Woodcrest Health Care Center *and* 1199 SEIU, United Health Care Workers East. Case 22–CA-083628

April 26, 2018

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND KAPLAN

This case, on remand from the United States Court of Appeals for the Third Circuit, requires us to determine whether the Respondent's announcement and implementation of improvements in healthcare benefits and reduction in coinsurance, copay, and contribution rates for all employees except those eligible to vote in a pending representation election was unlawfully motivated and therefore violated the National Labor Relations Act.[1] The court directed the Board, in addressing that question, to apply the analytical framework established by the Supreme Court in *NLRB v. Great Dane Trailers, Inc.,* 388 U.S. 26 (1967).

The Board has reviewed the record in light of the parties' statements of position and the court's opinion, which we accept as the law of the case. Applying *Great Dane* as instructed, we reaffirm the Board's prior finding that the Respondent violated Section 8(a)(1) and (3) of the Act by withholding benefit improvements from employees eligible to vote in a representation election, while announcing its intent to grant the improvements to other employees.

I. FACTS

The Respondent is one of four rehabilitation and nursing facilities in New Jersey that are managed by HealthBridge Management, LLC (HealthBridge). All four of the New Jersey HealthBridge-managed facilities provide their employees with a common health insurance plan, which is arranged through HealthBridge. On January 1, 2012, HealthBridge made changes to the common plan that, among other things, reduced benefits and increased costs for all employees.[2] Employees complained about the changes and, as a result of their dissatisfaction, some employees changed or dropped their coverage.

On January 23, 1199 SEIU, United Health Care Workers East (the Union) filed a petition to represent a unit of approximately 200 of the Respondent's employees. The parties thereafter entered into a stipulated election agreement which provided for a secret ballot election to be held on March 9.[3]

On March 5, 4 days before the scheduled election, the Respondent distributed a memorandum to all of its employees at the Woodcrest facility, except those involved in the union representational campaign, announcing that it was rescinding many of the January 1 changes to the health insurance plan.[4] The memorandum, which was signed by the Respondent's administrator, Lorri Senk, announced as follows:

> Three weeks ago I informed you that we were reviewing the changes that were made to the 2012 health insurance benefits and employee contribution rates. . . .
>
> Our review is now complete. I am very pleased to announce that we have been able to improve the medical insurance benefits offered to you and, in most cases, lower the cost you pay.

The memorandum additionally advised employees that their contribution rates would be reduced beginning March 23, and that they would receive a credit for the difference between their January 1 and March 23 contribution rates. The memorandum further advised employees that their coinsurance and copay rates would be reduced for services received on or after July 1.

It is undisputed that the election-eligible employees at Woodcrest learned that they were being denied these improvements in healthcare benefits while other employ-

[1] On February 27, 2014, the National Labor Relations Board issued its Decision and Order in this proceeding. *Woodcrest Health Care Center*, 360 NLRB 415 (2014). The Respondent petitioned the United States Court of Appeals for the Third Circuit for review of the Board's Order, and the General Counsel cross-petitioned for enforcement. On April 29, 2015, the court granted in part the Respondent's petition for review, vacating and remanding the benefit allegations to the Board for reconsideration in light of its decision. *800 River Road Operating Co., LLC, d/b/a Woodcrest Health Care Center v. NLRB*, 784 F.3d 902 (3d Cir. 2015). The court upheld the Board's findings that the Respondent violated Sec. 8(a)(1) by coercively interrogating an employee and by creating an impression of surveillance. Id. at 913–915, 917.

On September 13, 2017, the Board notified the parties that it had accepted the court's remand and invited them to file statements of position with respect to the issues raised by the remand. The Respondent, the General Counsel, and the Charging Party filed statements of position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] All dates are in 2012 unless otherwise indicated.

[3] An election was conducted on March 9. The Respondent filed objections. On November 26, 2014, the Board issued a Decision and Certification of Representative, which is reported at 361 NLRB 1014 (affirming and incorporating by reference the vacated January 9, 2013 Decision and Certification of Representative reported at 359 NLRB 522 (2013)).

