JD-31-26
Louisville, KY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

UNITED PARCEL SERVICE, INC.

and **Case 09-CA-342136**

BRANDY GARY, AN INDIVIDUAL

Shay N. Chandler, Esq., for the General Counsel
Ms. Brandy Gary*, for the Charging Party*
Lira A. Johnson, Esq., for the Respondent

BENCH DECISION AND CERTIFICATION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge: I heard this case on February 24, 2026 in Louisville, Kentucky. One additional witness testified by videoconference on March 30, 2026. Counsel presented oral argument on April 9, 2026 by videoconference. On April 10, 2026, by videoconference, pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, I issued a bench decision setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1]

Additional Discussion

As discussed in the bench decision, the Respondent conducted an extensive analysis of the jobs performed by various employees at its "Worldport" facility in Louisville, Kentucky. The Respondent called this project the 2023 "Air Region Career Architecture initiative." However, for

[1] The bench decision appears in uncorrected form at pages 5 through 25 of the hearing transcript for April 10, 2026. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification.

brevity, it will be referred to below simply as the "job analysis." The record does not establish exactly how long the analysis took, but it appears to have spanned several months, at least, and was not completed until sometime in November 2023.

Emails between human resources and other management personnel, which the Respondent produced pursuant to subpoena, establish that management knew about the employees' interest in unionization at least as early as October 31, 2023. (G.C. Exh. 8) The record does not indicate that its knowledge of the union activity caused the Respondent's management to perform the job analysis, which likely began before the Respondent became aware of such activity. However, it does appear that, after learning about employees' interested in unionizing, management decided to release the results of this job analysis in December 2023 rather than in March 2024, the date originally planned. (G.C. Exh. 14)

Nothing in the record suggests that the Respondent altered any of the job analysis calculations or results because of the union activity. There is no basis to conclude that management either increased or decreased the amount of the pay raise each employee would receive. However, the Respondent ultimately decided that about 49 or 50 employees would not receive the raises specified in the job analysis because they would be voting in Board-conducted elections.

The decision to exclude these workers appears to have been made shortly before managers began discussing the results of the job analysis with employees. In the subpoenaed emails which the General Counsel introduced, the first reference to excluding the employees does not appear until just before those discussions. In a December 5, 2023 email, labor relations official Bill Geiger states:

> The expectation is that the manager and/or director will begin having discussions [with employees] beginning tonight and have them wrapped up by the end of the week. Changes affecting the employees should be visible in Workday next Wednesday at the earliest. *Please note, the 50 people that are covered under a demand letter will not have impact sheets since they are in laboratory conditions.*
>
> (G.C. Exh. 15, italics added)

Geiger's use of the phrase "laboratory conditions" connects the Respondent's decision not to give raises to about 50 people with its filing petitions for the Board to conduct representation elections. The phrase describes a workplace in which employees feel no pressure to vote a certain way. Filing an election petition triggers the requirement for such "laboratory conditions."

In *General Shoe Corp.*, 77 NLRB 124, 127 (1948), the Board stated: "In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees."

Such "laboratory conditions" must be maintained from the date a petition is filed until the election. During this "critical period," unfair labor practices, and even some conduct that does not

constitute an unfair labor practice, can destroy the laboratory conditions. When that happens, the Board sets aside the election. Until 2023, the Board typically then conducted a rerun election although, in certain extreme cases, it would issue a bargaining order. However, about 3 years ago, a Board decision made significant changes in its election procedures.

At the risk of digression, it may be noted that this same Board decision has made it more important than ever for an employer to make sure that the laboratory conditions are not compromised. The decision has increased the consequences which result from an unfair labor practice during the critical period.

Before this change, when laboratory conditions had been destroyed or compromised, the Board typically would set aside the results of the first election and schedule another. As the Board explained in *General Shoe*, when "the requisite laboratory conditions" were not present, "the experiment must be conducted over again." Id.

In rare cases, the Board would conclude that the coercive effects of the unlawful conduct persisted, making it impossible to re-establish the laboratory conditions. In such cases, if – at some previous point in time – a majority of the bargaining unit employees had supported the union before serious unfair labor practices had eroded that support and made a fair, uncoerced election impossible, the Board would not order a rerun election. Instead of conducting another election, the Board would order the employer to recognize and bargain with the union. See, e.g., *Garvey Marine, Inc.*, 328 NLRB 991 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001); *Garten Trucking LC*, 373 NLRB No. 94, slip op. at 3-8 (2024). The Supreme Court upheld this procedure. *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969).

In 2023, as noted above, the Board made changes in its election procedure. These changes increased the consequences for unfair labor practices during the critical period and expanded the circumstances under which the Board would issue a bargaining order.

The *Cemex* Decision

On August 25, 2023, the Board issued its decision in *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023), which stated, in part:

> Under the standard we adopt today, an employer violates Section 8(a)(5) and (1) by refusing to recognize, upon request, a union that has been designated as Section 9(a) representative by the majority of employees in an appropriate unit unless the employer promptly files a petition pursuant to Section 9(c)(1)(B) of the Act (an RM petition) to test the union's majority status or the appropriateness of the unit, assuming that the union has not already filed a petition pursuant to Section 9(c)(1)(A).
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> 372 NLRB No. 130, slip op. at 25 (footnote omitted)

Thus, once a union notifies an employer that a majority of employees in an appropriate unit had designated the union to represent them, if the employer does not wish to recognize the union it must file with the Board a petition for an election, and it must do so "promptly." In a footnote, the Board stated that it would normally interpret "promptly" to mean within 2 weeks of the union's demand for recognition. *Cemex*, 372 NLRB No. 130, slip op. at 25, fn. 139. An employer that failed to file an election petition within this period had to recognize and bargain with the union even though no election had been conducted.

Additionally, the Board held that "if the employer commits an unfair labor practice that requires setting aside the election, the petition (whether filed by the employer or the union) will be dismissed, and the employer will be subject to a remedial bargaining order." *Cemex*, 372 NLRB No 130, slip op. at 26. Increasing the likelihood that an unfair labor practice during the critical period would result in a bargaining order creates a powerful incentive for employers to be particularly careful.

