

**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**  
**REGION 19**

ADVANCED LIFE SYSTEMS, INC.,

and

INTERNATIONAL ASSOCIATION OF  
EMT'S AND PARAMEDICS

Case Nos: 19-CA-096464  
19-CA-096899

**BRIEF OF RESPONDENT ADVANCED LIFE SYSTEMS, INC. IN SUPPORT OF ITS  
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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Gary E. Lofland  
Kellen J. Holgate  
HALVERSON NORTHWEST LAW GROUP, P.C.  
405 E. Lincoln Avenue  
PO Box 22550  
Yakima, Washington 98907

*Attorneys for Employer  
Advanced Life Systems, Inc.*

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## I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Administrative Law Judge's ("ALJ") decision in this case suffers from a misinterpretation of the facts and a result-oriented misapplication of the law. On August 24, 2012, the Board certified the Service Employees International Union (the "Union") as exclusive representative of the EMT's, paramedics, and dispatchers employed by Advanced Life Systems ("ALS"). At that time, ALS correctly understood that it had a duty to maintain the status quo -- it could take no unilateral action with regard to mandatory subjects of bargaining without first negotiating with the Union. However, the ALJ held that 1) ALS was required to unilaterally grant discretionary wage increases even in the absence of fixed evaluation criteria, predictable timing, or the predictable value of the raises and 2) that the *owners* of ALS were required to continue a tradition of using their *personal funds* to give personal gifts to employees during the negotiating period. Neither of these directives are supported by Board precedent or case law.

In the many years prior to Union certification, ALS had granted wage increases to its employees on an irregular basis and in unpredictable amounts. After the Union was certified, ALS understood that future wage increases would have to be negotiated with the Union – otherwise ALS's unilateral action of granting them would deprive the Union of the ability to bargain over wages in violation of the the National Labor Relations Act, (the "Act"). The ALJ incorrectly held that the wage increases in prior years, even though the identities of recipients, timing, and amount were entirely within the discretion of ALS, had somehow become an aspect of wages, hours, and other terms and conditions of employment. Thus, according to the ALJ, ALS was required to continue the practice of granting discretionary, merit based wage increases at discretionary intervals, in an

amount to be determined by ALS. Not only is such a directive impossible to administer -  
- Who gets a raise? How much? When? -- but it is also an unjustified extension of  
current Board and court precedent.

The other major issue determined by the ALJ concerns Christmas gifts given by the owners of ALS to employees during an annual Christmas party. Despite that 1) William and Billie Woodcock purchased the gifts with their personal funds, with no financial or tax benefit to ALS, 2) that the total price of gifts varied wildly from year to year, and in some years no gifts were given, and 3) that many of the gifts were only opportunities to “win” in a raffle; the ALJ held that William and Billie Woodcock were required to continue to provide Christmas presents to employees during bargaining. As with the wage increases, such a directive is impossible to administer, and completely ignores ALS’s corporate form. On a more basic level, it takes a social practice that should be promoted – i.e. the selfless giving of Christmas gifts -- and turns it into a negotiable portion of the employment relationship – a result that is likely to chill gift-giving rather than promote it.

At bottom, these two highly discretionary acts – the granting of wages increases (irregular in interval and amount) and ALS’s owners’ practice of giving employees Christmas gifts – were not consistent and predictable enough to mature into established past practices that ALS was required to maintain during negotiations. Even if they were established past practices, ALS was required to bargain with the Union over all discretionary aspects of their implementation. Had ALS chosen to unilaterally grant merit wage increases or give Christmas gifts during the periods at issue, it very likely would have resulted in an unfair labor practices charge based on a similar failure to

bargain theory. Accordingly, the ALJ's Decision and Recommended Order should be rejected, and the General Counsel's Complaint should be dismissed in its entirety.

## **II. STATEMENT OF FACTS**

### **a. The Parties**

ALS is a corporation organized under the laws of the State of Washington, (GC Exh 1), and is a subchapter S corporation for federal tax purposes. (TR 69:24). William Woodcock and his wife, Billie Woodcock, are the majority shareholders of the corporation, though William Woodcock oversees the day to day operations of the company as president and CEO. (TR 69:24-25; 70:3). ALS employs approximately fifty-five people. (TR 70:23). It provides emergency and non-emergency transport services, wheelchair, and car transfers using emergency medical technicians and paramedics to staff the vehicles. (TR 69:17-20; 71:7-13).