[4] The memorandum was specifically addressed to those classifications at Woodcrest that were not part of the unit of employees that the Union and the Respondent had stipulated were eligible to vote in the March 9 election. Thus, on its face, the memorandum excluded employees who were eligible to vote in the election.

ees were being granted them. Although the memorandum was distributed solely to employees who held positions identified in the memorandum, a copy was left in the employee breakroom. Unit employee Jeffrey Jimenez testified that he observed the memorandum in the breakroom prior to the March 9 representation election. Jimenez further testified, without contradiction, that at a communication meeting held shortly after the election, another unit employee stated that she had observed the memorandum in the breakroom and inquired whether unit employees were eligible for the benefit improvements. Senk replied "we cannot negotiate your contract, your benefits, and your insurance because right now you are in the critical period with the Union."

The parties stipulated that the healthcare benefit improvements were implemented in response to employee complaints about the changes that were made on January 1. The parties further stipulated that the improvements "applied to all employees except those involved in a union representational campaign" and that they were not implemented as to the Respondent's election-eligible employees.

II. THE PRIOR BOARD DECISION

The Board adopted without modification the administrative law judge's findings that the Respondent's announcement and targeted withholding of the improved healthcare benefits violated Section 8(a)(1) and (3) of the Act. 360 NLRB at 415. The judge explained that, "[a]s a general rule, an employer, in deciding whether to grant benefits while a representation election is pending, should decide that question as it would if a union was not in the picture." Id. at 424, citing *Great Atlantic & Pacific Tea Co., Inc.*, 166 NLRB 27, 29 fn. 1 (1967), enfd. 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 record established that the Respondent granted the benefit 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." 360 NLRB at 424.

The judge noted that Board law provides a safe harbor whereby an employer may lawfully postpone, rather than cancel, an adjustment in wages or benefits during the pendency of a union campaign, so long as it makes clear to the affected employees that the adjustment will occur whether or not they select a union, and that the sole purpose of the postponement is to avoid the appearance of improperly trying to influence the election's outcome. Id., citing *KMST-TV, Channel 46*, 302 NLRB 381, 382 (1991); *Atlantic Forest Products, Inc.*, 282 NLRB 855, 858 (1987). The judge found that the Respondent did not qualify for this safe harbor because it failed to inform the unit employees that the withholding was temporary and that the benefits would be provided retroactively, leaving them with the "clear impression" that they were being deprived of these improved benefits because of their Section 7 activity. 360 NLRB at 424.

III. THE DECISION OF THE THIRD CIRCUIT COURT OF APPEALS

On review, the Third Circuit faulted the Board for failing to make a specific finding as to the Respondent's motive for withholding the benefit improvements from the election-eligible employees, and instead treating the inquiry "as a 'but for' test—i.e., asking only whether the employees would have received benefits but for the Union's presence."[5] 784 F.3d at 910 (citations omitted). Citing Third Circuit and Supreme Court precedent, the court observed that the language of Section 8(a)(3) demonstrates that, in order to find a violation, "consideration must be given to the employer's motive." Id. at 908. It further remarked that the "Supreme Court has held, time and again, that a violation of § 8(a)(3) normally turns on an employer's antiunion purpose or motive." Id., citing *American Ship Building Co. v. NLRB*, 380 U.S. 300, 311 (1965); *NLRB v. Brown*, 380 U.S. 278, 287 (1965); *Radio Officers' Union v. NLRB*, 347 U.S. 17, 44 (1954). The court found that, in the benefits context, the requirement of antiunion motivation applies to Section 8(a)(1) as well. 784 F.3d at 909 fn. 4.

The court acknowledged, however, that in some circumstances, specific proof of improper motive may be unnecessary. Id. at 909, citing *Great Dane*, 388 U.S. at 33–34; *NLRB v. Hudson Transit Lines, Inc.,* 429 F.2d 1223, 1227–1229 (3d Cir. 1970); *NLRB v. Fleetwood Trailer Co.,* 389 U.S. 375, 380 (1967). The court described the burden shifting framework established by the Supreme Court in *Great Dane* for analyzing cases in which the challenged conduct appears to be discriminatory on its face:

> As a threshold matter, [the Board] must make a finding as to whether the employer engaged in one of two kinds of "discriminatory conduct which could have adversely affected employee rights to *some* extent." That is, first, if the Board finds the employer's conduct to be " 'inherently destructive' of important employee rights," then the Board may presume an unlawful motive. The employer then would have the opportunity to demonstrate "counter explanations" for its conduct, although the Board "may nevertheless draw an inference

[5] The court also faulted the Board for treating the safe harbor "as a sword" and finding, in essence, that the Respondent violated the Act because it did not comply with the safe harbor. 784 F.3d at 908.

