

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

Advice Memorandum

S.A.M.

DATE: February 10, 2015

TO: James G. Paulsen, Regional Director
Region 29

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

SUBJECT: CSC Holdings, Inc. and Cablevision Systems 524-3350-2800
New York City Corp. 530-6067-2050-4200
Case 29-CA-135822 530-6067-2050-4900
530-6067-2060-0100
530-6067-2080-3700
530-6067-2090
596-0420-5500
596-0440-0100

This case was submitted for advice as to whether the Employer violated Sections 8(a)(3) and (5) by creating and maintaining a disparity in wages and total compensation between represented and unrepresented employees while, at the same time, using these disparities in an unlawful anti-Union campaign. We agree with the Region that the Employer violated Section 8(a)(5) by its discriminatorily-motivated bargaining position that unit employees can only receive a total compensation package that is less than that given to unrepresented employees, given its unlawful conduct away from the bargaining table. We further conclude, however, that any Section 8(a)(3) allegation based solely on the Employer's unlawful denial of the 2012 wage increases is barred by Section 10(b) of the Act.

FACTS

For a more extensive review of the facts prior to mid-2013, see the Administrative Law Judge's Decision in Case 02-CA-085811, et al., JD(NY)-47-14 (December 4, 2014). In brief, for more than three years, beginning after the Union began organizing employees in Brooklyn in late 2011, the Employer has engaged in a campaign to defeat or decertify the Union in Brooklyn, the Bronx, and elsewhere, a campaign that has involved unlawful conduct already the subject of two consolidated complaints.

In late January 2012, the Union was elected as the representative of the Employer's Brooklyn employees. By this time, the Union was also in the midst of an organizing campaign amongst the Employer's Bronx employees. In early February 2012, the Employer's CEO made a televised speech to all of its unrepresented

employees. In that speech, the Employer's CEO talked about a number of changes the Employer intended to implement, including raising employee compensation. The CEO then said he was "disappointed" by the Brooklyn vote for the Union, and that he thought that if he had made the changes he was discussing a year earlier, that "maybe that vote would have been different in Brooklyn." The Administrative Law Judge (ALJ) in Case 02-CA-085811, et al., in finding the subsequent wage increases unlawful, found that the CEO's speech clearly demonstrated that Respondent intended to make the changes necessary to thwart further unionization (i.e., wages and benefits increases), and that the speech was "a virtual admission that these raises and benefits were motivated by Respondent's desire to thwart unionization throughout the footprint, including in the Bronx."

In mid-April 2012, during the Union's organizing campaign in the Bronx, the Employer's CEO gave another speech by teleconference to all of its unrepresented employees. He gave employees an update on changes the Employer intended to make, including new pay levels, grade changes (all affected employees would be moving up a salary grade), and career progressions, under which employees would receive wage increases, increased benefits, and a rollback of health insurance co-pay rates. He said that these changes would result in wages increases of \$15 million per year. In late April 2012, the CEO held a meeting with the Employer's Bronx employees, in which he reiterated the new wages and benefits increases, and said that, with the Union, implementing new changes would have to go through the Union and the Employer would have to get the Union's permission.

The wages and benefits changes became effective May 1, 2012, with unrepresented employees receiving average wage increases of 14 to 15%, with additional benefits increases, including reduced health insurance co-pay rates.¹ The Employer did not grant any wage increases to its Brooklyn employees, or offer any wage increases to the Union.

The Union filed a representation petition for a unit of Bronx employees, and an election was scheduled for late June 2012. Two days before the election, the Employer's CEO again met with the Bronx employees to urge them to vote against the Union in the representation election. He emphasized the wages and benefits increases the employees had received, and said that:

¹ The Employer asserts that the increased wages and benefits were accompanied by a quid pro quo of higher performance standards and a greater risk of discharge. There is no evidence in the record of any such linkage, nor did the Employer make this argument in litigating Case 02-CA-085811, et al. Rather, as found by the ALJ in that case, there was "compelling evidence that Respondent's decision to announce and implement wage increases was motivated by the intent to thwart union organization."

As it stands now, Bronx employees can speak directly with management to discuss any issues, good or bad, without union interference. This direct relationship is what enables management to implement positive changes quickly, in a rapidly changing technological and competitive environment. Unfortunately, this is not the case for the employees in Brooklyn who voted to let the [Union] speak for them, because the Company cannot unilaterally increase their pay or improve their benefits, as those issues are now subject to negotiation with the union. In fact, since January when the union was voted in to represent the Brooklyn employees, nothing positive has happened.

