

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

**THE OHIO EDISON COMPANY, A WHOLLY
OWNED SUBSIDIARY OF FIRSTENERGY CORP.**

and

CASE 08-CA-099595

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL UNION NO. 1194,
AFL-CIO, CLC**

FIRSTENERGY GENERATION CORP.

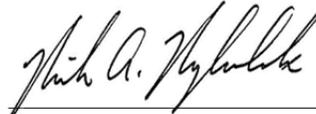
and

CASE 06-CA-092312

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL UNION NO. 272,
AFL-CIO, CLC**

**FIRSTENERGY'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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CASE 06-CA-092312

**INTERNATIONAL BROTHERHOOD OF
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AFL-CIO, CLC**

**FIRSTENERGY’S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

I. STATEMENT OF THE CASE

A. The Parties

The Respondent is FirstEnergy Generation Corp. (“FirstEnergy”), is an entity engaged in the generation and distribution of electricity. (ALJD¹ 2:22-24). FirstEnergy was formed in 1997 as the result of a merger between The Cleveland Electric Illuminating Company, which owned Toledo Edison, and Ohio Edison, which owned Pennsylvania Power. (Trial Transcript (“Trial Tr.”) 152:24-153:1; ALJD 2:44-46). Presently, FirstEnergy employs approximately 16,000 individuals, many of whom are represented by one of the twenty-three unions with which

¹ References to the ALJ’s Decision and Order appear as (ALJD __:__). The first number refers to the corresponding page(s) and the latter to the corresponding line(s) of text.

it has a collective bargaining agreement. (Joint Exhibit (“Jt. Ex.”) 1 at ¶ 15, 35; Trial Tr. 175:9-10; ALJD 2:46-47).

The Charging Parties are the International Brotherhood of Electrical Workers, Local Union No. 1194 and the International Brotherhood of Electrical Workers, Local Union No. 272 (“Local 272”).

Members of Local 272 are employed at the D. Bruce Mansfield Plant in Shippingport, Pennsylvania (Trial Tr. 153:7-11; ALJD 3:4-5), which was owned by Pennsylvania Power (Trial Tr. 153:9-10) and is now owned by FirstEnergy. (Jt. Ex. 1 at ¶ 11). Since 1978, Local 272 has been the exclusive collective bargaining representative of the FirstEnergy Unit. (Jt. Ex. 1 at ¶ 7; ALJD 3:7-8). Local 272 and FirstEnergy entered into a collective bargaining agreement effective from December 5, 2009 to February 15, 2013. (Jt. Ex. 1 ¶ 5; Jt. Ex. 4). The effective date of said agreement was extended through February 15, 2014 by a “stipulation of settlement” executed on or about August 16, 2012. (*Id.*; Jt. Ex. 5; ALJD 3:1-6).

B. Origins of the Employee Service Recognition Policy.

The tradition of voluntarily giving recognition gifts began with FirstEnergy’s predecessors, Ohio Edison and Pennsylvania Power. (Jt. Ex. 1 at ¶ 13; Trial Tr. 153:4-6; ALJD 3:20-22). The predecessors were not compelled to do so by virtue of any collective bargaining agreement (Jt. Ex. 1 at ¶ 13); it was, rather, a voluntary decision on the part of the Companies to recognize employees on certain anniversaries by presenting them with a tangible “thank you” gift. (Trial Tr. 154:2-4). To this end, full-time employees (Trial Tr. 182:17) were presented with a tie tack or a charm bracelet upon their first year anniversary with the Company (Jt. Ex. 6; Trial Tr. 39:21-22, 43:8-9; ALJD 3:23-25). Employees received more elaborate tie tacks and charms (Trial Tr. 154:13-20) on each five-year anniversary thereafter. (Jt. Ex. 1 at ¶ 17; Jt. Ex. 6; Trial Tr. 182:19-21; ALJD 3:25-27). Both Companies also held an annual recognition dinner for

“eligible employees”² as a way to celebrate anniversaries with the Company. (Trial Tr. 155:13-15, 182:23-25; ALJD 3:27-28). The above-described Employee Service Award Policy applied to members of Local 272. (Jt. Ex. 1 at ¶ 17).

In 1989, Ohio Edison and Pennsylvania Power (Trial Tr. 156:9-10, 157:1-6) changed their Employee Service Award Policy to include a gift catalog, from which full-time employees were invited to select a gift at five-year intervals. (Trial Tr. 43:3-5, 95:2-7, 96:1-2, 155:4-8; Jt. Ex. 6; ALJD 3:30-32). There were different levels of catalogs to celebrate different milestones, and the token gifts in the catalogs increased slightly in value based on the number of years an eligible employee had been with her or his respective company. (Trial Tr. 164:4-5; Jt. Ex. 25; ALJD 3:32-34).

Under the 1989 policy, gifts featured in a given catalog constantly changed (Trial Tr. 162:19-25 and 178:6-25) and the selection was very limited. (Trial Tr. 161:24-162:1). When an employee made a selection, the gift was shipped to the local Personnel Office and retrieved by her or his supervisor, who presented it as a token of appreciation and a thank you to the employee. (Jt. Ex. 6). Employees continued to receive a tie tack at their first year anniversary with the company and could still select a tie tack as their gift on subsequent anniversaries in lieu of a gift from the catalog. (Trial Tr. 155:9-11, 169:14-18). The employee recognition dinners also continued to be held. (Tr. at 82:23-25; Jt. Ex. 6).

C. Evolution of the Employee Service Recognition Policy.

Since its inception in 1997, FirstEnergy has voluntarily continued providing employees with gifts as a thank you and a token of appreciation. FirstEnergy’s Employee Service Recognition (“ESR”) policy is not included in its Compensation and Benefits Handbook (Jt. Ex.

² Michael Petras, a thirty-six year FirstEnergy employee, testified that employees with twenty-five years of service were invited to a recognition dinner held by the Company. (Trial Tr. 150:2-6, 154:22-155:3).

17), which contains all fringe benefits provided to all FirstEnergy employees. (Jt. Ex. 1 at ¶ 30; Trial Tr. 62:3-23, 101:20-102:5, 196:4-9; ALJD 4:1-3). It only exists in a series of documents entitled Human Resource Policy Letter 307.³ (Trial Tr. 197:23-198:5; ALJD 4:5-6). The current ESR policy applies to all of FirstEnergy's 16,000 plus employees (Jt. Ex. 1 at ¶ 35; Trial Tr. 175:9-12; ALJD 3:37-39), whether they are part-time or full-time (Trial Tr. 182:18), union or non-union, hourly or managers (Trial Tr. 175:1-6).

The ESR policy has not historically been negotiated or otherwise integrated into any collective bargaining agreements. The only exception is the collective bargaining agreement between FirstEnergy Nuclear Operating Co. and the International Brotherhood of Electrical Workers Local No. 29 ("Local 29").⁴ (Jt. Ex. 1 at ¶ 38; Jt. Ex. 22; ALJD 3:39-40). Local 29 decided to bargain with FirstEnergy to have its employees recognized every five years under the ESR Policy. (Jt. Ex. 22; Trial Tr. 176:18-22; 192:18-20). Their agreement to this end is memorialized in a collective bargaining agreement (Jt. Ex. 23), the effective dates of which were extended through September 30, 2014 by a "Stipulation of Contract Extension" (Jt. Ex. 22) executed on or about August 3, 2010. (Jt. Ex. 1 at ¶ 38; ALJD 3:40-43).

By contrast, the Administrative Law Judge Mark Carissimi (the "ALJ") explicitly noted, "[t]he most recent contract[] and extension[] between [FirstEnergy] and Local 272 . . . do[es] not contain a reference to the employee service recognition policy, nor did any of [their] preceding contacts In fact, the parties to this case have never negotiated regarding the employee service recognition policy." (ALJD 3:44-4:1).

³ Human Resources Letters constitute the formal corporate policies of all the FirstEnergy Generation Corp. subsidiaries. (Jt. Ex. 1 at ¶ 18; ALJD 4:6-7). It is undisputed that Human Resources Letter 307 currently applies to the members of Local 272 and always has. (Jt. Ex. 1 at ¶ 19; ALJD 4:7-8).

⁴ Except for the five year intervals which were negotiated by Local 129 members, the ESR program terms, catalogs, applicability, etc... are the same with all other FirstEnergy employees.

The ESR policy, at least since 1989, has always contained a reservation of rights, stating that the implementation and continuation of the policy is at the discretion of management. Each amendment of the ESR policy always contained the following disclaimer language: “This personnel policy is not a binding contract, but a set of guidelines for implementation. The Company explicitly reserves the right to modify any of the provisions of this policy at any time and without notice.” (Jt. Ex. 6; ALJD 4:17-19. *See* Jt. Ex. 7, 8, 9, 10, 11, 16). Accordingly, FirstEnergy has made a variety of changes to both to the ESR policy’s administration and, more importantly here, the criteria upon which eligibility is determined. No labor union, including Local 272, has ever objected to this reservation language, made a request to bargain when any change was made to the ESR policy (as discussed below), or filed an unfair labor practice over any change made to the ESR policy until now. (Trial Tr. 159:6-17, 159:22-160:5).

On January 1, 1999, FirstEnergy issued a revised Human Resources Letter 307 that replaced the original version of the ESR policy adopted from its predecessors and dated May 1, 1998. (Jt. Ex. 7; Jt. Ex. 1 at ¶ 18). The 1999 ESR policy broadened the eligibility criteria to include part-time as well as full-time employees. (Trial Tr. 183:17-19; ALJD 4:8-10). It also stated that employees would be recognized for their service at five-year intervals, thereby eliminating the tie tack and charm bracelets that would formerly have been given on an employee’s first-year anniversary. (Trial Tr. 183:20-23; ALJD 4:10-11). Eligible employees were still, however, invited to select a gift from a gift catalog. (Jt. Ex. 7). Once selected, an employee’s gift was shipped to the human resources group. (*Id.*) Local management had discretion over the “manner, time and presentation of an award,” and was encouraged to do so over coffee or lunch in an effort to create a “positive and rewarding experience.” (*Id.*; Trial Tr. 183:24-184:1, 185:16-18, 188:12-21). Finally, if an employee failed to make a selection, a gift

would automatically be chosen for them. (Jt. Ex. 7).

