

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington D.C.**

KAG WEST LLC

and

Cases 21-CA-39488
21-CA-39665

MISCELLANEOUS WAREHOUSEMEN,
DRIVERS AND HELPERS, LOCAL 986
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

**GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

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I. STATEMENT OF THE CASE

This matter was tried before Administrative Law Judge William G. Kocol ("ALJ") on October 24-25, 2011. On December 30, 2011, the ALJ issued his decision in which he found that KAG West, LLC ("Respondent") had violated Section 8(a)(3) and (1) of the National Labor Relations Act ("Act") by discriminatorily withholding a wage increase from its 350 employees in Southern California one week after they voted to unionize, while granting the wage increase to all of its remaining non-union employees.¹ On January 27, 2012, Respondent filed Exceptions and a brief in support thereof to the ALJ's Decision ("ALJD"). Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for Acting General Counsel ("GC") submits this answering brief, urging the Board to affirm the decision of the ALJ, which succinctly and correctly sets forth findings of credibility and fact, analyzes the issues presented and reaches legal conclusions supported by the evidence and Board law.

II. INTRODUCTION

The critical facts giving rise to the Respondent's violation are not in dispute,² and have so been found by the ALJ: Even though Respondent decided to grant a wage increase to its employees before the union election, it delayed announcement and implementation of the increase until after the election, intending to award or deny the increase to its Southern California employees based on the outcome of the election. And, immediately after its employees in Southern California voted to unionize, Respondent notified them that while employees in Northern California, Arizona, Nevada and employees in Southern California outside the voting

¹ The ballots were counted on August 17, 2010. at the regional office: 196 employees voted for Miscellaneous Warehousemen, Drivers, and Helpers, Local 986, International Brotherhood of Teamsters ("Union") and 147 voted against the Union. (TR 265: 17-19; GCX 7; RX 14)

² See, Respondent's Statement of Position at pp.14-15. (GCX 4).

unit would be receiving wage increases, they would not. While Respondent tiresomely argued before the ALJ and in its Exceptions that it intended to bargain with the Union over such wage increase if the Union had won the election, the ALJ flatly rejected this justification, concluding from the evidence before him that the decision to withhold the wage increase from the voting unit was discriminatorily motivated. As a matter of fact, shortly after the election results, Respondent announced in writing to all of its employees that it would grant wage increases to all of its employees, except for those who voted to unionize. Nowhere in its announcement did Respondent indicate, or even hint, that it would bargain separately with the Union over wage increases for the newly represented employees. The message conveyed by the announcement to the employees was clear and unambiguous: if you were not union, you would receive a wage increase; but if you were union, you would not. The ALJ properly concluded that such conduct was unmistakably discriminatory and retaliatory. Moreover, it is destructive under the Act.

Notwithstanding its discriminatory misconduct, Respondent seeks to take cover by advancing an empty argument, previously rejected by the Board: that so long as Respondent undertook its conduct "pursuant to advice of counsel," the rights guaranteed by Section 7 are somehow outflanked, as if the purported "advice of counsel" confers upon Respondent immunity from its unlawful conduct. Fortunately, no such immunity exists under the Act, and the ALJ concluded that this argument was "entirely self-serving and unconvincing." (ALJD at 5:45). In short, GC urges the Board to reject Respondent's transparent manipulation of the law, its self-serving evidence, affirm the ALJD in its entirety, and find that by withholding the wage increase from employees who selected the Union as their collective-bargaining representative, Respondent violated Section 8(a)(3) and (1).

III. THE ISSUE

The sole issue presented to the Board is whether Respondent's withholding of a wage increase from approximately 350-employees who voted to unionize was unlawful.³

IV. BACKGROUND AND FACTS

A. Respondent's Corporate Structure

Kenan Advantage Group, Inc. ("KAG"), the parent company of Respondent is the nation's largest tank truck transporter and logistics provider, delivering fuel, chemicals and food-grade products. (TR 69:18-19). It is a privately held company, operating in 38 states, with 7,000 employees, 200 big trucks and 6,000 trailers. Founders Dennis Nash and Carl Young are KAG's CEO and CFO respectively. (TR 70:2-4, 14, 19-22).

KAG consists of four operating groups or divisions (TR 71:12), the largest of which is its fuels delivery group, comprised of seven distinct regional subsidiaries, including Respondent. (TR 73:2-6). Each subsidiary in the fuel delivery group is headed or managed by a business unit leader or "BUL," who reports to the executive vice president for the fuel delivery group ("EVP") in Canton, Ohio. (TR 73: 24-24). KAG's largest division is its fuels delivery group, which includes the Respondent. KAG has been continually expanding its operations and acquiring companies. According to KAG's president, *if* such companies *had* labor agreements, those "situations" were "resolved" because "you know, we're a non-union company other than this area here in Southern California." (TR 73:9-17).

Bruce Blaise was promoted to KAG president in September 2011; however, from October 2008 through August 2011, Blaise was EVP. (TR 67: 25; 68: 1, 18). As EVP, Blaise's responsibilities were similar to those of a chief operating officer, with overall responsibility for

safety, sales and day-to-day operations of the fuels delivery group. (TR 74: 9-23). Moreover, as EVP, Blaise was responsible for approving all changes in employees' wages throughout the fuel delivery group, including Respondent. (TR 75: 2-17). Blaise reports to KAG's CEO and chairman. (TR 68: 23-24).