The CEO also told the Bronx employees, “We do not want to leave you behind.” After the meeting ended, there were questions and answers between the CEO and employees. One employee asked, “Are you really going to leave Brooklyn behind?” The CEO answered, “Yes, why would I train and invest in our employees when I have to relate to the Union and not to employees?”

The Union lost the Bronx representation election by a margin of 121 to 43.

Based on these events, the ALJ in Case 02-CA-085811, et al., concluded that there was “compelling evidence that Respondent’s decision to announce and implement wage increases was motivated by the intent to thwart union organization.” And, while not alleged or litigated in Case 02-CA-085811, et al., the same evidence also demonstrates that the denial of the wage increases to the Brooklyn unit employees was discriminatorily motivated, to punish them for having selected the Union.

Beginning in May 2012, the Employer and the Union began negotiations for a collective-bargaining agreement covering the Brooklyn unit. At the outset of negotiations, the Union made a complete proposal, including wages and benefits. The Employer made no economic proposals at this time and proposed that the parties bargain first only over non-economic issues, not discussing economic issues until all non-economic issues were resolved. The Region has concluded that the Employer insisted on only bargaining over non-economic issues, and refused to discuss economic issues from May 2012 to March 2013. During this period, the parties reached a large number of tentative agreements on a variety of non-economic subjects, including grievance arbitration, union security, payroll deduction of union dues, management rights, and contracting.

After the Union filed a series of unfair labor practice charges between July 2012 and August 2013, Regions 2 and 29 issued complaint (consolidated in Region 29) in Case 02-CA-085811, et al. The consolidated complaint alleged, *inter alia*, that the Employer violated the Act by: (1) granting the wage increases to its Bronx employees; (2) promising benefits if employees did not select the Union; (3) threatening to reduce benefits and impose more onerous working conditions if employees did select the

Union; (4) discharging 22 striking employees; and (5) surface bargaining, including by refusing to bargain over economic issues until agreement was reached on all non-economic matters from May 2012 until March 2013. There was no allegation in any of the charges, or in the consolidated complaint, that the denial of the wages and benefits increases to the Brooklyn employees violated the Act, and the Region expressly sought no remedy as to the Employer's Brooklyn unit employees not receiving the wage increases unlawfully granted to the Employer's unrepresented Bronx employees. The ALJ found violations on all of these allegations, except that he found no surface bargaining. In particular, the ALJ found that the Employer did not unlawfully insist on only bargaining over non-economic issues and refuse to bargain over economic issues. The Region will be filing exceptions to the ALJ's dismissal of this allegation.

In April 2013, the Employer made its first wage proposal, which provided for a small formal wage increase for the Brooklyn unit employees -- a 1.5% increase on an employee's anniversary date, and a 3% increase upon placement into a higher grade -- less than unit employees were already due to receive as regular merit increases, and far less than the 14-15% average wage increases granted to the unrepresented employees in May 2012. In July 2013, the Employer made another wage proposal -- a 3% increase in each of the first two years, and a 5% increase if an employee is progressed into a higher grade, with no guarantee of any such grade increases -- still far less than the amount previously granted to the unrepresented employees. In September 2013, the Employer made a third wage proposal -- a 3.5% increase in each of the first two years, and a 6.5% increase if an employee is progressed into a higher-graded position, also with no guarantee of any such grade increases -- again far less than the amount previously granted to the unrepresented employees. The Employer did not make any new wage proposals between September 2013 and November 2014.

The parties reached additional tentative agreements on other subjects, including an enhanced health insurance benefit higher than that given other employees (including the unrepresented Bronx employees). In total, the parties have reached at least 53 tentative agreements, as well as several others expressly conditioned on reaching a package agreement including the open issues. The parties are far apart on the few remaining open issues, however, which include hours of work, discipline and discharge, and wages.

In the summer of 2014, the Employer began a renewed anti-Union campaign in the Brooklyn unit. The Employer replaced its Brooklyn managers with the managers from the Bronx who were in place when the Union lost the representation election there; the new management team immediately began to speak with employees at weekly meetings about the value of not having a union, and generally disparaged the Union. The Employer discharged a key Union supporter, and disciplined another. The Employer also made certain unilateral changes, solicited employee complaints and grievances, promised its employees increased benefits and improved terms and

conditions of employment if they abandoned their support for the Union, and threatened to arrest or cause the arrest of its employees if they engaged in protected Union activity.