> of improper motive from the conduct itself' and find an unfair labor practice, if doing so would "strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." Second, if the Board finds instead that the employer's conduct fell short of the "inherently destructive" category—i.e., "the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight'"—then the burden shifts to the employer to "come forward with evidence of legitimate and substantial business justifications for the conduct." If it does not do so, it will be found to have violated § 8(a)(3). However, if the employer meets this burden, then the burden shifts back to the charging party or the NLRB to present "specific evidence" of the employer's intent to discourage [u]nion membership.

784 F.3d at 909–910 (emphasis in original, citations omitted).

The court stated that the 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 Respondent's] different treatment of the election-eligible employees cannot be reconciled with what the Supreme Court has instructed . . . the Board to do."[6] Id. at 910. The court remanded the case to the Board "to modify its longstanding mode of analysis in order to comply with the Supreme Court's equally longstanding precedent to the contrary." Id.

IV. DISCUSSION

We accept the court's opinion as the law of the case. Applying the *Great Dane* analytical framework as instructed, we find that the Respondent violated Section 8(a)(1) and (3) of the Act by announcing and implementing improvements in healthcare benefits and a reduction in coinsurance, copay, and contribution rates for all employees except those eligible to vote in a pending representation election.

A. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967)

In *Great Dane*, where the Board had found that an employer violated Section 8(a)(3) of the Act by withholding vacation benefits from striking employees while at the same time announcing that it intended to pay those benefits to nonstrikers,[7] the Supreme Court observed: "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." 388 U.S. at 32. The Court further observed: "The 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." Id.

Although the Court acknowledged that independent evidence of antiunion motivation is normally required to sustain a violation of Section 8(a)(3), it stated that some conduct is so "'inherently destructive of employees interests' that it may be deemed proscribed without need for proof of an underlying improper motive." Id. at 33, quoting *NLRB v. Brown*, 380 U.S. at 287; *American Ship Building Co. v. NLRB*, 380 U.S. at 311. Such conduct, the Court stated, "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). In such a situation, "the employer has the burden of explaining away, justifying or characterizing 'his actions as something different than they appear on their face.'" Id., quoting *Erie Resistor*, 373 U.S. at 228. And even if the employer comes forward with counter explanations for its conduct in this situation, "the Board may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." 388 U.S. at 33–34.

On the other hand, the Court stated that "when the resulting harm to employee rights is comparatively slight," an antiunion motivation must be proved if the employer has come forward with evidence of a substantial and legitimate business justification for its conduct. Id. at 34 (quotation marks omitted), citing *NLRB v. Brown*, 380 U.S. at 289; *American Ship Building Co. v. NLRB*, 380 U.S. at 311–313.

Finally, the Court explained that "in either situation, 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." 388 U.S. at 34.

[6] The court acknowledged that the Respondent treated employees in the stipulated bargaining unit differently because of the election, but found that "the Board made no attempt to determine the reason [the Respondent] decided to award benefits to some employees at the time and in the manner that it did." Id. at 910 fn. 5. It went on to state, however, that the Respondent's claim that it did not have an antiunion motivation "would be exceedingly weak if all it could say was that it was following faulty legal advice." Id.

[7] *Great Dane Trailers, Inc.*, 150 NLRB 438 (1964).

Ultimately, the Court found that it was unnecessary to decide whether the employer's denial of vacation pay to strikers while paying those same benefits to nonstrikers was "inherently destructive" of employees' interests, or had a comparatively slight impact on those interests, since the employer came forward with no evidence of legitimate motives for its conduct. Because the employer's conduct "could have adversely affected employee rights to some extent," and "no evidence of a proper motivation appeared in the record," the Court held that the Board's conclusion that the conduct violated Section 8(a)(3) of the Act was supported by substantial evidence and should have been sustained. Id. at 34–35.

