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

ADVANCED LIFE SYSTEMS, INC. Case No. 19–CA–096464
19–CA–096899

and

INTERNATIONAL ASSOCIATION OF
EMT'S AND PARAMEDICS

Ryan Connelly, Esq., for the General Counsel.
Gary E. Lofland, Esq. (Halverson Northwest Law Group), Yakima, Washington, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Yakima, Washington, on February 25, 2014. International Association of EMTs and Paramedics (IAEP) filed charges against Advanced Life Systems, Inc. (the Company) in Case 19–CA–096464 on January 15, 2013 and Case 19–CA–096899 on January 22, 2013. IAEP, an affiliated labor organization, filed the consolidated complaint on behalf of the National Emergency Medical Services Association (the Union).[1] An order to consolidate both cases and complaints issued on April 29, 2013. An amended order consolidating cases and complaints issued on September 13, 2013. The amended complaint alleges that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act[2] (the Act) by: (1) withholding regularly scheduled biannual wage increases; (2) failing to provide employees with Christmas bonuses; and (3) telling employees that wage increases were withheld because of their union activity. The complaint also alleges that the Company violated Section 8(a)(3) and (1) for discriminating in regard to the hiring, tenure or terms and conditions of employment of its employees. The complaint alleges that the Company engaged in this conduct because a majority of the Company's employees voted for the Union in the August 2012 election and engaged in concerted activities, and to discourage employees from engaging in these or other union and/or protected, concerted activities.

[1] From May or April 2012 to April 2013, IAEP had an affiliation and service agreement with the Union, in which IAEP provided the Union with representation services, contract negotiations, handling of arbitrations, organizing, and servicing the members. (GC Exh. 1(a); Tr. 18–19.)

[2] 29 U.S.C. §§ 151-169.

In its timely-filed answer, the Company essentially denies the material allegations and asserts as an affirmative defense that the General Counsel lacks standing to issue and bring this complaint because he was improperly appointed.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a Washington State corporation with an office and place of business in Yakima, Washington (the facility), is engaged in the business of providing emergency medical transportation services. In conducting its operations during the last 12 months, the Company derived gross revenues in excess of $5000, and purchased and received goods at the facility valued in excess of $50,000 directly from suppliers located outside the State of Washington. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Parties*

The Company is a family-held S corporation formed in April 1996. William Woodcock (Woodcock) is the Company's president, chief executive officer (CEO), majority shareholder and oversees day-to-day operations. Billie Woodcock, Woodcock's spouse, is the other majority shareholder, but is not actively involved in the operation of the business. Woodcock's two daughters are minority, nonvoting shareholders and are not actively involved in the business. Peter South is the Company's operations manager. Jameson McDougall is a paramedic with supervisory responsibilities.[3]

The Company employs approximately 55 workers, consisting of full-time and part-time employees, operating out of six stations throughout Yakima. Employee categories include Emergency Medical Technician (EMT) basics, advanced EMTs, paramedics, dispatchers, billing staff, and an operations manager.[4] These employees include Matthew Schuaer, an advanced EMT, and paramedics Lenny Ugaitafa and Cole Gravel.

[3] The Company admitted that Woodcock, McDougall, and South were supervisors and/or agents within the meaning of Sec. 2(11) and (13) of the Act. (GC Exh. 1(R).)

[4] Woodcock estimated that the 55 employees, including an undetermined amount of part-time employees, actually add up to the equivalent of 45 to 50 full-time employees. (Tr. 70–72.).

B. *The Parties' Collective-Bargaining Relationship*

In July 2012, the Union began organizing Company employees. On August 15 and 16, 2012, a representation election was held, and on August 24, 2012, the Board certified the Union as the unit's exclusive collective bargaining representative. The bargaining unit (the unit) includes all full-time, regular part-time and per diem EMT's, paramedics, and dispatchers employed by the Company out of its six Yakima facilities, but excludes all other employees, maintenance employees, and guards and supervisors as defined in the Act.[5] As of February 25, 2014, however, the Company and the Union had not yet met for any negotiations.[6]

C. *Wage Raises*

The Company has no written policy regarding wage schedules or increases in its policy manual or standard operating procedures.[7] Nor does it have a formal procedure of evaluating unit employees' performance.[8] However, during the hiring process, Woodcock or the General Manager usually informs new employees to expect periodic wage increases. Thereafter, increases are determined by Woodcock based on tenure and performance.[9]

Prior to July-August 2012, the intervals between wage increases and wage increase amounts varied somewhat, but were not random,[10] as employees typically received wage increases every 6 months or sooner.[11] The increases ranged from 25 cents to 2 dollars and 50 cents.[12] Woodcock started new employees at relatively low wage rates, but increased their wages as they progressed.[13]

At some point after the organizing campaign began in July and before the representation election in August 2012, Woodcock spoke with Schauer at station 4 about the implications of

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[5] GC Exh. 1(P) at 3-4, 1(R) at 1.