On February 1, 2002, a revised Human Resources Letter 307 replaced the 1999 version. (Jt. Ex. 8; Jt. Ex. 1 at ¶ 20; ALJD 4:21-22). The 2002 ESR policy provided employees, for the first time, with the option of ordering their gift from the Pat Geary and Associates website on the internet. (Jt. Ex. 1 at ¶ 20; Trial Tr.54:5-9, 184:13-18; ALJD 4:22-24).

On January 1, 2004, a revised Human Resources Letter 307 replaced the 2002 version. (Jt. Ex. 9; Jt. Ex. 1 at ¶ 21; ALJD 4:31-32). In 2004, FirstEnergy changed vendors for the gift catalog from Pat Geary and Associates to C.A. Short. (Jt. Ex. 1 at ¶¶ 22, 31; Trial Tr. 177:23-25, 187:22-24; ALJD 4:28-29). Accordingly, employees were directed to a new website to select their gift. (Trial Tr. 187:5-8). FirstEnergy also began presenting employees with a “service award package,” which included a certificate of appreciation and letter from Tony Alexander (“Alexander”), FirstEnergy Corp.’s CEO. (*see* Jt. Ex.’s. 18, 19). The service award package was presented to employees on their anniversary in lieu of the gift itself. (Jt. Ex. 1 at ¶¶ 21, 33; Trial Tr. 169:19-22, 170:1-10, 188:4-6; ALJD 4:34-36). Selected gifts were delivered directly to the employee’s home. (Jt. Ex. 9; Trial Tr. 187:15-18, 188:24-189:17; ALJD 4:33-34).

The 2004 Human Resources Letter 307 also changed the way FirstEnergy treated employees who failed to select a gift. If an employee failed to select a gift, a gift would not be given; employees had one year from their eligibility date to select a gift. (*Compare* Jt. Ex. 8 *with* Jt. Ex. 9; Trial Tr. 189:21-190:21 ALJD 4:36-37). Finally, employees were restricted to selecting gifts from the catalog that corresponded with the anniversary they were celebrating, whereas previously, employees were permitted to select from a lower level catalog level. (*Compare* Jt. Ex. 8 *with* Jt. Ex. 9. ALJD 4:29-30; *see* Trial Tr. 190:16-19).

On January 1, 2009, a revised Human Resources Letter 307 replaced the 2004 version.

(Jt. Ex. 10; Jt. Ex. 1 at ¶ 23; ALJD 4:40-41). In 2009, FirstEnergy changed its method for determining when employees returning from a break in service were eligible for a gift; the anniversary of employees rehired after January 1, 2005 would be calculated from their date of rehire. (Trial Tr. 191:4-192:4; ALJD 4:41-43). The anniversary of employees rehired prior to January 1, 2005, would continue to be calculated in accordance with the pension plan's break-in-service rules. (Trial Tr. 191:4-192:4; ALJD 4:43-45).

On February 28, 2011, a new Human Resources Letter 307 was issued to replace the 2009 version. (Jt. Ex. 11; Jt. Ex. 1 at ¶ 24; ALJD 4:45-46). The only change noted in the 2011 version was in the web address at which employees can access the gift catalog and make their selection. (Jt. Ex. 1 at ¶ 24; Trial Tr. 192:5-11).

On September 18, 2012, FirstEnergy announced several proposed cost-saving policy changes in light of the poor economic climate in the utility market. (Trial Tr. 129:23-130:2; 199:19-23; Jt. Ex. 12; ALJD 5:21-24). One proposed change affected the ESR policy; beginning on January 1, 2013, FirstEnergy proposed to recognize employees every ten years rather than every five years and offer them a gift from the gift catalog. (Trial Tr. 129:23-130:2; ALJD 5:35-38).

The change to FirstEnergy's ESR policy was only one of several changes it contemplated in the interest of its economic viability. (*See* Jt. Ex. 12). The economy was sluggish, and the Company needed to adjust accordingly. (*Id.*). As Stacey Silvis, who is the Manager of Employee Benefits for FirstEnergy Service Company, testified: "we were asked to, you know, just based on the economy and kind of where things are at from the Company's perspective to look at some of the different programs and the service recognition program was one." (Trial Tr. 199:19-23; *see also* Jt. Ex. 12). The decision to recognize employees every ten years rather than

every five years and offer them a gift was ultimately made by Alexander, FirstEnergy's CEO. (Trial Tr. 200:3-15). He explained the necessity of this change, and other changes, in the FirstEnergy Employee Update Special Issue released on September 19, 2012:

[O]ur company's common stock [recently] lost 6.45 percent in value – a drop of more than \$1.3 billion in market value.

It's not too late to turn around our performance if we take strong and aggressive steps. We have taken a number of actions already this year, but clearly more needs to be done to reposition our company to address our challenges in a sustainable way.

In this issue of *Employee Update*, we are announcing that we will reorganize certain parts of our company and take other steps to align our resources to best handle the work we have ahead of us. Unfortunately this will involve staffing reductions as well as some additional changes to employee benefits.

I know this is difficult news for everyone, but I believe we must face our challenges head-on, as we have done so many times, if we are to succeed this year and beyond. I have confidence in our team's ability to address the issues we face and to achieve our goals.

/s/ Tony Alexander

(See Jt. Ex. 12, 13). FirstEnergy estimated that the change to the ESR policy alone would result in a savings of \$200,000 per year, company-wide. (Trial Tr. 200:6-11).

D. The Service Award Packet and Gift Catalog.

There are different catalogs levels that correspond with different recognized milestones for employees. (See Jt. Ex. 18, 19, 25). The monetary value of the gift in each catalog and when the gift would be presented (every five years or every ten) was exclusively decided by FirstEnergy and its predecessors. (Trial Tr. 177:1-7). Originally, FirstEnergy determined that it would recognize employees every five years up to fifty years. (Jt. Ex's. 7-11 and 25). FirstEnergy had ten different levels of gift catalogs, one corresponding to each five year interval. (Trial Tr. 176:15-17). After January 1, 2013, and with the exception of IBEW Local 29, FirstEnergy now recognizes employees every ten years up to fifty years. (Trial Tr. 170:18-20).

Therefore, FirstEnergy has five different levels of catalogs, one for each ten year interval. (Trial Tr. 176:18-22). A sample five-year and ten-year year service award packet was entered into evidence as Joint Exhibits 17 and 18 respectively. (Jt. Ex. 1 at ¶ 33; Trial Tr. 22:18-23:20; ALJD 5:7-8).

Each gift catalog, no matter what level, contains between ninety and one hundred gifts, (Trial Tr. 178:1-3), broken down into various categories, such as jewelry, traditional, gourmet, electronics, outdoor, watches, home and leisure and tools. (Trial Tr. 173:4-13; ALJD 5:8-10; *see also* Jt. Ex. 20). There are nine or ten gifts for each category in every catalog.⁵ (Trial Tr. 178:1-5; ALJD 5:10-11). The gifts available in higher level catalogs slightly increase in value from those which were offered in the prior catalog level. (Jt. Ex. 1 at ¶ 34; ALJD 5:1-3; *see* Jt. Ex. 25).

It is undisputed that the gifts contained in the catalogs are constantly changing. (Trial Tr. 178:15-20; ALJD 5:12-14). Out of stock inventory is replaced with new items, and new models replace older models. (Trial Tr. 178:17-20; ALJD 5:12-14). At least once a year, C.A. Short completely revamps its gift catalogs and changes all of the gifts contained therein. (Trial Tr. 178:15-16). Because the catalogs are generated on demand, two employees can have an anniversary one month apart at the same gift level, but receive gift catalogs containing completely different items. (Trial Tr. 178:10-14). No two catalogs generated at any specific time, even weeks apart, are ever alike. (Trial Tr. 178:21-179:1).

All gifts contained in all catalogs are strictly tangible items such as clocks, watches,

⁵ The numbers in the bottom right corner of the catalog pages correspond to the anniversary price level of the catalog. The letter indicates what particular category the gifts listed on the page fall into. (Trial Tr. 172:25-173:19). For example, a page with the number two or four would contain those gifts available to employees celebrating their fifth or tenth service anniversaries respectively. (Trial Tr. 173:1-2, 173:19-21). With regard to the letters, a page labeled (b) will contain watches; (c) will have jewelry; and (e) will have electronics, etc.... (Trial Tr. 173: 8-13).

globes, etc... (See Jt. Ex. 19, 21; ALJD 5:14-15). An employee cannot elect to receive cash, gift cards, traveler's checks, bonuses, or anything else of a monetary nature under the ESR policy.⁶ (Trial Tr. 179:12-25; ALJD 5:15-16). The ESR gifts are not taxable as wages or income, nor is the value of the gift selected reported on an employees' W-2. (Trial Tr. 78:6-8, 180:2-13). The items contained in the catalog are described and represented to employees as nothing more than "gifts." The letter contained in the service award packet from Alexander, FirstEnergy's CEO, explains:

In recognition of your service anniversary and as an expression of our gratitude for your hard work and dedication, please select one of the *gifts* shown in the enclosed brochure. I hope it will remind you of our appreciation for the contributions you've made— and will continue to make —to the success of FirstEnergy.

(Emphasis added) (Trial Tr. 22:21-23:14; Jt. Ex. 17, 18). Michael Petras ("Petras"), a former union member who has been employed by FirstEnergy and its predecessors since 1972, described the ESR gifts he has received over the years as nothing more than "token[s] . . . just a gift from the company," and *not* compensation. (Trial Tr. 163:1-7).

E. Announcement of Proposed Policy Changes.

On September 18, 2012, FirstEnergy contacted various union representatives to inform them of FirstEnergy's proposed changes to the 401(k), Retiree Life, Educational Reimbursement and ESR policy. That day, Eileen McNamara ("McNamara"), FirstEnergy Solution's Director of Labor Relations, (Trial Tr. 122:2-3; Jt. Ex. 1 at ¶ 9), telephoned Herman Marshman ("Marshman"), the President of Local 272. (Trial Tr. 31:16-17). Reading a prepared script from her office, McNamara related the proposed changes to Marshman. (Trial Tr. 47:11-19, 49:3-7, 129:23-130:2). The purpose of the script was "to be sure that we were all being consistent in

⁶ Local 272 members do, however, participate in the Short Term Incentive Plan ("STIP"), which, by contrast to the ESR policy, *does* provide for cash bonuses. (Trial Tr. 82:4-12).

what we were saying,” and, that “all the unions received the correct information according to their collective bargaining agreement and that we kept a record of what we were saying.” (Trial Tr. 127:8-12). Thus, McNamara stressed the fact that she did not deviate from the content of the script. (Trial Tr. 22-25). Marshman recalled McNamara calling “to . . . [go] over the various changes that the Company was proposing to announce the following day.”⁷ (Trial Tr. 48:14-17, 21-23).