B. Application of Great Dane to this case

Applying the analytic framework of *Great Dane* to the facts of this case,[8] we find that the Respondent'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." Id. at 34. There is no dispute that the Respondent would have extended the benefit improvements to the employees in the stipulated unit were it not for their protected activity. As the judge in this case found, the Respondent 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." 360 NLRB at 424.

The evidence establishes, moreover, that the employees in the stipulated unit became aware before the election that they were being denied the benefit improvements. And Senk's response when questioned about the matter shortly after the election that "we cannot negotiate . . . your benefits, and your insurance because . . . you are in the critical period with the Union" placed the onus for the denial squarely on the Union. The foreseeable effect of this conduct was to discourage the future exercise of Section 7 rights by sending an unmistakable message to the employees in the stipulated unit that they were being punished for their support of the Union and 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.

Since it was proven that the Respondent engaged in "discriminatory conduct which could have adversely affected employee rights to some extent," under *Great Dane* the burden shifted to the Respondent to show that its conduct was motivated by substantial and legitimate business objectives. 388 U.S. at 34. We find that the Respondent has failed to carry that burden.

Although the Respondent has maintained throughout the litigation of this case that it withheld the benefit improvements from the employees in the stipulated unit in order to maintain the status quo and avoid impacting the election or exposing itself to unfair labor practice charges, it offered no evidence that this was its actual motive. The Respondent did not present testimony from its officials who actually made the decision to withhold, and there is no evidence in the record establishing how, when, or why the decision was made.[9] The Respondent does not contend that it was prevented from introducing such evidence because the case was litigated under a "per se" theory of violation, and it has not identified any relevant evidence that it would introduce if the record were reopened. The Respondent's bald assertion unaccompanied by any proof or offer of proof does not fulfill its

[8] The Respondent contends that the record should be reopened and additional evidence admitted if the Board is not persuaded on the existing record that the complaint allegations should be dismissed. We find that it is unnecessary to reopen the record for the following reasons. First, the material facts are stipulated or undisputed. Second, the parties were afforded the opportunity to file statements of position regarding the issues presented in the remand and to identify any new arguments or evidence that they would introduce if the record were reopened. The Respondent does not claim that it has any new arguments to advance, and it has identified no additional relevant evidence that it might present. Finally, the *Great Dane* framework is not a novel standard in the context of targeted withholding cases. See, e.g., *Great Atlantic and Pacific Tea Co.,* 166 NLRB at 29 fn. 3 (applying *Great Dane* and concluding that "the discriminatory treatment of employees was violative of Sec. 8(a)(1) and (3) whether or not there is proof that Respondent was motivated by an unlawful purpose as it was 'inherently destructive of employee interests,' and no persuasive evidence of a legitimate purpose appears therefor"). In light of the foregoing, and especially given the Respondent's failure to identify any new arguments or relevant evidence that it would present, we deny the Respondent's request to reopen the record. See also *NLRB v. Frick Co*., 397 F.2d 956, 964 (3d Cir. 1968) (denying employer's request that case be remanded and the record reopened to enable it to present evidence of its business justification, noting "the Supreme Court did not afford the employer in the *Great Dane* case an opportunity to present evidence of business justification by ordering the suit remanded to the Board but rather remanded the case to the Court of Appeals with directions to enforce the Board's order").

[9] Acting Director of Nursing Chereece Steele was the only official of the Respondent to testify regarding the benefit improvements. Steele testified that she observed supervisors distributing the March 5 memorandum in closed envelopes to approximately 25 employees. She further testified that when an employee in the stipulated unit asked about the benefit improvements at a communications meeting, the Respondent's attorney replied "we [are] not allowed to discuss that matter at this time."

obligation to "come forward with evidence of legitimate and substantial business justifications" for its conduct.[10]