[6] No explanation was provided by either party as to why they had not yet met to engage in collective bargaining. (Tr. 76.)

[7] R. Exh. 1–2.

[8] There was no testimony to refute Woodcock's credible testimony that he had exclusive authority in determining wage increases. (Tr. 82.)

[9] Schauer, Gravel, and Ugaitafa credibly testified that, upon being hired, they were told by South, Woodcock, or other managers to expect periodic wage increases once every 6 months. Starting out, employees typically received $1-r raises and then the raises decreased in 25- or 50-cent increments. (Tr. 23-24, 51–52, 63, 67.)

[10] Jt. Exh. 1.

[11] Prior to December 2012, Schauer received the following consecutive wage increases over the corresponding periods of time: 50 cents (4 months); $1 (4 months); 50 cents (4 months); 25 cents (5 months); 25 cents (6 months); 25 cents (6 months); and 25 cents (6 months). Gravel received the following consecutive wage increases during the following periods of time: $1 (3 months); 50 cents (5 months); 50 cents (5 months); 50 cents (5 months); $1 and 50 cents (6 months); 50 cents (6 months); 50 cents (6 months); 25 cents (6 months). Ugaitafa received the following consecutive wage increases during the following periods of time: 50 cents (2 months); 50 cents (4 months); $1 (1 month). (Jt. Exh. 1.)

[12] Among the employees who testified, the largest wage increase was $1.50 per hour. (Jt. Exh. 1.)

[13] Woodcock provided credible testimony that he also considers other factors, including the availability of employees, the economy, company expenses, call volumes, and reimbursement rates. (Tr. 79-81, 92.)

unionization. McDougall, Schauer's supervisor, was present. One implication of union certification, Woodcock told Schauer, would be the need to negotiate wage increases before the Company could give raises.[14]

In December 2012, after the Union prevailed in the election and was certified, Ugaitafa approached Woodcock about his overdue raise. Schaur was standing nearby and overheard the conversation. Woodcock explained that, because the Union was now involved, he had been advised by counsel to freeze all terms and conditions of employment, including pay raises.[15]

In January 2013, Schauer and Gravel approached Woodcock about the lack of pay raises since the Union was certified. They told him that it was supposed to be business as usual until contract negotiations were complete. Woodcock, however, insisted that pay raises had been discretionary and now needed to be negotiated.[16]

Since July-August 2012, a majority of the unit has not received any wage increases from the Company.[17] Nor did the Company notify the Union, at any time since it was certified in August 2012 as the bargaining unit's labor representative and prior to December 19, 2013, that it would cease giving wage increases. On December 19, 2013, however, approximately 2 months prior to this hearing, the Company notified the Union that it intended to provide employees with hourly wage increases in January 2014. Only certain employees, however, have received wage increases since that time.[18]

D. *Christmas Bonus*

The Company also has no formal written employee policy regarding bonuses.[19] However, prior to December 2012, unit employees regularly received Christmas payments in different forms and amounts. In fact, this practice evolved to the point where unit employees, upon being

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[14] There is no testimony as to the month or day that the conversation took place. However, the conversation between Schauer, McDougall, and Woodcock occurred at station 4 prior to the union certification. Neither Schauer nor Woodcock recalled everything that was said during the discussion. I credit Schauer's version, however, because he specifically recalled hearing Woodcock say that he would be unable to give raises if employees voted in favor of the Union. (Tr. 25–27.) Woodcock, on the other hand, conceded that the conversation took place, but simply denied stating what was alleged in the complaint. (Tr. 74–75.)

[15] Ugaitafa and Schaur provided credible testimony about this conversation. (Tr. 27–29, 64–65.) Woodcock, on the other hand, issued a vague denial to the complaint allegation ("not exactly like that") and conceded that he told the employees that he could not undertake unilateral action without first bargaining with the Union. (Tr. 75.)

[16] Schauer and Gravel provided inconsistent testimony as to what Woodcock told them on this occasion. Gravel simply recalled Woodcock responding that he would consult with his attorney (Tr. 30–31.), while Schauer recalled Woodcock saying that he was not allowed to give employee raises because they were now represented by the Union. (Tr. 53–55.) Nevertheless, Schauer's recollection of the conversation was close to Woodcock's version that everything had been discretionary in the past and now had to be negotiated. (Tr. 76.)