KAG acquired the Respondent in 2003. (TR 75: 5-7). Respondent operates from multiple locations in Southern California, Northern California, Arizona and Nevada.⁴ It has about 11 terminals in Southern California with about 350 employees; 10 in Northern California with about 200 employees; two in Arizona with 100 employees and two more in Nevada with about 50 employees. Terminal managers report to the Sacramento-based business unit leader. (TR 126). While Respondent also has locations in Oregon and Washington, at all material times, they fell under another business unit called Petro Chemical Transport or PCT (TR 181:4-9). Consequently, the Oregon and Washington locations are not relevant to these proceedings.

B. Respondent's History of Systemwide Wage Adjustments

On August 13 and 16, 2010, Respondent's 350 drivers as well as mechanics and polishers in Southern California voted to unionize. On August 24, 2010, 7 days after the NLRB election, and the day before the certification of representative issued, Respondent announced and granted a systemwide wage increase to all of its non-represented employees in Northern California, Arizona and Nevada, but denied the increase to its newly-represented Southern California employees. (GCX 3).

³ After fully crediting GC's witness, the ALJ dismissed the allegation that Respondent created the impression of surveillance, in Case No. 21-CA-39665, on legal grounds. GC has not filed Exceptions.

⁴ Respondent's California, Arizona and Nevada operations/locations were purchased from Beneto Bulk Transport LLC. (TR 259: 7-10).

In the 5 years from 2005 through 2010, Respondent implemented three systemwide wage adjustments,⁵ the first two of which included all employees throughout California, Arizona and Nevada: in October 2005, Respondent implemented a systemwide wage increase for its drivers. (TR 80:6-11). In late December 2009, the country's recession, changes in the industry and significant business losses resulted in Respondent's instituting a systemwide, across-the-board, reduction of employees' wages by approximately \$1.90 per hour. (TR 81:17-25; 82: 1). To prepare employees for the wage reduction, Respondent conducted meetings with them, at which it informed them that there would be NO WAGE INCREASES IN 2010. (TR 182 11-17; RX 6 at 6). However, shortly after the wage reduction occurred, Respondent noted "frustration and disenchantment" particularly among its Southern California drivers. (TR 87:13-17; 89:8-23). In February 2010, Respondent became aware of the Union's organizing campaign. (TR 191: 9-11).

In March 2010, only 3 months after the systemwide wage cut, Respondent began to explore the possibility of reversing its decision--purportedly because there had been a sustained period of economic recovery. (TR 88: 1-17). So, too, Respondent was obviously concerned about the nascent union campaign. So much so that, on March 16, 2010, Blaise wrote to Respondent's business unit leader, Doug Allen (TR 177:13-23): "Dennis [Nash] wants us to be sure we are moving quickly on the situation in Southern California. I'm thinking of catching an early flight in the morning and spending Wed., Thur., and Friday at Rialto. . . . Your feedback ASAP please." (RX 1). Therein, Blaise also told Allen to tell employees of Respondent's "plan to make positive adjustments in pay etc." (RX 1). In response to the Union's campaign, Blaise visited Southern California terminals in March 2010, and told employees that Respondent was

⁵ There appears to have been minor exceptions to this systemwide pattern, which are inconsequential because they were limited to a few employees who worked outside Respondent's overall structure.

hopeful that the economic situation was improving, and it was more likely that employees' wages would be restored if Respondent could pass such costs on to its customers.. (TR 88: 18-25; 89: 10-23; 150: 6-18; 94: 1-4).

On June 8, 2010, Respondent released an announcement to the trade press that, effective July 1, 2010, it would be seeking a rate increase from its non-contract customers. (RX 2). Respondent would approach its contract customers on an account-by-account basis (TR 95: 18-25; 96: 1-4; RX 2). Respondent was moving forward to capture additional funding to offset its planned increases. (TR 96 19-22). And, by mid-July 2010,⁶ according to Blaise, although the exact amounts had yet to be determined, it became clear that Respondent would be able to proceed with employee-increases. (TR 97: 13-21).

The parties stipulated that on August 24, 2010, in a memorandum posted, displayed and/or otherwise announced and disseminated at all of Respondent's Southern California bargaining unit locations, as well as at all non-union locations in Northern California, Arizona and Nevada, Respondent announced a wage increase effective the payroll period beginning August, 21, 2010; however, the newly-represented drivers, mechanics and polishers did not receive the wage increase. (GCX 3). Generally, the raise amounted to about \$1.90 increase per hour; effectively restoring employees to their December 2009 rate of pay. (TR 86: 23; GCX 3). As such, the so-called wage increase or raise was actually an adjustment or a restoration of the status quo ante; it was not a new benefit. Nonetheless, according to Blaise and other management-witnesses, Respondent was advised by counsel that any potential wage adjustments for future bargaining unit employees would be effectuated through collective

⁶ The Union filed a representation petition in Case 21-RC-21215 on July 2, 2010. The parties stipulated to an election on July 14, 2010. (GCX 1(i)).

bargaining. (TR 109). However, Respondent never communicated this position or intent to its employees or their representative. (TR 164-165; 168: 23-25; 169; 220: 23-25; 221; 224: 1-7).

C. **Respondent's Response to the Union Campaign**

As previously mentioned, Respondent was aware of the Union's campaign as early as February 2010 (TR 191: 9-11), in response to which it promptly mounted a vigorous anti-union campaign urging its employees to vote no and informing them that brighter days, with wage increases, lay ahead if they would rally behind the company. (TR 89: 130; 133 : GCX 4 at p. 19; RX 1). In furtherance of this message, Blaise met with Southern California employees in March 2010 (TR 150). Doug Allen also met with employees in Southern California to discourage them from supporting the Union; and Allen testified, rather unbelievably, that he could not recall whether he had heard that the Union's representative that it had its sights on Northern California employees too. (TR 150: 15-16; 195: 2-12; 219: 7-16).