The Union's Demands For Recognition

The events in the present case took place not long after the Board issued its *Cemex* decision. By letter dated November 17, 2023, the Union informed the Respondent that it represented "a majority of all the full and part time ramp, tug, and marshalling dispatchers employed by UPS Worldport." (Jt. Exh. 2) Once the Respondent received this letter, it had about 2 weeks, under *Cemex*, to file a petition for an election. The Respondent beat this deadline by filing the petition on December 1, 2023.

By letter dated November 22, 2023, the Union notified the Respondent that a majority of employees in another bargaining unit had submitted authorization cards. This unit consisted of all full and part time fueling quality control admins, fueling dispatch admins, fueling accounting admins and fueling ground guides. (Jt. Exh. 4) On December 6, 2023, the Respondent filed a petition for an election in this unit.

Under the *Cemex* decision, if the Respondent had failed to file the representation petitions "promptly" - within about 2 weeks after receiving the demands for recognition - it would have been required to recognize and bargain with the Union even though no election had taken place. However, it did file the representation petitions. When the Respondent filed each petition, doing so began a "critical period," during which any labor practice could now lead to a bargain order.

Perils of Announcing Wage Increase During Critical Period

The critical period is a narrow strait an employer must navigate cautiously. Either decreasing or increasing the wages or benefits of bargaining unit employees can land an employer on unfair labor practice rocks. Obviously, decreasing wages or benefits may constitute unlawful discrimination. However, a wage *increase* during the critical period also may disturb the laboratory conditions and violate the Act. See, e.g., *CVS Pharmacy*, 372 NLRB No. 91, slip op. at 1, fn. 2 (2023).

Additionally, depending on the total circumstances, merely *announcing* an improvement in wages or benefits may constitute an unlawful promise of benefits. See, e.g., *E.L.C. Electric, Inc.*, 344 NLRB 1200 (2005). To be violative, a promise does not even have to be explicit but may be implied.[2]

In the present case, the Respondent had decided to announce, in early December 2023, the results of its job analysis process and that would, in effect, be an announcement of pay raises. But about 50 of these employees were about to vote on the question of union representation. For these employees, the pay announcement would fall within the critical period leading up to an election. As Geiger put it in his December 5, 2023 email, these employees were "in laboratory conditions." (G.C. Exh. 15)

As the cases cited above indicate, raising the pay of employees during the critical period before an election, or even announcing a pay raise during that critical period, might well constitute an unfair labor practice. To avoid this possibility, the Respondent informed employees, in effect, that the pay rates of these employees would not change. However, this attempt to avoid committing the unfair labor practice of promising a benefit resulted in the unfair labor practice of discriminating against employees because of their union activity.

The prohibition against raising or lowering employees' pay during a critical period rests on the general principle that, during that period, employees' terms and conditions of employment should not change. When the Respondent decided not to grant pay raises to employees in the two new bargaining units, it erred in failing to recognize that the job analysis and its results *already* had become part of the employees' terms and conditions of employment.

The Respondent had conducted the job analysis to determine what employees in each job classification should be paid. It intended to increase employees' pay in accordance with this analysis ahoalnd it had informed employees that it was going to do so. At this point, the projected pay increase, based upon the results of an already-completed job analysis, had become a term and condition of employment. Abruptly to deny some employees the contemplated pay raises would be a change in course.

In *Promedica Health Systems, Inc.*, 343 NLRB 1351 (2004), an employer announced that employees would be receiving a wage increase but later informed them that the wage increase would be delayed until after the election, when it would be given if the union lost. Finding a violation, the Board stated:

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[2] For example, in *County Window Cleaning Co.*, 328 NLRB 190, 196 (1999), employees told the company's owner that they wanted union representation to obtain better benefits. The owner replied that they could sit down and talk about a small raise and that he was looking into insurance for the employees. The Board found that under the circumstances, this statement constituted an unlawful implied promise of benefits.

> It is well settled that conditions of employment include not only what an employer has already granted, but also what the employer has proposed to grant. *Liberty Telephone & Communications*, 204 NLRB 317 (1973). Thus, an employer violates Section 8(a)(1) by telling employees *that the implementation of an anticipated wage increase may be in doubt due to the obligation to engage in collective bargaining* with a union after the election. E.g., *Earthgrains Co.*, 336 NLRB 1119 (2001), enfd. sub non. mem. *Sara Lee Bakery Group, Inc. v. NLRB*, 61 Fed.Appx. 1 (4th Cir. 2003). Such statements reasonably convey a threat of loss of existing benefits if they reasonably "leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore." *Earthgrains*, supra at 1119-1120; *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980), enfd. 679 F.2d 900 (9th Cir. 1982).
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> 343 NLRB at 1353 (italics added).

However, when certain requirements are satisfied, the Board has allowed an employer to announce, during a critical period, that a contemplated pay increase will be *delayed* until after an election to avoid disturbing the laboratory conditions.

"A Safe Harbor"

In *Woodcrest Health Care Center*, 366 NLRB No. 70 (2018), the Board discussed how an employer lawfully could delay a pay increase, temporarily, without disturbing the laboratory conditions or violating the Act:

> The judge noted that Board law provides a safe harbor whereby an employer may lawfully postpone, rather than cancel, an adjustment in wages or benefits during the pendency of a union campaign, *so long as it makes clear to the affected employees that the adjustment will occur whether or not they select a union, and that the sole purpose of the postponement is to avoid the appearance of improperly trying to influence the election's outcome.* Id. [*Woodcrest Health Care Center*, 360 NLRB 415 (2014)], citing *KMST-TV, Channel 46*, 302 NLRB 381, 382 (1991); *Atlantic Forest Products, Inc.*, 282 NLRB 855, 858 (1987).
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> 366 NLRB No. 70, slip op. at 2 (italics added)

The Board also addressed the "safe harbor" requirements in *Uarco Inc.*, 169 NLRB 1153, 1154 (1968). It that decision, the Board found that the employer had not violated the Act by announcing that a contemplated wage increase would be delayed until after the election:

> The Employer *made clear* in its campaign statements, as set forth above, *that whether or not its employees were represented by a union, it planned to continue its established practice of adjusting wage rates in early April of each year*, pursuant to its annual wage

> survey, to bring them into conformity with prevailing rates in the area; and that the sole purpose of its announcement postponing the expected adjustments in wage rates and benefits for the employees involved was to avoid the appearance that it sought to interfere with their free choice in any election which might be directed.
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> 169 NLRB at 1154 (italics added).