[17] Jt. Exh. 1.

[18] Gravel and Ugaitafa received a wage increases in January 2014. (Tr. 52, 62, 90; R. Exh. 3.) The Company allegedly awarded wage raises to certain employees in an effort to retain them. (Tr. 90.)

[19] R. Exhs. 1, 2.

hired by the Company, were notified to expect such future payments.[20] Woodock generally gave unit members payments ranging in amounts from $50 to 500 each (totaling around $10,000-15,000) in the form of cash, check, tangible raffle chances, gifts, or trip prizes at the annual Christmas party hosted by the Company. Since the Company's inception in 1996, the payments were usually distributed at the annual Christmas party and the gifts increased in value as the business prospered. [21]

More recently, unit employees received some form of Christmas payments in 2008 and 2009.[22] In 2010, after an employee's home was destroyed in a mud slide, Woodcock asked unit employees if they would agree to forego their Christmas payments in return for a $10,000 contribution by Woodcock to the affected employee. Unit employees agreed, the affected employee was given a $10,000 check, and there were no Christmas bonuses. Some employees, however, randomly received gifts through a raffle.[23] In 2011, most employees received Christmas payments in the form of checks. New employees, however, were allowed to take part in a raffle for gift cards and other products.[24] In 2012 and 2013, Woodcock did not give Christmas payments to unit employees. Nor did he notify the Union that he would cease giving the customary Christmas bonuses or gifts.[25]

Monetary payments given to employees at Christmas time were always issued in the form of personal checks or cash from Woodcock and his wife. There were no records kept of such payments and neither Woodcock nor the Company claimed them as employee compensation or business expenses on their respective income tax returns.[26] Nor did employees report such payments as income on their income tax returns.[27]

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[20] Schauer and Gravel credibly testified that they were told by General Manager Ann McCarter that EMTs receive bonuses around Christmastime, and that EMTs receive $50 for every year up to $500, and paramedics receive $100 for every year up to $500. (Tr. 32, 55-56.)

[21] Woodcock credibly testified that his family personally gave employees Christmas gifts and that records were not kept. However, I do not credit his assertion that employees had to be present at the Christmas party to receive the gift (Tr. 82–85, 94–95.), as Gravel's credible and unrefuted testimony revealed that, in some instances, the payments were distributed by the dispatch office prior to the Christmas party. (Tr. 56.) Moreover, he failed to refute the credible testimony of Schauer and Gravel that bonuses ranged from $50- $500.

[22] Schauer testified to receiving a bonus in 2009 (Tr. 32.), but was impeached by a sworn affidavit in which he stated the contrary. (Tr. 39.) Gravel, however, provided credible and unrefuted testimony that he received one that year. (Tr. 55–56.)

[23] Woodcock's testimony was credible and corroborated by Gravel on this point. (Tr. 57, 85–86.)

[24] This finding is based on the credible and unrefuted testimony of Schauer (Tr. 36.), Gravel (Tr. 57.), and Ugaitafa (Tr. 66.)

[25] Woodcock conceded that he stopped the practice in 2012 and 2013 and, in response to leading questions, attributed it to several factors: helping a family member experiencing financial difficulties, increasing business competition from American Medical Response, and decreasing margins in the reimbursement system from Medicare and Medicaid. Transcript. (Tr. 36, 57–58, 66, 86–89, 93–94.)

[26] Woodcock's testimony as to the personal forms of cash and check payments to employees was not refuted by any company employees. (Tr. 85, 96.)

[27] This finding is based on Gravel's credible testimony. (Tr. 60.)

LEGAL ANALYSIS

I. The 8(a)(5) Violations

The complaint alleges that the Company stopped giving unit employees annual pay increases and Christmas bonuses without prior notice to the Union and without affording the Union an opportunity to bargain with respect to the changes, and without first bargaining with the Union to a good-faith bargaining impasse. The Company admits that employees have not received wage increases since 2012 but denies that it was required to do so. Similarly, the Company admits that it has not given any Christmas payments to employees since 2011, but denies that it has ever given employee bonuses or is required to do so.

Section 8(a)(5) of the Act provides that "[i]t shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees," 29 U.S.C. § 158(a)(5); and Section 8(d) identifies the subject matters of such bargaining as including "wages, hours, and other terms and conditions of employment." Id. § 8(d). An employer violates the Act when it unilaterally alters wages, hours, or other terms or conditions of employment without first negotiating to a valid impasse with the union representing the employees. *Covanta Energy Corp.*, 356 NLRB No. 98, 22 (2011), citing *NLRB v. Katz,* 369 U.S. 736, 742–743 (1962) ("Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy.")