Marshman is a Power Plant Operator (Trial Tr. 33:11) at FirstEnergy’s D. Bruce Mansfield plant. (Trial Tr. 32:12-16, 34:2-3). Marshman has been President of Local 272 since July of 2005, (Trial Tr. 36:2-4), and his duties include negotiating collective bargaining agreements with FirstEnergy. (Trial Tr. 36:9-10). As such, Marshman regularly receives communications from FirstEnergy regarding changes in the workplace, general policies and grievances. (Trial Tr. 36:20-37:1).

McNamara works under and reports to Chuck Cookson (“Cookson”). (Trial Tr. 135:14-16). At Cookson’s express request, and immediately after her phone calls with union representatives on September 18, 2012, including her phone call with Marshman, McNamara sent Cookson an email detailing the responses of each union representative she had contacted regarding the proposed policy changes. (Trial Tr. 135:11-18). Cookson “[w]anted input on the proposed changes[,] ...to understand [the union representatives’] reactions [and to know] what they said.” (Trial Tr. 135:19-25). The text of McNamara’s September 19, 2012 email to Cookson, Respondent’s Exhibit 4, states as follows:

Chuck – heard back from Herman [Marshman] and Local 50. Local 50 is fine. Herman is not happy (although very polite and made nice jokes). He said ‘oh no you don’t! again? Now you know I have to file a board charge honey’ and now he ‘has to come to Akron for this one’. He was very nice about it though. He was

⁷ Throughout his testimony Marshman repeatedly referred to the changes to the ESR policy as “proposed” by FirstEnergy—thus, even by Marshman’s account these proposed changes were not announced as *fait accompli*.

actually quite funny – but I am sure he is serious about the charge and coming to Akron. I told him to stop by my office if he makes it to Akron – he says, ‘oh yes, he is coming to Akron for sure.’ [sic].⁸

FirstEnergy followed up on McNamara’s phone call with Marshman and sent two letters detailing the proposed changes in writing, including proposed changes to the ERP policy. On September 19, 2012, FirstEnergy distributed a copy of its proposed changes to its employees in a FirstEnergy Update Special Issue. (Jt. Ex. 12). An electronic copy of the Newsletter was emailed to i.local272@att.net (Jt. Ex. 13), Marshman’s Union email address. (Trial Tr. 84:5-12, Jt. Ex. 1 at ¶ 26). The section summarizing benefit and other changes concludes: “Any changes affecting bargaining unit employees will be handled in accordance with the individual collective bargaining agreements. Information on those changes will be provided to those work groups.” (Jt. Ex. 1 at ¶ 25, Jt. Ex. 12).

The second written notice to Local 272 was a letter from McNamara dated September 27, 2013, confirming her conversation with Marshman that (in pertinent part) “Employee Service Awards – Will be given for each ten years of service rather than each five years.” (Jt. Ex. 1 at ¶ 28, Jt. Ex. 15). Nothing in this communication, or any other communication, whether verbal or written, stated that FirstEnergy was unwilling to engage in bargaining regarding any of the September 2013 proposed changes, including the ESR policy. In fact, the September 27, 2013 letter to Marshman ended by stating: “If you have any questions or concerns regarding the foregoing, please do not hesitate to contact me.” (*See* Jt. Ex. 14).

Since McNamara’s September 18, 2012 conversation with Marshman, neither he, nor any other representative of Local 272, contacted FirstEnergy with regard to the ESR policy or

⁸ A trial, McNamara denied Marshman’s claim that he told her the proposed policy changes were “subject to negotiations” during their September 18, 2012 phone conversation. (Trial Tr. 49:13-19) The ALJ explicitly discredited Marshman’s testimony to the extent that it conflicts with McNamara’s. (ALJD: 6:30-31).

otherwise made a request to bargain. (Trial Tr. 131:20-132:6). Local 272 waited six weeks and simply filed an unfair labor practice on October 30, 2012. (G.C. Exhibit 1(a); Trial Tr. 131:20-25, 132:1-3). The unfair labor practice charge was filed two months before the proposed changes to the ESR policy became effective—and still Local 272 failed to request bargaining over the proposed change.

The reason Marshman never requested bargaining with FirstEnergy over the proposed change to the ESR policy is quite clear. The first collective bargaining agreement between Local 272 and Pennsylvania Power was negotiated in 1978. (Trial Tr. 151:21-23). Since 1978, an employee recognition policy has never been mentioned, let alone incorporated into any of the twelve or thirteen successive collective bargaining agreements that have been negotiated since. (Trial Tr. 159:18-21 and 156:21-157:5). The ESR policy was never discussed in bargaining with Local 272, nor has Local 272 ever made a request to bargain over it, (Trial Tr. 159:6-17), despite numerous changes⁹ to the ESR policy by FirstEnergy or its predecessors.¹⁰ (Trial Tr. 159:22-160:5). Not a single member or representative of Local 272 has ever filed a grievance regarding any changes to the ESR policy, or regarding the policy's administration or terms since its inception. (Trial Tr. 160:6-10).

Thus, Local 272 did not make a request to bargain over the changes proposed by FirstEnergy in September of 2012 for good reason: it has never done so before. (Trial Tr. 169:17-20, *see generally* Trial Tr. 160:25-161:2). Indeed, it is a virtual certainty that the only reason charges were filed this time is because the change was part of other, much more significant changes to the Company's 401(k), Retiree Life, and Educational Reimbursement

⁹ Petras explained the changes that occurred to the policy between 1973 and 1997. (Trial Tr. 165:3-9).

¹⁰ Marshman admitted that at least since 2005, the period he has been president to Local 272, Local 272 has never bargained or requested bargaining over the ESR policy. (Trial Tr. 63:21-24).

(charges which were either dismissed or deferred to arbitration). Had the changes announced by the Company been limited to the ESR policy alone, as in the past, the Company submits that no unfair labor practice charges would have been filed in this case.

II. QUESTIONS PRESENTED

A. Did the ALJ err in concluding the Employee Service Recognition policy is a mandatory subject of bargaining such that FirstEnergy violated the Act by failing to bargain with Local 272 over the proposed changes? [Exceptions 2- 8 and 19]

B. Did the ALJ err in concluding Herman Marshman requested bargaining over the Employee Service Recognition policy by responding to the proposed changes to the ESR policy and others with the statement of “oh no you don’t! again? [sic] Now you know I have to file a board charge honey” and “[I have] to come to Akron for this one[.]”? [Exceptions 1, 9-13 and 19]

C. Did the ALJ err in determining that Local 272’s silence or inaction in response to FirstEnergy’s historic changes to the Employee Service Recognition did not constitute a past practice waiver? [Exceptions 14-19]

III. ARGUMENT

It is fundamental that employers are required to bargain with the representative of their employees over “wages, hours, and other terms and conditions of employment[.]” *Fiberboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 210 (1964), citing *NLRB v. American Nat’l Ins. Co.*, 343 U.S. 395 (1952). As to other matters, however, each party is free to bargain or not to bargain[.]” *Id.*, citing, *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). Importantly, the Board has construed the term “wages” to include “emoluments of value, like

pension and insurance benefits, which may accrue to employees out of their employment relationship.” See *Inland Steel Co.*, 77 NLRB 1, 4-5 (1948); *NLRB v. Niles-Bement-Pond Co.*, 199 F.2d 713, 714 (2d Cir. 1952). Absent a waiver by the Union, unilateral changes to mandatory subjects of bargaining by an employer constitute an unfair labor practice in violation of the National Labor Relations Act (the “Act”) Sections 8(a)(1) and (5). See *Century Electric*, 180 NLRB 1051, 1053 (1970). However, any unilateral changes made with respect to bona-fide “gifts” are not violative of the Act as gifts are not mandatory subjects of bargaining. See *Benchmark Indus., Inc.*, 270 NLRB 22 (1984); *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210 (8th Cir. 1965).

Even where the subject is a mandatory subject of bargaining, an employer is relieved of its duty to bargain over a proposed unilateral change if: (1) the union fails to timely request bargaining; or (2) if the union affirmatively waived its right to bargain. In the first instance, and upon notification from the employer of a proposed change, a union must promptly request to bargain. *Ciba-Geigy Pharms. Div. & Int’l Chem. Workers’ Union, Local No. 9*, 264 NLRB 1013, 1017 (1982). If the union fails to do so, the employer’s obligation to bargain is never triggered. *Id.* Where a request to bargain is made, the employer is still not required to comply if past practice of the parties constitutes a waiver of the union’s right to bargain over the matter at issue. *Mt. Clemens Gen. Hosp.*, 344 NLRB 450, 460 (2005) citing *Litton Microwave Cooking Products v. NLRB*, 868 F.2d 854, 858 (6th Cir. 1989). Past practice will amount to a waiver when it has occurred regularly enough that “employees could reasonably expect the ‘practice’ to continue[.]” See *Caterpillar, Inc.*, 355 NLRB 521, 522 (2010) *enfd.*, *Caterpillar Inc. v. NLRB*, 2011 U.S. App. LEXIS 11163 (D.C. Cir. 2011).

As explained in detail below, and contrary to the ALJ’s conclusions, FirstEnergy’s ESR

policy is not a mandatory subject of bargaining as the item provided by the Company is clearly a gift in the traditional sense of the word. Furthermore, even if the item provided by the Company to employees is not a gift and is otherwise a mandatory subject of bargaining, the record clearly establishes that Local 272 never requested to bargain over the proposed change. Respectfully, Marshman's complaints and cryptic comments cannot be deemed to be a request to bargain. More so, even if Local 272 did request bargaining, its historic in-action and silence in response to various significant ESR policy changes over the years amounts to a waiver of its right to demand bargaining over the most recent change.