On August 24, 2012, the Board certified the Union as exclusive representative of the paramedics, EMT's, and dispatchers following a Board election conducted on August 15 and 16, 2012. (GC Exh 1). As of the date of the hearing, February 25, 2014, no negotiations between ALS and the Union had occurred. (TR 76:18-20).

### **b. The Wage Increases.**

At the hearing, the General Counsel's witnesses could not agree on ALS's past practices regarding wage increases. Matt Shauer testified that, upon being hired, he was told that he would be given raises:

About every six months and that it was either 25 cents or 50 cents depending on our performance. [The ALS representative] didn't say how that performance would really be eval'd but that's what she said. She also said you get a larger pay raise at one year and at two years, and they're typically a dollar.

(TR 23:18-23).

The documentary evidence showed that Shauer received increases at 3.5 month, 2 month, 4 month, 5 month, and 6 month intervals. (Jt. Exh 1). The expected “larger pay raise” at one year and two years did not occur – Mr. Shauer received a .50 cent raise approximately 1 year after hire, and a .25 cent raise 23 months after hire. (Jt. Exh 1).

Cole Gravel had a different impression of ALS’s wage increase practices even though Gravel and Shauer were hired within 6 months of each other. (Jt. Exh 1).

Initially, when I was hired, the operational manager gave me my starting hourly rate, and told me that, that would increase once my paramedic cert came in, and that there would be periodic wage increases thereafter.

(TR 51:23-52:1).

As expected, Gravel received a \$1.00 per hour wage increase only 3 months after his start date (presumably after he received his paramedic certification). (Jt. Exh 1). Mr. Gravel gave no further testimony regarding the amount or timing of raises.

The final witness for the General Counsel, Lenny Ugaitafa, had still another perception of the ALS wage system. Ugaitafa testified that he learned upon hire that “we would receive annual pay raises on our anniversary date.” (TR 63:21-22). On cross examination, Ugaitafa conceded that he had no idea of the amount of raises, (TR 67:19), and that he had no knowledge of any six month increases. (TR 67:20-23). In fact, Ugaitafa received wage increases approximately 2 months after hire, 5 months after that, and again 1 month later. (Jt. Exh 1).

Woodcock testified, and it was unrefuted, that ALS had no written policy, matrix, or salary schedule. (TR 79:9-19). He further testified, and it was unrefuted, that there is no formal evaluation procedure, in writing or otherwise, to determine wages. (TR 81:10-

19). Since the formation of ALS, Woodcock was the only person who set and determined wages. (TR 79:20-23). He testified that wages were determined based on a variety of market factors, including availability of employees, the economy, expenses, call volume, and rates of reimbursement from Medicare and Medicaid. (TR 81:3-9). Finally, Woodcock testified that the amount and timing of any wage increases were totally within his discretion. (TR 82:5-16).

In sum, the three witnesses for the General Counsel could not even agree on ALS's wage program. William Woodcock's description of ALS's wage increases is the only description that aligns with the actual wage data in the record. When the data from 2008-2012 is viewed in total, for all unit employees, there is no way to predict who will get a raise, on what date, and in what amount. (Jt. Exh. 1). That is because the documentary evidence clearly reflects Woodcock's testimony – those decisions were purely within the discretion of ALS, acting through Woodcock.

**c. The Christmas Gifts.**

The General Counsel's witnesses were equally disjointed regarding Christmas gifts. Schauer testified that when he was hired in 2009 he was told that EMT employees received "longevity bonuses" around Christmas of \$50 for each year of employment. (TR 32:5-9). He stated that he received "fifty dollars I believe" in 2009. (TR 32:21). On cross examination, Schauer, reading from his sworn affidavit to the National Labor Relations Board, stated: "In 2009, when we asked him about the bonus, Woodcock said that he had donated it to one of our coworkers whose house was wiped out in the landslide." (TR 43:7). Schauer also testified that he *did not* receive any

payment in 2010. (TR 33:19). Schauer further testified that he received only \$100 in 2011, even though it would have been his third year. (TR 36:2).