An employer and the representative of its employees are obligated to bargain with each other in good faith regarding wages, hours, and other terms and conditions of employment. *NLRB v. Borg-Warner Corp.,* 356 U.S. 342, 349 (1958). The duty to bargain is limited to those subjects; as to all other matters, each party is free to bargain or not to bargain. Id. Among those other matters not requiring bargaining are gifts given to employees by their employers. *North American Pipe Corp.*, 347 NLRB 836, 837 (2006); See, e.g., *Benchmark Industries,* 270 NLRB 22 (1984), affd. *Amalgamated Clothing v. NLRB,* 760 F.2d 267 (5th Cir. 1985).

A. Wage Raises

The wage increases fall within the ambit of section 8(a)(5) "if they are of such a fixed nature and have been paid over a sufficient length of time to have become a reasonable expectation of the employees and, therefore, part of their anticipated remuneration." *Phelps Dodge Mining Co. v. NLRB,* 22 F.3d 1493, 1496 (10th Cir.1994) (quoting *NLRB v. Nello Pistoresi & Son, Inc.,* 500 F.2d 399, 400 (9th Cir.1974)). Periodic wage increases become conditions of employment if they are "an established practice . . . regularly expected by the employees." *Daily News of Los Angeles*, 315 NLRB 1236 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996).

On the other hand, if an employer "retain[s] total discretion to grant [wage] increases based on any factors it chooses," it is doubtful that discontinuing the policy would violate Section 8(a)(5)." *Daily News of Los Angeles v. NLRB,* 73 F.3d 406, 412 fn. 3 (D.C.Cir.1996). Indeed, wage increases that "are fixed as to timing but discretionary in amount do not become part of the employees' reasonable expectations and thus are not considered 'terms and

conditions' of employment." *Acme Die Casting*, 93 F.3d 854, 857 (D.C. Cir. 1996), citing *Phelps Dodge,* 22 F.3d at 1496 (holding that payments to employees were not a condition of employment where the payments varied in time, recipients, amounts and manner in which calculated). See *also Daily News,* 73 F.3d at 412 fn. 3 ("fixed timing alone would be sufficient to bring the program under *Katz*"). Further, the company's periodic wage increase must establish a discernable pattern or practice in regard to timing, amount and selection of employees to receive the increases. *Phelps Dodge,* 22 F.3d at 1497 citing *Ithaca Journal-News, Inc.*, 259 NLRB 394, 395 (1981); *UARCO, Inc.,* 283 NLRB 298, 300 (1987) (employer unlawfully discontinued an established 17-year annual wage increase to newly represented employees); *Southeastern Michigan Gas Co.,* 198 NLRB 1221, 1222–1223 (1972) (employer violated § 8(a)(5) by discontinuing established 20-year practice of biannual wage increases).

Prior to the Union's representation of unit employees, the Company had a longstanding practice of granting hourly wage increases mainly between 25 to 50 cents once every 6 months or sooner, depending on tenure and performance. Its cessation of such a practice since that time, without notice to the Union, amounts to a unilaterally discontinuation of an expected term of employment. *Jensen Enterprises*, 339 NLRB 877, 877 (2003) (by withholding customary increases during a potentially long period of negotiations for an agreement covering overall terms and conditions of employment, employer unlawfully changes existing terms and conditions without bargaining to agreement or impasse). Moreover, the unilaterally imposed change was "material, substantial, and significant," thus impacting the employees or their working conditions in violation of Section 8(a)(5). *Toledo Blade Co.*, 343 NLRB 385 (2004).

B. Christmas Payments

The inquiry here is whether the Christmas payments were gifts or "wages" in the form of bonuses. *See Acme Die Casting, v. NLRB.*, 93 F.3d 854, 857 (D.C. Cir. 1996); *Phelps Dodge Mining Co., Tyrone Branch v. NLRB*, 22 F.3d 1493, 1496 (10th Cir. 1994). The Board has construed the term "wages" to include "emoluments of value . . . which may accrue to employees out of their employment relationship." *N. Am. Pipe Corp. & Unite Here*, 347 NLRB 836, 837 (2006); See generally *Inland Steel Co.,* 77 NLRB 1, 4 (1948), enfd. 170 F.2d 247 (7th Cir. 1948), cert. denied 336 U.S. 960 (1949). On the other hand, it is recognized that gifts do not become wages or terms and conditions of employment simply because they are made in the context of an employment relationship. *N. Am. Pipe Corp. & Unite Here*, 347 NLRB at 837. An employer can make such payments as it pleases. Id. citing *NLRB v. Wonder State Mfg. Co.,* 344 F.2d 210, 213 (8th Cir. 1965), denying enf. in pertinent part at 147 NLRB 179(1964).