In September 2014, the Employer conducted an unlawful poll of employees, asking whether they still wanted to be represented by the Union.² The day before the unlawful poll, the Employer's CEO held a mandatory meeting where he made several unlawful statements, including: (1) threatening that the employees in Brooklyn would continue to receive a lower wage rate than unrepresented employees, would lose certain benefits, and, impliedly, would lose employment, if the employees continued to support the Union; and (2) promising to increase employee pay, and to pay the Union to disclaim interest in representing the Brooklyn unit employees, if the employees voted against the Union. In particular, the Employer's CEO expressly told employees that "issues like parity and pay, et cetera, do not expect Cablevision to change its position on that" and, in response to an employee's question as to what employees had to do to get the higher wages, "This vote tomorrow is the best idea I can come up with at the moment.... If I were there I'd tell you, you can do this in order to make money."³

Based on charges filed between August and October 2014, the Region issued a consolidated complaint alleging the above conduct to be unlawful.⁴ This consolidated complaint is currently scheduled for hearing in April 2015.

Beginning in the summer of 2014, the Employer emphasized at the bargaining table that it would not agree to wage parity, ostensibly because of the "value" of the parties' tentative agreements, including those over non-economic issues. The Employer's bargaining representatives expressly acknowledged that their valuation of

² The Employer claims that it held this poll because it was "confused" about the Union's continuing majority support. In this regard, in late July 2014, the Union proffered a petition supporting the Union's bargaining position, signed by approximately 75% of the bargaining unit. Soon thereafter, the Employer claims, it was informed that some employees had circulated a petition, signed by approximately 38% of the unit, seeking to have the Employer withdraw recognition from the Union.

³ According to the Employer, the vote in the unlawful poll showed that the Union no longer retains majority support.

⁴ In October 2014, a decertification petition was filed by a Brooklyn unit employee. The Regional Director dismissed the decertification petition, as the pending unfair labor practice charges prevented a question concerning representation. The Employer has a pending request for review of that dismissal.

the parties' tentative agreements was subjective, and that they were "just making judgments" about how the tentative agreements should affect their wage proposal.

In November 2014, the Union asked in bargaining if the Employer would grant Brooklyn employees wage parity if they gave up the tentatively-agreed enhanced health insurance benefit. The Employer's bargaining representative said "No," but indicated that such a move might have the effect of "moving the needle" on wages. The Union said it was only interested in trading the benefit for wage parity with the unrepresented employees.

At the parties' next bargaining session, in December 2014, the Employer made its first new wage proposal since September 2013. The Employer proposed that, if the Union gave up the tentatively-agreed enhanced health insurance benefit, the unit employees would get a slightly larger wage increase than it had previously proposed -- a 4.5% increase in each of the first two years, instead of 3.5% -- although still far less than the amount previously granted to the unrepresented employees.

The Employer also gave the Union a chart assigning dollar values to certain of the bargaining items as to which the parties had previously tentatively agreed. The Employer stated that it was willing to offer bargaining unit employees a total package valued up to the amount that, in the Employer's evaluation, was equal to the total package given to unrepresented employees. The Employer acknowledged the subjective nature of its valuations and asserted that, if the values it used for the tentative agreements were inflated, that only helped the Union, if it was willing to trade them for wages and benefits.

After the Union asked questions about this proposal, and made a formal information request for the data used to create the values the Employer used in its chart, the Employer clarified that its proposal was not strictly based on just its evaluation of the monetary costs of the various tentative agreements to the Employer, but also on the Employer's subjective estimates of the value of the tentative agreements (including those over non-economic issues) to the employees and the Union, above and beyond the cost to the Employer, as well as on other, unidentified, "secondary factors." The Employer reiterated that it was focused on "overall parity" between unit members and the Employer's unrepresented employees. The consequence of this position was that unit members could only receive a total monetary package approaching that of the unrepresented employees if the Union were to forgo most or all of the tentative agreements. In other words, since the Employer's valuation of "overall parity" was based on the cost to the Employer *plus* its subjective estimate of the additional "value" of non-economic items to employees and the Union, the total monetary compensation available to bargaining unit employees would necessarily be less than that given to the unrepresented employees, unless the Union were willing to forgo all or most of the parties' tentative agreements.