The announcement that the employer would not be granting wage increases before the election may be likened to a corrosive acid and the assurances - that employees would receive the raises later, regardless of whether they were represented by a union - may be analogized to the bicarbonate which neutralizes the acid. Without the neutralizer, the acid eats away at employees' willingness to engage in union and other protected activities.

In *Ansul Inc.*, 329 NLRB 935 (1999), the Board further delineated what would suffice to bring an employer's statement to employees within the "safe harbor." In that case, the employer's officials read the following message to employees:

> As you know, Ansul began a review of various production classifications in early 1997 to determine whether each classification, including your hand portable assembler position, fell within the correct grade.
>
> You may also recall that in June of this year each of you provided information regarding your job to assist us in that review.
>
> We have now completed our evaluation of your classification and again thank you for your input.
>
> However, we believe that we cannot legally announce the results of that review at this time.
>
> As you also know, the NLRB has scheduled an important election on September 18, 1997, and each [of] you are [sic] eligible voters in that election. Strict election rules protect employees against interference by an employer or a union.
>
> We are concerned that any announcement at this time might be viewed as an effort to influence the outcome of the NLRB election.
>
> In order to avoid even the appearance of such an effort, we have decided to postpone an announcement of the results of our classification review until the election results have been finalized,
>
> At that time the Company will then announce the results of its review and will do so regardless of the outcome of the election.

> Your patience and understanding is [sic] appreciated
>
> 329 NLRB at 935.

Although the judge found that this statement violated the Act the Board disagreed:

> The Respondent's statement clearly states that the reason for the postponement was to avoid the appearance of tainting the election, and it explains that the Respondent will announce the results of the review regardless of the outcome of the election. This is all that is required under the *Uarco* standard.
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> *Ansul Inc.*, 329 NLRB at 936

By stating "[t]his is all that is required," the Board left no doubt that these essential elements *were* required for the statement to be lawful. In the present case, the Respondent's statement to employees must be judged by this standard.

Complaint Paragraph 6

As amended at hearing, complaint paragraph 6 alleges that, on December 5, 2023, the Respondent's supervisors and agents read a script to employees which impliedly threatened to withhold a pay raise. This script is attached as an exhibit to the complaint, also is in evidence as General Counsel's Exhibit 4, and is quoted verbatim in the bench decision.

The Respondent does not deny that its supervisors read the script to employees, but it does deny that doing so violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 8.l

The announcement stated, in part, "If we were to make a change to an employee's wages or benefits *before the secret ballot election* the NLRB may interpret that as a violation of the law." (GC Exh. 4, italics added.) If the announcement had continued by stating that compliance with labor law was the only reason for withholding the wage increases and that the Respondent would institute the raises after the election, and regardless of the outcome of the election, this case would be controlled by the *Ansul* precedent and I would not find a violation. However, the announcement did not and employees reasonably would believe that they never would receive the raises specified by the job analysis.

Therefore, as stated in the bench decision, I have concluded that the reading of the script violated Section 8(a)(1) of the Act.

Complaint Paragraph 5

In the bench decision, I reserved ruling on whether the conduct described in complaint paragraph

5 violated the Act, as alleged in complaint paragraph 8. Complaint paragraph 5 alleges that about December 1, 2023, Fueling/Quality Control/Payroll Manager Dave Barbiea threatened employees that they would not receive a pay raise because employees were seeking union representation. The Respondent has denied this allegation.

On December 1, 2023, when the violation allegedly occurred, the Respondent already knew about the Union's demands for recognition. On that date, it filed a petition for an election in response to one of those demands. In 5 days it would file a petition for an election in response to the other demand.

Additionally, the record reflects that, on December 1, 2023, employees already knew they were going to receive pay increases. On November 22, 2023, management had notified them that the job analysis had been completed and that they would be getting specific information on December 1. Although this notice did not specifically state that the employees would be receiving pay raises, it clearly implied that they would. For example, it stated, "Our goal is to offer the best jobs in our industry - this means paying every UPSer fairly. . ." (GC Exh. 6)

Charging Party Gary testified that, on December 1, 2023, Manager Barbiea spoke with a group of 6 employees, including herself. Another employee, Joshua Channing Clemons, asked Barbiea whether they were going to receive the pay raise and Barbiea replied that they were not. According to Gary, Barbiea said that they would not be getting a raise "because it would be considered a bribe." She further testified:

> Q. Did he say a bribe for what?
> A. To try to keep out of the Union.
>
> (Tr. 50)

Barbiea, who had already retired before the hearing, did not testify. Another employee witness, Misty Marks, also testified that Barbiea said they would not be receiving the raise, but her testimony differed from Gary's concerning the reason Barbiea gave: "So we were just told that since we were talking to the Union, that UPS was afraid that we would consider it a bribe." (Tr. 70)

Another employee witness, Joshua Channing Clemons, testified that Barbiea told the employees he had left a meeting with upper management "and he did not believe we would get the raise because it would be considered a bribe." (Tr. 88-89) Clemons further testified:

> Q. Did he say what it was a bribe for?
> A. Because we were talking to the Union.
>
> (Tr. 89)

No witness contradicted the testimony that Barbiea said the employees would not receive the

raise because it would be considered a bribe. Accordingly, I find that he did make that statement.

Although the witnesses differ somewhat concerning how Barbiea explained the decision to withhold the pay raise, these small differences do not raise any doubts about the truthfulness of the witnesses. Moreover, the record indicates that Barbiea made similar statements about a "bribe" more than once, and he may have given slightly different explanations each time.

It isn't clear that Barbiea used the word "bribe" to mean an explicit money-for-your-vote transaction. It may well be that, by "bribe," he meant only that raising the wages of employees who were about to vote would be regarded as an improper inducement. A labor lawyer might rephrase Barbiea's statement to say that the Respondent withheld the raise because the Board might find that it destroyed the laboratory conditions necessary for employees to make free and uncoerced choices.