A. FirstEnergy Did Not Violate the Act by Failing to Bargain With Local 272 as the Gifts Provided Are Not a Mandatory Subject of Bargaining.

The ALJ considered the ESR policy's tangential connection to "employment related factors," but: (1) failed to apply the Courts and the Board's traditional five-factor test for determining whether a "gift" is a mandatory subject of bargaining; and (2) failed to consider employee expectations. Since 1980, the Board has used the following five factors to determine whether a "gift" from an employer to its employees is, in reality, part of their wages: "(1) the consistency or regularity of the payments; (2) the uniformity in the amount of the payments; (3) the relationship between the amount of the bonus and the remuneration of the recipient; (4) the taxability of the payment as income; and (5) the financial condition and ability of the employer." See *Woonsocket Spinning Co.*, 252 NLRB 1170, 1172 (1980) (quoting *Radio Television Technical Sch., Inc. v. NLRB*, 488 F.2d 457, 460 (3d Cir. 1973); adopting five-factor test based on *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210, 214 (8th Cir. 1965)); see also *Benchmark Industries, Inc.*, 270 NLRB 22 (1984), p. 3 and fn. 5 *aff'd sub nom.*, *Amalgamated Clothing v. NLRB*, 760 F.2d 267 (5th Cir. 1985).

The Board has acknowledged the significance of "employment related factors" including

“work performance, earnings, seniority, production, or other employment-related factors[.]” *Benchmark Industries*, 270 NLRB at 22. However, the Board has never indicated that these factors alone, which *may* be considered in the gift analysis, were intended to supersede the five-factor test.

Importantly, no one “employment related factor” is determinative in assessing whether a “gift” is a wage; rather, the relevant facts must be given weight commensurate with their impact on employee perceptions then balanced. *See N. Am. Pipe Corp.*, 347 NLRB at 837 (“A sufficient relationship to remuneration *may* exist if the payment is tied to various employment-related factors.” (emphasis added)); *see also Stone Container Corp.*, 313 NLRB 336, 337 (1993) (holding that food items were “gifts” despite the fact that they were provided only when employees went for specified periods with no lost-time accidents— a factor based on work performance); 2006 NLRB GCM LEXIS 48, 6 (“characterization of the bonus as voluntary does not outweigh the longstanding practice of such ‘gifts’ that would create a reasonable expectation of payment.”). “What is crucial in determining whether a bonus is part of the wage structure rather than a gift is the determination [as to] whether . . . Respondent has justified its employees’ expectations that they would receive the bonus as part of ‘wages.’” *Laredo Coca Cola Bottling Co.*, 241 NLRB 167, 174 (1979) *enfd.*, 613 F.2d 1338 (5th Cir. 1980), cert. denied 449 U.S. 889 (1980) (quoting *Gas Machinery Co.*, 221 NLRB 862, 865 (1975)); *see also Waxie Sanitary Supply*, 337 NLRB 303, 314 (2001).

Rather than apply the five-factor test to the facts of the instant case, the ALJ analogized or distinguished five gift cases before concluding the ESR gifts were really wages based simply on their relation to “years of service.” (ALJD 10:16-17). Two of the gift cases, *Conval-Ohio, Inc.*, 202 NLRB 85 (1973), and *Longhorn Machine Works*, 205 NLRB 685 (1973), predate the

Board's adoption of the five-factor test and should be discounted accordingly. Though the more contemporary cases¹¹ do not suffer from this defect, the ALJ's failure to engage in a five-factor test led him to arrive at a legally unsupportable conclusion— that “Respondent’s employee service recognition policy constitutes a mandatory subject of bargaining,” solely based on the fact that the Company’s ESR policy was tied to years of service. (ALJD 10:21-22).

Moreover, the ALJ’s reliance on *Conval-Ohio, Inc.* and *Longhorn Machine Works* are misplaced as each is materially distinguishable. In *Conval-Ohio, Inc.*, 202 NLRB at 91, the employer unlawfully discontinued a longevity award formerly given to employees after thirty, thirty-five, forty, forty-five and fifty years of service. *Id.* at 86. By contrast to the facts here, Conval’s predecessors attained approval from the single union of which its employees were members before initiating the longevity award program. *Id.* More importantly, **when Conval took over, it agreed to assume all commitments made by its predecessor, including the cash service award**, which it did for fourteen months. *Id.* at 89. The decision makes no mention of a disclaimer reserving Conval’s right to make changes to the cash service award. *Id.* at 91. In fact, after a brief discontinuation, Conval “agreed to reinstate the cash service awards . . . *without any conditions or reservations whatsoever.*” (emphasis added) *Id.* Finally, **the putative “gift” was a cash bonus**, ranging from \$100 to \$300, **paid to the employee as wages**, and not a tangible thank you gift. *Id.* at 68.

Thus, *Conval-Ohio, Inc.* is clearly distinguishable as FirstEnergy made no express agreement continue the ESR policy, and in fact, FirstEnergy reserved its right to change the ESR policy from time to time (Jt. Ex. 6; ALJD 4:17-19. *See* Jt. Ex. 7, 8, 9, 10, 11, 16); FirstEnergy has never bargained with Local 272 regarding the ESR policy, nor has Local 272 ever consented

¹¹ *Benchmark Indus.*, 270 NLRB 22 (1984), *affd. Amalgamated Clothing v. NLRB*, 760 F.267 (5th Cir. 1985); *North American Pipe Corp.*, 347 NLRB 836 (2006); *Phelps Dodge Mining Co.*, 308 NLRB 985 (1992).

to previous ESR policy changes (Trial Tr. 62:24-63:15, 69:25-70:6; ALJD 3:44-4:1); unlike the company-wide ESR policy here (Trial Tr. 182:18, 175:1-6; Jt. Ex. 11), the policy in *Conval* applied only to select employees of its predecessor, *Conval-Ohio, Inc.*, 202 NLRB at 87, and not to all employees; and FirstEnergy provided a non-taxable, tangible gift, not a monetary payment (Trial Tr. 78:6-8, 180:2-13; ALJD 5:16). Notably, the Board observed that the union in *Conval-Ohio, Inc.* did not dispute the unilateral discontinuation of a tangible gift, a gold watch, which was provided to employees at twenty-five years of service. *Id.*, 202 NLRB at 15.

The ALJ's citation to *Longhorn Machine Works* is equally irrelevant. There, an employer unlawfully discontinued its practice of giving employees a gold watch on their tenth service anniversary. This practice had never been reduced to writing. *Id.*, 205 NLRB at 688 fn.16. Thus, there was no reservation of the employer's right to change the "policy," as is the case here. (Jt. Ex. 6; ALJD 4:17-19. *See* Jt. Ex. 7, 8, 9, 10, 11, 16).

More importantly, there was no explicit finding that the watches were a mandatory subject of bargaining; rather, the focus of the relevant discussion was on whether the words "we prefer to discontinue the watch presentation," equated to actual discontinuance or merely meant the employer was open to negotiations. *Id.* at 690. Further, this was one of five issues addressed in the case, which centered on the employer's refusal to bargain in good faith with a newly certified union. *Id.* at 685. In fact, under the heading "Conclusion that . . . Respondent unilaterally ceased to award gold watches," the ALJ ended by noting "[t]his conclusion is supported by the continuing union animus shown by Respondent and the illegal[, unilateral change in vacation benefits], and is in keeping with the pattern of bad-faith bargaining found hereinafter." *Id.*

Given the lack of an explicit analysis as to whether the watches were a mandatory subject of bargaining and the ALJ's preoccupation with other, more egregious offenses, including the employer's clear anti-union animus, the ALJ here cannot rely on *Longhorn Machine Works* to conclude FirstEnergy's ESR policy is a mandatory subject of bargaining.

1. The ALJ Erred in Failing to Apply the Board's Five-Factor Test and Therefore Mistakenly Concluding That the Employee Service Recognition Policy is a Mandatory Subject of Bargaining.

The first factor, "consistency or regularity," does not weigh in favor of a finding that the ESR policy is a mandatory subject of bargaining. First, "[t]he length of time [over which gifts] were given . . . , without more, is insufficient to establish that they were terms and conditions of employment[.]" *Stone Container Corp.* 313 NLRB 336, 337 (1993). Relatedly, most Board decisions that cite this factor as support in finding that "gifts" are in fact "wages" involve gifts given at least annually. *Niles-Bement-Pond Co.*, 97 NLRB 165, 166-170 (1951) (holding a *year-end* bonus was a mandatory subject of bargaining); *See also McComb v. Shepard Niles Crane & Hoist Corp.*, 171 F.2d 69 (2d Cir. 1948) (finding a "prosperity bonuses" to be wages namely because regular distribution created an expectation that such would continue; the bonuses were given *every three months*). It is therefore reasonable to conclude from Board precedent that less frequent giving by the employer is insufficient to turn a gift into a wage, as they do not "justify the expectation on the part of the employees that . . . they would continue to receive a . . . bonus upon which they might rely as part of their 'wages.'" *Niles-Bement-Pond Co.*, 97 NLRB at 166-170. Here, FirstEnergy was providing its employees a "thank you gift" at five-year intervals such that an employee might even be surprised when invited to select a gift from a catalog. (Jt. Ex. 11). More so, the gifts contained in the catalogs are constantly changing, and employees cannot reasonably expect or anticipate any items that will be included in any given catalog—which makes the gifts offered entirely inconsistent. (Trial Tr. 178:10-179:1; ALJD 5:12-14).

For example, the catalog could offer a globe as a gift and the globe may be replaced with a paperweight. (*Id.*). The value and number of the gifts offered can also change. (Trial Tr. 178:1-5; ALJD 5:10-11). Thus, the first factor cannot support a finding that the gifts given pursuant to the ESR policy were, in reality, wages.