Standing out among Respondent's anti-union efforts, is Doug Allen's letter to all employees dated March 23, 2010 in which he informed them: "The Union can promise you anything to get your vote. Only our customers can provide us with job security and *only the company can make changes in wages, benefits, or working conditions.*" (TR 220: 2-17; GCX 10) (Underline in the original; otherwise emphasis supplied).

During the critical period, Respondent's top managers visited each terminal, at least three separate times, to conduct mandatory meetings designed to deter employees from voting to unionize. (TR 233). Moreover, Respondent retained "knowledgeable experts" to discourage employees from supporting the Union, and held anti-union meetings at hotels for select employees from various terminals. (TR 247-8; 254; GCX 4 at 20).

In San Diego, Terminal Manager Almeida took care to get Respondent's anti-union message out to employees by greeting them at the beginning of their shifts, during break

and at the end of shift. (TR 309: 1-13). Employees who did not attend mandatory anti-union meetings were subject to and received discipline. (TR 50-51; 305:10-13; RX 37).

D. Link between Wage Increase and Union Campaign

Blaise repeatedly testified that the August 2010 wage increase was deferred until after the election; that Respondent's intent had been to restore its employees to the wages they had received before the December 2009 cut; and that Southern California employees were denied the raise strictly because of the election. (TR 156: 10-17) (Emphasis supplied). Blaise also admitted that Respondent had not informed employees of its decision to grant a wage adjustment but to defer it until after the election in order to avoid any possible allegation that its action was improper or unlawful. (TR 166: 8-12). Moreover, Blaise admitted that had the Southern California employees NOT voted for the union they would have received a wage adjustment just like their counterparts in Northern California, Arizona and Nevada. (TR 162: 13-19).

Remarkably, in the course of about 70 pages of testimony, Blaise alluded to advice Respondent received from counsel and/or the rule of law (as undoubtedly articulated by counsel) at least 14 times! (TR 98, 99, 109, 132, 148, 149, 150, 154, 156, 157, 159, 160, 165,167).⁷ Moreover, several e-mails entered into evidence dealing with the wage increase issue were partially redacted because they were sent to counsel. (TR 132). Inasmuch as Respondent relentlessly claims that it meticulously followed the advice of counsel (TR 150), its counsel is in the very best position to know what Respondent did and when it did it. Therefore, significant

⁷ It was the inability to get a straight answer from Blaise that prompted GC to remark, during cross-examination, "[W]e all understand that you were trying to follow the letter of the law, okay?" (TR 161: 24-25). The transcript does not capture GC's inflection; however, Respondent's counsel, Mr. DiNardo promptly objected. (TR 162: 5). Nevertheless, Respondent unabashedly maintains that GC "recognized" Respondent's intent was to follow the letter of the law. Such was not and is not the case, as found by the ALJ: "This was an obviously facetious comment given that Blaise, sounding like a broken record, repeatedly invoked the advice of counsel defense." (ALJD at 6 n.4).

weight must be accorded to counsel's statement of position of November 8, 2010, and provided to the regional office,⁸ which states in pertinent part:

Blaise[] determined on or about the beginning of August, 2010, that in certain markets it would pass-through a portion of the customer rate increases to employees in the form of wage increases. With respect to KAG West, it was decided to implement the wage increases for non-bargaining unit employees, including dispatchers and administrative staffing Southern California, and to defer any decision on changes in wages for bargaining unit employees until after the election, and if the Union wins, to the collective bargaining process. . . .

At the time, the NLRB supervised representation election to determine whether a majority of employees supported the Union as their exclusive bargaining representative was approaching on August 14 and 16, 2010. It was determined that any announcement pertaining to changes in wages be delayed until after August 16 so as not to risk interfering with the election and the filing of related unfair labor practice charges. The election ballots were tallied on August 17, 2010. In the days that followed, Blaise gave final approval to the implementation of wage increases in certain areas, based on market and economic conditions.

On August 24, 2010, the Company announced the implementation of certain wage increases, effective for the pay period beginning August 21, for all employees in Northern California Arizona, and Nevada and for dispatchers and administrative staff in Southern California. (GCX 4 at 14-15). (Emphasis supplied).

On August 24, 2010, after a high-level strategy session in Canton, Ohio, Respondent decided to announce the wage increase by memorandum to all employees that same day. (GCX 3; RX 3). In the memorandum, Respondent did not inform its employees or the Union that in Southern California wages would be subject to collective bargaining. (TR 164-165; GCX 3). Moreover, Blaise testified that he never told, or directed any person who reported to him to tell affected bargaining unit employees that their increase was being postponed or deferred. (TR 166).

⁸ Attorney position statements are deemed party admissions. See, Raley's, 348 NLRB 382, 501-502 (2006).

V. OVERVIEW OF THE ALJD

In reviewing the ALJD, the Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that such resolutions are incorrect.⁹ Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F. 2d. 362 (3d Cir. 1951).