However, normal people do not go around talking about "laboratory conditions." Only labor lawyers do. The import of Barbiea's statement must be determined based on how the words reasonably would be understood not by a labor lawyer but by a typical employee. This is an objective standard, meaning that the Board looks to how employees reasonably would understand the words rather than how any particular employee did understand them.

Gary and Clemons quoted Barbiea as saying that pay raises "might be considered" a bribe, leaving unsaid who would be doing the considering. In contrast, Marks quoted Barbiea as saying that *other employees* might consider pay raises to be a bribe.

This difference doesn't matter because there is nothing unlawful about Barbiea's explanation that the pay raises were withheld because someone might consider them a bribe. Such a statement, by itself, does not constitute a threat and does not violate the Act.

Rather, the violation inheres in what Barbiea did not say. After announcing that he did not believe the employees would receive the contemplated pay raise, Barbiea did not explain that the raises were being withheld for just one reason, namely, because granting them during the critical period might disrupt the laboratory conditions necessary to assure a fair and uncoerced election. Even more significantly, he did not say that the Respondent would grant the pay raises after the election and would do so regardless of the election's outcome.[3] Such statements were necessary to bring the Respondent's action - withholding the pay raises - within the "safe harbor" described in

[3] Arguably, Barbiea might have given these assurances even though the employee witnesses did not mention it in their testimony. However, I believe this possibility very unlikely. The script prepared for managers to read to employees (G.C.Exh. 4) did not include any statement that employees would receive the raises after the election and regardless of its outcome. Presumably this script, sent to lower-level managers from above, reflected the Respondent's official position. It is difficult to believe that, when Babiea told employees what he had heard in a meeting with upper management, he would add a promise (to pay the raises later) which the Respondent never made. Therefore, I find that Barbiea did not give such assurances.

Uarco Inc., above, and *Ansul Inc.*, above.

Although Barbiea did not make a definitive statement that the employees would not receive pay raises but only indicated he *believed* that they would not, I conclude that employees reasonably would trust his words to be an accurate assessment of what the Respondent would do. Barbiea, after all, was recounting what he had heard in a meeting with higher management. Moreover, the record does not suggest that employees would doubt, or have any reason to doubt, the reliability of what he said.

Barbiea announced the bad news, that employees in the new bargaining units would not be receiving raises, 4 days before the managers read the scripts to employees. Thus, his words may well have been the first announcement by a manager that employees in the two new bargaining units would not be receiving raises.

As noted above, I have found that Barbiea did not tell employees that they would receive the pay increases after the election and regardless of its outcome. In these circumstances, Barbiea's statement was unlawful.

Accordingly, I conclude that the General Counsel has proven the allegations raised in complaint paragraph 5, and recommend that the Board find that the Respondent's conduct, described in that complaint paragraph, violated Section 8(a)(1) of the Act.

Complaint Paragraph 7

Complaint subparagraph 7(a) alleges that since about December 5, 2023, Respondent has failed and refused to grant its marshaling employees, tug employees, ramp employees, fueling quality control admins, fueling dispatch admins, fueling accounting admins, and fueling ground guides, a pay raise to which they were entitled pursuant to Respondent's 2023 Air Region Career Architecture initiative. Complaint subparagraph 7(b) alleges that the Respondent did so because the named employee classifications formed, joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. The Respondent denies these allegations.

The evidence establishes that the Respondent did not grant the pay raises provided by the 2023 Air Region Career Architecture initiative to those employees. Moreover, the record establishes that the Respondent failed to grant these raises because of the pending petitions for elections which the Respondent filed in response to the Union's demands for recognition.

As discussed above, the Respondent' announcement that certain employees would not be receiving a pay raise, violated Section 8(a)(1) of the Act. For the same reasons, the actual denial of the wage increases also violates Section 8(a)(1).

The complaint also alleges that denying the wage increase to these particular employees, who were going to vote on the question of union representation, constitutes discrimination in violation of Section 8(a)(3) of the Act. Before examining that issue, it may be helpful to review events which

occurred after December 5, 2023.

Later Events

On December 16, 2023, the Respondent entered into a Memorandum of Understanding with the Union. In it, the Respondent agreed to recognize the Union as the exclusive bargaining representative of the employees in the two new bargaining units if an arbitrator determined, by card check, that a majority of employees in these units supported the Union. (R. Exh. 2)

In the Memorandum of Understanding, the Respondent also agreed to withdraw the petitions it had filed seeking Board-conducted elections. It further agreed, among other things, that it would not conduct "captive audience meetings" with the employees in these two new bargaining units and also would not "engage a third party persuader" to meet with them.

The Union provided the signed authorization cards to Arbitrator Ira F. Jaffe who, on March 27, 2024, certified that a majority of the employees had designated the Union to represent them. (R. Exh. 4) The Respondent then recognized the Union and bargained with it concerning these employees' terms and conditions of employment.

The Union already represented a great number of the Respondent's employees in other job classifications, and these employees are covered by a "National Master United Parcel Service Agreement" effective during the period August 1, 2023 through July 31, 2028. (Jt. Exh. 1) On April 10, 2024, the Respondent signed an agreement with the Union which brought the new employees under the coverage of this National Master Agreement and its related addenda, riders and supplements.

The agreement which the Respondent signed on April 10, 2024 also increased the pay of these employees. (R. Exh. 3) There is no evidence that the Respondent has failed in any way to abide by the terms of this agreement. Likewise, the record does not suggest either that the Respondent engaged in unfair labor practices other than those alleged in the present complaint, or that any other unfair labor practice charge had been filed against the Respondent.

In most, although not all, cases alleging violations of Section 8(a)(3), the Board follows the analytical framework it established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). This framework requires the General Counsel to prove, among other things, the existence of animus, that is, an intention to take some action adverse to employees because they had engaged in union or other protected activities or to discourage employees from engaging in such activities.

In law, the term "animus" means "intent."[4] Perhaps because of its similarity to "animosity," the

[4] See *The Law Dictionary*, https://thelawdictionary.org/animus/, and the *FindlawDctionary of Legal*

word also carries a whiff of "hostility" or "belligerence"[5] but, strictly speaking, there can be "animus" without enmity.