The Board has found that an employer cannot unilaterally discontinue a bonus if it is of a fixed nature and has been paid over a sufficient length of time or with an explicit promise of future payments, thereby creating a reasonable expectation among employees that the payment will be received as part of their remuneration from employment. *North American Pipe Corp.* , 347 NLRB at 838. Thus, a holiday bonus is a mandatory bargaining subject if the employer's conduct raises the employees' reasonable expectation that the bonus will be paid. *Waxie Sanitary Supply*, 337 NLRB 303, 304 (2001) (unlawful discontinuance of a holiday bonus where the employer based the amount in part on individual performance and company profits, and posted the monthly gross profits in the employee lunchroom so that employees could monitor the size of their anticipated bonus for the prior 3 consecutive years). See, e.g., *E.C. Waste, Inc.*, 348 NLRB

565 (2006) (unlawful discontinuance of a supplemental bonus, given on top of statutorily mandated bonus, which was given at Christmas, every year until Union was elected, and in a significant amount, $900, per employee); *Sykel Enterprises.,* 324 NLRB 1123, 1124–1125 (1997) (unlawful discontinuance of a Christmas bonus where it was given to different employees in different amounts, determined solely by the employer, and based in part on "how the Company operated that year" for the prior four consecutive years).

Woodcock began hosting Christmas parties for Company employees the mid-1990s. They began as pot-luck dinners, but graduated to catered events in which the monetary value of payments and things given to employees increased over the years as the Company expanded its operations. At each Christmas party hosted by Woodcock at the Company facility from December 2008 through December 2011, he gave a total of between $5000 and $15,000 to unit employees through cash, checks, gift cards, TVs, clothing, raffle tickets for prizes, including cruises and other trips. On at least one occasion, payments were also distributed by the dispatch office prior to the Christmas party. The monetary value of each payment or thing given to each employee ranged in value from $50 to $500.

Here, the critical issue is whether the distribution chain of some form of Christmas compensation was broken in instances when employees were given raffle tickets and a chance to win valuable prizes. In *Benchmark Industries*, the Board found an employer had not violated Section 8(a)(5) when it unilaterally ended its practice (in existence for at least 3 years) of giving employees hams and holiday lunches or dinners as a Christmas bonus. *Benchmark Industries*, 270 NLRB 22 (1984). The Board concluded these were token items which could not be fairly characterized as compensation or as terms and conditions of employment. *Id.* Additionally, in *Harvstone*, the Board held that unilaterally discontinued Christmas bonuses, prizes and parties were in the nature of gifts rather than terms and conditions of employment. *Harvstone Mfg. Corp.*, 272 NLRB 939 (1984). However, in *Benchmark*, the Board plurality noted that the facts did not involve discontinuance of Christmas *cash* bonuses. Also, the Board acknowledged that "[i]n our view there are circumstances where Christmas bonuses may become part of the employees' remuneration and, therefore, a subject over which an employer must bargain with a union prior to discontinuing such payments." *Freedom Wlne-TV*, 278 NLRB 1293, 1296 (1986), citing *Benchmark*, supra at fn. 5. The present circumstances are those in which the Christmas payments constituted bonuses and a mandatory subject of bargaining.

These Christmas payments were given in the context of the employment relationship. The Company insists that these payments were "gifts" made on behalf of Woodcock family's personal funds and are, therefore, not attributable to the Company. Its claim is bolstered by the absence of any documentary evidence to refute Woodcock's credible testimony that the cash and checks given, and gift cards and prizes procured came from personal funds. However, the remaining circumstantial evidence strongly supports the charge that the Christmas payments were distributed on behalf of the Company. See *H.S.M. Machine Works, Inc*., 284 NLRB 1482, 1494 (1987) (cash payments and personal gifts given by owner of 95% of company deemed given by the company), citing *NLRB v. Rubatex Corp.*, 601 F.2d 147, 150 (4th Cir. 1979). First, Woodcock and his wife were majority owners of the Company. Secondly, the payments were given at the Christmas party, which was held at the Company's facility (since an employee always had to be on shift) or by the dispatch office. Employees only received a payment if they attended the party. Lastly, while Woodcock denied that the purpose of the party and payments

were employee retention-based, it was no doubt aimed at boosting employee morale, since employees had to be present to receive a gift and the event made them interact.

