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**Merck, Sharp & Dohme Corp. and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union Local 10-580, AFL-CIO, CLC.**

**Merck, Sharp & Dohme Corp. and Local 94c, International Chemical Workers Council of the United Food and Commercial Workers International Union, AFL-CIO.**

**Merck, Sharp & Dohme Corp. and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 4-575, AFL-CIO, CLC.**  
Cases 05-CA-168541, 06-CA-163815, and 22-CA-168483

May 7, 2019

#### DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN  
AND EMANUEL

On December 20, 2016, Administrative Law Judge David I. Goldman issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief.<sup>1</sup> The General Counsel and the Charging Parties<sup>2</sup> filed answering briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

This case arises out of Merck's decision to offer a one-time paid holiday, referred to as "Appreciation Day," on September 4, 2015 (the Friday before Labor Day) to all its employees except for employees in the United States

<sup>1</sup> On February 17, 2017, the Respondent also filed a motion to reopen the record to adduce additional evidence relevant to the Respondent's due process claim. In its motion, the Respondent asserts that the judge found a violation on a theory of animus that was neither pled in the complaint nor litigated at trial. In light of our decision to dismiss the complaint, we deny the Respondent's motion as moot.

<sup>2</sup> The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Locals 4-575 and 10-580, AFL-CIO, CLC and the International Chemical Workers Council of the United Food and Commercial Workers International Union, AFL-CIO, Local 94C (hereinafter collectively referred to as "the Unions") jointly filed one brief.

covered by a collective-bargaining agreement lacking that benefit ("covered employees"). The judge found that Merck's decision to exclude covered employees was motivated by the Unions' prior refusal to agree to mid-term contract modifications sought by Merck, including proposed changes to the administration of payroll and 401(k) benefits and how year-end holidays are "completed." The judge found that "this motive represents straightforward punishment of union employees in retaliation for past protected activity under the Act" and that Merck violated Section 8(a)(3) and (1) by withholding Appreciation Day from most of its unionized employees. Merck excepts to the judge's finding. We find merit in those exceptions.

Contrary to the judge, we find that the General Counsel failed to demonstrate that Merck's refusal to offer Appreciation Day to covered employees was unlawfully motivated. We also find that the judge erred in finding that statements made by Riverside Plant Manager Brian Killen explaining Merck's rationale for refusing to offer the Appreciation Day independently violated Section 8(a)(1) of the Act.

#### I. BACKGROUND

Merck is an international pharmaceutical company, employing 67,000 employees worldwide, 23,000 of whom work in the United States. Of the 23,000 U.S. employees, 2700 are represented in 9 bargaining units, each with its own labor agreement and local union. The individually represented units include: two units in Rahway, New Jersey; one unit in Riverside, Pennsylvania; three units in West Point, New Jersey; two units in Elkton, Virginia; and one unit in Kenilworth, New Jersey. Each of the nine bargaining units separately negotiated its collective-bargaining agreement with Merck, and the several agreements had different terms covering holidays and varying expiration dates. In the spring of 2015, Merck was not actively engaged in bargaining with any of the units. However, Merck had recently concluded negotiations at the Rahway and Elkton facilities a few months prior and was preparing to start collective bargaining at West Point before that contract expired in April 2016.<sup>3</sup>

<sup>3</sup> By late 2014, Merck's Executive Director of U.S. Labor Relations Tony Zingales had discontinued the Respondent's prior multi-facility bargaining practice, instead opting to negotiate with each of the nine bargaining units individually. Zingales explained that "master bargaining is not in the best interests of the company and not effective on a location-by-location basis." As a result of this individualized approach to bargaining, and because the contracts expired on a rolling basis, the Respondent was engaged in collective bargaining with one or another of the nine units nearly every year.

In the spring of 2015,<sup>4</sup> Merck reviewed its quarterly business results and found that its profits had exceeded expectations. As a result, CEO Kenneth C. Frazier asked his human resource professionals to come up with a way to thank the company's employees. After consulting with several of his top global benefit executives, Frazier decided to grant a one-time paid day off to show the Respondent's appreciation for the employees.

On July 28, in a town hall video meeting for the entire company, Frazier announced his intent to make September 4 a company-wide paid holiday known as Appreciation Day. Frazier explained that this holiday was intended to give special recognition for employees' hard work and to celebrate great company performance. The slide show accompanying the presentation indicated that the Appreciation Day did not apply to "those in US who are covered by [a] collective bargaining agreement."

Immediately thereafter, union officials and some employees began objecting to Merck's exclusion of covered employees in a variety of ways. Union-represented employees discussed whether they should decline to cooperate with an upcoming safety survey and cease participating in voluntary emergency service groups vital for plant operations. Several represented employees and union officials commented on Merck's intranet comment board in protest of the exclusion. Additionally, West Point local union president Daniel Bangert wrote an open letter to the Respondent's leadership expressing the Union's objection to the decision to exclude covered employees from receiving the Appreciation Day benefit.

On July 31, Frazier responded to Bangert by email, stating that "there are constraints on implementing unilateral changes—for better or for worse—for employees covered by a collective bargaining agreement." Likewise, Elizabeth Goggin, Merck's head of Global Labor Relations, responded to comments from various employees on an internal Company website. In her post, Goggin recognized that the Respondent "could have been clearer in acknowledging the constraints of collective-bargaining agreements in our initial communication about Appreciation Day." She went on to explain that "[c]hanges, for better or worse, cannot be made by the Company unilaterally unless there is a provision allowing for such changes."

At the request of Riverside Plant Manager Brian Killen, on August 3, the Respondent conducted a teleconference between several plant managers and Merck's Executive Director for U.S. Labor Relations, Tony Zingales. Killen and other plant managers asked for a justification for the exclusion and whether the Respondent

intended to negotiate with the unions about it. Based on Killen's credited testimony at the hearing, the judge summarized Zingales' response to Killen as follows:

Zingales told them that the benefit is not in the labor contracts "and we can't unilaterally give the day." . . . [In addition,] [t]he "feedback that we got was that . . . in the previous couple of years that the company had made changes to the non-CBA employees. . . relatively simple changes" such as "how they administer payroll and 401(k) and how they complete year end holidays." Zingales explained to Killen and the managers that these changes were made for nonunion employees but when "they tried to discuss them with the union outside of contract negotiations . . . the fee[edback] from the union was . . . wait until contract negotiations." Killen agreed that Zingales told him that the union's refusal to cooperate in agreeing to these "minor changes" in recent years was the reason that "Merck was not inclined to approach the union in offering the appreciation day" or to "just give it to the unions."<sup>5</sup>

On August 21, several local union presidents wrote a joint letter to Merck's CEO, referencing prior instances where the Respondent had included union-represented employees in company-wide holidays, and requesting that the unit employees receive the benefit.<sup>6</sup> The Respondent never directly responded to this request, except to reiterate that "constraints on implementing unilateral changes" prevented the Respondent from granting union-represented employees the day off.

On September 4, the Respondent granted Appreciation Day to all employees, except those employees who were covered by a collective-bargaining agreement that did not contractually entitle them to the paid day off. The Respondent granted Appreciation Day to unionized employees at its Kenilworth facility because the collective-bargaining agreement in place there entitled unit employees to any benefit given to the nonunion employees at that location. Also, the collective-bargaining agreement covering employees represented by Service Workers International Union, Local 10-00086 at West Point included September 4 as a negotiated "floating" holiday. (Jt. Exh. 8.) As to all other unionized employees, the Respondent stood pat on the paid holidays it had negoti-

<sup>5</sup> The Respondent filed no exceptions to the judge's finding that Killen's testimony (and Zingales' statements) constituted admissions by agents acting within the scope of their employment, pursuant to Federal Rules of Evidence 805 and 801(d)(2)(D). The judge also noted that the Respondent made no hearsay objections to this testimony.

<sup>6</sup> The judge noted three occasions where Merck had previously granted represented employees a paid day off from work along with unrepresented employees after consulting with the unions: January 2, 1998, Martin Luther King Day in 2006, and January 2, 2009.

<sup>4</sup> All dates hereafter refer to 2015, unless otherwise indicated.

ated with the Unions. That is, the Respondent did not offer to engage in midterm bargaining with the Unions over expansion of their negotiated holiday benefits.

Starting on November 8, several of the Unions filed a series of unfair labor practice charges against the Respondent. On June 30, 2016, the General Counsel issued an order consolidating these cases, a consolidated complaint, and notice of hearing alleging that the Respondent violated Section 8(a)(3) and (1) of the Act. The judge found the violation, reasoning that the General Counsel proved that the Respondent withheld the benefit from most of its unionized employees “because the unions failed to accede to the Respondent’s will and make midterm changes to the contract requested in the past.” According to the judge, “this motive represents straightforward punishment of union employees in retaliation for past protected activity under the Act.” For the reasons explained below, we reverse the judge and dismiss the complaint.

## II. ANALYSIS

Contrary to the judge, we find that the General Counsel has failed to show that the Respondent discriminated in violation of Section 8(a)(3) and (1) when it granted Appreciation Day to unrepresented employees, while refusing to offer the benefit to most of its represented employees. The Board has long recognized that an employer has a right to treat represented and unrepresented employees differently, so long as the different treatment is not discriminatorily motivated. *Shell Oil Co.*, 77 NLRB 1306, 1310 (1948). In *Shell Oil*, the Board rejected the General Counsel’s argument that three oil companies had unlawfully denied wage increases to represented employees while granting increases to unrepresented employees. The Board explained:

*Absent an unlawful motive*, an employer is privileged to give wage increases to his unorganized employees, at a time when his other employees are seeking to bargain collectively through a statutory representative. Likewise, an employer is under no obligation under the Act to make such wage increases applicable to union members, in the face of collective bargaining negotiations on their behalf involving much higher stakes.

Id. at 1310. Thus, it has long been established that “the mere fact that different offers are made or that different benefits are provided does not, standing alone, demonstrate unlawful motive.” *Sun Transport, Inc.*, 340 NLRB 70, 72 (2003); see also *Empire Pacific Industries*, 257 NLRB 1425, 1426 (1981); *B.F. Goodrich Co.*, 195 NLRB 914, 914-915 (1972). The quintessential case of unlawful discrimination in this context involves an employer that grants a benefit to its unrepresented employees but withholds that

benefit from its represented employees because they elected a union to represent them. See, e.g., *KAG-West, LLC*, 362 NLRB 981 (2015) (finding that employer unlawfully withheld wage increase from newly represented employees because they had recently elected a union).<sup>7</sup>

In order to determine whether the Respondent’s decision to deny represented employees Appreciation Day was unlawful, the Board applies the *Wright Line* framework.<sup>8</sup> The burden is on the General Counsel to initially establish that union or other protected concerted activity was a substantial or motivating factor in the employer’s decision to take adverse employment action against employees. Specifically, the General Counsel bears an initial burden to show (1) union or protected concerted activity, (2) employer knowledge of that activity, and (3) union animus on the part of the employer. *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 6 (2016), enf. 871 F.3d 358 (5th Cir. 2017); *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014), enf. 801 F.3d 767 (7th Cir. 2015). If the General Counsel meets his initial burden, the employer can prevail by showing “it would have taken the same action in the absence of the unlawful motive.”<sup>9</sup> Assuming that the General Counsel met the first two prongs of its initial burden under *Wright Line*, we find that the General Counsel did not show that Merck’s decision to treat represented employees differently than unrepresented ones was motivated by union animus.

The Respondent gave two reasons for not awarding Appreciation Day to the represented employees: (1) it was not inclined to approach the Unions to bargain over granting this additional benefit because the Unions had, in the past, refused to agree to the Respondent’s requested midterm contract changes, and (2) unilaterally granting the benefit would violate the Act. As stated above, the judge found that the Respondent’s admitted reliance on the Unions’ past refusal to agree to midterm contractual changes was direct evidence of its retaliatory intent. The judge further found that Zingales’ assertion that unilaterally giving represented employees Appreciation Day would have violated the Act was pretextual—that is, false or not in fact relied upon—and evidence of animus because, in the judge’s view, the Respondent could have

<sup>7</sup> Neither the judge nor the dissent cites a case in which an employer was found to have violated the Act by granting a benefit to its unrepresented employees but not its unionized employees because the latter group’s union had previously denied the employer’s requests to bargain over mid-term modifications. We are aware of no such precedent.