The ALJD applied the criteria established by the Wright-Line decision, and concluded that "Acting General Counsel has easily met his burden under Wright Line." (ALJD at 5:40-41) The ALJ emphasized that Respondent "admit[ted] that it withheld the wage increase because the employees chose to be represented by the Union," and that the decision to grant any wage increase "was in the context of KAG suddenly deciding to reconsider earlier wage reduction after the employees began seeking union representation." (ALJD at 5:37-40). In making his decision, the ALJ discredited Respondent's main witness, Bruce Blaise, and found that his testimony was entirely self-serving and unconvincing.¹⁰ (ALJD 5: 42-46) (Emphasis supplied)

Finally, GC addresses below certain misstatements and mischaracterizations of the ALJD made by Respondent's brief in support of its Exceptions (hereafter sometimes "Respondent's Brief"):

- 1) Nowhere in the ALJD does the ALJ find that the wage increase was a "new benefit." Indeed, as pointed out above, the ALJ characterized the Respondent's decision as reconsideration of its earlier wage reduction after the employees began seeking union

⁹ The ALJD makes one misstatement of fact that has no impact on the validity of its decision. While the ALJ correctly finds that in early August 2010, Blaise decided to grant wage increases to employees, he states that this was about 10 months after reducing wages. (ALJD 4: 5-7). In fact, this was less than 8 months after Respondent reduced employees' wages across-the-board effective on about December 29, 2009.

¹⁰ Nothing in the instant record calls for the Board to overrule the ALJ's credibility resolutions. Indeed, the testimony of Respondent's witnesses called to corroborate Blaise's testimony was equally self-serving and unconvincing.

representation. (ALJD at 5:37-40). Nonetheless, in its Brief, Respondent inaccurately refers to a purported "new benefit." For example, Respondent writes that "the ALJ found that. . . the disputed August 2010 wage increase was a new benefit." (Respondent's Brief at 1). And again, "The ALJ agreed the wage increase at issue in this case was a new benefit." (Respondent's Brief at 28). The distinction between characterizing the wage as a reversal of an earlier wage reduction versus a new benefit is important, because Respondent bases its defense of its misconduct on the Shell Oil line of cases, which were decided in the context of new benefits. GC discusses the Shell Oil cases below, but notes here that the factual premise supporting Respondent's legal defense is illusory.

- 2) Contrary to Respondent's contentions, nowhere in the ALJD does the ALJ find that Respondent's wage increases were "discretionary merit increases." This is because none of Respondent's wage adjustments (including 2005 systemwide wage increase and December 2009 systemwide wage reduction) were based on employee merit or job performance, and indeed, Respondent does not even perform annual appraisals or evaluations. (TR 78: 11-20). Instead, as the ALJ found, Respondent's wage actions of 2005 and 2009, were based largely on economic considerations. (ALJD 3: 31-35).
- 3) Contrary to Respondent's contentions, the ALJ did not find that Respondent does not grant "across-the-board" wage increases. Rather, the ALJ found that such increases are not granted regularly or periodically, i.e, at regular intervals. (ALJD 3: 31; 32-35).
- 4) Contrary to Respondent's argument, the ALJ cited Aluminum Casting and Engineering Co., 328 NLRB 8, 16 (1999) for the narrow proposition that an employer cannot use pending Board proceedings "as a legal cover for punishing employees for

having voted in favor of a union." (ALJD 6: 19-40) (Emphasis in ALJD). The ALJ noted that Aluminum Casting involved "withholding a regular wage increase from employees." (ALJD at 6: 21-22). Contrariwise, here the ALJ found that Respondent does not grant regular wage increases; therefore, Respondent's argument the ALJ "relied singularly" on Aluminum Casting totally misconstrues the point of the ALJ's analysis.¹¹

VI. ARGUMENT

A. The ALJ'S Wright Line Analysis Should Be Affirmed

The ALJ applied Wright Line, 251 NLRB 1083 (1980) enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), to the instant case, and found that "Acting General Counsel" ha[d] easily met his burden under Wright Line." (ALJD 5: 40-41). In so holding, the ALJ rejected Respondent's primary defense that its withholding of the wage increase from its Southern California employees was not unlawfully motivated, and found that Respondent's conduct was discriminatory and retaliatory¹². (ALJD 6: 42-43). The ALJ's findings are supported by his credibility findings, the timing of Respondent's unlawful actions, the notice Respondent sent to all of its employees announcing the wage increases, and its overt hostility toward the Union.

Wright Line sets out the requisite evidentiary framework for determining discriminatory motivation. Under Wright Line, General Counsel must show that employees were

¹¹ In this regard, the ALJD also references Arc Bridges, Inc., 355 NLRB No. 199 (2010), enf. denied 192 LRRM 2263, ___ F.3d. ___ (DC Cir. 2011) for a related proposition, that even in the Shell Oil cases, upon which Respondent relies, wages and benefits for represented and unrepresented employees need not be the same so long as the withholding is not discriminatorily motivated.

¹² The ALJ found that it was not necessary to resolve GC's alternative argument that Respondent's withholding of the wage increase violated Section 8(a)(1) independently and was inherently destructive of employees' Section 7 rights. (ALJD 7:1-3). GC notes, however, that the Board may address this argument, even if the absence of exceptions, as the allegation was encompassed by the consolidated complaint, as amended at (footnote continued next page)

engaged in protected activity; that the employer was aware of the activity, and that the activity was a substantial or motivating factor for its action. Motive may be shown by direct or circumstantial evidence and timing alone may suggest union animus as a motivating factor in an employer's action. NLRB v. Rain-Ware, Inc., 732 F. 2d 1349, 1354 (7th Cir. 1984); Kankakee Valley, 338 NLRB 906 (2003); Masland Industries, 311 NLRB 184, 197 (1993). Once the General Counsel establishes these elements, the burden of persuasion shifts to the employer to prove that it would have taken the same action even in the absence of the protected activity. Donaldson Bros. Ready Mix, Inc., 341 NLRB 958, 961 (2004); Wright Line, at 1089.