Cole Gravel testified that, upon hiring, he was told that Christmas “bonuses” were given out in December, but made no mention of a longevity factor. (TR 55:16). He testified that he received cash in varying amounts in 2008, 2009, and either 2010 or 2011. (TR 56:1-57:18). After some back and forth with counsel, Gravel concluded that, in either 2010 or 2011, “we did not receive Christmas bonuses that year because they were donated to a fellow employee.” (TR 57:5-15). The General Counsel’s final witness, Lenny Ugaitafa was hired in November of 2011, and received only a coffee shop gift card. (TR 66:12).

Summarized, the General Counsel presented evidence for three employees (out of a total of 55) regarding the alleged bonuses. 2011 was the only year in which all of the General Counsel’s witnesses were employed by ALS, and in that year two employees received cash gifts in varying amounts and one received a coffee gift card. Furthermore, according to the employees, in either 2010 or 2011 no gifts were given at all. Schauer’s alleged conversation about “longevity bonuses” was not corroborated by the other employees, and his own testimony regarding the amounts of cash received did not comport with his understanding of the longevity bonus system.

William Woodcock, on the other hand, “credibly testified” that gifts were given by him and his wife personally, and did not come from ALS funds. See Decision, FN 21; (TR 82:24-83:18). Any cash gifts came from the Woodcocks’ own funds, and they also purchased other tangible gifts like coats, socks, TVs, and cruises which employees could win in a lottery. (TR 83:12-18). Because the gifts were given from the

Woodcocks' personal funds, ALS kept no records of the amounts spent. (TR 84:15-24). ALS did not take a tax deduction for the business expense, and did not report the gifts to the IRS as employee compensation. (TR 85:4-10). The amount that the Woodcocks spent on the gifts was based on what the Woodcocks could afford. (TR 85:13-15).

Mr. Woodcock also testified that in 2010, an ALS employee lost his house in a landslide. Because the Woodcocks could not afford to help out the employee *and* pay for gifts, they decided to donate \$10,000.00 and purchased only a few gifts for a raffle for ALS employees. (TR 85:18-25).

### **III. SPECIFICATION OF QUESTIONS PRESENTED**

ALS's exceptions to the ALJ's Decision and Recommended Order present the following questions, corresponding by letter to the sections set forth under the Argument heading below:

- a. Whether the Regional Director of Region 19 and then-Acting General Counsel were improperly appointed and thus lacked standing to issue the Complaint.**

This question is presented in Exception No. 35.

- b. Whether ALS's history of discretionary wage increases was a past practice that ALS was required to continue to maintain the status quo?**

This question is presented in Exception Nos. 1, 2, 3, 4, 5, 11, 12, 13, 29, 39, 40, 42, 43, and 44.

- c. Whether William and Billie Woodcock's history of gift-giving was a past practice that they (or ALS) were required to continue to maintain the status quo?**

This question is presented in Exception Nos. 6, 7, 8, 9, 10, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 29, 39, 40, 43, and 44.

**d. Whether William Woodcock’s statements to employees regarding wage increases and Christmas bonuses, and ALS’s discontinuance of those practices, amounted to violations of Section 8(a)(1) and 8(a)(3) of the National Labor Relations Act?**

This question is presented in Exception Nos. 12, 25, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, and 44.

**IV. ARGUMENT**

**a. Regional Director Hooks and then-Acting General Counsel Lafe Solomon were improperly appointed, thus this action must be dismissed because Mr. Hooks lacked the authority to issue or amend the consolidated complaint.**

Under the Supreme Court’s decision in *Noel Canning v. NLRB*, 573 U.S. \_\_\_\_ (2014), the Board lacked a quorum at the time Ronald K. Hooks was appointed as the Regional Director of Region 19 on January 6, 2012. Slip Op. at p. 2. Though Mr. Hooks issued the Consolidated Complaint in this case at a time when the Board consisted of validly appointed members, his initial appointment was invalid because the Board could not validly act. Without a valid appointment, Mr. Hooks lacked the authority to issue or amend the complaints in this action. Furthermore, then-Acting General Counsel Lafe Solomon’s authority had expired on July 31, 2010<sup>1</sup>. Under 29 U.S.C. § 153(d), the General Counsel has “final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints . . .” Thus, neither Hooks nor Solomon could validly act at the time the Consolidated Complaint was issued.