<sup>8</sup> 251 NLRB 1083 (1980), enf. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

<sup>9</sup> *Flamingo Las Vegas Operating Co.*, 360 NLRB 243, 244 (2014) (internal citations omitted).

and should have requested midterm bargaining from each individual Union. We disagree on both counts.

We find that the Respondent's first justification for the denial of Appreciation Day to unit employees is devoid of animus. The judge's conclusion that the Respondent engaged in "straightforward punishment" when it considered the Unions' prior refusal to entertain proposed midterm modifications simply fails to take into consideration the everyday realities of the bargaining process. "Collective bargaining by its very nature is an 'annealing process hammered out under the most severe and competing forces and counteracting pressures.'" *Chevron Oil Co. v. NLRB*, 442 F.2d 1067, 1074 (5th Cir. 1971) (quoting *NLRB v. Dalton Brick & Tile Corp.*, 301 F.2d 886, 895 (5th Cir. 1962)). The process, by its nature, may involve hard negotiation, posturing, brinkmanship, and horse trading over a long period of time. Given this backdrop and the Board's historical tolerance for such an "annealing process" (so long as it does not cross the line into unlawful threats or bad faith), Zingales' articulation of the Respondent's rationale was not an admission of unlawful retaliation. Consideration of prior bargaining positions and extant contractual benefits is not unusual in the course of a collective-bargaining relationship, nor is it evidence of an employer's antiunion animus.

We find support for our decision in *Sun Transport*, 340 NLRB 70 (2003). In *Sun Transport*, the Board found that an employer did not violate the Act when it offered represented employees a less generous severance package than it offered to unrepresented employees even accepting that the different treatment was motivated by the union's prior bargaining positions. *Id.* at 72. In *Sun Transport*, the parties had been bargaining over a successor collective-bargaining agreement for several months when the employer decided to divest itself of the part of its business in which both groups of employees—represented and unrepresented—worked. Bargaining continued and included the issue of severance pay. The employer offered its unionized employees 1 week of severance pay for each year of service up to 20 years. At the same time, the employer separately offered to its nonunion workers 2 weeks of severance pay for each year of service up to 20 years. When the union asked the employer to explain its different treatment, the employer sent the union a letter stating that it had considered how unresponsive the represented employees had been to the employer's past efforts to contain costs and improve its competitive position. In particular, the employer noted that, during their bargaining over a successor contract, the parties were unable to reach agreement on some of the employer's proposals, resulting in continued high, uncompetitive costs. *Id.* at 71. Ultimately, the parties

did not reach agreement and the unionized employees received no severance benefit.

The judge in *Sun Transport* found the letter's explanation to be an admission that the employer had retaliated against the union for bargaining positions taken in the past and that the disparate treatment was therefore unlawful. The Board disagreed and dismissed the complaint. The Board found that the employer's letter did not demonstrate antiunion animus. *Id.* at 72. According to the Board, it was not clear that the union's past bargaining position was the basis of the lower severance pay offer (as opposed to the high costs resulting from that bargaining position). Importantly, however, the Board also held that "[e]ven if the severance pay offer was based on the [u]nion's bargaining position during the negotiations for a successor contract, we would still find no violation of the Act." *Id.* (emphasis added). The Board noted that the issue of severance pay arose during comprehensive bargaining over a successor contract and that the employer sought to use the severance pay issue to force concessions in other areas. As such, the severance offer was "but one element of the 'competing forces and counteracting pressures' inherent in the collective bargaining process," rather than evidence of bad-faith bargaining. *Id.* (internal citations omitted). Consequently, the Board concluded that the employer's consideration of the union's bargaining position did not demonstrate antiunion animus.

Similarly here, we find that the Respondent's reliance on the Unions' prior bargaining position—their refusal to accept the Respondent's proposed midterm modifications to year-end holidays and other matters—does not demonstrate antiunion animus. Rather, it was, in the parlance of *Sun Transport*, part of the competing forces and counteracting pressures inherent in the bargaining process. The message sent by the Respondent's action was clear: if the Unions were unwilling to entertain proposed midterm modifications and insisted on adhering to the terms of the contracts, the Respondent, too, would stand firm, and the Unions were going to have to live with the limitations of their contractual benefits along with their advantages.<sup>10</sup>

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<sup>10</sup> Our dissenting colleague asserts that the Respondent's failure to offer the bargaining strategy justification prior to the hearing is evidence of pretext. We disagree. In our view, the Respondent clearly articulated at the time of the decision that it was not willing to give away a holiday during mid-term bargaining because the Unions had been unwilling to entertain past proposed midterm modifications. That the Respondent did not call the justification a "bargaining strategy" at the time does not render its more precise hearing explanation pretextual. Zingales' August 3 statement that "Merck was not inclined to approach the union in offering the appreciation day" or to "just give it to the unions" is evidence of a contemporaneous reference to its bargain-

The judge distinguished *Sun Transport* on two grounds, neither of which we find persuasive. First, the judge asserted that here, unlike there, the Respondent's different treatment of union and nonunion employees was not shown to be based on "costs" or "uncompetitiveness" resulting from the Unions' prior bargaining position (i.e., their adherence to the existing contracts in the face of a request by the Respondent for midterm changes). However, in *Sun Transport* the Board found that the employer merely expressed its belief that the union's bargaining position had led to higher costs, which in turn were "a factor" contributing to the employer's disparate severance offers. The Board ultimately found that it could not say whether the Union's bargaining position was the basis for the disparate offers. Importantly, however, the Board then found that, even assuming the disparate offers were "based upon the [u]nion's bargaining position," the Board would still find no violation. *Id.* at 72.

Second, the judge and our dissenting colleague distinguish *Sun Transport* on the ground that here, unlike there, the parties were not engaged in bargaining over a successor collective-bargaining agreement when the Respondent treated union and nonunion employees differently. The judge and the dissent conclude that absent such ongoing negotiations, the Respondent's actions were not taken to force concessions in other areas but rather simply to engage in "pure retaliation" for the Unions' prior bargaining positions. We disagree.

We find that the absence of ongoing bargaining is not outcome determinative. The parties' bargaining relationship is a continuing affair; it does not cease during the term of an agreement. We also disagree with the dissent's assertion that the lack of active bargaining proves that the Respondent did not intend to use the issue as a bargaining chip in future negotiations. Indeed, it would be reasonable for the Respondent to conclude that its decision here might well prompt the Unions to be more openminded to proposed concessionary midterm modifications in the future than it had been in the past.<sup>11</sup>

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ing strategy. Thus, this was not a new justification offered for the first time at the hearing.

<sup>11</sup> We also reject the judge's finding that the Respondent violated Sec. 8(a)(1) when Plant Manager Killen told employee Ed Vallo, the local union president at Riverside, that the reason for the denial of the Appreciation Day was the Union's prior refusal to entertain midterm contract modifications. A statement violates the Act if it has "a reasonable tendency to coerce employees in their choice whether to engage in union activity." *Real Foods Co.*, 350 NLRB 309, 309 fn. 4 (2007). Contrary to our dissenting colleague, we find that Killen's statement was a lawful explanation of the Respondent's reasons for the denial of the benefit and would not have a reasonable tendency to coerce employees in their Sec. 7 activity. Our disagreement with our colleague's

Additionally, we find neither animus nor pretext in the Respondent's assertion that granting the Appreciation Day unilaterally to unit employees would violate the Act. The parties' collective-bargaining agreements contained provisions regarding paid holidays, so it was not unfounded for the Respondent to consider that granting an additional paid day off to unit employees without notice or an opportunity to bargain may have violated the Act. See *B.F. Goodrich Co.*, 195 NLRB at 915 (finding that "efforts by an employer to extend new benefits to represented employees would usually be in derogation of the contractually established benefits package. Such unilateral action may, indeed, constitute an unlawful refusal to bargain."). Although the Respondent could have offered to bargain, nothing in Section 8(d) suggests that a party must bargain over or accept midterm contract changes.<sup>12</sup> See *Boeing Co.*, 337 NLRB 758, 762 (2002) ("[I]n the absence of reopener language, we find Section 8(d) protects every party to a collective-bargaining agreement from involuntarily incurring any additional bargaining obligations for the duration of the agreement."). Thus, we find that the Respondent's assertion of its concern regarding unilateral midterm changes was not evidence of animus or pretext.

Finally, we find that the District of Columbia Circuit Court's rejection of the majority position in *Arc Bridges*, 362 NLRB 455 (2015), *enf. denied* 861 F.3d 193 (D.C. Cir. 2017), further supports dismissal of the complaint. In that case, the Board had found that the employer violated Section 8(a)(3) and (1) by withholding a pay increase from represented employees, while granting increased pay to unrepresented employees, in the course of collective bargaining. 362 NLRB 455, 456-458. Among other reasons for finding animus, the Board rejected the employer's legitimate business reason for the

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view of this case is perhaps best illustrated by our different characterizations of the effect of Killen's statement on Vallo. We agree with our colleague that Killen's statement would tend to influence Vallo's "decision-making in his representative capacity when next approached by management seeking midterm concessions." For our colleague, this represents a tendency "to interfere with Vallo's protected activity." For us, it constitutes the lawful application of leverage within an ongoing bargaining relationship. Hence, we reverse the judge's finding of a violation.

<sup>12</sup> The dissent asserts that the Respondent's decision to grant paid holidays on three prior occasions—after first seeking the Union's consent—undermines the Respondent's argument that unilaterally granting the mid-term benefit would violate the Act. The fact that the Respondent has awarded a holiday to employees three times in the past 20 years does not mean that it was obligated to do so here. Nor does the Respondent's prior award of benefits undercut its statement that such unilateral action violates the Act. Although the unions wrote a letter consenting to such an award as a collective group, the Respondent exercised its right to address any increased benefits individually at future bargaining.

raise (i.e., the employer’s attempt to avoid a strike and prevent further employee attrition). *Id.* at 458–459. The court disagreed with the Board’s finding of animus, noting that “[t]he Board failed adequately to explain why these two justifications, which are respectively a facially reasonable bargaining strategy and a rational business decision, are indicative of antiunion animus.” 861 F.3d at 197–198. So also here. For the reasons explained above, the Respondent’s decision to withhold the Appreciation Day benefit from most of its represented employees was a rational business decision and a reasonable strategy to apply leverage within the context of its ongoing bargaining relationships with the several Unions. In addition, the record establishes that, with the advent of Zingales as its executive director of labor relations, the Respondent had adopted a policy and practice of bargaining with each unit separately and, consistently, of not granting midterm contract benefits globally to multiple bargaining units. This, too, was a facially reasonable bargaining strategy and further supports our finding that the challenged decision was not motivated by antiunion animus.<sup>13</sup>

In sum, we find that the Respondent’s decision not to grant represented employees the paid holiday was simply a reflection of the “competing forces and counteracting pressures” that were a part of the historical collective-bargaining relationship. *Sun Transport*, 340 NLRB at 72. In these circumstances, and in the absence of evidence of any bad faith on the Respondent’s part, we find that the General Counsel failed to meet its initial burden under *Wright Line*, and thus he did not meet his burden to establish that the Respondent violated the Act.

<sup>13</sup> We disagree with the dissent’s attempt to distinguish the court’s reversal of *Arc Bridges* on the grounds that (1) the relevant events in that case occurred during ongoing bargaining; and (2) the court accepted that the employer’s denial of the wage increase was based on increased employer costs as a result of bargaining difficulties, rather than antiunion animus. While it is true that the parties were engaged in active negotiations in *Arc Bridges*, for the reasons stated above, we do not find the absence of ongoing negotiations here outcome determinative. Moreover, similar to the court’s holding in *Arc Bridges*, we find that the Respondent’s statement linking the Union’s prior refusal to consider midterm contract modifications to the Union’s refusal to grant the paid holiday was merely an “accurate statement” reflecting the Respondent’s bargaining strategy and not evidence of animus. See *id.* at 197 (employer’s representation that it would keep giving pay raises “until the Union was voted in” was lawful as an “accurate statement” of bargaining strategy). See also *Orval Kent Food Co.*, 278 NLRB 402, 403 (1986) (declining to infer an unlawful motivation from a manager’s remark attributing a decision not to give wage increases to the union’s certification because such “remarks were merely a realistic statement of the effects of the bargaining obligation which the [Employer] incurred when the Union was certified to represent the ... employees”).