Throughout the fall and winter of 2014-2015, the Employer's bargaining representatives continued to make clear its firmly-held position that the Employer would not agree to any collective-bargaining agreement that provided for a total package that exceeded the compensation received by unrepresented employees. Thus, for example, in September 2014, an Employer bargaining representative stated that they were "not prepared to accept" "parity plus." In December 2014, one Employer bargaining representative said, "there's only so much we'll pay for the contract, it has to be equal to what we otherwise spend in the footprint," followed by another Employer bargaining representative saying, "If you look at the values, they have to be adjusted, we have to look at them since the value of those items exceed the value of the footprint salary, and it's never been your or our intention to be in a situation in which we had a value to Brooklyn which was greater than the value to the footprint in terms of dollars." And, in January 2015, an Employer bargaining representative said, "we have to make sure these numbers are properly discounted or prorated so that if we're going to be getting to wage parity, we want to make sure it doesn't go over wage parity, so these numbers have to be slightly discounted."

On August 28, 2014, the Union filed the charge in the instant case, alleging that the Employer violated Sections 8(a)(3) and (5) by engaging in bad faith bargaining regarding wages, and by discriminatorily failing and refusing to pay the Brooklyn employees the same or similar wages as all other employees in the company because of the Brooklyn employees' decision to unionize.

ACTION

We conclude that the Employer violated Section 8(a)(5) by its discriminatorily-motivated bargaining position that unit employees can only receive a total compensation package that is less than that given to unrepresented employees, given its unlawful conduct away from the bargaining table. We further conclude, however, that any Section 8(a)(3) allegation based solely on the Employer's unlawful denial of the 2012 wage increases is barred by Section 10(b) of the Act.

Section 8(d) does not compel the participants in a bargaining relationship to reach agreement, but they must exhibit an intent to reach an accord.⁵ Satisfaction of this obligation is not met by a party's commitment to execute a contract only on its own terms.⁶ Rather, there must be "the serious intent to adjust differences and to

⁵*NLRB v. Herman Sausage Co., Inc.*, 275 F.2d 229, 231, *rehearing denied* 277 F.2d 793 (5th Cir. 1960), *enforcing* 122 NLRB 168 (1958).

⁶See *Wal-Lite Div. of U.S. Gypsum Co.*, 200 NLRB 1098, 1101 (1972), *enforcement denied on other grounds*, 484 F.2d 108 (8th Cir. 1973).

reach an acceptable common ground."⁷ Determining whether a party had the proper intent requires scrutiny of the totality of its conduct, both at and away from the bargaining table.⁸ Furthermore, "[a]ll aspects of . . . bargaining and related conduct must be considered in unity, not as separate fragments each to be assessed in isolation."⁹ And, although an employer may seek concessions without violating Section 8(a)(5),¹⁰ concessionary demands may be unlawful if they are "designed to frustrate agreement on a collective bargaining contract."¹¹

In evaluating the Employer's conduct, it is well established that the Board may use conduct that occurred prior to the 6 month Section 10(b) period as background evidence to shed light on a respondent's motivation for conduct within the 10(b) period, so long as the General Counsel's case does not rely solely on the evidence proffered as background evidence.¹² Thus, the Employer's current conduct must be evaluated in light of its long course of unlawful anti-Union conduct, including the denial of the 2012 wage increases.

As a general rule, absent an unlawful motive, an employer may give wage increases to its unrepresented employees without making such wage increases applicable to employees represented in collective bargaining by a union.¹³ The Board

⁷*NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 485 (1960). See also *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952).

⁸*Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984); *American Stores Packing Co.*, 142 NLRB 711, 720 (1963), enforced 58 LRRM 2635 (10th Cir. 1965); *Modern Manufacturing Co., Inc.*, 292 NLRB 10, 11 (1988).

⁹*"M" System, Inc.*, 129 NLRB 527, 547 (1960).

¹⁰ See, e.g., *Concrete Pipe & Products Corp.*, 305 NLRB 152, 153 (1991), review denied 983 F.2d 240 (D.C. Cir. 1993).

¹¹ *Reichhold Chemicals*, 288 NLRB 69 (1988), reconsidering 277 NLRB 639 (1985), review denied in pertinent part 906 F.2d 719, 726-27 (D.C. Cir. 1990).