The ALJ relied on *Sub-Acute Rehabilitation Center at Kearney d/b/a Belgove Post Acute Care Center*, 359 NLRB No. 77 (2013) and *Bloomingtondale’s, Inc.*, 359 NLRB No. 113 (2013) as the basis for his rejection of ALS’s lack of standing defense.

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<sup>1</sup> Under the Act, 29 U.S.C. 153(d), Mr. Solomon was Acting General Counsel for only 40 days after his appointment on June 21, 2010. As such, the General Counsel could not validly act in 2012 and 2013.

Decision and Order at p. 11-12. Not only were the legal theories presented in those decisions different than ALS's, but the *Noel Canning* holding invalidates those decisions insofar as they hold that the Board was properly constituted at the time Mr. Hooks was appointed. Because the ALJ ordered relief based on an invalid complaint, his order is similarly invalid.

**b. The ALJ erred in holding that ALS's history of discretionary wage increases was a past practice that ALS was required to continue during the bargaining period.**

- i. The legal background: Employers are required to maintain the status quo after a union is certified as exclusive bargaining representative.

The ALJ erred because ALS's program of wage increases was not sufficiently regular to become a reasonable expectation of employees, and even if it was, the discretionary aspects were subject to bargaining. In *NLRB v. Katz*, 369 U.S. 736 (1962), the Supreme Court held that an employer violated Section 8(a)(5) of the Act by making unilateral changes to represented employees' terms and conditions of employment. Such a change "is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal" to bargain. *Id.* at 743 (footnote omitted). However,

The Board has recognized that an employer's obligation to maintain the status quo sometimes entails an obligation *to make* changes in terms and conditions of employment, when those changes are an established part of the status quo.

*Alan Ritchey, Inc. and Warehouse Union Local 6, International Longshore and Warehouse Union, AFL-CIO* (hereinafter "*Alan Ritchey*"), 359 NLRB No. 40, \*5 (2012)<sup>2</sup>.

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<sup>2</sup> ALS notes that, under *Noel Canning*, the Board did not have a quorum when it issued the *Alan Ritchey* decision so its continuing validity is in question. However, that decision relied heavily on past Board precedent and court decisions, and ALS urges the Board to adopt its reasoning regarding discretionary wage increases during the bargaining period.

When a past practice of changes is alleged, the party asserting the practice has the burden of proving its existence:

[t]he party asserting that the status quo consists of a past practice bears the burden of proof on the issue and the evidence must show that the practice occurred with such regularity and frequency that employees could expect the practice to continue or reoccur on a regular and consistent basis.

*Eugene Iovine, Inc. and Local Union No. 3. International Brotherhood of Electrical Workers, AFL-CIO* (hereinafter “*Eugene Iovine*”), 353 NLRB No. 36, \*1 (2008) (internal quotations and citations omitted).

In the context of wage increases, the Board in *Alan Ritchey* provided the example of *Southeastern Michigan Gas Co.*, 198 NLRB 1221 (1972) to show when an employer is required to maintain a past practice:

Thus, if an employer has an established practice of granting employees a 1-percent increase in wages on the anniversary of their hire date, an employer not only does not violate its duty to bargain by making that change unilaterally, it violates its duty if it *fails* to do so.

*Alan Ritchey* at \*5.

Important to this case, the *Alan Ritchey* Board added the following: “A corollary to this rule, however, is that an employer must always bargain over the discretionary aspect of the change in question.” *Id.*

Prior to *Alan Ritchey*, the Board and court decisions provided little guidance to employers in ALS’s position. On one hand, an employer’s grant of a discretionary wage increase is a denial of the union’s right to bargain regarding the timing, amount, and criteria for the increase. See *Katz*, 369 U.S. at 746-747. On the other hand, failing to continue a practice of discretionary wage increases can itself be a unilateral action. See *Daily News of Los Angeles*, 315 NLRB No. 158 (1994). In the Decision, the ALJ referenced many of these old and confusing Board and court decisions. See Decision

at 6. For example, in *Phelps Dodge Mining Co. v. NLRB*, 22 F.3d 1493, 1496 (10<sup>th</sup> Cir. 1994), the Tenth Circuit held that wage increases must continue

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 employees and, therefore, part of their anticipated remuneration.