For the above reasons, we shall order that the complaint be dismissed in its entirety.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. May 7, 2019

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John F. Ring, Chairman

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William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

This is a straightforward case of employer discrimination against union-represented employees because of what their unions had legitimately refused to do: modify existing collective-bargaining agreements at the employer’s request. The Respondent had recently enjoyed exceptional profits and decided to thank its workforce by granting an extra paid day off from work—an “appreciation day.” The Respondent decided not to grant the “appreciation day” to all its employees, however. It denied this benefit to most of its union-represented employees, specifically because their unions had not acquiesced in the Respondent’s past requests for mid-term collective-bargaining agreement modifications. This reason was conveyed by one of the Respondent’s plant managers to a local union president. The judge here correctly found: (1) that the Respondent’s denial of the “appreciation day” to its union-represented employees “represents straightforward punishment of union[-represented] employees in retaliation for past protected activity under the [National Labor Relations] Act”; and (2) that the plant manager’s statement revealing the Respondent’s rationale for its decision independently violated the Act. The Board should affirm these well-supported findings.

I.

The undisputed facts are as follows. On July 28, 2015,<sup>1</sup> in a town hall video meeting for the entire company, the Respondent’s CEO Ken Frazier announced the company’s decision to grant the “appreciation day” to its employees. The slide show accompanying the an-

<sup>1</sup> All dates are in 2015.

nouncement, however, stated that the appreciation day did not apply to “those in US who are covered by a collective bargaining agreement.”

The same day as the announcement, the Respondent for the first time informed its human resource managers that union-represented employees were excluded because the benefit was not in the applicable collective-bargaining agreements and “we can’t unilaterally give the day.” When Riverside Plant Manager Brian Killen questioned Executive Director of U.S. Labor Relations Tony Zingales about this exclusion, Zingales explained that the refusal to include most union-represented employees was because the Unions had refused to agree to minor midterm contract modifications in the past few years.<sup>2</sup> According to Killen, Zingales informed him that in the previous couple of years the Respondent had made changes affecting its nonunion employees, including changes related to payroll, 401(k) retirement benefits, and year-end holidays, but that the Unions had refused to cooperate in agreeing to these “minor changes.” Accordingly, as Killen recounted Zingales saying, “Merck was not inclined to approach the union in offering the appreciation day” or to “just give it to the unions.”

Soon thereafter, Killen met with Ed Vallo, president of the Riverside local union, and repeated to Vallo the Respondent’s rationale for denying the “appreciation day” to union-represented employees.

In response to the Respondent’s actions, several local union presidents wrote a joint letter to CEO Frazier, referencing prior instances in which the Respondent *had* included union-represented employees in company-wide benefits, and requesting that unit employees receive the “appreciation day” benefit. The letter also offered assurances that no grievances would be filed if employees were to receive the day off. The Respondent did not answer this letter, but CEO Frazier emailed West Point, New Jersey local union president Daniel Bangert, asserting that “constraints on implementing unilateral changes” prevented the Respondent from granting the “appreciation day” to union-represented employees. At the time of these events, no collective-bargaining negotiations were underway, and in fact no relevant labor agreement was due to expire for at least another year.

As planned, on September 4 the Respondent’s entire nonunion workforce enjoyed a paid day off from work while most of its union-represented employees reported for work as usual.

<sup>2</sup> Represented employees at the Respondent’s Kenilworth, New Jersey facility received the “appreciation day” because their local contract included a provision entitling them to receive the same benefits as their nonunion counterparts.

## II.

On these undisputed facts, the judge properly found that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily denying union-represented employees the “appreciation day,” and independently violated Section 8(a)(1) when Riverside Plant Manager Killen informed Local Union President Vallo of the reason why.

### A.

An employer may treat represented and unrepresented employees differently when providing new benefits, so long as the disparate treatment is not unlawfully motivated.<sup>3</sup> As the majority acknowledges, the Board assesses motivation in cases like this one using the familiar *Wright Line*<sup>4</sup> analytical framework. But the majority’s conclusion that the General Counsel failed to demonstrate unlawful motivation under that framework is plainly mistaken.

The Union’s prior refusals to agree to midterm contract modifications was conduct that is protected under the Act. See *R.E.C. Corp.*, 296 NLRB 1293, 1293 (1989) (employer violated Act by laying off employees because they refused to agree to midterm contract modifications). It follows that the Respondent’s admission that the “appreciation day” was not given to most union-represented employees *because* of that protected conduct constitutes direct evidence of the Respondent’s retaliatory motive—and no additional evidence of unlawful motivation is required. Cf. *Webco Industries*, 337 NLRB 361, 364 fn.10 (2001) (noting that “on those rare occasions when an employer states forthrightly that he fired an employee because of his protected conduct, the Board does not look further for retaliatory motive, because the motive has been admitted.”). Simply put, although the Respondent previously had granted union-represented employees benefits that were being extended company-wide, on this occasion the Respondent denied union-represented employees the “appreciation day” because

<sup>3</sup> *Shell Oil Co.*, 77 NLRB 1306, 1310 (1948); see also *Sun Transport, Inc.*, 340 NLRB 70, 72–73 (2003); *Empire Pacific Industries*, 257 NLRB 1425, 1426 (1981); *B.F. Goodrich Co.*, 195 NLRB 914, 914-915 (1972).

<sup>4</sup> 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel’s initial burden is to show that protected activity was a motivating factor in the employer’s adverse action. Specifically, the General Counsel must show (1) union or protected activity, (2) employer knowledge of that activity, and (3) union animus on the part of the employer. If the General Counsel makes that showing, the burden then shifts to the employer to show that it would have taken the same action even absent the employees’ protected activity. *Wright Line*, *supra*, at 1089.

the Unions had rebuffed its proposed mid-term contract modifications.

*B.*

The majority's reasons for finding that the General Counsel failed to demonstrate that the Respondent's decision was unlawfully motivated cannot withstand scrutiny. The majority first posits that the Respondent's reliance on the Unions' past resistance to mid-term contract changes merely reflected the "competing forces and counteracting pressures inherent in the collective bargaining process." Second, the majority finds merit in the Respondent's further rationale that its decision not to grant the benefit was borne out of fear of committing an unlawful unilateral change. There is no merit to either rationale.

1.

The majority draws its "collective bargaining process" rationale from *Sun Transport*, supra and the District of Columbia Circuit's decision in *Arc Bridges*.<sup>5</sup> As explained by the judge, *Sun Transport* and *Arc Bridges* presented materially different circumstances.

In *Sun Transport*, the Board declined to find a Section 8(a)(3) violation where the respondent denied union-represented employees the same severance pay it granted to unrepresented employees—amid active bargaining for a new contract. 340 NLRB at 72—73. The majority necessarily concedes that "in the spring of 2015 [when the announcement was made], Merck was not actively engaged in bargaining with any of the units."<sup>6</sup> In contrast to the *Sun Transport* situation, then, the Respondent's exclusion of union-represented employees from the company-wide "appreciation day" was *not* "intertwined" with ongoing bargaining where the Respondent was attempting to "force concessions in other areas." *Id.* at 72. To the contrary, the record shows that the Respondent had just negotiated a new collective-bargaining agreement with the local union at its Rahway, New Jersey facility, which was effective May 1, 2015, through April

2023, so that bargaining for Rahway was almost 8 years away from the time of the announcement. Similarly, at the Elkton, Virginia plant, the parties had concluded an agreement in 2014 that was effective through April 30, 2018, almost 3 years after the "appreciation day." And the contract covering unit employees at the West Point, New Jersey facility was not set to expire until the end of April 2016, giving the parties almost a year before bargaining began. Thus, as the judge found, the Respondent "in a very real sense. . . consciously *refused* to use appreciation day as a bargaining chip with the unions." (emphasis in original). It neither sought nor gained any leverage from its refusal to provide the "appreciation day" benefit to union-represented employees, but rather acted in "pure retaliation" for the Unions' prior protected conduct.

In *Arc Bridges* the Board found that the employer had violated Section 8(a)(3) by failing to give the same wage increase to union-represented employees that it gave to unrepresented employees. The District of Columbia Circuit disagreed, but, as in *Sun Transport*, based on circumstances not present here. The court found that the employer's refusal to grant the same wage increase to union-represented employees occurred in the context of ongoing negotiations, in which the union had requested substantially more than the employer was willing to give to unrepresented employees. In addition, the court accepted that the employer's reason for not giving the wage increase to union-represented employees was "increased costs," not the employees' Section 7 activity. *Arc Bridges*, above, 861 F.3d at 197.

Again, the parties in the present case were *not* engaged in active negotiations, and, as stated, the Respondent itself never articulated a "bargaining strategy" rationale. Instead, as the judge found, the Respondent's stated reasons were either pretextual or evidenced direct retaliation for protected activity.<sup>7</sup>

<sup>5</sup> *Arc Bridges, Inc. v. NLRB*, 861 F.3d 193 (D.C. Cir. 2017), denying enforcement to 362 NLRB 455 (2015).

<sup>6</sup> At the hearing, the Respondent's labor relations official Zingales asserted for the first time that the decision was part of a supposed "bargaining strategy" at Rahway, Elkton, and West Point—despite conceding that he did not mention "bargaining strategy" when recommending the exclusion to the Respondent's top managers and despite plant manager Killen's uncontroverted testimony that Zingales did not mention "bargaining strategy" when explaining the exclusion to plant managers. The Board generally finds, such "post-hoc" justifications pretextual, as the judge properly did here. See, e.g., *Approved Electric Corp.*, 356 NLRB 238, 239 (2010) ("[t]he Board commonly recognizes such shifting rationales as evidence that an employer's proffered reasons for discharging an employee are pretextual.") (citing *City Stationery, Inc.*, 340 NLRB 523, 526 (2003)).

<sup>7</sup> The majority's attempt to rehabilitate Zingales' August 3 statements that "Merck was not inclined to approach the union in offering the appreciation day" or to "just give it to the unions" as "evidence of a contemporaneous reference to its bargaining strategy" is wholly unpersuasive. Those statements immediately followed Zingales' complaint to Killen that the Union had refused to acquiesce in the Respondent's past attempts to modify the collective-bargaining agreement, directly confirming the Respondent's retaliatory intent.

Nor is there any merit to the majority's reliance on the notion that the parties have an "ongoing bargaining relationship" and thus are essentially always in a state of active negotiations. Accepting this premise would open the door to employers asserting a similar "bargaining strategy" rationale whenever they wished to shield otherwise retaliatory action.



## 2.

The majority's reliance on the Respondent's claimed fear of committing an unlawful unilateral change is also unwarranted. This claimed fear is contradicted by the Respondent's own written statements when it announced the "appreciation day," as well as by its own past conduct in similar situations. In its announcement notice, the Respondent represented that the benefit "applies globally where business operations and local practices/laws permit, and, as required, subject to consultation with employee representatives or works councils" (emphasis added). Thus, the Respondent knew exactly how to grant unit employees the "appreciation day" without violating the Act. Moreover, as described, on August 21 several local union presidents wrote a letter to CEO Frazier affirmatively requesting unit employees' inclusion in the benefit, which plainly should have allayed the Respondent's asserted fears of being charged with unlawful unilateral action. Relatedly, if the Respondent still harbored any lingering doubts about the Unions' potential reactions, those doubts surely should have been laid to rest by the Unions' assurances that no grievances would be filed if the "appreciation day" were extended to unit employees.<sup>8</sup>

Further, the Respondent's asserted fear of violating the Act is completely at odds with its past actions in similar circumstances. As the majority acknowledges, the Respondent had on three previous occasions granted union-represented employees a paid-day off from work, along with nonunion employees, after consulting with the Unions: on January 2, 1998, on Martin Luther King Day in 2006, and on January 2, 2009. These examples further highlight the pretextual nature of the Respondent's "fear of violation" rationale, and they simultaneously bolster the General Counsel's showing that the Respondent's denial of the "appreciation day" to union-represented employees was unlawfully motivated.<sup>9</sup>

## C.

Finally, independent of the 8(a)(3) and (1) violation, Plant Manager Killen's statements revealing the retali-

<sup>8</sup> The majority points out that the Respondent was not required to propose the "appreciation day" to the Unions, and I do not claim otherwise. But the question presented is *why* the Respondent chose not to. The pretextual reasons it asserts speaks to its unlawful motivation.