¹² See, e.g., *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411, 416-417 (1960); *Grimmway Farms*, 314 NLRB 73, 74 (1994) enforcement denied in part on other grounds 85 F.3d 637 (9th Cir. 1996) (the Board considered a work stoppage outside the 10(b) period as background evidence for a respondent's refusal to rehire employees); *Douglas Aircraft Co.*, 307 NLRB 536, fn. 2 (1992) enforced 66 F.3d 336 (9th Cir. 1995) (the Board considered pre-10(b) period discipline as evidence of animus to evaluate a discharge within the 10(b) period).

¹³ See, e.g., *Shell Oil Company*, 77 NLRB 1306, 1310 (1948).

has made it clear, however, that an employer violates the Act by discriminatorily denying represented employees wages or benefits granted to unrepresented employees, while failing or refusing to offer such wages or benefits in negotiations.¹⁴

Thus, for example, in *South Shore Hospital*, an employer gave wage increases to its unrepresented employees, but discriminatorily did not offer the wage increases to the union in collective-bargaining negotiations. As here, the employer initially refused to bargain over economic issues at all -- in that case for approximately six months. Unlike here, the employer then offered wage parity to the union, but without applying the wage increases retroactively to make the represented employees whole. The Board found that the employer's discriminatorily-motivated withholding of the wage increases and bad-faith bargaining violated Sections 8(a)(3) and (5) of the Act, particularly noting that the employer there persisted in its bad-faith conduct by making clear to the union that it would not grant retroactivity under any circumstances. The Board emphasized that such conduct unlawfully confronts the union with a Hobson's choice: the union can either capitulate to the employer's discriminatory bad-faith bargaining position, and thereby abdicate in large measure its statutory role as an employee representative, or it can remain without any contract at all while the unit employees continued to suffer the loss of wages and benefits being enjoyed by other employees -- wages and benefits which would have been theirs had they not selected the union. Whichever path the union chooses, it can only lead to undermining it in the eyes of the employees as an effectual employee representative. And, as the employer's withholding of wages and benefits was an integral part of its unlawful course of conduct, it must also be viewed as repugnant to statutory policy.¹⁵ Similarly, in *Chevron Oil Co.*,¹⁶ the Board found that an employer violated the Act by failing to bargain in good faith, and discriminatorily withholding from unit employees wage increases and improved benefits that it granted to its unrepresented employees.

In the instant case, the Employer has done precisely what the Board found unlawful in *South Shore Hospital* and *Chevron Oil*. In May 2012, the Employer gave

¹⁴ See, e.g., *South Shore Hospital*, 245 NLRB 848, 857-62 (1979), *enforced*, 630 F.2d 40 (1st Cir. 1980); *Chevron Oil Co.*, 182 NLRB 445, 449-50 (1970), *enforcement denied in pertinent part on other grounds* 442 F.2d 1067, 1074 (5th Cir. 1971); *Fieldcrest Cannon*, 318 NLRB 470, 471, 560-63 (1995), *enforcement denied in pertinent part* 153 LRRM 2617, 2625-35 (4th Cir. 1996); *Eastern Maine Medical Center*, 253 NLRB 224, 241-247 (1980), *enforced* 658 F.2d 1, 7-10 (1st Cir. 1981).

¹⁵ *South Shore Hospital*, 245 NLRB at 861, quoting *Chevron Oil Co.*, 182 NLRB at 450.

¹⁶ 182 NLRB at 449-50.

the unrepresented employees wage increases to thwart the Union organizing campaign, and denied the wage increases to the Brooklyn unit employees to punish them for selecting the Union or, in the words of the Employer's CEO, to leave the Brooklyn unit employees behind and ensure that "nothing positive" happened for them. When the parties began negotiations, the Employer insisted on only bargaining over non-economic issues for close to a year. When the Employer finally made its first wage proposal in April 2013, its proposal was far less than the wage increases granted to the unrepresented employees, and only provided for a small formal wage increase that would have been less than unit employees were already due to receive as regular merit increases. The Employer slightly increased its wage proposal twice in 2013, but always to an amount that was still far less than the amount previously granted to the unrepresented employees. Thereafter, the Employer made no new wage proposals for more than a year, emphasizing during this period that it would not agree to wage parity, ostensibly because of the "value" of the parties' tentative agreements, including those over non-economic issues. When the Employer finally did make a new wages proposal in December 2014, it offered only a slight wage increase, still far less than the amount previously granted to the unrepresented employees, and only on the condition that the Union concede the health insurance benefit to which the parties had already tentatively agreed. Most importantly, the Employer continued to adhere to its firmly-held position that the Employer would not agree to any collective-bargaining agreement that provided for a total package that exceeded the compensation received by unrepresented employees, based on the Employer's subjective and inflated valuation of the parties' tentative agreements.