Similarly, periodic wage increases must continue if they are “an established practice . . . regularly expected by the employees.” *Daily News of Los Angeles v. NLRB*, 315 NLRB 1236 (1994), *enfd.* 73 F.3d 406 (D.C. Cir. 1996).

ii. The Alan Ritchey framework.

The Board decisions and cases were fact-intensive and seemingly ad hoc, making it difficult for employers such as ALS to accurately predict the legal effect of either granting wage increases or discontinuing them during the bargaining period.

[T]he Board’s perspective seems to shift from case to case. Predicting whether the Board will view a pattern of wage increases as established or discretionary has proven difficult not only for employers and employees, but for the Board’s own ALJs as well.

*Acme Die Casting v. NLRB*, 93 F.3d 854, 858 (D.C. Cir., 1996).

However, the analysis provided in *Alan Ritchey* resolves the confusion and presents a framework for analyzing wage increases during the period after union certification but before an initial bargaining agreement.

First, in order to be considered part of the “status quo” the General Counsel has the initial burden of showing “that the practice occurred ‘with such regularity and frequency that employees could expect the ‘practice’ to continue or reoccur on a regular and consistent basis.” *Eugene Iovine* at \*1. If the General Counsel cannot meet this burden, then no past practice exists, and any wage increase would be a unilateral act in violation of the Act. See *NLRB v. Katz*, 369 U.S. at 746.

Second, if the General Counsel can prove that wage increases were sufficiently regular to qualify as a past practice, the non-discretionary aspects of the program must continue during the bargaining period. “[H]owever the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted.”

*Alan Ritchey* at \*6, *quoting Oneita Knitting Mills*, 205NLRB 500 (1973).

- iii. The ALJ erred when it found that ALS was required to continue its discretionary wage increases.

The ALJ did not follow the above analysis. First, the General Counsel did not meet its initial burden of showing that ALS’s practice of granting wage increases was a practice that occurred “with such regularity and frequency that employees could expect the practice to continue or reoccur on a regular and consistent basis.” The General Counsel’s witnesses could not even agree on the outlines of ALS’s practice of wage increases. One employee believed he was entitled to bi-annual increases. Another believed increases would occur on his anniversary date. One did not testify as to timeframes, just that increases would be periodic. Mr. Woodcock’s testimony was the only testimony that actually comported with the documentary evidence – the timing, amount, and recipients of raises were within the discretion of ALS and Mr. Woodcock. Because the employees could not adequately describe the “past practice” of wage increases, the General Counsel failed to meet its initial burden.

However, even if ALS’s wage increases were regular enough to be deemed a “past practice,” nearly every aspect of the program required the exercise of discretion.

The Board has held in a variety of other contexts that once employees choose to be represented, an employer may not continue to act unilaterally with respect to terms and conditions of employment--even where it has previously done so routinely or at regularly scheduled intervals. If the employer has exercised and continues to exercise discretion in regard to the unilateral change at issue, e.g., the amount of annual wage increases, it must first bargain with the union over the discretionary aspect. See, e.g., *Oneita Knitting Mills*, 205 NLRB 500 (1973).

*Alan Ritchey, Inc.*, 359 NLRB No. 40 (Dec. 14, 2012).

Unlike the factual scenarios presented in other Board decisions quoted by the ALJ, ALS did not have a specified date on which raises were to occur. There were no fixed criteria. The amount of raises, when they occurred, varied from \$.25 cents to \$1.50. (Jt. Exh. 1). Sometimes ALS granted a wage increase to a single employee, and sometimes it granted an increase to nearly all employees. (Jt. Exh. 1). Under *Alan Ritchey* and the precedent it relied on, ALS's exercise of those discretionary aspects of the program (essentially any of them) after the Union was certified would have been grounds for an unfair labor practices charge based on unilateral action. The Board is clear: "Granting merit increases, as in *Katz*, *Oneita Knitting*, and subsequent cases, is also inherently discretionary . . . . Nonetheless we require bargaining over those inherently discretionary decisions." *Alan Ritchey* at 14.