<sup>9</sup> See *Approved Electric Corp.*, 356 NLRB at 240 ("evidence that [an] employer's purported reasons for [an] action were pretextual—that is, either false or not in fact relied upon"—supports a finding that the action at issue was discriminatorily motivated). The judge correctly found that the General Counsel carried his initial *Wright Line* burden, and was also correct, for the reasons stated in his decision, that the Respondent did not meet its rebuttal burden under *Wright Line*.

tory motive behind the Respondent's decision "would reasonably tend to interfere with, threaten or coerce employees in the exercise of their rights under Section 7 of the Act." *Waste Stream Management*, 315 NLRB 1099, 1100 (1994). The test is an objective one, and in evaluating the remarks the Board does not consider the motivation behind them or their actual effect. *Miller Electric Pump & Plumbing*, 334 NLRB 824, 825 (2001); *Joy Recovery Technology Corp.*, 320 NLRB 356, 365 (1995), *enfd.* 134 F.3d 1307 (7th Cir. 1998). The majority asserts that because the Respondent's motive was lawful, Killen's statement cannot be unlawful. I disagree with the majority's premise, of course. But in any case, the coercive tendency of Killen's statement must be considered separately. That depends on what Killen said and not on the Respondent's actual motive in taking the action Killen referred to. I know of no case, and my colleagues cite none, where an independent 8(a)(1) statement falls away, as my colleagues suggest, because an unlawful motive has not been ascribed to the conduct supporting the 8(a)(3) violation. Intentions aside, Killen's statements would have a reasonable tendency to interfere with Vallo's protected activity, specifically, Vallo's decision-making in his representative capacity when next approached by management seeking midterm concessions.<sup>10</sup>

## III.

Nothing in the Act required the Respondent to treat its union-represented and its unrepresented employees identically, but it was not free to treat them differently in order to punish represented employees for the statutorily-protected actions of their Unions. That is plainly what happened here. The majority errs in excusing the Respondent's reprisal and its unlawful statement revealing its unlawful motive. Accordingly, I dissent.

Dated, Washington, D.C. May 7, 2019

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Lauren McFerran,

Member

<sup>10</sup> My colleagues state that "[their] disagreement with [my] view of this case is perhaps best illustrated by our different characterizations of the effect of Killen's statement on Vallo." Although they agree that Killen's statement would tend to influence Vallo's decision-making in his representative capacity, they reject the judge's common-sense conclusion that this impermissibly interfered with Vallo's protected activity. My colleagues instead dismiss Killen's statement as conveying no more than "the lawful application of leverage within an ongoing bargaining relationship." But for reasons explained, this spin on the "bargaining strategy" rationale must fail because the parties were not engaged in negotiations at the time.

## NATIONAL LABOR RELATIONS BOARD

*David L. Shepley, Esq.*, for the General Counsel.  
*Mark J. Foley, Esq. (Drinker, Biddle & Reath, LLP)*, of Philadelphia, Pennsylvania, for the Respondent.  
*Jonathan Walters, Esq. (Markowitz & Richman)*, of Philadelphia, Pennsylvania, for the Charging Parties

## DECISION

DAVID I. GOLDMAN, Administrative Law Judge. This case involves a pharmaceutical manufacturer that employs approximately 67,000 people worldwide, with roughly 23,000 employed in the United States. Of these U.S. employees approximately 2700 are union-represented and covered by collectively-bargained agreements.

In late July 2015, at a “global town hall” video meeting for employees, the employer’s CEO announced that in appreciation for their work and the company’s performance employees worldwide would receive an “appreciation day”—a paid day off on September 4, 2015. The day off was for employees worldwide, with one exception: the employer stated that the paid day off “[d]oes not apply to those in U.S. who are covered by [a] collective bargaining agreement.”

The announcement was not well-received by U.S. union-represented employees. Local union officials appealed to the employer to include the union employees in appreciation day. The employer refused and on September 4 the paid day off was provided to most employees worldwide except for U.S. union-represented employees (with an exception, as described below, for one group of union employees who were deemed contractually entitled to any benefits given to the nonunion employees at their plant).

The government alleges that the refusal to provide the union-represented employees the appreciation day was unlawfully motivated and in violation of Section 8(a)(3) and (1) of the National Labor Relations Act (Act). I agree, based on several factors, the chief one being the admission, mooted at trial and attributed to the manager who recommended the union employees’ exclusion, that the exclusion was in retaliation for the unions’ past refusal to entertain midterm contractual changes sought by the employer. Contrary to the contentions of the employer, I find that this motive represents straightforward punishment of union employees in retaliation for past protected activity under the Act. I also find that a plant manager’s admitted statement to one of the union presidents that this unlawful motive was the rationale for excluding union employees constitutes unlawful coercion, an independent violation of Section 8(a)(1) of the Act.

## STATEMENT OF THE CASE

On November 9, 2015, Local 10–580 of the United Steel, Paper and Forestry, Rubber,

Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, CLC (Local 10–580) filed an unfair labor practice charge alleging violations of the Act by Merck, Sharp & Dohme Corp. (Merck). Region 6 of the Na-

tional Labor Relations Board (Board) docketed this charge as Case 06–CA–163815. Local 10-580 filed an amended charge in the case on December 28, 2015, a second amended charge on January 29, 2016, and a third amended charge on March 10, 2016.

On January 27, 2016, Local 94C, the International Chemical Workers Council of the United Food and Commercial Workers International Union, AFL–CIO (Local 94C) filed an unfair labor practice charge against Merck alleging violations of the Act, docketed by Region 5 of the Board as Case 05–CA–168541. Local 94C filed an amended charge on February 9, 2016, and a second amended charge on March 10, 2016.

On January 25, 2016, Local 4–575 of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, CLC (Local 4–575) filed an unfair labor practice charge against Merck docketed by Region 22 of the Board as Case 22–CA–168483. A first amended charge was filed in the case on February 22, 2016, and a second amended charge filed March 10, 2016.

Based on an investigation into these unfair labor practice cases, on June 30, 2016, the Board’s General Counsel, by the Regional Director for Region 6 of the Board, issued an order consolidating these cases, and a consolidated complaint and notice of hearing alleging that Merck had violated the Act. On July 27, 2016, Merck filed an answer denying all alleged violations of the Act. The General Counsel issued an amendment to the consolidated complaint on September 19, 2016, to which Merck filed an answer on September 30, 2016.

A trial in these cases was conducted on October 4 and 5, 2016, in Bloomsburg, Pennsylvania. Counsel for the General Counsel, the Respondent, and the Charging Parties filed post-trial briefs in support of their positions by December 2, 2016.

On the entire record, I make the following findings, conclusions of law, and recommendations.

## Jurisdiction

Merck is a corporation with offices and place of business in Riverside, Pennsylvania, Elkton, Virginia, and Rahway, New Jersey. Its facilities at these locations have been engaged in the manufacture and nonretail sale of pharmaceutical products. At all material times, Merck has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. At all material times, Local 10-580, Local 94C, and Local 4-575 have been labor organizations within the meaning of Section 2(5) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

## UNFAIR LABOR PRACTICES

## FINDINGS OF FACT

## INTRODUCTION

Merck manufactures and sells pharmaceuticals and employs approximately 67,000 worldwide. Approximately 23,000 are employed in the United States. Of those 23,000 employees, approximately 2700 are union-represented, whose terms and conditions of employment are covered by collectively-

bargained agreements.

Merck's U.S. union-represented employees work in nine bargaining units, each with their own labor agreement and local union. The record does not speak with any precision to the definition of the bargaining units and it is immaterial for the purposes of these cases. There are two units at the Rahway, New Jersey facility. One is represented by Charging Party Local 4-575, the other by Local 68 of the International Union of Operating Engineers. Charging Party Local 2-0580 represents employees at Merck's Riverside, Pennsylvania plant (also called the Danville or the Cherokee plant). The West Point, New Jersey facility employees are organized into three bargaining units. One is represented by the International Brotherhood of Teamsters, Local 107, one by Charging Party 10-0086, and one by the Office and Professional Employees International Union, Local 1937. There are two bargaining units at the Elkton, Virginia plant, one represented by Charging Party Local 94, and the other by Workers United, Local 1398. District 15, Lodge 315 of the International Association of Machinists represents a bargaining unit at the Kenilworth, New Jersey facility.

#### The origins of appreciation day

On September 4, 2015, Merck provided a paid "appreciation day" off for most of its workforce both in the U.S. and worldwide. Union-represented U.S. employees did not receive this extra day off. The exception was the Kenilworth, New Jersey facility unit employees because Merck determined that Kenilworth's bargaining agreement mandated that the unit employees receive benefits received by nonunit employees at the plant.

The origins of the September 4 appreciation day were described in testimony provided by Jeff Zeller, Merck's vice-president of global compensation and benefits. Zeller testified that in the spring of 2015, his manager, who was the chief HR officer for Merck, approached Zeller and asked him to think about some ideas for Merck to show appreciation to Merck employees "for the strong business results that we were seeing so far that year in 2015." After consultation with his HR management team, and with colleagues outside the U.S., Zeller determined that an extra paid day off would be "the right signal to our employees." Zeller forwarded the proposal to his manager and ultimately the decision to move forward was made by CEO Ken Frazier. According to Zeller, shortly after the July 4 holiday the decision was made by Merck to move forward with a paid day off on September 4, 2015, the Friday before the Labor Day holiday in the United States.

The exclusion from appreciation day of the U.S. union-represented employees was prompted by the advice and direction to Zeller of (then) Executive Director of U.S. Labor Relations Tony Zingales. Zeller testified that he "relied solely on [Zingales'] judgment as it relates to employees covered under the collective-bargaining agreement." According to Zeller, Zingales' "take" was that "you can't do this unilaterally" and "it should not apply to those under collective bargaining agreement." Zeller testified that "Tony [Zingales] explained to me that employees in the U.S. are covered by a collective bargaining agreement, and you can't unilaterally provide an automatic day." Zeller testified that he and the rest of the company

took Zingales' guidance and advice on this. Zingales did not tell Zeller that the employees should not get the benefit because of labor relations issues. He did not tell Zeller that providing the appreciation day benefit to union-represented employees would run counter to Zingales' "bargaining strategy" or "philosophy."<sup>1</sup>

#### The July 28 announcement of appreciation day

Merck periodically conducts "global town hall" business briefings for its employees, during which, through webcast or dial-up, or in person, the entire worldwide workforce is provided an update on the company's performance. The global town halls are led by Merck CEO Ken Frazier.

A global town hall briefing was conducted July 28, 2015. Toward the end, Frazier announced that there would be a worldwide appreciation day on September 4, 2015, in which operations would cease and employees would have the day as a paid day off. The slides for Frazier's presentation, which were shown in the meeting, stated because "[y]ou and your colleagues give so much time and energy to our company . . . [Merck] [w]anted to provide this 'special' recognition and 'thank you' for great performance we're seeing at this mid point of 2015." (emphasis in original). Another slide highlighting the day off stated around the border of a picture of a globe of the world: "You give so much of your time . . . We want to give some back." (All capitalized in original). Across the middle of the globe in large font it stated, "Thank You."

The slide indicated that Merck's operations would be closed September 4, 2015. However, the slide also indicated that this global shutdown "Does not apply those in US who are covered by a collective bargaining agreement."

An announcement "[f]ollowing up on Ken [Frazier's] announcement" was sent out later that day July 28. It stated, "Enjoy an additional day off in 2015." The announcement stated that "the company is providing you with an additional day off in recognition of the company's performance through the midpoint of 2015." The announcement explained:

Merck and MSD operations will close on Friday, Sept. 4. Please note the following:

- This applies globally where business operations and local practices/laws permit, and, as required, subject to consultation with employee representatives or works councils.
- In countries or sites where Sept. 4 is already a day off or it is not otherwise possible to close operations on that particular day, your local managing directors or site leads will select another day and communicate this information to you soon.
- If you have already scheduled Sept. 4 as a vacation day or your site requires you to work on that day to meet business

<sup>1</sup> Zingales testified that he told Zeller that one group of union employees should receive the day off—the unit employees at the Kenilworth facility. Their collective-bargaining agreement contained a "maintenance of standards provision" that, according to Zingales, "required us to provide benefits to the bargaining unit employees that were provided to salary employees."

needs, please use the additional day off at another time and coordinate with your manager.

- This additional day off does not apply to those in the U.S. who are covered by a collective bargaining agreement.

By all evidence, plant managers and employees were not made aware of the new benefit until July 28, when it was announced during the global town hall. According to Zeller, the matter was kept “pretty hush within human resources and global communications” in an effort to keep it a surprise for the July 28 briefing.