The present case presents an unusual example of animus without hostility. The Respondent's intent is quite clear. It denied certain employees the pay raises which other employees received because these particular employees were going to vote in a Board-conducted election. And the election was the direct result of employees' union activity leading to the Union's demands for recognition.

But nothing in the record suggests that the Respondent or its managers bore personal hostility towards the Union or employees who supported the Union. The fact that the Respondent agreed to recognize the Union, pursuant to a card check by an arbitrator, certainly does not suggest any hostility to the Union or intent to undermine it. Likewise, the Respondent's quickly entering into a collective-bargaining agreement covering the employees is inconsistent with any intent to thwart the union or to discourage employees from engaging in union activities.

In the bench decision, I erred in stating that an analysis under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), would lead to a conclusion that the General Counsel had failed to prove animus. Although the record does not establish hostility, it amply supports a finding of intent, namely, that the Respondent denied these employees pay raises because of the upcoming election which resulted from their protected union activities.

Therefore, correcting the bench decision, I conclude that the General Counsel has established the initial *Wright Line* requirements, including the requirement of showing a link between the employees protected activities and the decision to discriminate, as required by *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 (2019).

Because the General Counsel established the initial *Wright Line* requirements, the burden would shift to the Respondent to prove that it would have taken the same action in any event. However. the Respondent clearly could not carry that burden. It only denied these employees the wage increases because they were about to vote concerning union representation, which was a direct result of their protected union activity.

Even though a *Wright Line* analysis would lead to the same conclusion I reach here - that the

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Terms, https://dictionary.findlaw.com/definition/animus.html

[5] Because of this unfriendly overtone, one writer suggests that lawyers avoid using "animus" when a statute itself refers instead to "motive." D. L. Schenburg, "'Motive' or 'Animus'? Lessons From Appellate Practice," *Nat. Law Rev.* January 13, 2025, https://natlawreview.com/article/motive-or-animus-lessons-appellate-practice.

Respondent violated the Act - I do not believe that *Wright Line* provides the appropriate framework. The *Wright Line* framework shines when the question concerns an employer's true motives for taking an adverse employment action. Where there is more than one possible motive, the *Wright Line* framework allows a determination concerning the extent to which an unlawful motive affected the outcome.

However, in the present case, the Respondent had only one motive, which the record clearly establishes. The Respondent denied a pay raise to employees in the two new bargaining units out of fear that granting such increases would destroy the laboratory conditions which the Board requires.

The more appropriate analytical approach derives from the Supreme Court's decision in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967) and its progeny. See, e.g., *Arc Bridges, Inc.*, 355 NLRB 1222 (2010). In *Great Dane Trailers*, the Supreme Court stated that "even if the employer does come forward with counter explanations for his conduct in this situation, the Board may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." 388 U.S. at 33-34.

The Board struck this proper balance in *Uarco Inc.*, above, and *Ansul*. above. It allowed employers to withhold a contemplated pay raise temporarily, during the critical period, if they also stated that the sole reason for doing so was to comply with labor law requirements and assured the affected employees that they would receive the raise after the election, regardless of its outcome.

When the Respondent announced that the employees in the new bargaining units would not receive raises. it failed to give the necessary assurances that they would receive the pay increases after the election, and regardless of the election's outcome. Therefore, I conclude that it violated Sections 8(a)(1) and 8(a)(3) of the Act.

Summary

For the reasons discussed above and in the bench decision, I recommend that the Board find that the Respondent violated Section 8(a)(1) of the Act by the conduct alleged in complaint paragraphs 5, 6 and 7, and that it also violated Section 8(a)(3) of the Act by the conduct alleged in complaint paragraph 7.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act, including posting the notice to employees attached hereto as Appendix B.

The Respondent also must make whole the affected employees by paying them the pay raises they would have received because of the Respondent's 2023 Air Region Career Architecture initiative. These payments must be for the time period which began when other employees first received wage

increases pursuant to this initiative and which ended when the affected employees began being compensated pursuant to the "Administrative/Specialist Addendum to National Master UPS Agreement." (R.Exh. 3)

The make-whole relief shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970) enfd. 444 F.2d 502 (6th Cir. 1971) enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

Conclusions of Law

1. The Respondent, United Parcel Service, Inc., is and at all relevant times has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, International Brotherhood of Teamsters, Local Union No. 89, is and at all relevant times has been a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by informing employees that they would not receive a pay raise because of the pending representation petitions, which were occasioned by the Charging Party's demands for recognition, which resulted from employees designating the Union to represent them.

4. The Respondent violated Section 8(a)(1) and (3) of the Act by withholding from employees the pay raises which they would have received pursuant to the Respondent's 2023 "Air Region Career Architecture initiative."

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent did not engage in any unfair labor practices alleged in the consolidated complaint not specifically found herein.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended

ORDER[6]

The Respondent, United Parcel Service, Inc., its officers, agents, successors, and assigns,

[6] 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.

shall

1. Cease and desist from:

(a) Informing employees that they will not be receiving a wage increase which other employees will receive because of a pending representation petition.

(b) Denying employees a wage increase which other employees will receive because of a pending representation petition.

(c) In any like or related manner 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 whole, with interest, all employees who were denied a wage increase granted to other employees pursuant to the Respondent's 2023 Air Region Career Architecture initiative. The make-whole relief shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970) enfd. 444 F.2d 502 (6th Cir. 1971) enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records 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 facility in Louisville, at all places therein where notices customarily are posted, copies of the attached notice marked "Appendix B."[7] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. 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 the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at its

[7] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read, "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Worldport facility in Louisville, Kentucky, at any time since December 1, 2023.

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

Dated Washington, D.C. May 8, 2026

Keltner W. Locke
Administrative Law Judge

APPENDIX A

Bench Decision

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. The Respondent, United Parcel Service, Inc., violated the Act by failing to grant employees in two new bargaining units a planned wage increase after they sought Union representation.

Procedural History

This case began on May 10, 2024, when the Charging Party, Brandy Gary, filed her initial charge in this proceeding. She amended the charge on June 5, 2024, and again on May 25, 2025.

On July 31, 2025, after investigation of the charge, the Regional Director for Region 9 of the National Labor Relations Board issued a Complaint and Notice of Hearing, which I will call the "Complaint." In issuing this complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the "General Counsel" or as the "government."