The second factor, “uniformity in the amount of the payments,” does not justify a finding that the ESR policy is a mandatory subject of bargaining. In *Benchmark*,¹² 270 NLRB 22, 22, the Board deemed dinners and hams given to employees at Christmas true gifts, in part, because all employees received them, i.e. the gifting was uniform. The ESR policy is also uniform in the sense that it applies to every one of FirstEnergy’s 16,000 plus employees (Jt Ex. 1 at ¶ 35, Trial Tr. 175:9-12), regardless of whether they are part-time or full-time (Trial Tr. 182:18), union members or managers, etc... (Trial Tr. 175:1-6; Jt. Ex. 11). The only difference from *Benchmark* is that the gifts are not given to all employees at the same time. The gifts are instead presented at intervals determined by the Company. (Trial Tr. 156:21-157:5, 159:6-17, 159:18-21). Furthermore, the ESR policy provides for gifts that are uniform in value for all employees that attain the same anniversary level; thus, both a vice president and a janitor would select a gift of the same approximate value at their ten-year anniversary. (Jt. Ex. 25). Based on these facts, the second factor should be construed to weigh in favor of a finding that the ESR policy is uniform, and therefore, the gifts given pursuant thereto are true gifts.

FirstEnergy acknowledges that the ESR policy is non-uniform in the sense that long-term employees are entitled to select more valuable gifts than their more junior colleagues. (Jt. Ex. 25). That said, this factor alone is insufficient to transform this gift into a mandatory subject of bargaining. Uniformity played a role in both *NLRB v. Wonder State*, 344 F.2d 210, 214 (8th Cir.

¹² As discussed below, uniformity has both supported and mitigated findings that a “gift” was, in fact, a wage. Compare *NLRB v. Wonder State* 344 F.2d 210, 214 (8th Cir. 1965) and *Benchmark*, 270 NLRB 22 (1984). FirstEnergy has therefore elected to apply the more recent precedent.

1965) and *Benchmark*, 270 NLRB 22 (1984). One reason the Eighth Circuit decided the Christmas bonus at issue in *Wonder State* was a gift is because “there was *no uniformity* in or basis for the amount.” (emphasis added) 344 F.2d at 214. Thus, employees had no reasonable expectation that the gift was part of their remuneration. However, in *Benchmark*, uniformity played a different role; there, the Board deemed dinners and hams given to employees at Christmas true gifts, in part, because all employees received them, i.e. *the gifting was uniform*. *Benchmark*, 270 NLRB at 22. Here, FirstEnergy’s ESR policy and gift can fulfill both rationales, as under *Wonder State*: 1) the gifts presented in the catalogs are always changing and are therefore not uniform; and 2) are not uniform in the sense that they are presented to employees at different times and the value of the gifts contained in the catalog presented is determined by how long an employee has worked for the Company. At the same time and consistent with *Benchmark*, the gifts are uniform in sense that all 16,000 FirstEnergy employees are eligible to receive them on the same terms.

The third factor looks to “the relationship between the amount of the bonus and the remuneration of the recipient,” which is non-existent in this case. This factor comes into play when the value of a “gift” is based, at least in part, on employees’ regular remuneration, as was the case in *Niles-Bement-Pond Co.*, 97 NLRB 165 (1951). There the “bonuses” were either a percentage of the employee’s pay or equivalent to a week’s wages. *Id.* at 165. For this reason, among others, the “bonuses” were deemed wages. *Id.* at 166-167. By marked contrast in this case, the value of the gifts an employee is eligible to select per the ESR policy bears absolutely no relationship whatsoever to an employee’s earned wages or position with the Company. The value of gifts offered to an employee in any level catalog was randomly selected by the Human Resource Department to correspond to certain anniversaries, not an employee’s earned

compensation. (Jt. Ex. 25; Trial Tr. 216:24-217:8). More so, the gifts are not dependent upon any other performance related factor. The employee must simply stay employed with the Company. Thus, this factor cannot support a finding that gifts given pursuant to the ESR policy are anything but true gifts.

The fourth factor, “taxability,” serves only to bolster the conclusion that items offered to employees under the ESR policy are simply gifts. Unlike the employers in *General Telephone Co. v. NLRB*, 337 F.2d 452, 453-454 (5th Cir. 1964) and *Radio Television Technical School, Inc. v. NLRB*, 488 F.2d 457, 460-461 (3d Cir. 1973), which treated Christmas bonuses as taxable income, FirstEnergy and the IRS do not treat the ESR gifts as taxable income. (Trial Tr. 78:6-8, 180:2-13; ALJD 5:16). This is because the ESR policy constitutes an excludable qualified award plan under IRS regulations.¹³ The undisputed evidence in the record established that ESR gifts are not taxable as income or wages. (Trial Tr. 78:6-8, 113:23-25, 180:2-14). Thus, the non-taxable nature of FirstEnergy’s gifts adds weight to the argument that they are not wages and the ESR policy is not, therefore, subject to bargaining.¹⁴

The fifth factor, the “financial condition and ability of the employer,” also weighs in favor of a finding that FirstEnergy’s gifts are not, in fact, wages. Though in *Gas Machinery Co.*, the Board announced that the fourth factor “is expressly eliminated by the [its] holding in *Pistoresi* that the employer’s legitimate business reasons . . . are immaterial,” 221 NLRB 862,

¹³ The Internal Revenue Code (“IRC”) provides that “[n]o deduction shall be allowed . . . for the cost of an employee achievement award” subject to certain inapplicable exceptions. (IRC Section 274). It proceeds to define an employee achievement award as “an item of tangible personal property which is (i) transferred by an employer to an employee for length of service achievement . . . (ii) awarded as part of a meaningful presentation, and (iii) awarded under conditions and circumstances that do not create a significant likelihood of the payment of disguised compensation.” (IRC Section 274). **Thus, by definition, the IRS regulations consider the ESR policy gift to be non-compensation.**

¹⁴ In that regard, it should be noted that the Local 272 members do enjoy a bonus that is viewed as taxable income and would constitute wages. Members of Local 272 participate in the Short Term Incentive Program (“STIP”) and it is referenced in their collective bargaining agreement. (Trial Tr. 82:4-12) The token thank-you gifts given at five or ten year intervals pursuant to the ESR policy are very different.

865 (1975), citing *Nello Pistoresi & Son, Inc.*, 203 NLRB 905 (1973), the Board has continued to acknowledge this as a relevant fact. See *Sykel Enterprises, Inc.*, 324 NLRB 1123 (1997) (noting that bonuses were based, in part, on “how the Company operated that year”), *Phelps Dodge Mining Co.*, 308 NLRB 985, 987, 1000 (1992), enf. denied 22 F.3d 1493 (10th Cir. 1994) (noting bonuses were “linked to the current overall profitability”). Further, in *NLRB v. Wonder State Manufacturing Co.*, 344 F.2d 210, 214 (8th Cir. 1965), the Eighth Circuit found a Christmas bonus was a true gift, in part, because “whether a bonus was paid and the amount thereof depended on the financial condition and ability of [the] respondent.” As the Court noted, during the year in which it was discontinued, the employer faced “serious decline in business and sharply decreasing earnings[.]” *Id.* at 17.

Should the Board consider this factor, it too should weigh in favor of a finding that the ESR gifts are not wages. The historic changes to FirstEnergy’s ESR policy evidence the reality that it has been more generous or less generous based on the ebb and flow of the economy and its financial welfare. For example, it expanded the group invited to employee recognition dinners (Trial Tr. 155:13-15) and then stopped holding the dinners entirely. (Trial Tr. 158:4-12). FirstEnergy extended the ESR policy to cover part-time employees (Trial Tr. 183:17-19), then stopped recognizing one-year anniversaries. (Trial Tr. 183:20-23). FirstEnergy also transitioned from calculating anniversaries based on pension years, (Jt. Ex. 7), to determining eligibility from a returning employee’s date of re-hire. (Jt. Ex. 1 at ¶ 23, Trial Tr. 191:4-192:4). These policy changes underscore conclusion that the ESR gifts are true gifts, and thus dependent on the financial well-being of the company giving the gift.

Moreover, uncontroverted testimony clearly indicates that the most recent changes were also motivated by FirstEnergy’s need to cut costs: “[W]e were asked to, you know, just based on

the economy and kind of where things are at from the Company's perspective to look at some of the different programs and the service recognition program was one." (Trial Tr. 199:19-23). The fact that poor economic conditions motivated FirstEnergy to propose changes to the ESR policy is further confirmed the by a letter to employees from Alexander, FirstEnergy's CEO, in the September 19, 2012 FirstEnergy Update Special Edition. (Jt. Ex. 12 and 13). Therein he announced that FirstEnergy's stock had dropped more than \$1.3 billion in market value then explained, "[i]t's not too late to turn around our performance. . . . We have taken a number of actions already this year, but clearly more needs to be done." *Id.* In light of the various changes FirstEnergy has made to the ESR policy in response to serious financial pressures, including the most recent change, the fourth factor only underscores the reality that FirstEnergy's gifts are not wages.

In sum, (1) ESR policy does not provide for regular gifting— gifts are given after long intervals of time and the selection is always changing; (2) the policy applies to all employees, yet neither the timing nor available gifts are uniform; (3) the value of an ESR gift is unrelated to the recipient's remuneration; (4) ESR gifts are non-taxable; and (5) changing the ESR policy was a direct result of FirstEnergy's financial condition. Given these facts, each of the five factors weighs in favor of a finding that FirstEnergy's ESR policy is not a mandatory subject of bargaining because gifts given pursuant thereto are just that, gifts.

2. The ALJ Erred in Failing to Recognize That the Employment-Related Factors Either Support a Finding That the Employee Service Recognition Policy is Not a Mandatory Subject of Bargaining or Are Insufficient to Support a Contrary Conclusion.

The ESR policy's tie to seniority (or length of employment) does not outweigh the conclusion derived from a careful analysis under the traditional five-factor test and evidence that employees did not come to expect continued gifting as part of their remuneration (in part due to

the lack of ties to any other employment-related factor). Again, the Board has held that “a sufficient relationship to remuneration *may* exist if the payment is tied to various employment related factors” including “performance, wages, regularity of the payment, hours worked, seniority, and production.” (emphasis added) *N. Am. Pipe*, 347 NLRB at 837. The analysis is not rigid and is a question of fact. *See NLRB v. Wonder State Mfg. Co.*, 344 F.2d at 213.