#### Employee and Merck responses to the announcement

The announced intention to exclude the union-represented employees from receipt of appreciation day caused something of a furor in the unionized plants. There were intimations that union employees would not cooperate with an upcoming safety survey and cease participating in voluntary emergency service groups, which were important for plant operations. Merck’s intranet comments board received many posts and commentaries from excluded employees and union officials. The local union president for the West Point plant, Daniel Bangert, wrote an open letter to CEO Frazier objecting to the exclusion of union employees.

Frazier, and then Elisabeth Goggin, who is Merck’s global head of labor relations, responded with email and an intranet posting, respectively, that stressed and asserted the inability of Merck to unilaterally provide an extra day off to employees covered under a collective-bargaining agreement.

On August 21, the local union presidents wrote a joint letter to CEO Frazier requesting that unit employees be included in the benefit, expressing concern over the announcement, referencing past instances where company-wide benefits had been offered to union-represented employees, and disavowing any suggestion from Merck that the unions would file a grievance or charge if the unit employees were given the appreciation day benefit.

#### Riverside Plant Manager Killen learns why Merck excluded union-represented employees

The July 28 announcement prompted Riverside Plant Manager Brian Killen to request a conference call with Zingales and the HR department. Killen testified that in a conference call with the other excluded plant managers and Zingales and his HR group on August 3, Killen and other managers asked why their plants were excluded and whether there was an intention to negotiate with the unions about it.

Zingales told them that the benefit is not in the labor contracts “and we can’t unilaterally give the day.” Killen knew that answer was inadequate. As he testified, “clearly I knew that wouldn’t be a sufficient response for my own information and I needed more information to go back to the site.” Killen asked whether Merck was going “to have some kind of bargaining or what is our path forward.” When told no, that “there was no intent to bargain further,” Killen “and other plant managers asked about the reason.” The “feedback that we got was that . . . in the previous couple of years that the company had made changes to the non-CBA employees . . ., relatively simple

changes” such as “how they administer payroll and 401(k) and how they complete year end holidays.” Zingales explained to Killen and the managers that these changes were made for non-union employees but when “they tried to discuss them with the union outside of contract negotiations . . . the fee[back] from the union was . . . wait until contract negotiations.” Killen agreed that Zingales told him that the union’s refusal to cooperate in agreeing to these “minor changes” in recent years was the reason that “Merck was not inclined to approach the union in offering the appreciation day” or to “just give it to the unions.”

I note that while Killen was, and was known to be, in disagreement with Merck’s decision to exclude the union-represented employees—particularly those under his supervision—Killen was and is an agent of and aligned with the Respondent. This only adds to the credibility of Killen’s account of Zingales’ stated explanation for the motive for refusing to offer appreciation day to the union-represented employees. Moreover, Killen’s account is indirectly corroborated by Zingales, who, in his testimony about appreciation day, made the point—without directly adopting it as a motive for excluding union employees—that there were “changes in benefits levels or administrative cha[n]ges or practices that were applied to non-union employees or salary employees that didn’t apply to the unionized groups with the exception of the Kenilworth unit.” He referenced the issue in a manner suggestive of the belief that if the unions didn’t have to take the bad they are not entitled to the good, a plausible, but, as discussed below, unacceptable motivation under the circumstances.

Thus, the motives for excluding union employees that Zingales shared with Killen and the plant managers was (1) that it would be illegal to unilaterally provide these employees with appreciation day and (2) that he was not going to offer it to them through the unions in retaliation for the unions’ past unwillingness to make “minor changes” requested of them by Merck. As an evidentiary matter, Killen’s account of Zingales’ comments is an admission and I credit it. Apart from his status as a witness for and aligned with the Respondent, I found Killen to be a highly credible witness, both in his demeanor and his forthright and plausible account of events, and I credit his testimony for that reason as well.<sup>2</sup>

#### The local union officials’ allegations

In my view, Killen’s credibility extends to his account of his conversations with Riverside union officials about appreciation day. Killen testified that he told Riverside local union president Ed Vallo the substance of Zingales’ remarks as to the appreciation day: i.e., that Merck’s position was that the benefit could not unilaterally be provided to union employees and that Merck did not intend to discuss it because of the unions’ previous refusal to discuss payroll administration, 401(k) administration,

<sup>2</sup> I note that there was no objection to this testimony. To the contrary, the Respondent adopts it on brief. See R. Br. at 13-14. In any event, pursuant to Federal Rules of Evidence 805 and 801(d)(2)(D), neither Zingales’ statement to Killen nor Killen’s recounting of it to Vallo (or on the witness stand, for that matter) constitutes hearsay. Both Zingales and Killen were admitted agents of the Respondent and acting in the scope of their employment when the statements were made. See, *United States v. Gibson*, 409 F.3d 325, 337 (6th Cir. 2005).

and year-end holiday changes that Merck had sought to change mid-contract.

Moreover, Killen convincingly denied union president Vallo's and Union Steward James Little's contention that in a meeting within "a few days after the announcement" Killen told them that Merck refused to include the union plants in appreciation day because "there were serious labor issues at other sites," particularly safety issues, and that it was "despicable" what was going on at the Rahway site—referring to unspecified labor issues—given that "they had just finished up contract negotiations" and that "Merck was not "going to reward bad behavior."<sup>3</sup>

Vallo and Little testified that this conversation occurred at the old plant manager's office in building 117, and that HR representative Janelle Patton was present. Patton denied attending a meeting with Vallo and/or Little about issues around appreciation day until late September, weeks after the early August discussion referenced by Little. While Vallo and Little both testified that Patton's usual practice was to take notes at the meetings she attended with them and Killen, no notes of this meeting were produced.<sup>4</sup>

This is not a particularly easy credibility resolution, as Vallo and Little appeared to me to be testifying honestly. I believe that in their many "free flowing" (as Little and Killen both described their) conversations in the days and months after the appreciation day announcement, there was discussion of many issues, including problems at other plants. However, Vallo and Little were vague and uncertain on many details, and on the time frame of the meeting in which the statement was allegedly made that Rahway and West Point's issues were the *reasons* for exclusion of all union-represented employees from appreciation day.<sup>5</sup> There was also confusion about the dates and timeline for Vallo/Little's discussions with Killen about a proposal for sev-

<sup>3</sup> Contrary to the arguments of the counsel for the General Counsel, I found Killen convincing in both demeanor and with regard to his recollection. Contrary to counsel for the General Counsel, I found the instances where Killen could not recall something, for instance, a location of a meeting or whether HR representative Patten was present at a particular meeting, to be honest attempts to answer. By all evidence, there were many meetings, formal and informal, attended by some combination of Patten, Killen, Vallo, and Little. I note that contrary to the claim of the counsel for the General Counsel on brief, Killen was *not* unsure and did *not* profess lack of recollection as to whether he told Vallo and/or Little that labor issues at other sites, regarding safety, and particularly at Rahway, motivated Merck to exclude union employees from appreciation day. Rather, he (convincingly, to my mind) denied this.

<sup>4</sup> Contrary to counsel for the General Counsel, I did not find Patton's testimony suspect. She testified that, as an HR representative, she would prefer to be involved with all discussions with the union representatives, but that Killen, as plant manager, did not involve her in every meeting he had with Vallo. In particular, while she almost always attended the recurring weekly meetings Killen conducted with Vallo, she was seldom part of the frequent "ad hoc" meetings that Killen held with Vallo. In my view, this appeared to be part of the normal push/pull between HR and plant operations—not an effort to hide her presence at meetings from the tribunal.

<sup>5</sup> Vallo testified that at Rahway there were "ongoing" "labor issues that came up after negotiations that were impacting the site," but asked if he had any specifics he said "not really."

en hours of leave that appears to have been conducted in September or even October, not in August as suggested by Vallo. In the face of the convincing denials by Killen and Patten, I do not credit Vallo and Little's claim that Killen told them that these issues were the reason that all union-represented employees were excluded from the appreciation day.<sup>6</sup>

Merck carries through with its plan to exclude union-represented employees from appreciation day

Between August 3 and 20, Killen spoke with Vallo and Little and they discussed whether some kind of recognition of plant employees could be made in lieu of appreciation day. During this period, Killen testified that while Zingales and his office had ruled out agreeing to give the union employees the appreciation day holiday, they had not ruled out specific site-by-site adjustments that could be made at plant managers' request. Discussions with Vallo, often accompanied by Little, were undertaken by Killen at his (and Vallo and Little's) initiative in this regard, but nothing was agreed to by upper management. By August 20, Killen was informed by his immediate boss, Dan Hoey, that senior level Merck management had determined that "there would be no further discussions on appreciation day in terms of potential to bargain for it locally or change directions." This was confirmed to Killen the next day in a conference call with plant managers and Zingales and with Zingales' immediate boss Elisabeth Goggin. On this call it was stated that the issue was closed, "[t]here's no intent to bargain further." However, Killen was reminded during this call, by Goggin, that as plant managers, Merck provided them with "authority to recognize people for a job well done at our own sites." With this authority, Killen continued to pursue discussions with Vallo about some kind of recognition for Riverside employees, but

<sup>6</sup> I note further the lack of support for the truth of the claim Vallo and Little attributed to Killen. It weighs against the conclusion that it was said. There was extensive testimony about recent contract negotiations at Rahway, conflicting views of the application of a new overtime provision, grievance filing activity, and the union's concern over the steady erosion of the bargaining unit over many years. All of these are serious issues, but none that seems obvious as a basis for retaliation by Merck against the unions generally. Moreover, the contention that Killen attributed Merck's decision to any of these issues, or safety concerns, or ongoing "bad behavior" at Rahway and West Point, is undermined by the lack of evidence that Killen had direct knowledge of any of this. Based on his testimony, the bulk of his information about other plants' relationships with Merck came from Vallo, not from Merck. There is just no evidence, other than the alleged comments attributed to Killen, that these were the source of the appreciation day exclusion, much less that Merck officials told Killen this. As to Killen's version of what he testified that he told Vallo—that union-represented employees were not going to be offered appreciation day because of past union refusals to entertain midterm contract changes—this was alluded to by Zingales in his testimony, thus, providing corroboration. Moreover, as noted earlier, Killen's testimony of what Zingales told him constitutes an admission from Zingales. Thus, Killen's testimony provides direct evidence of what he was told by Merck about why union employees were denied the appreciation day off. I believe he was told that and this makes it plausible that he would convey what he was told and not something there is no evidence that he knew.

those discussions were not successful and abandoned in early October.

Appreciation day occurred as scheduled, on September 4, 2015. In the U.S., the federal holiday of Labor Day was celebrated September 7, creating a 4-day weekend for Merck employees receiving the appreciation day off. Merck's union-represented employees did not receive appreciation day off, with the exception of the employees in the Kenilworth bargaining unit.

#### ANALYSIS

The General Counsel contends that Merck's failure to provide appreciation day to the union-represented employees was unlawfully motivated in violation of Section 8(a)(3) and (1) of the Act.<sup>7</sup> He also contends that Killen's explanation of the motive to Vallo independently violated Section 8(a)(1) of the Act.

#### I. SECTION 8(A)(3)

##### A. *The Wright Line standard*

The Respondent and the General Counsel agree that *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), provides the appropriate analytical standard for assessing the alleged 8(a)(3) violation.<sup>8</sup>

*Wright Line* is the Supreme Court-approved analysis in 8(a)(1) and (3) cases turning on employer motivation. See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983) (approving *Wright Line* analysis). In *Wright Line*, the Board determined that the General Counsel carries his burden by persuading by a preponderance of the evidence that union or other protected conduct was a motivating factor (in whole or in part) for the employer's adverse employment action. Proof of such unlawful motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), enfd. 184 Fed. Appx. 476 (6th Cir. 2006); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

Under the *Wright Line* framework, as subsequently developed by the Board, the elements required in order for the General Counsel to satisfy his burden to show that protected activity was a motivating factor in an employer's adverse action are union or protected activity, employer knowledge of that activity, and union animus on the part of the employer. *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 6 (2016); *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014); enfd. 801 F.3d 767 (7th Cir. 2015).

Such showing proves a violation of the Act subject to the following affirmative defense: the employer, even if it fails to

<sup>7</sup> Any conduct found to be a violation of Sec. 8(a)(3) would also discourage employees' Sec. 7 rights, and thus, is also a derivative violation of Sec. 8(a)(1) of the Act. *Chinese Daily News*, 346 NLRB 906, 934 (2006), enfd. 224 Fed. Appx. 6 (2007).