Additionally, it appears that all unit employees who attended the party received a Christmas payment in some form or another. Only employees who recently started working for the Company were ineligible for cash payments. For example, Ugaitafa only received a $50 coffee gift card instead of being entered into the drawing, since he had only worked for the Company for one month as of December 2011. Regardless of the payment form, Woodcock distributed significant payments to unit employees, ranging from $50 to $500. In 2011, prior to the Union's arrival, Woodcock sought the employees' *approval* to forgo Christmas payments and, instead, give the total funds to an employee who lost his house in a mudslide. This series of events demonstrates that the Company knew that unit employees expected to receive Christmas payments in some form or another. Considering that most unit employees received payments, the significance of the amount, and the consistency of the payments, Woodcock's practice created a reasonable expectation among unit employees that the Christmas party payment would be received as part of their remuneration from employment. See *Laredo Coca-Cola Bottling Co.*, 241 NLRB 167, 173–174 (1979), enfd. 613 F.2d 1342–1343 (5th Cir. 1980), cert. denied 449 U.S. 889 (1980) (unlawful discontinuance of a Christmas bonus where it was given the previous 3 years and employees received payments in the form of cash, beer, soda, hams, or fruitcakes based on employee earnings and subjective evaluation of employee's performance and attitude).

Finally, Woodcock discontinued the payments in 2012 and 2013, both subsequent to the union certification. Woodcock attributed this to a myriad of factors, including the need to help a family member with financial difficulties, increased business competition from a competitor, American Medical Response, and decreased margins in the Company's reimbursement system from Medicare and Medicaid. Specifically, he claims that profits were down and he could not afford to distribute payments as he had in the past. The Company also notes that it did not deduct the payments as business expenses.

In relying on such economic arguments, however, Woodcock essentially conceded that past Christmas payments were bonuses because they were tied to production and the financial health of the Company. See *North American Pipe Corp.* , 347 NLRB at 837; *Sykel Enterprises,* 324 NLRB at 1124–1125. Moreover, the Company's failure to report the payments as business expenses is inconsequential, as unreported tax withholdings alone are insufficient to prove that payments are gifts, and not bonuses or wages. See *North American Pipe Corp.* , 347 NLRB at 840.

Under the circumstances, the Company's discontinuation of payments at its annual Christmas party violated Section 8(a)(5) and (1) of the Act.

II. The 8(a)(1) Violations

The complaint also alleges that Woodcock made several coercive statements to employees relating to the Union: (1) that he would not be able to give them raises if they voted for the Union; (2) subsequently, after the Union was certified as labor representative, that he could not give them their raises because the Union was there; and (3) that he did not need to give wage increases during contract negotiations. The Company denies the allegations.

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7 of the Act]." 29 U.S.C. § 158(a)(1). Section 7 rights include the right "to self-organization, to form, join, or assist labor organizations [and] to bargain collectively through representatives of their own choosing." 29 U.S.C. § 157.

Statements that the Company would not be able to give employees raises if they voted for the Union and, subsequently, if a union represented them, would certainly run afoul of the Act. Such statements would be unlawful because they constitute threats of reprisal. *Winkle Bus Co.,* 347 NLRB 1203, 1205 fn. 12 (2006). In this case, Woodcock told Schauer, prior to the representation election, that he would be unable to give raises if employees voted in favor of the union. That statement effectively restrained protected Section 7 activity. See *Milum Textile Services Co.,* 357 NLRB No. 169, slip op. at 12 (2011) (implicitly threatening to reduce wages if employees selected union). Similarly, Woodcock's statement that he would freeze pay raises because employees were now represented by a union, constituted a threat of reprisal. *Teksid Aluminum Foundry,* 311 NLRB 711, 712–713 (1993) (explicit threat of wage freeze).

Similarly, Woodcock told employees unit employees that pay raises had always been discretionary and, since they selected a union to represent them, now needed to be negotiated. *Jensen Enterprises*, 339 NLRB 877, 877 (2003) (employer's statement that wages would be frozen until a collective-bargaining agreement is unlawful if employer has a past practice of granting periodic wage increases). *First Student, Inc.,* 341 NLRB 136, 141 (2004) (employer's announcement to employees that there would be no wage increase during negotiations, notwithstanding history of providing annual wage increases, violated Sec. 8(a)(1)); *Illiana Transit Warehouse Corp.*, 323 NLRB 111, 113–114 (1997); *299 Lincoln Street, Inc.*, 292 NLRB 172, 174 (1988); *More Truck Lines*, 336 NLRB 772, 773–775 (2001), enfd. 324 F.3d 735 (D.C. Cir. 2003). Such an announcement suggested to employees that the employer intends to unilaterally take away benefits and require the union to negotiate to get them back. See also *Covanta Energy Corp.,* 356 NLRB No. 98, slip op. at 12 (2011). Under the circumstances, the Company violated Section 8(a)(1) of the Act.