In any case, even if the record supported the Respondent's claim that it withheld the benefit improvements in order to maintain the status quo and avoid impacting the election or exposing itself to potential unfair labor practice charges, we would not find that to be a legitimate justification. In *NLRB v. Exchange Parts Co.,* the Supreme Court explained: "The 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." 375 U.S. 405, 409 (1964). The Board has long recognized that the Court's rationale is applicable to both the granting and the withholding of benefits. Accordingly, the Board has repeatedly held that 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. *Care One at Madison Avenue*, 361 NLRB 1462, 1474 (2014), enfd. 832 F.3d 351 (D.C. Cir. 2016); *Associated Milk Producers, Inc.*, 255 NLRB 750, 755 (1981); *Great Atlantic & Pacific Tea Co.*, 166 NLRB at 29 fn. 1. "When an employer follows this course of action it, in fact, maintains the status quo, in accordance with the rationale of *Exchange Parts*." *Care One at Madison Avenue*, 361 NLRB at 1475.

In cases involving company or system-wide adjustments in benefits, these principles apply regardless of whether the adjustments are part of a regular pattern or, as in this case, are made on a one-time basis. If the employer would have granted the benefits because of economic circumstances unrelated to union organization, the grant of those benefits would not have violated the Act. As the Board explained in *Associated Milk Producers:*

> Where, as here, a systemwide increase is put in effect in a manner free from union considerations, the withholding of that increase at a subdivision unit undergoing union organization is not necessary to avoid risking unlawful interference . . . . This is so because the systemwide application does what a regular pattern of wage increases does in other circumstances–provides the evidence necessary to demonstrate that the increase was given free from union or other prohibited considerations. . . .
>
> The Board has considered systemwide changes in wages and benefits as "normal" or free from improper considerations without inquiry as to their historical pattern and has found the withholding of such an increase at a single facility during preelection campaigning to be violative of Section 8(a)(1) and (3) of the Act.

255 NLRB at 755, citing *Russell Stover Candies, Inc.*, 221 NLRB 441 (1975); see also *Network Ambulance Services, Inc.*, 329 NLRB 1, 1 fn. 4 (1999) and cases cited therein; *Pennsylvania Gas and Water Co.*, 314 NLRB 791, 793 (1994), enfd. mem 61 F.3d 895 (3d Cir. 1995).

As the foregoing precedent demonstrates, the Respondent here could have avoided influencing the election and exposing itself to potential unfair labor practice charges by granting the benefit improvements to all of its employees, including those subject to the petition. Alternatively, it could have deferred the announcement and implementation of the improvements until after the election.[11] Although the Third Circuit pointed out that "the Board made no attempt to determine the reason [the Respondent] decided to award benefits to some employees

[10] *Great Dane*, 388 U.S. at 34. See also *Otis Hospital*, 222 NLRB 402, 404 (1976) (employer failed to establish that withholding promised wage increase after employees petitioned for an election was motived by concern over exposure to unfair labor practice charges where it presented no testimony or other evidence to that effect), enfd. 545 F.2d 252 (1st Cir. 1976); *GAF Corp. v. NLRB*, 488 F.2d 306, 309 (2d Cir. 1973) (same); *NLRB v. Frick Co*., 397 F.2d at 962–963 (explaining that once it was proven employer engaged in "discriminatory conduct which could have adversely affected employee rights to some extent," the burden shifted to employer to come forward with evidence that its action was motivated by a substantial and legitimate business justification and employer's "bald statement" was not sufficient to meet that burden), citing *NLRB v. Fleetwood Trailer Co.*, 389 U.S. at 378 fn. 4; *NLRB v. Great Dane*, 388 U.S. at 34.

[11] The Board also permits an employer, if it is uncertain whether it can sustain its burden of proving that improvements in wages or benefits were given free from union considerations, to postpone the improvements so long as it makes clear that the improvements will be granted whether or not the employees select a union, and that the sole purpose of the postponement is to avoid the appearance of attempting to influence the election. *Kauai Coconut Beach Resort*, 317 NLRB 996, 997 (1995); *KMST-TV, Channel 46*, 302 NLRB at 382; *Atlantic Forest Products, Inc.*, 282 NLRB at 858; *Uarco Inc.*, 169 NLRB 1153, 1154 (1968). By making such an announcement, the employer neutralizes the natural inference drawn by employees that the improvements were withheld in order to influence the election and punish them for their union activity. *Uarco*, 169 NLRB at 1154. As the Board has previously emphasized, an employer is not obligated to take this course of action. It is "an optional exception to the general rule that the employer is required to proceed with projected wage or benefit improvements as if the union were not on the scene." *Network Ambulance Services*, 329 NLRB at 2.