<sup>8</sup> I note that there is no allegation that the Respondent's refusal to provide union-represented employees appreciation day was "inherently destructive of Section 7 rights." See *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967). Accordingly, I do not consider the issue.

meet or neutralize the General Counsel's showing, can avoid the finding that it violated the Act by "demonstrat[ing] that the same action would have taken place in the absence of the protected conduct." *Wright Line*, supra at 1089.

#### B. *Application of Wright Line*

##### 1. The General Counsel's affirmative case

###### a. *The Respondent's admitted motive was discriminatory*

In the complaint, and at trial, the General Counsel contended that the Respondent's motive for refusing to provide appreciation day for union-represented employees, and Killen's explanation for Merck's motive for this, revolved around "labor troubles." Specifically, it was alleged that Killen told the union representatives that Merck's decision was based on safety problems and labor-related activities at Rahway and West Point.

I have found that, contrary to the General Counsel's claim, Killen did not tell union representatives Vallo or Little that labor problems at Rahway or West Point, or safety problems, were the reason that union-represented employees were excluded from the appreciation day. And I do not find that there is evidence to support the claim that it was the reason.

Rather, I have found that Zingales, the individual who effectively recommended the exclusion of the union-represented employees from appreciation day, admitted that Merck's motive was that it could not provide the benefit unilaterally and that it would not offer the unions the benefit because in recent years the unions had refused to accommodate Merck's mid-contract requests for "minor changes" in payroll and 401(k) administration and holiday issues. Killen also testified that he told Vallo this.<sup>9</sup>

This latter admitted motive proves a violation under *Wright Line*. Clearly the unions' refusal to accede to the employer's request for midterm changes was protected activity. *R.E.C. Corp.*, 296 NLRB 1293, 1293 (1989) ("The employees' conduct in refusing to reopen the contract was clearly protected"; finding employer violated Act by "laying off employees because they refused to reopen the parties' collective-bargaining agreement and agree to midterm modification"). The Respondent obviously knew about it, as Zingales raised it. The credited evidence shows that Merck refused to offer union employees the day off because of and in retaliation for the unions' protected activity of refusing to bargain midterm contractual changes desired by the Respondent. And, as discussed below, Zingales' explanation that appreciation day could not be offered unilaterally is not a convincing or accurate explanation for not offering the benefit.

To be clear, absent an unlawful motivation, there is no requirement that an employer provide represented and unrepresented employees with the same benefits. At the same time, offering or providing of differing benefits may be a violation of Section 8(a)(3) and (1) of the Act, if such conduct is motivated by antiunion considerations.

<sup>9</sup> I note that the Respondent admits that Zingales told Killen this was the rationale for not offering the benefit to employees, and admits that Killen told this to Vallo. See R. Br. at 13-14.

Under *Shell Oil Co.*, 77 NLRB 1306, 1310 (1948), and its progeny, “an employer may, during the course of collective-bargaining negotiations, treat represented and unrepresented employees differently when providing new benefits, so long as the disparate treatment is not unlawfully motivated.” *Arc Bridges, Inc.*, 362 NLRB 455, 456 (2015). For instance, in *Sun Transport Inc.*, 340 NLRB 70, 72 & fn. 12 (2003), the Board dismissed an 8(a)(3) allegation based on an employer offering less severance pay to union-represented employees during collective bargaining than it was offering to unrepresented employees. The Board explained that

the mere fact that different offers are made or that different benefits are provided does not, standing alone, demonstrate unlawful motive. Although an employer is not free to discriminatorily afford represented employees less benefits than unrepresented employees, i.e., in order to discourage support for the union, the record does not establish that the Respondent engaged in such conduct here. . . . Rather, the Respondent's offer was made in an effort to induce concessions as part of the give-and-take during negotiations over a comprehensive successor agreement.

See also, *B.F. Goodrich Co.*, 195 NLRB 914, 915 (1972) (“Thus, in the absence of discriminatory motives in withholding a benefit from these employees in order to encourage or discourage their membership in or representation by a union, we find no merit in the General Counsel's contention that Respondent violated Section 8(a)(3) by granting the profit-sharing benefit only to unrepresented employees”).

The issue then, is whether the Respondent's decision not to provide the day off to its represented employees (except to those it felt it contractually required to provide it to) was unlawfully motivated. In other words, was the decision not to provide appreciation day because of the unions' past refusal to accommodate the employer's midterm demands for changes retaliation for union activity?

The Respondent, while admitting (R. Br. at 13–14) this as a “rationale,” calls it part of a “bargaining strategy,” of the kind permitted by the Board in *Sun Transport*, supra, and points to Zingales' testimony that he did not think it “a good bargaining strategy to give away [a] holiday.” But the Respondent's decision and actions manifestly were not a bargaining strategy, at least not one that the Board legitimates. Indeed, appreciation day, and the decision not to provide the appreciation day off to the represented employees, was not made during or as part of collective bargaining. It was not refused as part of an ongoing effort “to force concessions in other areas.” *Sun Transport*, supra at 72. To the contrary, the decision was made in direct and admitted retaliation for the union's past lawful refusal to bargain midterm changes to the collective-bargaining agreement. In other words, the evidence shows that the employer, by its own admission, decided to maintain its position of withholding a new benefit that it was providing worldwide to all nonrepresented employees (and even represented employees outside of the U.S.) in direct response to the unions' past collective-bargaining strategy of refusing to entertain midterm contractual changes. (There is, of course, no claim by Merck that union employees were less deserving of appreciation than other em-

ployees in terms of the work performed or job done at Merck.)

To call this a “bargaining strategy” does not avoid the fact that its motivation is discrimination against the union-represented employees for the purpose of penalizing them because of the union's (lawful) refusal to accept previous and unrelated employer-offered terms and conditions of employment. Calling it a “bargaining strategy” insulates the conduct from the proscriptions of the Act no more than would the layoff of a group of employees in retaliation for their refusal to entertain midterm contractual changes. *R.E.C. Corp.*, 296 NLRB at 1293.

The difference between the Respondent's motives here, and the situation where an employer is motivated by a lawful “bargaining strategy,” is plainly demonstrated by comparing the instant situation to that in *Sun Transport*, supra—a case relied upon by the Respondent.

In *Sun Transport*, in late 1996, the employer began successor negotiations with its employees' union for a new labor agreement. In March 1997, the employer decided to divest itself of the business and thereafter the successor agreement negotiations also encompassed the issue of a severance package. At the same time, the employer offered to its unrepresented employees a severance package more lucrative than what it was offering at the bargaining table to the union for the unionized employees. In April or May 1997, a tentative agreement was reached on the severance and the successor contract, both of which were voted down by the union's membership. Subsequent negotiations focused mostly on severance, as the sale was underway. The employer refused the union's offer that the same severance provided the unrepresented employees be provided. The unit employees again rejected a tentative severance package that was inferior to that provided the unrepresented employees, and ultimately the union-represented employees received no severance for their jobs. In a November 1997 letter to the union, the employer's vice-president Fretz explained that in formulating its severance proposal the employer “had considered how responsive the ‘represented group’ had been to the Respondent's efforts to contain costs and improve its competitive position,” noting that in the recent negotiations “the parties had failed to reach agreement on some of the Respondent's proposals, and this resulted in continued high, uncompetitive costs” which was a factor “when we determine whether we are willing to offer severance packages to a given group of employees, as well as having some impact on our evaluation of the total additional costs we are willing to sustain.” *Sun Transport*, supra at 71.

The administrative law judge in *Sun Transport* found that the employer's position constituted an admission that the Respondent retaliated against the Union for its bargaining positions. The Board reversed, but did so with reasoning that makes clear that Merck's motives here are unlawful.

In *Sun Transport*, the Board rejected the judge's conclusion that the employer had offered less severance pay to represented employees in retaliation for the union's bargaining positions, because the Board found that the employer's motive for offering less to the union employees was the cost of bargaining positions taken by the union in negotiations. Specifically, the Board in *Sun Transport* rested its conclusion on its finding that

the employer attributed its “high, uncompetitive costs” and “uncompetitive situation” to the union bargaining positions, and

those high costs, in turn, were a factor considered by the Respondent in formulating its severance proposal. Thus, we cannot say that the [union’s] bargaining position itself was the basis for the severance pay offer.

Further, even if the severance pay offer was based upon the Union’s bargaining position during the negotiations for a successor contract, we would still find no violation of the Act. With respect to this Union, the matter of severance pay arose during comprehensive bargaining for a new contract. The Respondent sought concessions in late 1996 and continued to seek them in 1997. And, in 1997, this bargaining was intertwined with the bargaining over severance pay. The Respondent sought to use the severance pay issue to force concessions in other areas. More particularly, the Respondent, as it explained in the November 17 Fretz letter, was tying its position on severance to the Union’s refusal “during the entire period” (i.e., during the negotiations in 1996 and 1997 for a successor collective-bargaining agreement) to make concessions in other areas.

. . . . The Respondent’s severance offer was but one element of the “competing forces and counteracting pressures” inherent in the collective-bargaining process. Consequently, the Respondent’s consideration of the Union’s bargaining positions does not demonstrate antiunion animus. [citations omitted.]

Merck’s motive for refusing to provide the appreciation day off to represented employees does not square with the rationale that saved the employer in *Sun Transport*. Unlike in *Sun Transport*, here there is no evidence that Merck’s position was based on “costs” or “uncompetitiveness” that resulted from the unions’ refusal to grant what Killen described as “minor changes” during the contract term. Thus, directly contrary to the distinction drawn by the Board in *Sun Transport*, here, the unions’ position on the midterm changes—not the costs that Merck incurred because of them—was the basis for failing to give the appreciation day off. “Thus,” unlike in *Sun Transport*, here “we [can] say that the [union’s] bargaining position itself was the basis for the [employer’s] offer.”

Moreover, the Board’s second rationale in *Sun Transport* for finding no violation is also inapposite here. Unlike in *Sun Transport*, the failure to include the union-represented employees in appreciation day was not “intertwined” with ongoing bargaining. Unlike in *Sun Transport*, Merck was not using the appreciation day “issue to force concessions in other areas.” To the contrary, Merck sought and gained nothing from its position of not providing appreciation day off to the union-represented employees. In a very real sense, it consciously *refused* to use appreciation day as a bargaining chip with the unions. Merck’s position on appreciation day was not “but one element of the ‘competing forces and counteracting pressures’ inherent in the collective-bargaining process.” Rather, this was pure retaliation for the unions’ positions taken in the recent past, and bargaining was neither sought nor granted by Merck over appre-

ciation day.

In short, in this case Merck’s motivations bear none of the indicia relied upon by the Board in *Sun Transport* to find the discrimination between represented and nonrepresented employees to be merely a part of a lawful bargaining strategy. Merck’s admitted and credited motive for not providing union-represented employees the appreciation day benefit constitutes straightforward evidence of discriminatory motive under the Act.

*b. The July 28 announcement effectively blames the employees’ union status for the exclusion from appreciation day*

There is, however, more. The July 28 announcement to employees, by itself, adds to the weight of the discriminatory inference. While announcing that appreciation day “applies globally where” permitted “and, as required, subject to consultation with employee representatives,” the announcement adds the condition that “[t]his additional day off does not apply to those in the U.S. who are covered by a collective bargaining agreement.”

Thus, while appreciation day covers employees, even when it requires “consultation with employee representatives,” the only employees who are excluded from receiving the benefit are (U.S.) employees who are union-represented and covered by a collective-bargaining agreement. This explanation “essentially encouraged employees to blame” the union and their union status for the failure to receive the benefit and is an independent indicia of discriminatory motive. *Arc Bridges*, 362 NLRB 455, 457 (finding this to be an indicia of discriminatory motive).<sup>10</sup>

*c. The Respondent’s unilateral-action rationale is a pretext*

The strength of the General Counsel’s *Wright Line* case is also increased by the transparently pretextual nature of the Respondent’s claim that it did not provide the paid day off to union employees because it would violate the law to do so unilaterally without consulting with the employees’ union.

Zingales testified that it was his belief that it would be a violation of the law to unilaterally provide appreciation day to employees with a collective-bargaining agreement. He told Zeller this was the grounds for excluding union-represented employees from appreciation day. Merck executives Goggin and Frazier reiterated this after July 28, when they issued statements trying to calm the anger over the union employees’ exclusion, but reiterating the exclusion of union employees from the benefit.