On February 24, 2026, a hearing in this matter opened before me in Louisville, Kentucky. At that time, the Respondent produced records which the General Counsel had subpoenaed. However, the Respondent's counsel stated that the Respondent was still in the process of searching for records. To prevent delay, I stated I would allow the government to rest its case with the understanding that, should the Respondent produce additional subpoenaed documents before the date set for oral argument, I would allow the General Counsel to introduce those documents into the record and call the custodian of the documents as a witness if necessary to authenticate and explain the documents.

The parties finished presenting evidence on February 24, 2026, and I adjourned the hearing until March 30, 2026, to give counsel sufficient time to receive and review the transcript before presenting oral argument. Additionally, I told counsel that after they presented oral argument on March 30, 2026, I would recess the hearing for one day, when it would then resume by videoconference for delivery of the bench decision.

After the hearing adjourned on February 24, 2026, but before its scheduled resumption on March 30, 2026, the Respondent provided to the General Counsel additional subpoenaed documents. The General Counsel determined that it would be necessary to call the custodian of the records to give testimony explaining the subpoenaed records. During a telephone conference call, the parties agreed that when the hearing resumed on March 30, 2026, the General Counsel would call a witness to testify about the subpoenaed documents. The parties further agreed that the hearing then would recess until April 9, 2026, when it would resume for oral argument by videoconference, and that the bench decision would be delivered by videoconference on April 10, 2026.

When the hearing resumed on March 30, 2026, the General Counsel called a witness to testify concerning the subpoenaed documents and I received those documents into evidence. The hearing then recessed until April 9, 2026, when counsel presented oral argument. Today, April 10, 2026, the hearing resumed for delivery of this bench decision.

Amendment to Complaint Subparagraph 7(a)

After the hearing opened, the General Counsel moved to amend complaint subparagraph 7(a). The Respondent did not object and I granted the motion. As amended, complaint subparagraph 7(a) states as follows:

> Since about December 5, 2023, Respondent has failed and refused to grant its marshalling, tug and ramp dispatcher employees fueling quality control admins, fueling dispatch admins, fueling accounting admins, and fueling ground guides, a pay raise to which they were entitled pursuant to Respondent's 2023 Air Region Career Architecture initiative.

Respondent denies this allegation.

Admitted Allegations

Complaint subparagraphs 1(a), 1(b) and 1(c) pertain to the unfair labor practice charge which began this case, and to two subsequent amendments to that charge.

Complaint subparagraph 1(a) alleges that Charging Party Gary filed the original charge in this case on May 10, 2024 and that it was served on the Respondent, by United States mail, on May 14, 2024.

In its answer, the Respondent admitted that it received the original charge, along with a cover letter dated May 14, 2024. However, Respondent's answer further stated that UPS lacks sufficient information to confirm the individual/entity who filed the charge or when it was filed and, therefore, denies those allegations and the remaining allegations in Paragraph 1(a).

Based upon the Respondent's admission and the affidavit of service, I find that the original charge was served on or about May 14, 2024. The charge itself provides evidence concerning who filed it and when. Based upon that information, and the affidavit of service, I find that the General Counsel has proven the allegations in complaint subparagraph 1(b).

Complaint subparagraph 1(c) alleges that Charging Party Gary filed the second amended charge on May 28, 2024 and that a copy was served on the Respondent, by United States mail, on May 29, 2024. The Respondent's answer admits that it received a copy of the second amended charge together with a cover letter dated May 29, 2024 but stated it "lacks sufficient information to confirm the individual/entity who filed the charge or when it was filed." Based on the admissions in the Respondent's answer, information on the charge itself, and the affidavit of service, I find that the

General Counsel has proven the allegations raised in complaint subparagraph 1(z).[8]

The Respondent's answer admits the allegations raised in complaint subparagraphs 2(a), 2(b) and 2(c). Based on these admissions, I find that the General Counsel has proven the allegations raised in these subparagraphs. More specifically, I conclude that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and meets the Board's discretionary standards for the assertion of jurisdiction.

The Respondent's answer admits, and I find, that the International Brotherhood of Teamsters, Local Union No. 89, is a labor organization within the meaning of Section 2(5) of the Act, as alleged in complaint paragraph 3. For brevity, I will refer to this labor organization simply as the Union.

The Respondent's answer admits the allegations raised in complaint paragraph 4. Based on those admissions, I find that the fueling/quality control/payroll manager, Dave Barbiea, is a supervisor of the Respondent within the meaning of Section 2(11) OF the Act and its agent within the meaning of Section 2(13) of the Act. The Respondent's answer similarly admits that UPS Airlines President Bill Moore is the Respondent's supervisor and agent within the meaning of Sections 2(11) and 2(13) of the Act, respectively, and I so find.

During the hearing, the parties stipulated that two other individuals - Tony Georges and Tara Carter - were supervisors within the meaning of Section 2(11) of the Act. I so find.

The complaint includes, as an attachment labeled Exhibit "A," a script for a brief speech. Complaint paragraph 6, as amended at hearing, alleged that at various times on December 5, 2023, the Respondent, "by supervisors and agents whose names are presently unknown to Counsel for the Acting General Counsel, at Respondent's facility, by reading a script attached hereto as Exhibit A, impliedly threatened to withhold a pay raise from its employees because employees were seeking union representation."[9]

The Respondent's answer to complaint paragraph 6 admitted "that the script attached to the Complaint as Exhibit A was read to certain employees" but denied "the allegation that reading the script constituted a threat to withhold a pay raise because employees were seeking union

[8] Respondent's answer denied the allegations in complaint subparagraph 1(b), stating that it had "no record of receiving a copy of the first amended Charge with a cover letter dated June 14, 2024 and, therefore, denies service of the first amended charge." Based upon the charge itself and the affidavit of service, and noting the presumption of administrative regularity, I find that the General Counsel has proven the allegations in complaint subparagraph 1(b).

[9] As noted above, the original complaint had alleged that the Respondent's supervisors and agents had read the script at various times "from about November 27, 2023 to November 30, 2023." During the hearing, the General Counsel moved to amend the complaint by replacing "November 27, 2023 to November 30, 2023" with "December 5, 2023." I granted the motion.

representation."