Here, several factors establish Respondent's animus to the Union, but, as the ALJ states, it is the timing of Respondent's conduct that categorically reveals its unlawful motive: In December 2009, Respondent reduced its employees' wages systemwide. Shortly thereafter, the Southern California employees began their organizing campaign. In February, 2010, Respondent learned that the Union was organizing its Southern California workers, and shortly thereafter, in mid-March 2010, it began exploring the possibility of giving back to employees the \$1.90 that it had taken from them 3 months earlier. Respondent communicated this to employees throughout Southern California. In fact, on March 16, 2010, Blaise communicated by e-mail to Doug Allen and told him: "Dennis [Nash] wants us to make sure we are moving quickly on the situation in Southern California." (RX 1). In the e-mail, Blaise lists for Mr. Allen a series of points to make to the Southern California employees, suggesting that a wage increase may be forthcoming: "At this time, [o]ur full intention is to keep moving forward and if by late summer we feel confident that we have weathered the storm. . . , we plan to make positive adjustments in pay, etc." Blaise instructed Respondent's managers to make this point to the Southern California

hearing and was fully litigated. Under such circumstances, the Board is free to apply its own reasoning and is not required to at "rubber stamp" the ALJD. W.E. Carlson Corp., 346 NLRB 431, 434 (2006) (citation omitted).

drivers in March 2010. In addition, in March 2010, in order to move quickly on the "situation," Blaise journeyed to Southern California and met with the drivers to spread the message that things were going to improve if only they would stick with the company. (ALJD 3: 40-46; RX 1).

The ALJ discredited Blaise's testimony that Respondent's "sudden turnaround" was motivated by an improved economy, emphasizing that "only a few months earlier," Respondent announced to its employees that "there would not be any wage increase in 2010." (ALJD 4:1-2). Instead, the ALJ concluded: "it was the union activity of the drivers in southern California that motivated KAG to begin the process of granting wage increases to employees."¹³ (ALJD 4: 44-52)

Substantial evidence establishes unequivocally that Respondent made its decision to grant raises to employees prior to the union election, but that it concealed this information from its employees to enable Respondent to withhold this benefit from the affected employees if the Union won. In early June 2010, KAG made known to the trade press its intention to seek rate increases from its customers effective July 1, 2010, and that such increases would be passed on to Respondent's employees. (TR 96: 19-25; 97:1-4; RX 2). On July 2, 2010, the Union filed a petition seeking to represent Respondent's drivers, mechanics and polishers in Southern California. (ALJD 2:26-27). Blaise testified that in mid-July, 2010, prior to the union election, it appeared that wage increases were going to happen, yet despite that fact, Respondent did not inform its Southern California employees of this positive development, nor did it inform them that any raises would be deferred until after the election so as to avoid the appearance of

¹³ In Respondent's Brief, it argues that since the ALJ found that but for the union activity in Southern California no one would have received an increase; employees who did not are no worse off and there was no discrimination. See, Respondent's Brief at 38-39. This argument is entirely sophistic. However, the short response is that the adverse action here was not the decision to grant wage increases, but withholding them from Southern California employees.

interfering with employees' choice. See, H.S.M. Machine Works, Inc., 284 NLRB 1482, 1484 (1987).¹⁴

Instead, Respondent kept the imminent increase under wraps, until a week after the ballot count showed that the Union had won.¹⁵ On August 24, Respondent issued a company-wide announcement informing all its employees that everyone except the Southern California group would be receiving a wage increase effective August 21, 2010. On the witness stand, Blaise testified that had the Union lost, the Southern California drivers would have received the wage increase. (TR 162: 13-19).

During the period between the ballot count, August 17, 2010, and the announcement of the wage increase 1 week later, Respondent (along with its attorneys) were busy strategizing for its selective implementation. Of particular note during this period is an e-mail dated August 19, 2010, and addressed to Doug Allen (copying Blaise), the subject of which is "Current Game Plan," and which reads in pertinent part:

There is a strategic planning meeting next Tuesday which will determine many of the moves we will be making next. In the interim, I will be developing some bullet points and letters for review. One will be announcing what has taken place in Southern CA and one will be discussing wage increases.

With respect to your Monday meetings, you can discuss with [Blaise], but my understanding is that since the meetings are already scheduled, you will probably have to comment on raises and make the statement that a more formal announcement will be distributed this week. (GCX 13) (Emphasis supplied).

Per the above e-mail communication, on Tuesday, August 24, 2010, the same date as the increase was announced, Respondent conducted a final "strategy planning meeting" in Canton, Ohio to

¹⁴ H.S.M. Machine and cases cited therein hold that an employer is generally required to grant scheduled wage increases during the pendency of a representation petition. However, if the employer's past practice is haphazard it may withhold the increase provided it truthfully tells its employees that it has merely postponed or deferred the increase and that it has done so only to avoid the appearance that it interfered with the election. Id. at 1484.

prepare for the roll-out of the raise in the west coast. Among the items to be discussed at the meeting was the wording and distribution of the memorandum regarding the wage increase. At the meeting, the comments of the managers and human resource heads would be considered before final implementation. Moreover, at the strategy planning meeting there would also be discussion about "the announcement on union activity along with bullet points that were distributed to the [terminal] managers" 2 days after the ballot count. See, RX 3. In short, the facts overwhelmingly support an inference that the meeting's real purpose was to strategize or plan the most effective ways in which to punish the newly represented workers and discredit their Union.