The Employer's animus and discriminatory motivation is clear. In the first wave of unlawful employer conduct, addressed in Case 02-CA-085811, et al., the Employer unlawfully granted the wage increases to the unrepresented employees, promised benefits to employees if they did not select the Union, threatened to reduce benefits and impose more onerous working conditions if employees did select the Union, and discharged 22 striking employees. Then, in the renewed anti-Union campaign that began in the summer of 2014, the Employer replaced its Brooklyn managers with managers from the Bronx who immediately began disparaging the Union. The Employer discharged a key union supporter, and disciplined another. The Employer made certain unilateral changes, solicited employee complaints and grievances, promised its employees increased benefits and improved terms and conditions of employment if they abandoned their support for the Union, and threatened to arrest or cause the arrest of its employees because they engaged in protected Union activity. Finally, in September 2014, the Employer conducted an unlawful poll of employees, and the Employer's CEO threatened the employees in Brooklyn that they would continue to receive a lower wage rate than unrepresented employees, would lose certain benefits, and, impliedly, would lose employment, if the employees continued to support the Union, and promised to increase the Brooklyn employees' wages (and to

pay the Union to disclaim interest in representing the Brooklyn unit employees), if the employees voted against the Union.¹⁷

The connection between the Employer's bargaining position and its anti-Union campaign is perhaps best exemplified by the Employer's CEO's statements before its unlawful poll that "issues like parity and pay, et cetera, do not expect Cablevision to change its position on that" and, in response to an employee's question as to what employees had to do to get the higher wages, "This vote tomorrow is the best idea I can come up with at the moment.... If I were there I'd tell you, you can do this in order to make money." That message was entirely consistent with the Employer's bargaining position that, under its concept of "overall parity" and its use of its subjective "costs plus value" valuations, unit employees would necessarily receive less than other employees, and less than the same employees would have received if they had not selected the Union. These messages, that employees will always receive lower wages and benefits if they want to continue to be represented by the Union, and that the only way they can approach the wages and benefits they would otherwise have gotten without the Union would be to forego collective bargaining, are inimical to the Employer's obligations under Section 8(a)(5).

Based on the above analysis, we would also have found that the Employer violated Sections 8(a)(3) of the Act by its denial of the wage increases to the Brooklyn unit employees represented by the Union, if this conduct was the subject of a timely charge. As discussed below, however, we conclude that any complaint allegation regarding the Employer's conduct in 2012 and 2013 is barred by Section 10(b) of the Act.

Section 10(b) requires that a charge be filed no later than six months after the commission of the allegedly-violative act. This period begins to run when the charging party receives clear and unequivocal notice, whether actual or constructive, of the acts that constitute the alleged unfair labor practice.¹⁸

Here, the initial denial of the wage increases occurred in May 2012, almost two years before the 10(b) period in the instant case began in February 2014. The Union

¹⁷ Given this entire course of unlawful conduct, the Employer demonstrated its anti-Union animus and discriminatory motivation even if it did not engage in unlawful surface bargaining by refusing to bargain over economics for close to a year. Thus, a contrary finding on the surface bargaining allegation in Case 02-CA-085811, et al., would not affect our conclusion that the Employer violated Section 8(a)(5) of the Act by its current bargaining position and unlawful conduct away from the table.

¹⁸ See, e.g., *John Morrell & Co.*, 304 NLRB 896, 899 (1991), *enforced mem.* 998 F.2d 7 (D.C. Cir. 1993); *Strick Corporation*, 241 NLRB 210 fn. 1 (1979).

argues that the charge in the instant case should be considered timely, as it was only in July 2014 that the Union knew or should have known that the Employer would not offer the Union wage parity for the represented employees in the Brooklyn unit. This argument, however, ignores the ample evidence of the Employer's discriminatory motivation for the withheld wage increases before that time.