The ESR policy at issue here is completely unrelated to employee performance, hours worked or production. In *North American Pipe Corp.*, 347 NLRB 836, 839 (2006), the Board found stock distributed to employees was a gift, in part because it was unrelated to performance—“the award was not dependent on the quality or quantity of work performed. . . . Likewise, [the gifts] do not relate the award to any discrete and specific work performed by the Respondent's bargaining unit employees.” The same is true of gifts given pursuant to the ESR policy. The letter accompanying gift catalogs FirstEnergy distributed to eligible employees even has similar language to that in *North American Pipe Corp.*: “In recognition of your service anniversary and as *an expression of our gratitude for your hard work and dedication*, please select one of the gifts shown in the enclosed brochure. *I hope it will remind you of our appreciation for the contributions you've made—* and will continue to make *—to the success of FirstEnergy.*” (Jt. Ex. 6, emphasis added). The lack of a connection to performance, hours worked or production only adds weight to the conclusion that ESR gifts are simply gifts.

The ESR policy's lack of a relationship to employee wages and the irregularity of FirstEnergy's gifting were discussed above and, again, both support a finding that ESR gifts are not wages. All employees are eligible to receive a gift **and have to do nothing but remain employed by the Company in order to receive it.**

The Board has also considered how a “gift” is presented in determining whether it was

truly a gift. *See Mr. Potty, Inc.*, 310 NLRB 724, 730 (1993) (“[T]he Christmas gift-giving element unquestionably colors the character of the bonus involved. By contrast, respondent’s bonus program lacked any connection to a seasonal or other celebratory event[.]”); *NLRB v. Citizens Hotel Co.*, 326 F.2d 501, 503 (5th Cir. 1964) (acknowledging that a meaningful presentation weighs in favor of a finding that gifts are not wages).

Thus, the letter from FirstEnergy’s CEO is also significant in the sense that it contributed to the celebratory nature of the ESR gifts, as does presentation of the certificate of appreciation contained in the packet. (Jt. Ex. 19). Notably, FirstEnergy formerly held commemorative gatherings (Trial Tr. 154:5-24, 155:13-15, 182:23-25), and encouraged those distributing gifts to do so over lunch or coffee (Jt. Ex. 7, 185:16-18, 188:12-21). Certainly, the fact that the gifts are given in honor of a personal milestone— five or ten years of employment with the same company (Jt. Ex. 16) –in and of itself suggests the tokens of appreciation at issue here are nothing more than gifts.

3. The ALJ Erred in Ignoring the Fact That FirstEnergy Employees Have No Reasonable Expectation That They Will Continue to Receive Employee Service Recognition Gifts.

The Board has historically emphasized the importance of employee expectations in analyzing whether a “gift” is truly a gift. *See Waxie Sanitary Supply*, 337 NLRB 303, 304 (2001) (bonus constituted wages partially because employer provided employees with formula used to calculate bonus and posted profit figures on monthly basis, such that employees could monitor prospective amount of bonus); *Citizens Hotel Co.*, 138 NLRB 706, 712 (1962) (Christmas bonus was part of terms and conditions of employment where employees “were reminded by Respondent of [the bonus], and plainly it was held out to them as an incentive factor in connection with their work.”); *E.C. Waste*, 348 NLRB 565, 565 fn. 2 (2006) (bonuses were wages partially because they were given annually for a period of years and “explicitly

characterized by the Respondent as a part of employees' 'salaries and benefits'").

Here, by contrast, FirstEnergy did not give employees any reason to think ESR gifts were part of their overall compensation. The ESR policy is administered by the Human Resources Department (Trial Tr. 168:17-169:2) and was not listed in the Compensation and Benefits Handbook. (Trial Tr. 62:3-23). The available gifts constantly changed such that employees would not reasonably wait on making a purchase with the intention of selecting a particular item when they were next eligible to select a gift, at a minimum five years later. Indeed, some of the most telling evidence that FirstEnergy employees did not think of the gifts as compensation is the fact that Marshman himself failed to select a gift four out of the six times he was eligible to do so. (Trial Tr. 77:12-18). Likewise, David Childers, Business Manager and Financial Secretary for Local 1194, did not receive a catalog for his twenty-fifth anniversary, yet he did not bother to grieve the oversight. (Trial Tr. 113:5-10).

With only one lone employment-related factor, longevity, weighing against the conclusion that ESR gifts are actually gifts under the five-factor test, the Board should not conclude that the ESR policy is a mandatory subject of bargaining. Such a conclusion is against the greater weight of the evidence and at odds with the Board's emphasis on employees' reasonable expectations that the gifting will continue, which is clearly lacking here. For these reasons, the ALJ erred in finding the ESR gifts are wages and, in turn, the ESR policy is a mandatory subject of bargaining.

In closing, it must be reiterated that the foregoing analytical framework was developed in cases involving monetary payments to employees, such as performance based or Christmas bonuses, though the Board has occasionally applied the it in analyzing whether various food items or dinners constituted gifts. *See N. Am. Pipe Corp.*, 347 NLRB at 837. Since its adoption,

the Board has never applied the five-factor test in the context of tangible items that can be clearly classified as “gifts,” as is the case here.

B. Local 272 Never Requested Bargaining After Receiving Notice of a Proposed Change to the Employee Service Recognition Policy So As to Trigger FirstEnergy’s Duty to Bargain.

Once a union receives notice that the employer intends to implement changes regarding a mandatory subject of bargaining, the union must “promptly request that the employer bargain over the matter.” *Ciba-Geigy Pharms. Div. & Int’l Chem. Workers’ Union, Local No. 9*, 264 NLRB 1013, 1017 (1982). The failure by a union to request bargaining will relieve the employer of its duty to bargain. *Id.* “[A] valid request to bargain need not be made in any particular form. . . so long as the request clearly indicates a desire to negotiate and bargain on behalf of the employees[.]” (emphasis added) *MSK Corp.*, 341 NLRB 43, 45 (2004). However, “merely protesting the impending change is not sufficient.” *Ciba-Geigy*, 264 NLRB at 1017.

Again, after learning of proposed changes to FirstEnergy’s 401K, Retiree Life, Educational Reimbursement *and* ESR Policies, the credited testimony establishes that Marshman said, “‘oh no you don’t! again? Now you know I have to file a board charge honey’ and now he ‘has to come to Akron for this one[.]’” (R. Ex. 4; Trial Tr. 130:22-131:5). Local 272 did not follow up with McNamara, Alexander or any other FirstEnergy employee. Local representatives never “came to Akron.” Rather, after six full weeks of silence, Local simply filed an unfair labor practice charge alleging that FirstEnergy “ha[d] by making unilateral changes in the . . . employee service awards, failed to bargain collectively.” (Trial Tr. 69:17-20). The ALJ’s finding that Marshman requested bargaining was therefore predicated, in error, solely upon the above exchange between he and McNamara coupled with the fact that he filed a charge. (ALJD 13:21-24).

1. The ALJ Erred in Holding That Marshman’s Facetious Complaints in Response to McNamara’s Announcement of Proposed Changes to Multiple Policies Constituted a Request to Bargain.

Marshman’s threat to “come to Akron” and to “file a board charge” did not amount to a clear indication of Local 272’s desire to bargain over the ESR policy. (R. Ex. 4, Trial Tr. 130:22-131:5). The ALJ erred in arriving at a contrary conclusion because Marshman’s words neither clearly indicated a desire to bargain, nor identified the subject to be bargained over with sufficient specificity. In a 2006 memo, the Board’s Office of General Counsel considered a situation similar to the instant case. *See* 2006 NLRB GCM LEXIS 48 (“2006 GC Memo”). There the employer announced the impending discontinuation of its annual holiday bonus. *Id.* at 1. During a bargaining session, the union “raised the bonus issue with the Employer’s attorney/negotiator, informing him that the Union intended to file charges with the NLRB” and threatened to “take action[.]” *Id.* at 3 and 8. Still, the General Counsel concluded the union had not requested bargaining citing Board case law that a threat to file a charge is not tantamount to making a request to bargain. *Id.* at 1.

First, the context in which Marshman protested FirstEnergy’s proposed change to the ESR policy severely weakens any argument that it constituted a request to bargain. During their phone conversation Marshman “made nice jokes” and McNamara described him as “quite funny.” (R. Ex. 4). More importantly, his referring to Ms. McNamara as “honey” in the same breath as his “request” would (and did) lead a reasonable person to conclude he was speaking in jest. (*Id.*). Marshman does not have to use any magic words to make a request to bargain, but as a minimum, he must communicate in some way that Local 272 had a real interest in meeting to discuss or negotiate over the proposed changes with the Company.

Second, the substance of Marshman’s statements does not amount to a clear indication of Local 272’s desire to bargain. Marshman’s words are the same, in substance, as what the union

said to the employer during bargaining in the above-referenced 2006 GC Memo— he vowed to “take action” by coming to Akron and file an unfair labor practice charge. (ALJD 6:24-25). Marshman’s threat to come to Akron or file a charge cannot be construed by a reasonable person as a request to bargain. A visit to Akron could have fulfilled a variety of purposes, such as reiterating his threat to file an unfair labor practice charge, requesting information, or from McNamara’s interpretation of Marshman’s comments, simply to “*complain* to Tony Alexander.” (Trial Tr. 131:10-11). *See Paulstra Crc Corp.*, 2004 NLRB LEXIS 492 (2004) (“The Board has frequently held that a protest, a grievance, or the filing of a charge are not tantamount to a request to bargain.”). Thus, the ALJ’s conclusion that Marshman intended to “further discuss” the proposed ESR policy change is not supported by the record as a request to bargain in accordance with current Board law. Nor is it supported by Marshman’s subsequent actions— he never went to Akron, indeed, he did nothing further after his phone call with McNamera. The interpretation of whether a request to bargain was made should be objective and clear. The fact that the ALJ and McNamera differed in their understanding of Marshman’s comments is undeniable evidence that Marshman’s request to bargain would not be clear to an average reasonable person.

Furthermore, even if Marshman had clearly conveyed Local 272’s desire to bargain, his lack of specificity with respect to the contested issue rendered his words insufficient to constitute a request to bargain over the ESR policy. In *Windsor Redding Care Ctr., LLC*, 2012 NLRB LEXIS 875 (2012), for example, demands to bargain over the employer’s attendance policy and discipline administered to two named employees as well as “a general request to bargain over disciplines. . . did not create a separate, specific request to bargain over the terminations of Whitmire and Rowland, two different employees, who were terminated for unique reasons.” *Id.*

Marshman's request was even more generalized. First, it was made after McNamara described proposed changes to four separate policies. (Trial Tr. 47:11-19, 49:3-7, 129:23-130:2). Second, he failed to specify which changes he wished to bargain over, but rather indiscriminately threatened to "file a board charge" and "come to Akron[.]" (R. Ex. 4, Trial Tr. 130:22-131:5). From the conversation a reasonable person could not even determine what changes he was complaining about. In light of his imprecision, Marshman's words cannot be construed as a request to bargain over the ESR policy.