B. Decision to Grant Wage Increase Not Made Simultaneous to Announcement

In a further effort to avoid culpability, Respondent argues that the decision to grant wage increases was made on the same day that it announced them: August 24, 2010. Such an argument is yet another fabricated defense to its unlawful conduct, and serves to undercut the ALJ's finding and conclusion that Respondent decided to grant the wage increase prior to the election results yet withheld any announcement of its decision till after the election. Clearly, Respondent's revisionist self-serving timetable is false, and is contradicted by Respondent's internal communications and the statement of position submitted by Respondent's counsel during the investigation of this matter wherein it states:

Blaise determined on or about the beginning of August, 2010, that in certain markets it would pass-through a portion of the customer rate increases to employees in the form of wage increases. With respect to [Respondent], it was decided to implement the wage increases for non-bargaining unit employees, including dispatchers and administrative staffing Southern California, and defer any decision on changes in wages for bargaining unit employees until after the election.

¹⁵ Respondent's position that the parties' propaganda put the affected employees on notice that their wages would be frozen if the Union prevailed is worthless. Such statements are common campaign rhetoric and do not contemplate or take into account discriminatory or otherwise unlawful conduct.

The election ballots were tallied on August 17, 2010. In the days that followed, Blaise gave final approval to the implementation of the wage increases in certain areas, based on market and economic conditions.

On August 24, 2010, the Company announced the implementation of certain wage increases, effective for the pay period beginning August 21, for all employees in Northern California, Arizona, and Nevada, and for dispatchers and administrative staff in Southern California. GCX 4 at 14-15) (Emphasis supplied).

As found by the ALJ, the facts speak of a retaliatory strategy and action by Respondent. Having decided to grant a wage increase BEFORE the election, Respondent did not advise employees, as it was required to do, that an expected raise would be deferred pending the outcome of the election to avoid the appearance of election interference. In its statement of position, Respondent further admits that it decided BEFORE the election that the recipients of the raise would be determined by the results of the election. The undisputed fact establishing unlawful motivation is that Respondent announced its decision to implement a wage increase for all its employees, with the exception of those who had just voted to unionize, less than a week after the ballot count, and on the eve of Board certification. By the time the parties commenced bargaining on November 9, 2010,¹⁶ the damage had been done. Respondent's preemptive action already had disparaged and disabled the Union among its supporters, and sent a decisive message to Respondent's employees systemwide, who might have supported unionization in the future.

Nonetheless, Respondent insists that under Board law, its action was lawful because it merely deferred wage adjustments to the process of collective bargaining. Thus, argues Respondent, the ALJ's finding of animus was based on nothing more than a purportedly legitimate decision by Respondent not to grant represented

employees the same raise as it granted its non-represented employees because it wanted to preserve the raise issue for collective bargaining, and protect itself from a charge that Respondent violated Section 8(a)(5). Respondent's Brief at 44. Once again, however, Respondent mischaracterizes the factual basis for the ALJ's finding. The ALJ focused on the suspect timing and conduct of Respondent. As pointed out by the ALJ, Respondent's actions from the beginning were motivated by the union organizing activity; the decision to reinstate the wage levels in effect before the December 2009 reduction was made prior to the election; yet, Respondent withheld its announcement until after the election to send an unmistakable message to its employees that unionism will be punished where it hurts the most--in the pocket of organized employees.

As such, Respondent's wage decision was fashioned along Section 7 lines—as a punishment—for the vote. It was discriminatorily motivated: the timing of the decision and its announcement as well as Respondent's complete failure to communicate the reason for the delay to its employees establishes Respondent's unlawful motive. As the ALJ noted, in citing Aluminum Casting, Respondent seeks "legal cover for punishing employees for having voted in favor of the union." (ALJD 6: 38-40).

1. Other Facts Support a Finding of Animus

In addition to withholding the wage increase from Southern California employees only 1 week after the NLRB election, and Blaise's admission that they would have received the increase had the vote gone the other way, Respondent's abject failure to inform or explain its decision or conduct to its employees or the Union, before or after its implementation of the wage adjustment, warrants an inference of discriminatory motive. Had the Union acted without animus, it would have explained to all of its

¹⁶ GCX 4 at 15.

employees prior to the election that it decided to increase their wages, but that because of pending union organizing activity, the expected raise was being deferred until after the election. No such announcement was made. Further, in the notice to all employees announcing the wage increase, a law abiding employer would have noted explicitly that the wage increase to the represented employees would be subject to collective bargaining. Again, no such clarifying notification was made, and the clear inference was that represented employees would NOT receive a wage increase.

There is other evidence in the record of Respondent's union animus. For example, the ALJ found that Respondent's talking points for terminal managers exhibited its anti-union sentiments. (ALJD at 2-3). So, too, its letter of August 25, 2010, wherein Respondent states that historically it was "union-free" and that the union was bad for everyone, and that corporate success depended on keeping the union out. (ALJD 2: 35-51; 3 1-21; RX 3). Yet another example of animus, which relates directly to Respondent's unlawful conduct, is its message to employees that it has complete and unfettered control of wage increases and benefits: "[O]nly the company can make changes in wages, benefits or working conditions." (GCX 10).

In sum, the evidence of record supports the ALJ's findings that GC met her burden under Wright Line and Respondent failed to prove that it would have withheld the wage increase even in the absence of the election results and employees' union activities.

C. The ALJ's Rejection of the Shell Oil Line of Cases Should Be Affirmed

Contrary to Respondent's Exceptions, the ALJ did not err by refusing to apply Shell Oil Co., 77 NLRB 1306 (1948), and related cases including B.F. Goodrich Co.,¹⁷ 195 NLRB 914 (1972) and Howard University (Advice Memorandum in Case 5-CA-23135, March 31, 1978)¹⁸ because they are distinguishable from the instant case. First, most of the Shell Oil cases involve new benefits. Here, the wage adjustment is clearly distinguishable from a new benefit since it was a restoration of an old benefit and it was granted systemwide. Pennsylvania Gas and Water Co., 314 NLRB 791, 792-793 (1994). In this regard, the ALJ did not find that the wage increase was a new benefit; rather, he found that Respondent's across-the-board wage increases are not granted regularly or periodically. (ALJD 3: 31). Moreover, as found by the ALJ, the wage adjustment was, in fact, no more than a restoration of a pre-existing benefit that had been revoked systemwide only months earlier. (ALJD 5:38-39).