Member Kaplan expresses no opinion concerning the Board's safe harbor policy in the benefits context. Rather, in the instant case, he agrees with his colleagues that, under *Great Dane*, the Respondent engaged in "discriminatory conduct which could have adversely affected employee rights to some extent," and has failed to establish a "legitimate and substantial business justification" for its discriminatory conduct. 388 U.S. at 34.

at the time . . . that it did,"[12] tellingly, the Respondent offers 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. Nor is there any evidence or claim that the timing of the announcement and implementation was compelled by exigency or external factors.

Moreover, the Board, with court approval, has repeatedly held that neither an employer's good-faith belief that a pending representation election precluded the grant of wage or benefit improvements nor the fear of being charged with unfair labor practices justifies the withholding of improvements which normally would have been extended to the affected employees. See, e.g., *Care One at Madison Avenue, LLC v. NLRB*, 832 F.3d at 359–360; *Pennsylvania Gas and Water*, 314 NLRB at 793; *Gerry's I.G.A.*, 238 NLRB 1141, 1153 fn. 33 (1978), enfd. 602 F.2d 1021 (1st Cir. 1979); *Associated Milk Producers*, 255 NLRB at 755; *Otis Hospital*, 222 NLRB 402, 404–405 (1976), enfd. 545 F.2d 252 (1st Cir. 1976); *Florida Steel Corp.*, 220 NLRB 260, 266 (1975), enfd. mem. 543 F.2d 1389 (D.C. Cir. 1976).[13]

Contrary to the Respondent's contention in its position statement, the fact that it distributed the March 5 memorandum announcing the benefit improvements only to employees outside the stipulated unit does not rebut the inference of unlawful motive. The January 1 benefit changes were extremely unpopular. It was certainly foreseeable that their rescission would become known to employees in the stipulated unit. And it is undisputed that those employees did learn that the changes had been rescinded and that healthcare benefits were improved for other employees. Moreover, even after the Respondent became aware that employees in the stipulated unit knew they were not receiving the benefit improvements given the other employees, it made no attempt to assure them that the improvements would be granted to them after the election and regardless of the outcome. See *Gerry's I.G.A.*, 238 NLRB at 1153–1154. Instead, Senk placed the onus squarely on the Union. In these circumstances, it is immaterial that the Respondent did not make a pre-petition announcement to employees in the stipulated unit of its intent to grant the improvements to all other employees or that it allegedly attempted to withhold knowledge of the improvements from the unit employees. The result is the same—the employees in the stipulated unit learned that they were being denied benefit improvements that were granted to other employees, and they would reasonably infer that the denial was intended to punish them for their union activity or to influence their vote in the election.[14] Furthermore, the Respondent's conduct would foreseeably discourage *all* of its employees—including those who received the benefit improvements—from engaging in future union activity. Thus, the inference of wrongful motive is left intact.

In sum, we find that the Respondent engaged in "discriminatory conduct which could have adversely affected employee rights to some extent." *NLRB v. Great Dane Trailers, Inc.,* 388 U.S. at 34. Therefore, under *Great Dane,* the burden shifted to the Respondent to show that its conduct was motivated by a substantial and legitimate business justification. Because the Respondent has 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. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. at 380; *NLRB v. Great Dane Trailers, Inc.,* 388 U.S. at 34–35. Accordingly, we affirm the Board's prior finding that the Respondent violated Section 8(a)(1) and (3) of the Act by announcing and implementing improvements in healthcare benefits and a reduction in coinsurance, copay, and contribution rates for all employees except those who were eligible to vote in the representation election.

[12] 784 F.3d at 910 fn. 5.