The ALJ erred in analogizing the instant matter to *Indian River Memorial Hospital*, 340 NLRB 467 (2003). There, the union informed the employer, in writing, that the shift changes it had announced "would require bargaining." *Id.* When the employer responded, "[n]o schedule change has been implemented," the union assumed it was a "dead issue[.]" *Id.* The employer began implementing shift changes several months later at which point the union wrote stating, "[t]his matter is clearly . . . a mandatory subject of bargaining. . . . [I]f the Hospital fails to rescind this Notice . . . [the union] will file Unfair Labor Practice Charges[.]" *Id.* The employer explained it was "willing to *bargain collectively* over those items concerning wages, hours, and working conditions," but not shift changes, as such was a "management right." (emphasis added) *Id.* at 472. The employer then denied that the union had requested to bargain, but the ALJ disagreed citing: (1) the union's explicit request for bargaining when it first learned of potential shift changes; and (2) the employer's implicit recognition that the union desired bargaining in their second exchange. *Id.* at 469. Here, Local 272 has *never* requested to bargain over the ESR policy, let alone in the recent past. (Trial Tr. 62:24-63:15). Further, per her email to Cookson, McNamara felt Marshman was "serious about the charge and coming to Akron," but her trial testimony and contemporaneous email confirms that she did not perceive Marshman's

comments as a request to bargain. Exhibit 4; Trial Tr. 130:3-7. In the absence of a prior request to bargain or an indication that FirstEnergy was under the impression that Local 272 wished to bargain, *Indian River Memorial Hospital* is not analogous to the instant matter. Marshman's comments remain insufficient to constitute a request to bargain.

Further, and contrary to the ALJ's holding, *Medicenter, Mid-South Hospital*, 221 NLRB 670, 671 (1975) reinforces the conclusion that Marshman never requested to bargain. There, a hospital required employees to submit to polygraph testing after "a series of acts of vandalism." *Id.* When plans to do so were announced, the union representative "indicated vehement opposition, saying, among other things, the Union would never agree to it." *Id.* at 679. Yet the union chose "to solicit no information . . . , to advance no reasoned arguments . . . , and to proffer no suggestions or comments about the manner in which the program would be executed." *Id.* Nor did the union representative "ask to meet again later that day . . . [or] the following morning or afternoon for further discussions." *Id.* Instead of requesting to bargain, the union chose to file an unfair labor practice charge. *Id.* at 675. Because the union never actually requested bargaining, the Board held the employer's unilateral implementation of polygraph testing was lawful. *Id.* at 680.

As in *Medicenter, Mid-South Hospital*, Marshman's reaction to the proposed ESR policy changes did not amount to a request to bargain. Contrary to Marshman's testimony, which the ALJ did not credit, Marshman never explicitly requested bargaining over any of the proposed changes McNamara relayed. (Trial Tr. 49:11-19, 69:25-70:6). Instead, he made a string of facetious comments— "on no you don't! again? [sic] Now you know I have to file a board charge honey[.]" (R. Ex. 4, Trial Tr. 130:22-131:5). Thus, absent a request for additional information, a request for a meeting or an actual meeting, questions about the changes, an argument against

why the changes should not be made, or other circumstances that would have led McNamara to believe that Local 272 actually wanted to expend its time and resources bargaining over the ESR policy, Marshman's comments cannot fairly be construed as a request for bargaining.

The ALJ erred in distinguishing the instant case from *Medicenter, Mid-South Hospital*, 221 NLRB 670. He noted: (1) unlike the union therein, Marshman expressed “a desire to further discuss the implementation of the changes to the [ESR] policy;” and (2) FirstEnergy failed to “expressly invite Local 272 to present an alternative to the impending change.” (ALJD 14:19-23). The latter fact is entirely irrelevant and, indeed, the ALJ's suggestion that FirstEnergy had a duty to invite the union to request bargaining defies well-established Board law. *Id.* at 679 quoting *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 297 (1939) (“[T]he statute does not compel [the employer] to seek out his employees or request their participation in negotiations[.]”). Further, and as discussed above, it is unfair to characterize Marshman's comments or threat to visit Akron as an expression of Local 272's intent to “further discuss” changes to the ERS policy. The ALJ therefore erred both in distinguishing the instant case from *Medicenter, Mid-South Hospital* and holding that Marshman made a proper request to bargain.

2. The ALJ Erred in Concluding Local 272's Filing of an Unfair Labor Practice Charge Erased Any Reasonable Doubt as to Whether It Wished to Bargain Over the ESR Policy.

The ALJ erred in concluding “any doubt [FirstEnergy] had regarding Local 272's desire to bargain . . . should have been removed by the language contained in the charge filed by Local 272.” (ALJD 14:7-10). However, “[t]he Board has frequently held that . . . the filing of a charge [is] not tantamount to a request to bargain.” *Paulstra Crc Corp.*, 2004 NLRB LEXIS 492 (2004). A charge may be characterized as a request to bargain only if “the union had previously requested recognition and/or bargaining with the employer, and the employer had stonewalled the union and failed to recognize its existence even for the purposes of general bargaining.”

Windsor Redding Care Ctr., LLC, 2012 NLRB LEXIS 875 (2012) (basing the foregoing conclusion on *Williams Enterprises, Inc.*, 312 NLRB 937 (1993); *Sterling Processing Corp.*, 291 NLRB 208, 217 (1988); *Roberts Electric Co.*, 227 NLRB 1312 (1977); and *Sewanee Coal Operators Assn.*, 167 NLRB 172 (1976)). Local 272 has represented certain employees at FirstEnergy's D. Bruce Mansfield facility since 1978 (Jt. Ex. 1 at ¶ 7) and they successfully bargained as recently as August 16, 2012 (Jt. Ex. 5)– just over a month before FirstEnergy announced the proposed changes to its ESR policy. (ALJD 3:7-8). With these facts as a backdrop, the ALJ erred in applying the exception to the rule, rather than the general rule, by giving Local 272's unfair labor practice charge the force of a true request to bargain.

In addition to ignoring Board law, the ALJ's conclusion is erroneous because there is no evidence that McNamara was made aware of the unfair labor practice charge such that she might have interpreted the filing of the charge in the context of Marshman's comments made six weeks prior. Thus, McNamara could not conclude that Local 272 actually wanted to bargain through a combination of Marshman's comments and the later filing of the charge.

Further, the ALJ erred in concluding Local 272's unfair labor practice charge clarified its request to bargain by analogy to *Trucking Water Air Corp.*, 276 NLRB 1401, 1407 (1985). *Trucking Water Air Corp.* involved two entities engaged in shipping goods, Feuer Transportation, Inc. ("Feuer") and Trucking Water Air Corp. ("TWA"). *Id.* at 1401-1402. The main issue was whether TWA was successor to Feuer, which had ceased operations, such that TWA was bound to recognize Local 445. *Id.* at 1401. The President of TWA was a former Feuer employee who had been involved enough in its operations that he signed a settlement stipulation resulting in a Board Order that forbid Feuer from refusing to bargain. *Id.* at 1402. Thus, when the President of Local 445 learned TWA planned to start operating at a former Feuer

terminal (before its agreement with Feuer would have expired) he called the President of TWA to ask that they “sit down” and “talk about the situation.” *Id.* at 1407. Based on these facts the ALJ felt “constrained to conclude that [the President of TWA] had no other alternative but to presume that [the President of Local 445] had telephoned him for the purpose of discussing a collective-bargaining agreement.” *Id.* Almost as an afterthought, the ALJ mentioned that any doubt as to Local 445’s intent was eliminated when it filed an unfair labor practice charge just over two weeks later. *Id.* at 1401-1402, 1407.

The crucial difference between *Trucking Water Air Corp.* and the instant case is that here the Board cannot fairly conclude Local 272 requested bargaining before filing its unfair labor practice charge. *See* Section IV.B.1 *infra*. Moreover, Local 272 waited a full six weeks after learning of the proposed ESR policy change before filing a charge (*compare* 129:23-130:2 *with* General Counsel Exhibit 1(a)), which severely limits the likelihood that FirstEnergy would interpret the filing of the charge in connection with Marshman’s facetious comments.

In sum, Marshman’s threats to “come to Akron” and to “file a board charge” are legally insufficient to constitute a request to bargain. Even if his comments had adequately conveyed Local 272’s desire to bargain, which they did not, the comments would still be insufficient because he never stated his desire to bargain over the ESR policy. Finally, the unfair labor practice charge could not eliminate FirstEnergy’s “doubt” as to whether Local 272 desired bargaining; Local 272 had never requested to bargain over the ESR policy before, and it presented no past communication with FirstEnergy that might have infused Marshman’s words with more meaning than his plain language conveyed. Contrary to the ALJ’s reasoning, Marshman and the Union had a duty to ensure, in the three months between announcement and implementation of the proposed ESR policy change, FirstEnergy understood his comments to be

a request to bargain, yet they failed to do so.

C. Even If Local 272 Had Requested to Bargain Over the Employee Service Recognition Policy, FirstEnergy Was Not Obligated to Do So Because the Parties' Past Practices Gave Rise to A Valid Waiver.

In addition to its contemporary inaction, Local 272's historic tolerance in the face of unilateral, material changes to the ESR policy constitute a past practices waiver. "[T]he courts and the Board have held that a waiver . . . may be inferred from extrinsic evidence of the contract negotiations and/or practice." *Mt. Clemens Gen. Hosp.*, 344 NLRB 450, 460 (2005) citing *Litton Microwave Cooking Products v. NLRB*, 868 F.2d 854, 858 (6th Cir. 1989). More specifically, the employer must show "the practice occurred 'with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." See *Caterpillar, Inc.*, 355 NLRB 521, 522 (2010) *enfd.*, F.3d, 2011 U.S. App. LEXIS 11163 (D.C. Cir. 2011).