Second, as discussed above, in the Shell Oil line of cases the facts surrounding the conferment of the material benefit were not bundled up with discriminatory motive. Indeed, for the most part, in the Shell Oil cases, the conduct occurred during the course of an established bargaining relationship—some of which were longstanding. In other instances, the employer

¹⁷ In B.F. Goodrich, the Board concluded there was no Section 8(a)(3) violation because there was no evidence of discriminatory motive and a new benefit had been conferred. Nonetheless, the Board found an 8(a)(1) violation because the plan disqualified employees from participation immediately upon their selection of union representation. Here, Respondent's actions, its decision to grant benefits based on Section 7 considerations, i.e., to all employees with the notable exception of those wayward unionists in Southern California, disparaged the Union, the collective bargaining process, and the very rights its employees had exercised a week earlier. As such, Respondent's conduct independently restrains and coerces employees in the exercise of their Section 7 rights and contravenes the policies of the Act.

¹⁸ The Advice Memorandum in Howard University, 1993, WL 142605 has no precedential value and should not be considered. Moreover, inasmuch as the instant case was Advice authorized, clearly Advice considers the two cases distinguishable. In this regard, the University historically maintained different systems for granting raises to its represented and unrepresented employees: the former were subject to a formal raise system that was submitted annually to Congress, but raises for the latter group were discretionary. Second, the University did not discuss the possibility of wage increases with employees prior to the election; whereas in the instant case management addressed the possibility of wage adjustments with employees as early as March 2010. Moreover, the University notified the union of its intent to grant unrepresented employees raises, and announced the raise (footnote continued next page)

advised the union of its intent in advance. None of the Shell Oil cases involved a set of circumstances as here, where employees had banded together to form a union, only to find that before the Union even took its first step as their representative, they lost a wage increase granted to all non-represented employees, but not to them. As intended, this telegraphed to them exclusion and retaliation and made their new representative look bad and ineffective. Thus, in the instant case, there is ample evidence of discriminatory or retaliatory motive by Respondent who was historically "union-free," and intent upon doing whatever was necessary to stay that way in advance (as opposed to in anticipation) of the bargaining obligation.

1. Systemwide Wage Increase Not a New or Sporadic Benefit

The evidence showed that Respondent's past wage adjustments in 2005 and 2009 were effectuated systemwide for all its employees throughout California, Arizona and Nevada. (GCX 3). A systemwide application does what a regular pattern of wage increases does in other circumstances. The Board considers systemwide changes in wages and benefits as "normal," and has found the act of withholding them for a discreet group undergoing organization violates the Act. Associated Milk Producers, Inc., 255 NLRB 750, 755 (1981), citing Russell Stover Candies, Inc., 221 NLRB 441 (1975). Indeed, the Board deems systemwide grants of benefits equivalent to an established pattern and practice. See, Pennsylvania Gas, supra. Here, Respondent decided to grant a systemwide, across-the-board, wage adjustment—just like it had done in 2005 and 2009, before its Southern California employees voted for union representation. Consequently, the wage increase of August 2010 was not a new benefit. The fact that the August 2010 wage increase was not a new benefit is underscored by the uncontroverted evidence that Respondent merely restored employees (other than in Southern California) to their

to employees in a memorandum about 6 weeks after the election wherein it explained that "Pay increases for employees who are members of collective bargaining units are based on contracts in force."

pre-existing compensation level of December 2009, before their systemwide wage cut. Thus, on this basis alone, the Shell Oil line of cases is distinguishable, but there are additional bases.

Again, as discussed earlier, Respondent decided to grant a wage adjustment before the election, deferred its implementation until after the election, and would have given the increase to its Southern California employees, but for their decision to unionize. This is unlawful, and runs afoul of the principle that an "employer, when confronted by a union organizing campaign, must proceed as it would have done had the union not been conducting its campaign." Russell Stover Candies, Inc., 221 NLRB 441 (1975).

Further, the instant case does not involve an "employer . . . postpone[ing] the granting of an irregular or haphazard raise 'if it truthfully tells its employees that it has merely postponed or deferred the increases [so as to] avoid the appearance that it has interfered with the election.'" Pennsylvania Gas & Water Co., *supra* at 793, and cases cited therein. As in Pennsylvania, "the raise was not deferred, it was denied to the affected employees." *Ibid.* Nor is this a case of an employer withholding a benefit, not decided upon until after the selection of a union, because such a benefit would properly be the subject of negotiations. Here, it is admitted that conference of the benefit had been decided upon prior to the Union's victory. As discussed above, following the election, all that remained to be determined by Respondent was its implementation strategy; the decision to grant the wage increase was already made.

2. The Shell Oil Cases Do Not Sanction Discrimination

The ALJ rejected Respondent's defense based on the Shell Oil line of cases by concluding that the withholding of wage increase to the represented employees was discriminatorily motivated. (ALJD 6: 5-40). As discussed above, Respondent's contention that had it granted the wage increase to its Southern California employees, it would have been subject to Section 8(a)(5) charges is factually false, and does not divert from its unlawful

conduct under Section 8(a)(3). Under Board law, all Respondent had to do to avoid or successfully defend Section 8(a)(5) or 8(a)(1) charges would have been to advise its affected employees that their systemwide wage increase was being deferred until after the election.¹⁹ As stated earlier, Respondent did not do that, and for an obvious reason: it wanted to punish and discredit its employees and the Union, and deter the rest of its employees from engaging in protected conduct. As such, Respondent's claim that it wanted to comply with the law, but was caught "between a rock and a hard place," falls on its face.