However, I reject as meritless, and untrue, the Respondent’s contention that a motive for failing to provide the appreciation day to union-represented employees was the belief that it would violate the Act to do so unilaterally. If *that* were its motivation

<sup>10</sup> I note that although unalleged in this case, “it is settled that it is a violation of Sec. 8(a)(1) for an employer to tell employees that they will be losing a benefit because their status as union represented makes them ineligible for the benefit.” *Covanta Energy Corp.*, 356 NLRB 706, 714 (2011); *Niagara Wires, Inc.*, 240 NLRB 1326, 1327 (1979) (it is a per se violation of Sec. 8(a)(1) for employer to maintain a pension plan that by its terms excludes from coverage employees who are ‘subject to the terms of a collective bargaining agreement.’”



for not providing the benefit, it would have offered it to the unions as a proposal for the unions to consider, and—as the local union presidents indicated they would—accept. Indeed, remarkably, in view of Merck’s argument, its July 28 announcement of appreciation day stated that the benefit “applies globally where business operations and local practices/laws permit, and, as required, subject to consultation with employee representatives or works councils.” (Emphasis added.) Thus, as Merck itself recognized, any concern with granting the benefit unilaterally to union-represented employee would (and easily could) be overcome by “consultation with employee representatives.” As the Board has explained it:

To the extent that the Respondent is arguing that it *had* to withhold the increase to avoid violating Sec. 8(a)(5), there is no merit in that position either. Had the Respondent wanted to give its represented employees the same 3-percent increase that it gave the unrepresented employees, it could have simply asked the Union for permission. If the Union consented, the Respondent could have granted the increase without violating Sec. 8(a)(5).

*Arc Bridges*, 362 NLRB 455, 459 fn. 18 (Board’s emphasis.)

Merck’s argument that the benefit could not be provided unilaterally is a flimsy, unbelievable, and nonresponsive excuse for its unwillingness to offer the benefit. It is a purported rationale contradicted by its own notice explaining how it will provide appreciation day in instances where “local practices/laws” require consultation with a union. Thus, Merck’s “unilateral action” defense does nothing to explain why it maintained that the benefit would not “apply to those in the U.S. who are covered by a collective bargaining agreement.”

The truth is, its July 28 announcement notwithstanding, Merck never intended to consult with its U.S. “employee representatives” so that the benefit could be provided to U.S. union-represented employees. Killen was told this directly by Zingales on August 3, just days after the announcement, and he was told why: the unions’ past bargaining position. And on August 21, Merck conclusively informed its plant managers that there would be no bargaining over the matter. The purported restriction on the unilateral grant of benefits was not the reason for the decision not to offer union-represented employees appreciation day. For all these reasons, Zingales’ testimony that it was the reason is not credible. Notably, as Killen testified, upon hearing this “unilateral action” rationale on August 3, he immediately recognized that “clearly I knew that wouldn’t be a sufficient response” . . . to go [take] back to the site.” He knew that dog wouldn’t hunt. And I agree. It begs the question, which is to say it is an obvious pretext.

While I do not reach or adopt the General Counsel’s argument that Merck had what amounted to a past practice of passing on to union-represented employees benefits given to non-represented employees, the past instances in the record of offering new benefits to union employees demonstrate that Merck knew how to provide union employees a new benefit when it wanted to do so.<sup>11</sup>

<sup>11</sup> Thus, on January 2, 1998, Merck gave represented and unrepresented employees the day off in addition to the scheduled holidays off. In 2009, Merck again decided to make January 2, a company holiday

Merck’s refusal to offer appreciation day to union-represented employees had nothing at all to do with and was not hindered by any alleged belief that it would be unlawful to provide the benefit unilaterally. The pretextual nature of this claim, repeated by Zingales, Goggin, and Frazier, adds to the strength of the General Counsel’s prima facie case of discrimination. *El Paso Electric Co.*, 355 NLRB 428, 428 fn. 3 (2010) (finding of pretext raises an inference of discriminatory motive and negates rebuttal argument that it would have taken the same action in the absence of protected activities); *All Pro Vending, Inc.*, 350 NLRB 503, 508 (2007); *Rood Trucking Co.*, 342 NLRB 895, 897–898 (2004), citing *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995) (“When the employer presents a legitimate basis for its actions which the factfinder concludes is pretextual . . . the factfinder 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 . . .”) (internal quotation omitted).

Accordingly, I find that the General Counsel has more than met his prima facie case and proven that discriminatory animus motivated the Respondent’s decision not to provide appreciation day for the union-represented employees.

## 2. The Respondent’s *Wright Line* rebuttal

The remaining issue under *Wright Line* is whether the Respondent has demonstrated that it would have denied union-represented employees appreciation day even in the absence of the protected union conduct that motivated its actions. Under the circumstances, it is not a serious claim. I have already concluded, for the reasons discussed above, that the Respondent’s claim that it could not unilaterally provide the benefit was a pretext. Notably where “the evidence establishes that the proffered reasons for the employer’s action are pretextual—i.e., either false or not actually relied upon—the employer fails by definition to show that it would have taken the same action for those reasons, regardless of the protected conduct.” *David Saxe Productions*, 364 NLRB No. 100, slip op. at 4 (2016); *Rood Trucking*, 342 NLRB at 898, quoting *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003). However, the Respondent raises some additional arguments that I address below.

### a. Bargaining strategy as a defense

Zingales testified that, “in addition” to the unilateral-action issue, he believed that it was “not consistent with bargaining strategy” to provide the union-represented employees addition-

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and it reached an agreement with Local 4–575 to include the union-represented employees. R. Exh. 6. In 2006, after contract negotiations had concluded with a multi-union council that bargained as a group with Merck at that time, Merck decided to make Martin Luther King Jr.’s birthday a company holiday. The then-director of labor relations, Glen Guior, called Vallo and said, “Ed, I want you to officially ask me as the Merck Inter-union council to have a Martin Luther King’s birthday as an additional holiday for all the sites represented by the council.” Vallo at first thought that Merck was not being serious, but, assured he was, Vallo asked and Guior agreed, and the union employees thereafter received the holiday along with Merck unrepresented employees. I cite these examples, not as evidence of an official past practice, but as evidence that if Merck wanted to provide a benefit to union employees, it knew how to do so.

al benefits that were not in their labor agreement. Zingales had a preference for dealing with the unions at the different Merck locations individually, and felt that “master bargaining is not in the best interest of the company and not effective on a location-by-location basis.” In 2014, under Zingales’ leadership, Merck ended the remnants of multi-union bargaining “master” bargaining—already by that time reduced to two locations from five or six—and Zingales was resistant to any type of group bargaining with the unions. Moreover, Zingales explained, “I don’t think that coming off a significant labor negotiations in Elkton and then Rahway”—negotiations he described as “long drawn out” and “difficult,”—and with the West Point contract expiring in nine months on April 30, “that it was a good bargaining strategy to give away [a] holiday.”

The Respondent suggests that, even absent its unlawful motive, it would not have offered the union employees the day off because it might smack of the multiunion coordinated bargaining that Zingales opposed and that Merck had moved away from. This is unconvincing. Merck did not need to engage in multiunion bargaining in order to offer the unions the day off. An email or phone call to each union would have sufficed if Merck was worried that offering the day off en masse would be misinterpreted as a revival of multiunion bargaining—a concern that, frankly, seems contrived. Appreciation day was to show appreciation to the employees by providing an unplanned paid day off. Union-represented employees were left out of this—not because Merck says they were unappreciated. But rather, to “pay back” the unions for a lack of cooperation in recent years. It is highly implausible, and entirely unproven, that union-represented employees were left out of appreciation day so that Merck could avoid any implication that it was violating its principles against multi-union bargaining.

Similarly, I reject as untrue the general suggestion of Zingales that his “philosophy” or “bargaining strategy” precluded any changes for union employees during the term of a contract. Indeed, we know that Zingales had requested midcontractual changes from the unions and was unhappy that the unions refused. Thus, it appears that this asserted live-and-die-by-the-contract “strategy” emerged only in response to and in retaliation for the unions’ previous rebuff of Merck’s entreaties. That would taint it, were it true. However, I do not believe it. Notably, Zingales did not offer this as a contemporary explanation for Merck’s actions to Killen, to Zeller, or to anyone else, as far as the record shows. The first time the explanation was offered was at the hearing in a description by Zingales of his internal thinking on the matter. This type of unverifiable assertion is not the most compelling evidence. All the less so because it appears to be a transparent effort to track cases in which the Board permits the employer leeway to grant or deny new benefits as part of a “bargaining strategy.” I do not believe it.

The Respondent’s motivation for not providing, for not offering—for not permitting—union-represented employees to have appreciation day off was because the unions failed to accede to the Respondent’s will and make midterm changes to the contract requested in the past. The Respondent has failed to demonstrate that it would have taken this action in the absence of the past protected activities of the unions.

#### *b. The 8(d) defense*

The Respondent also argues that it cannot be found to have discriminated for not giving union-represented employees the day off because the benefit is not in the collectively-bargained agreements. Obviously, the contracts do not provide for appreciation day, it not having been contemplated at the time the contracts were negotiated. The Respondent contends (R. Br. at 24) that it may

rest on its rights under Section 8(d) [of the Act] not to be required “to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period . . .” See 20 U.S.C. 158(d). Similar to the strategy of Merck’s unions not to consider negative adjustments to their contractual terms and conditions of employment until negotiations for new agreements were underway, the Company’s strategy was to wait until negotiations to consider proposing additional days off.

Doubling down on this view, the Respondent devotes an entire subsection of its brief (R. Br. at 29–30) to the argument that Section 8(d) provides “a statutory right” not to bargain over the appreciation day benefit and that

to find a Section 8(a)(3) violation based on an employer’s refusal to discuss a mid-term modification would essentially read Section 8(d) out of the Act. An employer either has a right under Section 8(d) to rest on its contractual rights or it does not.

The Respondent’s contention is wrong. Section 8(d) of the Act, by its terms, defines what it means to “bargain collectively,” the refusal to do so being an unfair labor practice pursuant to Section 8(a)(5) of the Act. But nothing in Section 8(d) or Section 8(a)(5) speaks to whether an employer’s actions violate Section 8(a)(3)—which is what is at issue here—or whether the employer is acting “by discrimination in regard to . . . any term or condition of employment to encourage or discourage membership in any labor organization.” The Respondent’s contention that Section 8(d) immunizes it from discrimination claims is without support in law or logic. Employees working under a collective-bargaining agreement can be discriminated against without regard to whether an employer’s actions also violate a bargaining obligation, or, for that matter, contractual obligations. The statutory duty to bargain and the statutory duty not to discriminate are distinct and independent obligations under the Act.<sup>12</sup>

<sup>12</sup> While uncommon, instances of a discriminatory application of benefits by an employer during a collective-bargaining agreement that do not violate the Sec. 8(a)(5) bargaining obligation do arise. See, e.g., *Reebie Storage and Moving Co.*, 313 NLRB 510 (1993) (employer did not violate Sec. 8(a)(5) by failing to apply contract to all eligible unit members but only to union members, but “identical” conduct violated Section 8(a)(3) based on unlawful discrimination of providing greater remuneration and superior benefits to union employees than to nonunion employees); *enft. denied on other grounds* 44 F.3d 605 (7th Cir. 1995); *Esmark, Inc.*, 315 NLRB 763 (1994) (Board does not find factu-

I note that under the Respondent's theory of 8(a)(5) and 8(d) immunity for discriminatory conduct, an employer would be free to announce to employees that, for the express purpose of encouraging union-represented employees to decertify their unions, it will provide \$1000 to each of its unorganized employees, and not to any of its union-represented employees working under a collective-bargaining agreement. The difference between this hypothetical case and Merck's actions is one of degree not kind. Both cases turn on an assessment of the motives for not providing the benefit to union-represented employees. In both cases a violation of 8(a)(3) is the correct conclusion if the employers' actions were unlawfully motivated. The existence of a contract does not shield the employer from liability for antiunion discrimination.

Critical to its error is Merck's assumption of equivalence between the unions' past refusal to accede to requests for mid-contract changes, and Merck's refusal to offer the appreciation day. The comparison is specious, and goes to the heart of Merck's misreading of its obligations under the Act. Respondent's suggestion of "tit-for-tat" does not permit it to discriminate. What we have here is a decision to exclude union-represented employees from a day off offered to all other employees *because* of their unions' previous lawful bargaining conduct. Section 8(a)(3) proscribes an employer from making discriminatory decisions about employee terms and conditions that are motivated by employees' union affiliation. By contrast, the union conduct for which Merck is retaliating is free of any suggestion of discrimination, or even any statutory basis for condemning such discrimination against an employer were it proved.