III. The 8(a)(3) Violation

The complaint alleges that the Company also violated Section 8(a)(3) of the Act by eliminating its customary biannual wage increases raises for a majority of its employees since July/August 2012 and Christmas bonuses after December 2011 because a majority of its employees voted in favor of the Union to served as their labor representative and engaged in concerted activities, and to discourage these or other protected concerted activities. The Company denies the allegations.

An employer violates Section 8(a)(3) by taking adverse action against an employee because the employee engages in, or is suspected of engaging in, union activities. *Mays Electric Co.*, 343 NLRB 121, 134 (2004). Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 602 F.2d 899 (1st Cir. 1981, cert. denied 455 U.S. 989 (1982), the General Counsel has the burden of establishing that union activity was a motivating factor in the Respondent's action alleged to

constitute discrimination in violation of Section 8(a)(3) of the Act. The elements required to support such prima facie violations of Section 8(a)(3) are union or other protected concerted activity by employees, employer knowledge of the activity, and a connection between union animus by the employer and adverse employment action. See, e.g., *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007); *Desert Springs Hospital Medical Center*, 352 NLRB 112 (2008); *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). Once the General Counsel has established a prima facie case, the burden shifts to the Respondent to show it would have, and not merely could have, terminated an employee even in the absence of protected activity. *Chadbury Beverages, Inc. v. NLRB,* 160 F.3d 24, 31 (D.C. Cir. 1998).

There is no dispute that the Company knew that employees voted in favor of union representation and, after the Union was certified, proceeded to discontinue its past practice of granting periodic wage increases and Christmas payments. Considering his prior consistent practice of paying Christmas bonuses, Woodcock was clearly making a statement that the injection of the Union into the employer-employee relationship would have repercussions; his discontinuance of the wage increases and Christmas bonuses evidenced animus toward the Union.

Moreover, the aforementioned 8(a)(1) violations of threats to freeze wages before the Union was certified and then freezing wages after the Union came in, shed additional evidence of Woodcock's animus and unlawful motivation. See *Ridgeview Industries,* 353 NLRB 1096, 1097 fn. 3 (2009) (evidence of numerous 8(a)(1) violations is sufficient to demonstrate unlawful motive with respect to an 8(a)(3) violation).

The burden thus shifts to the Company to demonstrate that it would have, even in the absence of union certification, frozen wages and Christmas payments. Woodcock attributed the wage freeze to increased competition and health insurance costs, and decreased governmental reimbursement rates. However, his vague explanation was insufficient to overcome the clearly pretextual nature of his actions and fell short of meeting the Company's rebuttal burden. See *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB No. 57, slip op. at 5 (2011), enfd. sub nom. *Mathew Enterprises. v. NLRB*, 498 Fed. Appx. 45 (D.C. Cir. 2012) (finding of pretext defeats an employer's attempt to meet its rebuttal burden).

Under the circumstances, the Company violated Section 8(a)(3) and (1) of the Act. An argument can be made that the finding and conclusion that the wage freeze violated Section 8(a)(5) makes it unnecessary to sustain an 8(a)(3) violation. See *Bryant & Stratton Business Institute,* 321 NLRB 1007 fn. 4 (1996) (unnecessary to pass on alternative finding that wage freeze also violated Section 8(a)(3) in light of finding that the wage freeze violated Section 8(a)(5) and that finding would not materially affect the remedy). Such a decision, however, is one best left to the Board upon review of any exceptions to my findings and conclusions.

IV. Standing To Issue Complaint

Finally, the Company asserts as an affirmative defense that the Regional Director of Region 19 and then-Acting General Counsel were improperly appointed based, in part, on a lack of quorum and, thus, lacked standing to issue this complaint, under *Noel Canning v. NLRB,* 705 F.3d 490 (D.C. Cir. 2013), pet. for cert. pending, No. 12-1281 (filed Apr. 25, 2013). The Board

rejected that argument in *Sub-Acute Rehabilitation Center at Kearney d/b/a Belgove Post Acute Care Center*, 359 NLRB No. 77 (2013), and *Bloomingdale's, Inc.*, 359 NLRB No. 113 (2013).