On this issue, the ALJ clearly erred. Had ALS continued its practice of granting discretionary raise increases in amounts and at times determined by Mr. Woodcock, it would have deprived the Union of the opportunity to bargain over the criteria, amount, timing, and selection of employees receiving raises. See *The Ithaca Journal-News, Inc.*, 259 NLRB 394, 396 (1981) ("Requiring respondent during negotiations to continue giving raises to employees selected by it, at times and in amounts unrestricted by

clearly established pattern, is tantamount to licensing it to grant them unilateral wage increases”). Yet the ALJ held that ALS was required to do so. This cannot be the case, and the ALJ’s decision must be overturned on this issue.

**c. The ALJ erred by holding that Christmas gifts given by William and Billie Woodcock were “wages” and that the owners of ALS were required to continue giving personal gifts during the bargaining period.**

In holding that William and Billie Woodcock were required to spend their personal funds on annual Christmas parties and gifts for ALS employees, the ALJ impermissibly extended the definition of “wages” under the Act. As noted above, an employer is required to bargain with its represented employees in good faith with respect to wages, hours, and other terms and conditions of employment. *NLRB v. Borg-Warner Corp.* 356 U.S. 342, 349 (1958). Other matters are not mandatory subjects of bargaining, and each party is free to bargain or not to bargain. *Id.* Gifts given to their employees by their employers are not mandatory subjects of bargaining. *Benchmark Industries*, 270 NLRB 22 (1984), *affd.* *Amalgamated Clothing v. NLRB*, 760 F.2d 267 (5<sup>th</sup> Cir. 1985). However, “[a] Christmas bonus ... becomes an element of wages and, therefore, a term and condition of employment that cannot be altered unilaterally if it is tied to other remuneration and paid regularly over an extended period.” *Exxel/Atmos, Inc. v. N.L.R.B.*, 147 F.3d 972, 976-77 (D.C. Cir. 1998) (internal citations omitted). As with the merit increases, it was the General Counsel’s burden to show that a “past practice” existed that had to be continued throughout the bargaining period to maintain the status quo. *Eugene Iovine* at \*1.

The ALJ erred because the gifts were not wages. Even assuming that these gifts were attributable to ALS, the General Counsel failed to establish a sufficient past

practice, or that the gifts were “tied to other remuneration and paid regularly over an extended period.” The ALJ also glossed over two potentially dispositive facts. First, the gifts were not given by ALS, they were given by William and Billie Woodcock and paid out of their own funds. Second, ALS did not treat the “gifts” as wages for employees for tax purposes, nor did it count the gifts as a business expense. The ALJ mentioned these key facts, then disregarded them with cursory analysis. Properly analyzed, these facts show that ALS, the Woodcocks, and the employees considered the Christmas gifts to be only gifts – otherwise they would have come from ALS’s funds, ALS would have taken tax advantage of them, and ALS would have required employees to treat them as income. In any event, the testimony *did* indicate that the Woodcocks’ gift giving decisions were highly discretionary, or even arbitrary, such that the discretionary portions of the program would have to be negotiated (assuming that there was even such a program). Under the analysis in Section IV(b) above, even if the gifts were wages, the Woodcocks could not unilaterally exercise their discretion in giving them without first negotiating with the Union. Thus, the charges based on cessation of the gift giving must be dismissed.

- i. The General Counsel failed to meet its burden that a past practice of Christmas bonuses existed at ALS.

As with the wage increases, the General Counsel failed to meet its initial burden of showing that ALS’s gift giving “occurred ‘with such regularity and frequency that employees could expect the ‘practice’ to continue or reoccur on a regular and consistent basis.” *Eugene Iovine* at \*1. The crux of the General Counsel’s argument is that the practice of gift giving was so regular that it became part of the status quo. Unlike the history of wage increases, for which there was documentary evidence, there was no

documentary evidence regarding the past practice of gift giving. As such, the only evidence was that which the parties presented at the hearing. The totality of the evidence regarding Christmas gifts is summarized as follows:

**Christmas Gifts by Year**

	2008	2009	2010	2011	2012
Schauer	Not yet employed	Testimony impeached.	No gift.	\$100.00	No gift
Gravel	\$100.00	Testified that he received a gift but unable to remember amount.	No gift	\$300.00	No gift
Ugaitafa	Not yet employed	Not yet employed	Not yet employed	\$50.00 coffee gift card	No gift.