Whether or not the General Counsel should have or could have mounted an 8(a)(5) case against Merck does not implicate the issue of whether the Respondent engaged in unlawfully motivated discrimination by refusing to provide the day to employees. Indeed, the Respondent concedes as much by agreeing

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al basis to pierce veil and hold parent of employer liable for 8(a)(5) bargaining violation for abrogation of contract but finds parent liable under Sec. 8(a)(3) for same sham closing and reopening of facility). More commonly, but also illustrative of the point, are cases in which both an 8(a)(5) and an 8(a)(3) violation is found based on the same or similar conduct, but the violations are separately analyzed and independent of one another. See, e.g., *Covanta Energy Corp.*, 356 NLRB 706 (2011) (elimination of corporate bonus and recommended annual wage increase separately analyzed and independently found to be violation of Sec. 8(a)(3) and 8(a)(5)); *Phelps Dodge Mining Co.*, 308 NLRB 985 (1992) (separate analysis of 8(a)(3) and 8(a)(5)), enft. denied 22 F.3d 1493 (10th Cir. 1994). Alternatively, sometimes the Board finds it unnecessary to reach an 8(a)(3) allegation because, having found the same conduct to have been an 8(a)(5) violation, an additional violation would not materially affect the remedy. See, e.g., *Alamo Rent-A-Car*, 362 NLRB 1091, 1093 fn. 8 (2015), 831 F.3d 534 (D.C. Cir. 2016); *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1007 fn. 4 (1996). And vice-versa. See, e.g., *Advanced Life Systems*, 364 NLRB No. 117, slip op. at 3 fn. 8 (2016) (Board does not reach 8(a)(5), because, having found the same conduct to have been an 8(a)(3), additional violation would not materially affect the remedy. *Sutter Roseville Medical Center*, 348 NLRB 637, 637 fn. 7 (2006) (same). But in no case does the Board hold that the lack of finding of an 8(a)(5) violation precludes the finding of an 8(a)(3) violation.

(R. Br. at 18; R. Exh. 1 at 3), correctly, that *Wright Line* and its assessment of the Respondent's motivation is the appropriate basis for deciding this case.

In short, employers are not required to engage in mid-contract bargaining (over matters waived in a collectively-bargained agreements). But an employer cannot refuse to do so for unlawful reasons, in this case, in admitted retaliation for a union's previous bargaining conduct.<sup>13</sup>

*C. The allegations relied upon to find the violation are closely-related to the pleadings and fully litigated*

While the General Counsel argues on brief (as I have found) "that even Killen's own version of his conversation with [union] officials demonstrates that Merck's decision to exclude was unlawfully motivated" (GC Br. at 23 fn. 12) (citation omit-

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<sup>13</sup> Respondent's position is meritless without regard to its premise that it had no duty to bargain about appreciation day and did not violate the Act by refusing to bargain about this new appreciation day. However, I note that even this premise is in question and unproven. No bargaining violation is alleged, but Merck's assumption that it could not have been is far from certain. It rests on the untested and non-incident claim that because the unions' contracts with Merck contain other holidays, the unions have clearly and unmistakably waived the right to bargain about appreciation day (which is not a holiday in the contract). However, waiver is not lightly inferred and must be "clear and unmistakable." See *Metropolitan Edison v. NLRB*, 460 U.S. 693, 708 (1983). The party asserting waiver must establish that the parties "unequivocally and specifically express[ed] their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007). As the Board explained in *Empire Pacific Industries*, 257 NLRB 1425, 1425 (1981):

As further set forth in *B. F. Goodrich*, an employer is under a duty to bargain during the existence of a collective-bargaining agreement concerning any mandatory subject of bargaining which has not been specifically covered in the contract and which the union has not clearly and unmistakably waived. [Footnote omitted.] Thus, where an employer grants a benefit to a group of unrepresented employees, if the benefit is a mandatory subject of bargaining which is not specifically covered by the represented employees' collective-bargaining agreement and has not been clearly and unmistakably waived by the union, the employer is obligated to bargain with the union concerning the implementation of this benefit for the represented employees. In such a situation, the failure to bargain in good faith with the union over the benefit granted constitutes a violation of Section 8(a)(5) and (1) of the Act. *L.M. Berry and Company*, 254 NLRB 42 (1981) and *B. F. Goodrich, supra*. Furthermore, implementing such a benefit for unrepresented employees while refusing to bargain with the union over the benefit is also a violation of Section 8(a)(1).

See also *B.F. Goodrich*, 195 NLRB at 915 ("As found by the Trial Examiner, the Union did not waive its right to be consulted about the institution of this type of benefit during the parties' negotiation of the existing collective-bargaining agreement. By thereafter instituting the plan for its unorganized employees while unlawfully refusing to bargain with the Union as the statutory representative of its warehouse employees, Respondent deprived the latter employees of their right to bargain collectively with respect to obtaining this additional benefit. As such conduct interferes with, restrains, and coerces the unit employees in the exercise of their right to bargain collectively through representatives of their own choosing, we conclude that Respondent thereby further violated Section 8(a)(1)").

ted), I recognize that the General Counsel chiefly argued that the “labor troubles” at Rahway and West Point were the motivation for the Respondent’s unlawful conduct. This was based on the alleged comments of Killen to Vallo and Little that I have not credited. More formally, the complaint (GC Exh. 1(u) at para. 9) attributed Merck’s actions generally to “concerted activities” of employees represented by the charging party unions, an allegation that covers Zingales’ credited admission of Merck’s motivation for excluding union employees from appreciation day, which Killen then conveyed to Vallo. While the credited motivation is different from that primarily advanced by the General Counsel at trial, it is within the scope of the pled allegation. (See GC Exh. 1(u) at para. 9). Thus, there is no due process issue, as the complaint alleged, and, indeed, the trial focused on whether the Respondent’s motivation for its failure to provide union-represented employees with the appreciation day violated Section 8(a)(3) of the Act. That is to say, the finding of unlawful motivation “is closely connected to the subject matter of the complaint and has been fully litigated.” *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989), enf. 920 F.2d 130 (2d Cir. 1990); *Casino Ready Mix, Inc.*, 335 NLRB 463, 464 (2001), enf. 321 F.3d 1190 (D.C. Cir. 2003). And that is particularly so here, where “the finding of a violation is established by testimonial admissions of the Respondent’s own witnesses.” *Id.* The Respondent, on direct examination of its own witness, supplied the answer to the question of the motive for its actions and proved the unlawful motivation. There was no objection to the relevant evidence; indeed, it was repeated and reaffirmed on cross-examination (Tr. 265) and reasserted in the Respondent’s brief. (See R. Br. at 13–14.) It is no defense to an allegation of unlawfully motivated conduct to admit to a (slightly) different unlawful motive for the conduct.

I find that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily failing to provide appreciation day to union-represented employees.

#### II. SECTION 8(A)(1)

The Board will find a supervisory statement to violate Section 8(a)(1) of the Act where it “would reasonably tend to interfere with, threaten, or coerce employees in the exercise of their rights under Section 7 of the Act.” *Waste Stream Management*, 315 NLRB 1099, 1100 (1994).

It is well-settled that in evaluating the remarks, the Board does not consider either the motivation behind the remarks or their actual effect. *Miller Electric Pump & Plumbing*, 334 NLRB 824, 825 (2001); *Joy Recovery Technology Corp.*, 320 NLRB 356, 365 (1995), enf. 134 F.3d 1307 (7th Cir. 1998). Rather, “the basic test for evaluating whether there has been a violation of Section 8(a)(1) is an objective test, i.e., whether the conduct in question would reasonably have a tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, and not a subjective test having to do with whether the employee in question was *actually intimidated*.” *Multi-Ad Services*, 331 NLRB 1226, 1227–1228 (2000) (Board’s emphasis), enf. 255 F.3d 363 (7th Cir. 2001).

Killen’s explanation to Vallo about why Merck refused to provide the union employees with appreciation day was, by all

evidence, offered in good faith, without his endorsement, and in an effort to answer Vallo’s questions about Merck’s motives for a decision with which Killen disagreed. It might seem counter-intuitive to condemn as a separate violation of the Act a manager’s frank discussion with a union representative about an employer’s motives for an adverse decision, all the more so when it reveals an otherwise hidden and unlawful motive. Yet, Killen’s intentions aside, as they must be put, the message would have reasonable tendency to interfere with Vallo’s protected activity. Specifically, his decisionmaking in his representative capacity when next approached by management seeking midterm concessions. His participation as local union president is core Section 7 activity, and there is a reasonable tendency that informing an employee that these decisions have led to retaliation against bargaining unit members will interfere, threaten, and coerce. I recognize that it does not appear that Vallo (or Little) recalls Killen saying this—they testified to a different allegedly unlawful explanation by Killen—but under the objective test employed by the Board, that is not the relevant inquiry. I believe Killen. I believe he said it and accurately reported what he was told by Zingales. In doing so, he violated the Act. *Alamo Rent-A-Car*, 362 NLRB 1091, 1092 fn. 3 (managers’ statements to unit employees that they were losing STD benefits “because of their union contract” but that nonunion employees would retain a form of the benefit violates 8(a)(1)); *Goya Foods of Florida*, 347 NLRB 1118, 1131 (2006) (comment that employees would be unable to participate in the company’s pension plan if they were union members violates 8(a)(1)).<sup>14</sup>

#### CONCLUSIONS OF LAW

1. The Respondent, Merck, Sharp & Dohme Corp., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily denying union-represented employees a paid day off in retaliation for union activity protected by the Act.

3. The Respondent violated Section 8(a)(1) of the Act by informing employees that the Respondent was denying union-represented employees a paid day off in retaliation for union activity protected by the Act.

4. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and

<sup>14</sup> While Killen’s statement differed from the one alleged by the General Counsel, it occurred in the same time frame, concerned the same subject (i.e., the Respondent’s motive for excluding union-represented employees from appreciation day), was made by the same supervisor to the same union representative, and came into evidence during Killen’s direct testimony through his admission. The matter “is closely connected to the subject matter of the complaint and has been fully litigated.” *Pergament United Sales, Inc.*, 296 NLRB at 334; *Casino Ready Mix, Inc.*, 335 NLRB at 464.

desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent shall make whole the union-represented employees for any losses of earnings and other benefits they suffered as a result of its discriminatory denial to them of the paid day off known as appreciation day.

The make-whole remedy shall be computed in accordance with *Ogle Protective Service*, 183 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), the Respondent shall compensate any employees adversely affected by the unlawful conduct for the adverse tax consequences, if any, of receiving lump sum backpay awards, and in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, file with the Regional Director for Region 6 a report allocating backpay to the appropriate calendar year for each employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted at all of the Respondent's facilities employing union-represented employees who were denied appreciation day, and at such facilities shall be posted wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. 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. In the event that, during the pendency of these proceedings the Respondent has gone out of business or closed a 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 September 4, 2015. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 6 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>15</sup>

#### ORDER

The Respondent Merck, Sharp & Dohme Corp., Kenilworth, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing employees that it is denying union-represented employees a paid day off in retaliation for union activity protected by the Act.

<sup>15</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Discriminatorily denying union-represented employees a paid day off in retaliation for union activity protected by the Act.

(c) 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) Make union-represented employees who were denied the paid day off known as appreciation day whole for any losses of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision in these cases.

(b) 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 of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facilities where any union-represented employee was denied the paid day off known as appreciation day copies of the attached notice marked "Appendix."<sup>16</sup> Copies of the notice, on forms provided by the Regional Director for Region 6, 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any 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 September 4, 2015.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 6 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. December 20, 2016

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD

<sup>16</sup> If this Order is enforced by a judgment of a 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."

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 tell you that we are denying union-represented employees a paid day off in retaliation for union activity protected by the Act.

WE WILL NOT discriminatorily deny union-represented employees a paid day off in retaliation for union activity protected by the Act.

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 make union-represented employees to whom we discriminatorily denied the paid day off known as appreciation day whole, with interest, for any loss of earnings or other benefits suffered as a result of our discrimination against them.

MERCK, SHARP & DOME CORP.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/06-CA-16315](http://www.nlr.gov/case/06-CA-16315) 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.