Based on the Respondent's admission, I find that certain of the Respondent's supervisors or agents read to employees the speech attached to the complaint as Exhibit A.

The Respondent denied other allegations in the complaint.

Facts

The Respondent, United Parcel Service, operates a large hub in Louisville, Kentucky. The name of this facility, Worldport, suggests the size of the facility. Although the record does not reflect the exact size of the workforce there, it clearly numbers in the thousands. (Tr. 102-103)

Most of the employees are unionized but, until late 2023, two groups were not. One group consisted of "ramp, tug and marshalling dispatchers." By letter dated November 17, 2023, the Union notified the Respondent that it represented "a majority of all the full and part tune ramp, tug, and marshalling dispatchers employed by UPS Worldport." The letter further stated "we respectfully demand that UPS immediately recognize Teamsters Local Union No. 89" as the exclusive bargaining representative. (Jt. Exh. 2)

Five days later, the Union sent the Respondent a letter "respectfully" demanding recognition as the exclusive bargaining representative of another group of employees. This group consisted of "full and part time Fueling Quality Control admins, Fueling Dispatch admins, Fueling accounting admins, and Fueling ground guides."(Jt. Exh. 4) Both letters indicated that the Union had authorization cards signed by a majority of the employees in the respective bargaining units.

The Respondent, meanwhile, had been doing an analysis of the wage rates paid to certain of its workers who were unrepresented. The record does not state exactly when the Respondent began this analysis but there is no suggestion that the Respondent undertook this wage analysis in response to the Union's organizing efforts.

To the contrary, it appears that the analysis was part of a companywide effort to reevaluate the job duties and pay rates of some of its unrepresented employees. The Respondent called this project the "Career Architecture initiative."

On November 22, 2023, coincidentally the same date the Union sent its second letter demanding recognition, management informed employees that it had finished the job analysis. The employees received this news in an email from Bill Moore, the president of UPS Airlines. That email, titled "Air Region position analysis results announced beginning Dec. 1," stated:

> We heard you when you asked us to look at pay for specialist and administrative jobs across the Air Region. We looked at every specialist and administrative position in the region, and compared current pay rates to market rates.

> The Air Region job analysis is part of a bigger initiative across UPS, called Career Architecture, to revamp career paths and pay structures for all non-union jobs with a long list of benefits and opportunities that come with being part of the UPS family.
>
> The job analysis is complete, and we will let you know the results beginning Dec. 1, with individual conversations in the weeks to follow.
>
> The study went deeper than just pay, however. We looked in-depth at the work that is being done to determine how it can be done most efficiently. For some positions, there may be changes in job responsibilities. We also looked at job locations and may determine that certain roles should be relocated for efficiency.
>
> Our goal is to offer the best jobs in our industry - this means paying every UPSer fairly while operating efficiently and building our Network of the future so we can better serve our customers.
>
> Thank you for your dedication to outstanding service. We look forward to sharing the results of the study on Dec. 1.
>
> (GC Exh. 6)

Although Moore's memo contemplated that the discussions would begin December 1, 2023, they actually began on December 4 or 5, 2023. However, on December 1, Moore did transmit to the managers a sheet of "talking points." (G.C. Exh. 5)

Also on December 1, 2023, the Respondent filed with the Board a petition asking for a secret ballot election to determine whether a majority of employees in the unit of ramp, tug and marshalling dispatchers sought representation by the Union. The Board docketed this petition as Case 09-RM-331109. (Jt. Exh. 3)

On December 5, 2023, management emailed to employees a memo from Moore which stated that "Career Architecture job reviews have been completed on nearly all non-union positions in the U.S. Part-time supervisors can expect to hear more about these changes in 2024. . ." (Jt. Exh. 6)

Clearly, the Career Architecture initiative would result in a wage increase. Human Resources Vice President John Veentjer testified that under the Career Architecture initiative, any employee making less than 21 dollars per hour was "brought to 21 and then given a 3 percent increase. Anyone above 21 was given a 3 percent increase." (Tr. 32)

However, the 49 employees in the two new bargaining units would not be receiving raises. On the evening of December 5, 2023 or the next day (Tr. 33-34), managers read the following script to the fuel quality control, fuel dispatch, and fuel accounting admins (nonsupervisory administrative

employees) and to employees classified as ground guides:

> As you know, Teamsters Local 89 has sent UPS management a letter demanding that UPS recognize Teamsters Local 89 as the collective bargaining representative of "all the full time and part time Fueling Quality Control admins, Fueling Dispatch admins, Fueling accounting admins, and Fueling ground guides employed by UPS Worldport.
>
> Current law requires UPS to file a petition with the NLRB to ensure employees have the opportunity to vote in a secret ballot election.
>
> Under the law, "Laboratory conditions" means, UPS is not allowed to change or promise to change any wages, benefits or working conditions for the employees that will be listed or covered in the petition. If we were to make a change to an employee's wages or benefits before the secret ballot election the NLRB may interpret that as a violation of the law.
>
> We will continue to communicate, provide you with important facts, and keep you updated throughout this process.
>
> (G.C. Exh. 4)

Veentjer's testimony indicated that managers read this notice to employees on the night of December 5, 2023 or the next day, and it would seem plausible that managers read the script to employees on both days, to different shifts of workers. However, the Respondent did not file a petition seeking an election among the fueling quality control admins, fueling dispatch admins and fueling ground guides until December 6, 2023. The Board docketed this petition as Case 09-RM-331394. (Jt. Exh. 5)

However, the Board never conducted an election in either bargaining unit. Instead, the Respondent agreed to allow an arbitrator to check the authorization cards signed by employees and determine whether a majority had designated the Union to represent them.

Arbitrator Ira Jaffe did so and informed the parties, by March 27, 2004 letter, "that the Union has provided reliable evidence that a majority of the designated employees in Dispatch in the UPS Worldport facility desire representation by the Union. (R. Exh. 4)

The Respondent then recognized and bargained with the Union and the parties reached an agreement, which the Respondent's representative signed on April 4, 2024. (R. Exh. 3) The agreement now sets the wage rates of the bargaining unit employees.

