election—the Center could have lawfully announced and granted the benefit improvements to *all* employees, consistent with its asserted justification of maintaining the status quo and avoiding impacting the election or exposing itself to meritorious unfair-labor-practice charges. (A. 33.) Alternatively, the Center could have achieved the same result by deferring the announcement and implementation of the benefit improvements until after the election for all employees. (*Id.*) In this regard, the Board found it telling that the Center offered “no explanation for the timing of the announcement, a mere 4 days before the election and more than 2 months after the unpopular changes were instituted.” (A. 34.) Thus, far from providing a legitimate justification for the targeted withholding, the Center’s asserted justifications fail based on extant Board law.<sup>10</sup> Moreover, the Board, with court approval, has repeatedly rejected as illegitimate employers’ justifications that

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<sup>10</sup> If determined to grant the benefits before the election, only to non-unit employees, the Center could have lawfully *postponed* the benefit improvements for unit employees. To do so, Board law required the Center to make clear to unit employees that they would receive the improvements whether or not they selected the Union, and that the sole purpose of the postponement was to avoid the appearance of attempting to influence the election. (A. 33 n.11 (citing cases).)

they had a “good-faith belief” a pending election precluded granting a benefit or that they feared being charged with an unfair labor practice. (*Id.* (citing cases).) *See, e.g., Care One*, 832 F.3d at 359-60; *Associated Milk Producers*, 255 NLRB at 755.

In its brief, the Center argues that the Board erred in evaluating the “efficacy” of its asserted justification for the withholding (Br. 35) and asserts that “a genuine belief that it [was] acting appropriately” qualifies as a legitimate business justification (Br. 40). But, as just described, the Board’s principal finding was not that the Center’s purported effort to protect the integrity of the election was ineffective. It was that the very legal principles invoked by the Center to justify its actions should have led the Center to take a different course of action. That finding is not only consistent with, but arguably required by, this Court’s determination that any alleged difficulty in navigating the Board’s benefits jurisprudence “is not a sufficient business justification.” *Woodcrest*, 784 F.3d at 910 n.5. Therefore, the Board properly evaluated whether the Center’s asserted business justification was “legitimate” under extant Board law, not whether the Center itself believed that it was legitimate.

*Vesuvius Crucible*, 668 F.2d 162, cited by the Center (Br. 35, 40-41), is not to the contrary. In that case, the employer relied on its “legitimate and good faith interpretation” of language in an expired collective-bargaining agreement as a

justification for its refusal to pay accrued vacation benefits to both striking and non-striking employees. *Id.* at 166. On review, the court determined that the Board had “overstepped its authority” by rejecting the employer’s reasonable interpretation and instead “formulating its own interpretation of the contract,” an area outside its expertise. *Id.* at 167. Here, by contrast, the Board evaluated the legitimacy of the Center’s asserted justification for its discriminatory conduct in light of Board case law and national labor policy, areas unquestionably within its expertise. *See Woodcrest*, 784 F.3d at 906.

## CONCLUSION

In sum, applying *Great Dane* as the Court instructed, the Board reasonably concluded that by announcing and implementing healthcare benefit improvements for all employees except those eligible to vote in the representation election, the Center engaged in discriminatory conduct which could have adversely affected employee rights. Consequently, the Board appropriately found that the record evidence gave rise to an inference of unlawful motive, and shifted the burden to the Center to establish a substantial and legitimate business justification for its conduct. As shown, the Center failed to establish—or even assert—such a justification. Wherefore, the Board respectfully requests that the Court enter a judgment denying the petition for review and enforcing the Board’s Order in full.

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December 2018

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**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner/Cross-Respondent	)	
	)	
and	)	Nos. 18-2336, 18-2426
	)	
1199 SEIU UNITED HEALTHCARE WORKERS EAST	)	
	)	
Intervenor	)	
	)	
v.	)	
	)	
800 RIVER ROAD OPERATING COMPANY, LLC, D/B/A WOODCREST HEALTH CARE CENTER	)	
	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE OF BAR MEMBERSHIP**

In accordance with Third Circuit L.A.R. 28.3(d) and 46.1(e), Board counsel Jared D. Cantor certifies that he is a member in good standing of the State Bar of Connecticut. He is not required to be a member of this Court's bar, as he is representing the federal government in this case.

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Dated at Washington, DC  
this 21st day of December 2018

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	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 9,337 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016. Board counsel further certifies that: the electronic version of the Board’s brief filed with the Court in PDF form is identical to the hard copy of the brief that has been filed with the Court and served on opposing counsel; and the PDF file submitted to the Court has

been scanned for viruses using Symantec Endpoint Protection version 13.3.1.14  
and is virus-free according to that program.

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this 21st day of December 2018

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	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on December 21, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all the parties or their counsel of record through the CM/ECF system.

Dated at Washington, DC this 21st day of December 2018	<u>/s/Linda Dreeben</u> Linda Dreeben Deputy Associate General Counsel National Labor Relations Board 1015 Half Street, SE Washington, DC 20570
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