[13] To the extent the Respondent's briefs and position statement can be construed as arguing that its conduct is lawful because it relied on advice of counsel, that argument is rejected. See *Care One at Madison Avenue, LLC v. NLRB*, 832 F.3d at 360; *NLRB* v. *Hendel Manufacturing Co., Inc.*, 483 F.2d 350, 353 (2d Cir. 1973); *Great Atlantic & Pacific Tea Co.*, 166 NLRB at 28. As the Third Circuit Court of Appeals has explained:

> [G]ood faith, based upon an erroneous interpretation of the law, is not available as a defense. . . . An employer who pursues a course of conduct later determined to be an unfair labor practice does so at his peril. . . . The equities [in such a case] favor the employees; it would be inequitable to require them to absorb pay losses ascribable to the unfair labor practice of the Company.

International Union of Electrical, Radio and Machine Workers, Local 613, AFL–CIO (Erie Technological Products, Inc.) v. NLRB, 328 F.2d 723, 727 (3d Cir. 1964) (citations omitted). See also *NLRB v. Clearfield Cheese Co., Inc.,* 322 F.2d 89, 93 (3d Cir. 1963).

[14] The Board has rejected the claim that mere silence suffices to dispel the coercive effect of withholding benefits from election-eligible employees. See *Medical Center at Bowling Green*, 268 NLRB 985, 985 (1984), enf. denied on other grounds 756 F.2d 41 (6th Cir. 1985); *Gerry's I.G.A.*, 238 NLRB at 1152–1153. Contrary to the Respondent's contention, *Bowling Green* is not distinguishable on the basis that the employer there made a pre-petition announcement of its intent to grant a pay increase to all employees. As discussed above, given the widespread opposition to the January 2012 benefit reductions, it was foreseeable that employees in the stipulated unit would learn that benefit improvements had been granted to other employees and that they would infer that the Respondent's failure to extend the same benefits to them was intended to influence their vote in the election or to punish them for their union activity.

REMEDY

Having found that the Respondent violated Section 8(a)(1) and (3) of the Act by withholding the improvements in healthcare benefits and reduction in coinsurance, copay, and contribution rates from employees who were eligible to vote in the March 9, 2012 representation election in order to discourage union activity and support, we shall order the Respondent, upon union request, and to the extent it has not already done so, to retroactively grant the benefit improvements and reduction in coinsurance, copay, and contribution rates to the employees in the stipulated bargaining unit. We shall also order the Respondent to make unit and former unit employees whole for any losses suffered as a result of its unlawful conduct in the manner set forth in *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). We shall further order the Respondent to compensate affected unit employees and former unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director a report allocating the backpay awards to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

ORDER[15]

The National Labor Relations Board orders that the Respondent, 800 River Road Operating Company LLC d/b/a Woodcrest Health Care Center, New Milford, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Announcing and implementing improvements in healthcare benefits and a reduction in coinsurance, copay, and contribution rates that excludes employees eligible to vote in a representation election, in order to discourage employees from supporting a union.

(b) 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.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon union request, and to the extent it has not already done so, implement the January 1, 2012, improvements in healthcare benefits and reduction in coinsurance, copay, and contribution rates for the unit of employees who were eligible to vote in the March 9, 2012, representation election but were specifically excluded from those benefits.

(b) Make current and former unit employees whole, with interest, for any losses resulting from their exclusion from the improvements in healthcare benefits and reduction in coinsurance, copay, and contribution rates available to other employees, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its New Milford, New Jersey facility, copies of the notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 5, 2012.

[15] The Order shall not be construed as requiring or authorizing the Respondent to implement changes in the unit employees' current healthcare benefits unless requested to do so by the Union.

[16] If this Order is enforced by a Judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Within 21 days after service by the Region, file with the Regional Director for Region 22, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 26, 2018

Lauren McFerran, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER PEARCE, concurring.

I agree with my colleagues in all respects except that I would additionally find that even assuming the justification advanced by the Respondent would qualify as a "substantial and legitimate business end," the record contains sufficient affirmative evidence of improper motivation to sustain the Board's finding that Section 8(a)(1) and (3) has been violated. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967); *NLRB v. Brown*, 380 U.S. 278, 289 (1965).