Another fact distinguishing this case from Shell Oil is that in Shell Oil, the employer's decision to grant wage increase occurred after the union elections, "when negotiations . . . were impending. . . ." Id. at 1309. In contrast, here, Respondent decided to grant its wage adjustment well before the election results were announced. Further, in Shell Oil, while the timing of the employers' announcement of their decision to award wage increases to non-represented employees is not clear, a careful reading of this pre-Taft Hartley decision indicates that it was 30 to 60 days after certification. Id. at 1309-1310. On the other hand, in the instant case, the change was announced the day before certification; the denial of the wage increase being a direct outgrowth of the employees selection of the Union as their representative with an eye on strategies repugnant to statutory policy. See, Chevron Oil Co., 182 NLRB 445, 450 (1970), enf. denied 442 F. 2d 1067 (5th Cir. 1971).

Another case relied upon by Respondent, United States Postal Service, 261 NLRB 505 (1982) is also inapposite. The Postal Service is a highly unionized and regulated employer that has a well-established practice of treating represented and unrepresented employees

¹⁹ Respondent convolutes the facts when it argues that, had it granted the wage increase to employees prior to the election, it would have violated Section 8(a)(1) under NLRB v. Exchange Parts Co., 375 U.S. 405 (1964). See, Respondent's Brief at 35. While Respondent made its decision to confer a wage increase systemwide before the election, there is no allegation that it granted or promised anything to anyone until after the election. It is the post-election withholding of the wage increase that is unlawful.

differently; such practice has been acknowledged and accepted by the many labor organizations with which it deals. Contrariwise, with the exception of the Southern California employees at issue, Respondent is non-union employer, and the Union had no information about the wage increase at issue here until it was announced as a fait accompli.

So, too, Orval Kent Food Co., Inc., 278 NLRB 402 (1986), is distinguishable from the instant case because that case discussed the legality of discretionary merit increases based on employee performance, a very different set of circumstances from the present one involving a systemwide, across-the-board raise. In Orval Kent Food, after the union was certified, the employer made proposals to the union at the bargaining table concerning both merit and general increases, which the union did not accept. As a result, the represented maintenance workers did not receive merit increases. Before the Board, the employer took the position that had the union not been in the picture, it would have granted merit increases to the crew or at least to some of them. Unlike here, there was no evidence in Orval Kent that the employer had implemented systemwide wage adjustments, or that it selectively conferred a benefit on some employees to the exclusion of its newly certified maintenance workers. Unlike the facts in Orval Kent, the unfair labor practice allegation in the instant case did not involve discretionary merit increases. And there were no attempts to discuss the raise with the Union in a timely or efficient manner.

Unlike Orval Kent and the Shell Oil line of cases, here, Respondent's touted deference to its collective bargaining obligation is a legalistic pretext. When Respondent announced the discriminatory wage adjustment there was no context of collective bargaining; there was no established relationship; and there were no negotiations. It was all too early or perhaps too late, depending on which side of the table the parties would sit some 3 months later. While this is not a "nip in the bud" theory case; it's clearly a nip in the first fruits—one in which the injury to employees' Section 7 rights may prove irreparable if left unremedied. For these

reasons, the Shell Oil line of cases and Orval Kent provide no support to Respondent and this defense should be disregarded.

D. Advice of Counsel Does Not Provide Immunity to Respondent

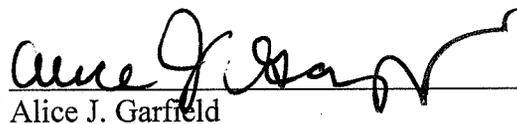
In two cases cited above, Pennsylvania Gas and Water Co. *supra* at 793 and Assoc. Milk Producers, *supra* at 752, the employers contended that their decisions to withhold wage increases from certain workers were made pursuant to the advice of counsel. In both instances, the Board affirmed the judges' decisions finding Section 8(a)(3) violations notwithstanding such ill-placed reliance on counsel. In the instant case, the ALJ also rejected Respondent's reliance of the advice of counsel as a legitimate defense. In this regard, the ALJ discredited Blaise and found his testimony "entirely self-serving and unconvincing." (ALJD at 5: 41-46). Moreover, the ALJ noted that Blaise "seemed, more eager to repeat KAG's legal position than simply relate the facts as best he could." (ALJD 5: 45-45; 6: 1-2). Nonetheless, Respondent continues to assert that because it acted on advice of counsel, its conduct was *a fortiori* lawful and beyond suspicion or challenge. Respondent cites no authority for its assertion because no such facile (albeit costly) refuge should be afforded to lawbreakers.

VII. CONCLUSION

In light of the above and the record as a whole, GC urges the Board to affirm the finding of the ALJ that Respondent violated Section 8(a)(3) and (1) of the Act and adopt the ALJ's recommended order in its entirety.

Dated: 10 February 2012

Respectfully submitted,



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STATEMENT OF SERVICE

I hereby certify that a copy of General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision was submitted by E-filing to the NLRB's Executive Secretary in Washington D.C. on February 10, 2012. The following parties were served with a copy of the same document by electronic mail.

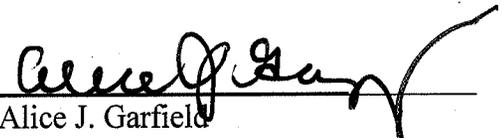
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