CONCLUSIONS OF LAW

1. By telling unit employees that they will not get raises if they choose, or have chosen, to be represented by a union, the Company violated Section 8(a)(1) of the Act.

2. By refusing to give unit employees wage increases because they chose to be represented by a union, the Company violated Section 8(a)(1) of the Act.

3. By refusing to give employees their traditional Christmas payments because they chose to be represented by a union, the Company violated Section 8(a)(1) of the Act.

4. By unilaterally ceasing to grant established wage increases to unit employees, the Company violated Section 8(a)(5) and (1) of the Act.

5. By unilaterally ceasing to grant Christmas payments to unit employees, the Company violated Section 8(a)(5) and (1) of the Act.

6. By discontinuing its custom and practice of granting unit employees periodic wage increases and Christmas payments because the employees chose to be represented by a union, the Company violated Section 8(a)(3) and (1) of the Act.

7. The aforementioned unfair labor practices affected commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Company has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[28]

ORDER

The Company, Advanced Life Systems, Inc., Yakima, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[28] 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.

(a) Refusing to bargain with the National Emergency Medical Services Association

("the Union) as the duly designated representative of a majority of its employees in the bargaining unit appropriate for purposes of collective bargaining (the "unit"), within the meaning of Section 9(b) of the Act:

> All full-time, regular part-time and per diem EMT's, paramedics and dispatchers employed by us out of our Yakima, Washington facilities, but excluding all other employees, maintenance employees, and guards and supervisors as defined in the National Labor Relations Act.

(b) Telling unit employees that they will not get raises if they choose, or have chosen, to be represented by a union.

(c) Refusing to give unit employees wage increases because they chose to be represented by a union.

(d) Unilaterally ceasing to grant established wage increases to unit employees.

(e) Unilaterally ceasing to grant established Christmas payments to unit employees.

(f) In any other manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

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

(a) On request of the Union, reinstate the practice of providing unit employees with a wage increase of at least 25 cents an hour every 6 months.

(b) On request of the Union, reinstate the practice of providing a Christmas payment.

(c) Fully remedy its failure to provide its established practice of wage increases, within 14 days from the date of this Order, by making unit employees whole for any loss of earnings and other benefits they suffered as a result of the Company's actions, by ordering the Company to provide a wage increase of at least 25 cents an hour, 6 months from the date of employees' last wage increase in 2011–2012, with an additional increase of at least 25 cents an hour at 6-month intervals after that point.

(d) Fully remedy its failure to follow its established practice of wage increases within 14 days from the date of this Order by making unit employees whole for any loss of earnings and other benefits they suffered as a result of the Company's actions, by ordering the Company to provide unit employees a Christmas payment for 2012 and 2013 in an amount not less than an employee's last Christmas payment.

(e) Within 14 days after service by the Region, post at its six facilities in Yakima, Washington, copies of the attached notice marked "Appendix."[29] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Company's authorized representative, shall be posted by the and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Company customarily communicates with its employees by such means. Reasonable steps shall be taken by the Company 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 Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since July 2012.

(f) Reasonable steps shall be taken by the Company 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 Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since July 2012.

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

Dated, Washington, D.C. May 2, 2014

Michael A. Rosas
Administrative Law Judge

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

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the aforementioned rights.

WE WILL NOT refuse to bargain in good faith over terms and conditions of employment with your designated exclusive bargaining representative in the following bargaining unit:

All full-time, regular part-time and per diem EMT's, paramedics and dispatchers employed by us out of our Yakima, Washington facilities, but excluding all other employees, maintenance employees, and guards and supervisors as defined in the National Labor Relations Act.

WE WILL NOT tell you that you will not get raises if you choose to be represented by a union.

WE WILL NOT tell you that we cannot give you a raise because you choose to be represented by a union.

WE WILL NOT fail to give you raises because you chose to be represented by a union.

WE WILL NOT fail to give you a holiday payment or gift because you chose to be represented by a union.

WE WILL NOT unilaterally, and without notifying and/or bargaining with your union, cease giving you raises.

WE WILL NOT unilaterally, and without notifying and/or bargaining with your union, stop giving you a holiday payment.

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

WE WILL, upon request, bargain in good faith over subjects covering wages, hours, and other terms and conditions of your employment.

WE WILL reinstate our past practice of giving raises and holiday payments.

WE WILL pay you for the wages and other benefits lost because we unilaterally ceased giving you raises and holiday payments.

ADVANCED LIFE SYSTEMS, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

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.

915 2nd Avenue, Room 2948, Seattle, WA 98174-1078
(206) 220-6300, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/19-CA-096464 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., 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, (206) 220-6284.