It is beyond dispute that the Respondent would have granted the improvements in healthcare benefits and reduction in coinsurance, copay, and contribution rates to the employees in the stipulated bargaining unit if they were not eligible to vote in the pending representation election. The announcement and implementation of improved benefits for one group of employees while withholding the same benefits from another group of employees "who are distinguishable only by their participation in protected concerted activity" is "discrimination in its simplest form." *Great Dane*, 388 U.S. at 32. See also *NLRB v. Great Atlantic & Pacific Tea Co.,* 409 F.2d 296, 298 (5th Cir. 1969).

I find, moreover, that the business justification advanced by the Respondent for its conduct was, in fact, pretextual. As my colleagues point out, the Respondent has maintained throughout the litigation of this case that it withheld the benefit improvements from the employees in the stipulated unit in order to maintain the status quo and avoid illegally influencing the election. However, the Respondent presented no testimony or other evidence at the hearing to substantiate that claim and it has identified no additional relevant evidence it would introduce if the record were reopened.

The Respondent's failure to postpone the benefit improvements only for the duration of the campaign also undermines its attempt to establish a legitimate justification. If the Respondent's motive for withholding the improvements was to avoid illegally influencing the election, as it claims, it could have granted the improvements to the employees in the stipulated unit once the election was over or at least conferred with the Union about the matter. There is no claim that it did either.[1] When an employer presents a legitimate justification for its actions which is found to be pretextual, "the [Board] may not only properly infer that there is some other motive, but that the motive is one that the employer desires to conceal—an unlawful motive." *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir.1995), quoting *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir.1966) (internal quotation marks omitted)).

The timing of the Respondent's announcement is also strongly indicative of unlawful motivation. There appears to have been no urgent requirement that the Respondent announce its decision to rescind the unpopular changes in the employees' healthcare benefits—implemented more than 2 months earlier—just 4 days before the election. And the Respondent makes no attempt to explain why, if it was concerned about influencing the election, it did not simply defer the announcement until after the election. Finally, administrator Lorri Senk's response, when asked whether unit employees were eligible for the benefit improvements, that she could not discuss the matter "because you are in a critical period with the Union," essentially encouraged the employees to blame the Union for the Respondent's decision to withhold the improvements.

In sum, substantial evidence supports the conclusion that the Respondent's motive for withholding the benefit improvements from the employees in the stipulated unit was to influence the outcome of the election, to punish the employees for their support of the Union, and to serve as a warning to others. See, e.g., *Care One of Madison Avenue, LLC v. NLRB*, 832 F.3d 351, 358 (D.C. Cir. 2016); *Pennsylvania Gas and Water Co.*, 314 NLRB 791, 793 (1994), enfd. mem 61 F.3d 895 (3d Cir. 1995).

[1] The Respondent contends that if the record were reopened, it would submit evidence that "all of its employees . . . . have received the same insurance benefits since January 2013." However, the Respondent does not specify whether it granted the improvements to the employees in the stipulated bargaining unit, rescinded the improvements for the employees outside of the stipulated bargaining unit, or implemented an entirely new health care plan for all of its employees. Further, if the Respondent granted the improvements to the unit employees, there is no evidence or claim that it credited them the difference between the contribution rate they paid since January 1, 2012, and the new lower contribution rate, as it did for its other employees.

Accordingly, in finding the violation, I would rely on this additional rationale.

Dated, Washington, D.C. April 26, 2018

Mark Gaston Pearce, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT announce and implement improvements in healthcare benefits and a reduction in coinsurance, copay, and contribution rates that excludes employees eligible to vote in a representation election, in order to discourage you from supporting a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, upon union request, and to the extent we have not already done so, implement the January 1, 2012 improvements in healthcare benefits and reduction in coinsurance, copay, and contribution rates for our unit employees who were eligible to vote in the March 9, 2012 representation election and were specifically excluded from those benefits.

WE WILL make current and former unit employees whole, with interest, for any losses resulting from their exclusion from the improvements in healthcare benefits and reduction in coinsurance, copay, and contribution rates available to other employees.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

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

The Board's decision can be found at www.nlrb.gov/case/28-CA-083628 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.