Nor does the use of the continuing wage disparity in the Employer's anti-Union campaign, or the Employer's current failure to offer wage parity in bargaining, somehow revive the timeliness of any allegation regarding its denial of the 2012 wage increases. It is well established that an employer's allegedly discriminatory, but time-barred, change in wages does not become timely simply because the effects of the change continue,¹⁹ or because the employer fails or refuses to reconsider the change within the 10(b) period.²⁰ Therefore, we conclude that any Section 8(a)(3) allegation based solely on the Employer's unlawful denial of the 2012 wage increases is barred by Section 10(b) of the Act.

Accordingly, the Region should amend the outstanding consolidated complaint to include an allegation that the Employer violated Section 8(a)(5) of the Act by its discriminatorily-motivated bargaining position that unit employees can only receive a total compensation package that is less than that given to unrepresented employees, but should dismiss, absent withdrawal, the allegation that the Employer violated Sections 8(a)(3) by denying the Brooklyn unit employees the 2012 wage increases. In addition to a bargaining order and other appropriate relief, the Region should seek reimbursement of the Union's bargaining costs during the Section 10(b) period. In *Frontier Hotel & Casino*,²¹ the Board held that such a remedy was necessary to both

¹⁹ See, e.g., *Goodall Company*, 86 NLRB 814, 815, 844 (1949) (rejecting the argument that an unlawful wage increase is a "continuing violation" because it is reflected in weekly or other recurring payments).

²⁰ See, e.g., *Bonwit Teller, Inc.*, 96 NLRB 608, 610 (1951), *enforcement denied on other grounds* 197 F.2d 640 (2nd Cir. 1952), *cert. denied* 345 U.S. 905 (1953), *overruled on other grounds*, *Livingston Shirt Corp.*, 107 NLRB 400 (1953) (holding that even though an employer's initial decision to discontinue wage reviews may have violated the Act, "the mere failure of the Respondent during the 6-month limitation period to modify or rescind that decision" cannot be regarded as a continuing violation of the Act because "any other view would tend to nullify the purpose of Congress in enacting Section 10(b)").

²¹ *Frontier Hotel & Casino*, 318 NLRB 857, 859 (1995) *enforcement granted in pertinent part sub nom. Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997). See also *Fallbrook Hospital*, 360 NLRB No. 73, slip op. at 2-3 (April 14, 2014); *Regency Service Carts*, 345 NLRB 671, 672 (2005) (reimbursement of bargaining expenses

make the charging party whole for the resources that were wasted due to the respondent's unlawful conduct, and to "restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table." In *Teamsters Local 122 (August A. Busch & Co.)*, the Board emphasized that reimbursement of bargaining expenses "reflects the *direct causal relationship*" between a respondent's unlawful conduct and the costs a charging party incurs while bargaining.²² The Board has further made it clear that merely reaching tentative agreements on some subjects during bargaining will not preclude reimbursing a union's bargaining expenses, where the respondent had no intent to ultimately enter into a collective-bargaining agreement.²³

Here, the Employer has made clear that it has no intent of reaching agreement with the Union, except on its own discriminatorily-motivated terms. The Employer's intent, coupled with its other Section 8(a)(1), (3), and (5) violations, contributed to an overall course of bad-faith bargaining that "infected the core" of the parties' bargaining process. Therefore, the Region should seek a remedy that includes reimbursement of Union negotiating expenses in order to restore the status quo ante.

/s/

B.J.K.

cc: Injunction Litigation Branch
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appropriate where employer demonstrated unwillingness to enter contract by stating bluntly: "you want a contract, we don't" and "we're not going to be reasonable...I'll sit here for the next three years.").

²² 334 NLRB 1190, 1195 (2001), *enforced* 2003 WL 880990 (D.C. Cir. 2003).

²³ See *HTH Corp.*, 356 NLRB No. 182 (June 14, 2011), *enforced* 693 F.3d 1051 (9th Cir. 2012) (although parties met in 37 bargaining sessions and reached approximately 170 tentative agreements, reimbursement of bargaining expenses appropriate where employer simply went through the motions of bargaining in an effort to run out the initial certification year); *Whitesell Corporation*, 357 NLRB No. 97 (September 30, 2011) (although parties reached several tentative agreements, reimbursement of bargaining expenses still appropriate where employer attempted to undermine union, made regressive proposals, unilaterally altered working conditions of employees, failed to answer information requests in timely manner, and where several of the tentative agreements were only reached under certain ground rules that the employer agreed to in order to avoid contempt proceedings).