Complaint paragraph 5 alleges that about December 1, 2023, Respondent, by Fueling/Quality Control/Payroll Manager Dave Barbiea, in the fueling department at Respondent's facility, threatened employees that they would not receive a pay raise because employees were seeking union representation.

Although Charging Party Gary did not pinpoint the date, she described an occasion when another employee, Channing Clemons, asked Manager Barbiea if they would receive the raise and Barbiea replied that they would not:

> Q. Okay. And he said you were not going to receive the raise. Did he say why?
> A. He said basically because it would be considered a bribe.
>
> Q. Did he say a bribe for what?
> A. To try to keep out of the Union.
>
> Q. And who all was present for that conversation?
> A. Myself, Dave, Misty Marks, Channing Clemons, Tracey Rogers, Michelle Greenwell.
>
> Q. And where was this conversation happening?
> A. It was in our general office area of cubicles.
>
> (Tr. 50)

Fueling dispatcher Joshua Channing Clemons generally corroborated Gary's testimony about the "bribe" comment. (Tr. 88-89) Although he did not recall the exact phrase "Career Architecture initiative," he stated that management had performed an analysis of wage rates which would result in employees receiving raises.

Misty Marks also testified that Barbiea said "it would be considered a bribe to give you the raise." (Tr. 62) Barbiea did not testify. According to Gary, he had retired in early 2026, some time before the hearing.

None of the witnesses pinpointed the date when Barbiea allegedly made the "bribe" remark and Gary testified that he made it more than once. However, even though the testimony is somewhat vague, all of the witnesses generally corroborate each other and there is no contradictory testimony. Therefore, crediting Gary, I find that Barbiea did made the bribe statement.

Analysis

The main issue in this case concerns whether the Respondent, after planning to give unrepresented employees a raise, and announcing that intention, did not grant the wage increase to the 49 employees in the two bargaining units.

In general, what the Respondent should do when it learns of a union organizing campaign can be summarized with a nautical expression: "Steady as she goes." The Respondent should continue

proceeding just as it would have in the absence of a union organizing campaign.

Should it deviate to starboard by granting a wage increase in response to the union's efforts, it likely commits an unfair labor practice. Similarly, if an employer deviates to portside by reducing wages, it likely is engaging in unlawful discrimination.

In the present case, the Respondent's course was clear. As part of a companywide initiative, it planned to give raises to its nonunion workers. Although it did not announce the specific amount of the wage increase, it clearly informed employees that a pay raise was coming.

Then, abruptly, when it learned about the union organizing campaign, it denied raises to the 49 employees in the two new bargaining units. That clearly marks a sudden change of course in direct response to the union campaign.

Ordinarily, it would be appropriate to use the framework established by the Board in analyzing whether an employer's action against employees violates Section 8(a)(3) of the Act is governed by *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under the *Wright Line* test, the General Counsel has the initial burden of establishing that employees' union activity was a motivating factor in the Respondent's taking action against them. The General Counsel meets that burden by proving union activity on the part of employees, employer knowledge of that activity, and antiunion animus on the part of the employer. See *Willamette Industries*, 341 NLRB 560, 562 (2004) (citations omitted). However, to meet the General Counsel's initial burden, the evidence of animus also must support finding that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee. *TschiggfrieProperties, Ltd.*, 368 NLRB No. 120 (2019).

If the General Counsel makes this initial showing, the burden then shifts to the Respondent to prove as an affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. Id. at 563; *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). See *El Paso Electric Co.*, 350 NLRB 151 (2007).

In the present case, there is very little, if any, evidence of animus. The Respondent's willingness to forego an election and have an arbitrator check authorization cards, and the alacrity with which the Respondent reached an agreement with the Union after learning of its majority status, militate against a finding of animus.

Were I to analyze this case using the *Wright line* framework, I would conclude that the General Counsel did not carry the government's initial burden of proof because a preponderance of the evidence does not establish animus.

However, it is not necessary to use the *Wright Line* framework. In *Arc Bridges, Inc.*, 355 NLRB 1222 (2010), the Board found that conduct similar to the alleged violations here was inherently destructive of employee rights and violated Section 8(a)(1) and (3) even in the absence of evidence

of animus. That case, I believe, is controlling here.

It is true that under some circumstances, an employer lawfully may put an upcoming wage increase "on hold." *Ansul, Inc.*, 329 NLRB 935 (1999) involves a situation similar to the present case. There is a crucial difference however.

When the respondent in that case announced that "in order to avoid even the appearance" of an effort to undermine the union, it had "decided to postpone an announcement of the results of our classification review until the election results have been finalized," it added a further statement. It said "At that time the Company will then announce the results of its review and will do so regardless of the outcome of the election."

The Board held that this explanation was sufficient and found that this respondent had not violated the Act. However, the present Respondent did not give such assurance. Accordingly, I conclude that by failing to grant the wage increases to the 49 employees in the two bargaining units, it violated the Act.

Whether the Respondent also violated Section 8(a)(1) by the statements alleged in the complaint is a more difficult question. I wish to do further research on the matter and will address it in the certification of bench decision which will follow.

The Respondent has made some arguments challenging the constitutionality of the Board. Those acts involve policy issues which must be decided by the Board. It appears that Respondent raised these arguments to preserve them for appeal and they are preserved.

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, Remedy, Order and Notice. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

Thank you for the civility displayed by all parties and counsel. The hearing is closed.

APPENDIX B

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by 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 interfere with, restrain or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT inform employees that we are denying them a pay increase, given to other employees, because employees sought union representation or engaged in other protected concerted activities.

WE WILL NOT deny employees a pay raise because they selected a labor organization to represent them or because they are entitled to vote, in a Board-conducted election, on whether or not to designate a union as their exclusive bargaining representative.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole, with interest, all employees who did not receive pay raises pursuant to our 2023 Career Architecture initiative because they were eligible to vote in Board-conducted elections to determine whether they wished to be represented by the International Brotherhood of Teamsters, Local Union No. 89.

United Parcel Service
(Respondent)

Dated _____ By _____
(Representative) (Title)

JD-31-26

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

John Weld Peck Federal Building, 550 Main Street, Room 3-111, Cincinnati, OH 45202-3271
(513) 684-3686, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/09-CA-342136or 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.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (513) 684-3733.