In *Mt. Clemens General Hospital*, 344 NLRB at 459, the employer operated a tax shelter annuity ("TSA") program, which was not referenced in any collective bargaining agreement. The employer had increased and decreased the number of annuity providers "on several occasions" without resistance from the union, but when it dropped down to one provider, the union requested information and filed an untimely grievance. *Id.* at 459, 459 fn. 16. The Board found that because the TSA program was not in the collective bargaining agreement and there was a twenty-year history of unopposed, unilateral changes by the employer, the union had waived its right to contest the most recent change. *Id.* at 460.¹⁵

The ALJ erred in discounting FirstEnergy's analogy to *Mt. Clemens General Hospital* due to the decision's non-binding nature and, to a lesser degree, "specific contract language

¹⁵ As a side note, by contrast to other cases involving past practice waiver, there was no mention of a management rights clause in *Mt. Clemens General Hospital*. See *Litton Microwave Cooking Prods. Div. v. NLRB*, 868 F.2d at 857.

supporting the administrative law judge's conclusion.” *See id.* The ALJ explained:

[I]n *Mount Clemens*, the Board indicated that the only exceptions before it for [sic] the General Counsel's exceptions to the administrative law judge's order and notice regarding an information request. *Id.* at p. 450 fn..2. [sic] It is clear therefore that no exceptions were filed to the administrative law judge's finding that the employer did not violate Section 8(a)(5) and (1) by making changes in its pension plan. *Id.* at 459-460. It is settled Board policy that review of an administrative law judge's decision is limited to the issues raised by exceptions and that in the absence of exceptions, the Board does not pass on an administrative law judge's rationale, FES, 333 NLRB 66 (2001). Accordingly, I do not consider the portion of the Board's decision in *Mount Clemens* relied on by the Respondents to be binding precedent.

(ALJD 15 n3). However, in *Mt. Clemens General Hospital*, the Board explicitly “affirm[ed] the judge’s rulings, findings, and conclusions,” 344 NLRB at 450, for good reason— the decision is well reasoned in keeping with established Board law. The ALJ accurately pointed out that in *Mt. Clemens General Hospital*, unlike the present case, there was a zipper clause that acted as an express waiver. *Id.* at 460. However, it is clear that the past practice and zipper clause constituted a mutually exclusive and equally dispositive alternative basis for finding the union had waived its right to bargain over the change at issue. *Id.* at 460. For these reasons, the ALJ erred in dismissing *Mt. Clemens General Hospital* and should, instead, have respected both its factual similarity to the present case and analytical soundness in holding that Local 272 waived its right to bargain over the ESR policy as a past practice.

The ALJ also erred in concluding that most past changes to the ESR policy “involved administrative matters involving the operation of the policy” such that they could not be relied upon to establish a past practice waiver. (ALJD 15:13-14). Where the change at issue “constitutes a material departure from well-established past practice,” that past practices cannot form the basis of a waiver. *E. I. du Pont de Nemours & Co.*, 2013 NLRB LEXIS 777 (2013). By contrast to the changes at issue in *Mt. Clemens General Hospital* and the instant case, the

change considered in *Caterpillar, Inc.*, 355 NLRB 521 (2010) *enfd*, 2011 U.S. App. LEXIS 11163 (D.C. Cir. 2011), was a material departure from past practice. There, the employer cut coverage of brand-name drugs so that instead of having a higher co-pay, employees taking such drugs would thereafter be responsible for their full retail price. *Id.* at 521. The employer had made three types of changes to the Insurance Plan in the past: preauthorization requirements, drug-quantity limits and step therapies.¹⁶ *Id.* The new change did not fall into any of these categories; rather than creating a new administrative prerequisite to obtaining brand-name drugs at the agreed upon co-payment, it eliminated such drugs from the Insurance Plan completely. *Id.* at 522-523. Thus, the Board held there was no past “practice” and, in turn, no basis to find the union had waived its right to bargain. *Id.* at 522.

By contrast to the changes considered in *Caterpillar, Inc.*, there is a “thread of similarity” amongst those changes FirstEnergy has implemented with regard to the ESR policy. *Id.* The change contested herein relates to employee eligibility for receipt of an anniversary gift; rather than being eligible every five years, employees are now eligible every ten years. (Jt. Ex. 1 at ¶ 29, Jt. Ex. 16 and Trial Tr. 192:12-17). Several past changes, to which Local 272 never objected, also relate to employee eligibility. For example, in the 1989 Pennsylvania Power and Ohio Edison expanded the policy by inviting five, ten and fifteen year employees to recognition dinners. (Trial Tr. 155:13-15). In 1999 FirstEnergy decided to stop recognizing employees at their first anniversary, eliminating the gift of a tie tack or charm bracelet that would formerly have been given on such occasion (Trial Tr. 158:4-12), and began including part-time employees

¹⁶ Under the step therapy plan participants were “required to start with an over-the-counter medication before progressing to a generic prescription drug and then to a brand drug if the generic drug did not prove effective.” *Id.* 355 NLRB at 527.

in the ESR policy.¹⁷ (Trial Tr. 183:17-19). Finally, as recently as 2009, FirstEnergy changed the way in which anniversary dates are determined for re-hires, which impacted the timing of their eligibility.¹⁸ (Jt. Ex. 7, Jt. Ex. 1 at ¶ 23, Trial Tr. 191:4-192:4).

The above changes, like the most recent change from recognizing employees on five-year intervals to ten-year intervals, affect employee eligibility, not the value of their gift, manner in which it was selected/presented or other truly administrative aspects of the ESR policy. Based on these facts, FirstEnergy has demonstrated a “past practice” and Local 272’s record of inaction should rightfully be construed as a past practice waiver.

Because Local 272 had notice of prior ESR policy changes, the ALJ erred in impliedly holding that they could not be the basis of a past practice. “Formal notice is not required if the union has actual knowledge of the proposed change.” 2006 GC Memo. Thus, it is irrelevant that “the record does not establish [FirstEnergy and its predecessors] give [sic] specific notice to the Unions” if Local 272 had actual knowledge, which it did. (ALJD 15:19-21). The record clearly indicates that Marshman, President of Local 272 since 2005, had actual knowledge of the ESR policy and changes thereto since he was hired as an employee by FirstEnergy’s predecessor, Pennsylvania Power, in 1980. (Trial Tr. 32:18-19, 36:2-4). Marshman expressly admitted not only to being aware of, but actually participating in the ESR policy for the last 30 years— well before the first recorded changes. (Trial Tr. 39:4-5, 39:17-20 and Jt. Ex. 6).

Moreover the record confirms that FirstEnergy has gone to great lengths to keep its employees and their representatives informed. Its predecessors historically communicated with

¹⁷ The ALJ erred in holding “[t]he most significant change” was “inclusion of part-time employees.” (ALJD 15:18-19). All changes affecting employee eligibility, including the more recent change in calculation of anniversary dates for re-hires, are equally significant.

¹⁸ Rather than calculating the anniversary of a returning former employee based on their pension years (Jt. Ex. 7) FirstEnergy now counts such employees’ anniversaries from their most recent date of hire (Jt. Ex. 1 at ¶ 23; Trial Tr. 191:4-192:4).

employees via newsletter and FirstEnergy followed suit. (Trial Tr. 204:20-23, 206:2-4). The FirstPlace Portal, an internal website, was established in 2001 and remains an actively used means of communication with employees. (Trial Tr. 198:16-18; *see generally* Jt. Ex. 17, R. Ex. 7). All employees have access to the Portal and FirstEnergy has placed computers at facilities so as to make access easier. (Trial Tr. 197:18-22). The Policy Letters, such as Human Resources Letter 307 which sets out the ESR policy, have been made available through the Portal (Jt. Ex. 1 at ¶ 30, R. Ex. 7) since its inception. (Trial Tr. 198:23-25). FirstEnergy has also used email to communicate with its employees since at least 2005. (Trial Tr. 204:15-16). Finally, it physically posts notices (Trial Tr. 204:1-3), and starting two years ago, leaves information in kiosks (Trial Tr. 81:15-21) at its facilities. Given Marshman's testimony and the knowledge conferred upon him and other Local 272 members via the newsletter, the FirstPlace Portal, email *and personal experience*, Local 272 cannot credibly deny knowledge of the ESR policy and historic changes thereto.

FirstEnergy's historic changes to employee eligibility under the ESR policy, of which Local 272 was well aware, constitute a past practice. The new change is within the scope of this past practice— employees are now eligible for an ESR gift every five years rather than every ten. Thus, through its silence, Local 272 waived its right to request bargaining over the 2013 ESR policy change and FirstEnergy cannot be found in violation of the Act for failing to bargain over said change.

D. Bargaining Over the ESR Policy is Untenable.

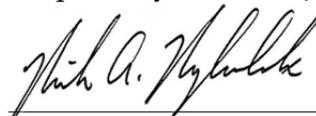
Respondents urge the Board to consider the practicality of deeming the gifts FirstEnergy honors long-term employees with as part of their terms and conditions of employment and, in turn, a mandatory subject to bargaining. Such a holding would allow each of FirstEnergy's twenty-three unions to demand bargaining over all aspects of the ESR policy, which would be

burdensome and untenable. Conceivably, all twenty-three unions could bargain about the type of items included in the catalog, the color of items, the cost of the items, the catalog levels, the brands of items, the number of items, when anniversaries would be recognized, etc... leading to twenty-three different ESR policies and hundreds of different gift catalogs. The true purpose of the gift is to serve as a thank you and a sign of appreciation which should be conveyed to the employee with “no strings attached.” It would not further the purposes of policies of the Act to engage in litigation over gifts gratuitously provided to employees. The gift was not meant to be a wage and was not given to induce employees to be more productive, safe or to stay with the Company longer than they normally would. The gift is simply that– a gift given to an employee as a simple thank you and a token of appreciation.

IV. CONCLUSION

In light of the foregoing, Respondent, FirstEnergy, respectfully requests that this case be dismissed because: (1) the Employee Service Recognition policy is not a mandatory subject of bargaining; (2) Local 272 waived its right to bargain over the 2013 Employee Service Recognition policy change by failing to timely request bargaining; and 3) Local 272 waived its right to bargain over changes to the Employee Service Recognition policy as a past practice waiver.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Exceptions to the Decision of the Administrative Law Judge has been filed with the NLRB via the e-file system and served upon the following via U.S. Mail, regular delivery, postage prepaid:

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This 14th day of March 2014.