Gravel testified that in 2008, he received \$100.00. The General Counsel provided no other evidence of gift giving in 2008. Gravel also had the only unimpeached gift testimony for 2009, but could not remember the amount of the gift. All employees eventually agreed that no gifts were given in 2010, and the 2011 gifts are listed above. Over the four-year period, there was only one year in which all three employees agreed they received gifts. There is no pattern to discern from the above data. Despite ALS's 55 employees, the General Counsel concentrated on these three, who did not provide a long enough time frame or consistent enough pattern to be deemed "regular and consistent." The General Counsel cannot meet its burden on such a flimsy factual basis.

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- ii. The General Counsel failed to establish that the gifts were tied to other remuneration and paid regularly over an extended period.

Even if the General Counsel was able to prove that ALS had a “past practice” of gift giving, the General Counsel also had to show that the gifts were actually “wages” and subject to mandatory bargaining. “[I]t 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. An employer can make such payments as it pleases.” *North American Pipe Corporation and Unite Here*, 347 NLRB 836 (2006) (citations omitted). Instead:

If the ostensible gifts are so tied to the remuneration which employees receive for their work that they are in fact a part of remuneration, they are in reality wages and subject to the statute’s mandatory duty to bargain. A sufficient relationship to remuneration may exist if the payment is tied to various employment-related factors. These factors include work performance, wages, regularity of the payment, hours worked, seniority, and production.

*Id.* at \*4 (internal citations omitted).

When the alleged gifts really are just gifts, the Board has treated them as such. For example, in *Benchmark Industries*, 270 NLRB No. 8 (1984), the Board ruled that Christmas dinners and hams, which “had been given to all employees regardless of their work performance, earnings, seniority, production, or other employment related factors,” were not wages, but merely gifts. *Id.* at \*1. In responding to dissenting Board member Zimmerman, the majority stated:

Our dissenting colleague, in adopting the judge's finding of a violation, treats the Christmas dinners and hams as conditions of employment essentially because the Respondent gave them to its employees for 3 years. That, we believe, is an overly legalistic view of the employment relationship, at odds with the experience of most Americans that there may be expressions of good feeling between employer and employee

which, at least at Christmas, allow for the giving of gifts with no strings attached.

*Id.*

In this case, the ALJ attempted to distinguish *Benchmark Industries* because that decision did not involve *cash* bonuses, and instead involved “token items.” Decision and Order at p. 8. However, the Board has made clear that the *value* of the gift is immaterial. See *North American Pipe* at \*6 (discussing that the Board’s ‘gift analysis’ applies regardless of the amount involved, including when payments in issue are clearly of significant economic value).

As a threshold matter, none of the parties – the Woodcocks, ALS or the employees – even treated the gifts as wages. ALS gave no gifts – they were given by the Woodcocks despite tax advantages available to ALS had it deducted the gifts as employee compensation.<sup>3</sup> The employees did not report the gifts as income on their income tax returns. See Decision and Order at p. 5, fn 27. The ALJ misapplied *North American Pipe Corp.* by holding that that the tax treatment of the gifts was “inconsequential.” Decision and Order at p. 9. The Board does consider an employer’s decision to withhold taxes from payments, but “this factor alone is not dispositive. Indeed, . . . the withholding of taxes [is] merely one of many factors supporting findings that the payments constituted wages.” *North American Pipe Corp.* 347 NLRB No. 78 at \*7. Given the absence of any other factors to support classifying William and Billie

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<sup>3</sup> The ALJ credited William Woodcock’s testimony that the gifts were given by the Woodcocks personally, which was unrefuted. Decision and Order at p. 5, FN 26. Under the Internal Revenue Code, employee compensation is a deductible business expense. 26 U.S.C. § 162(a)(1). Given the alleged value of gifts, the tax benefit to ALS would have been significant had it claimed the deduction. Similarly, compensation is included in gross income to the employee, while gifts from individuals are excluded from income. 26 U.S.C. § 61(a)(1) (compensation); 26 U.S.C. § 102(a) (gifts), *but see* 26 U.S.C. § 102(c) (including in gross income certain gifts given by an employer to an employee).

Woodcocks' gifts as wages, ALS's and the employees' tax treatment of the gifts should carry significant weight.

The Board's remaining gift analysis described in *North American Pipe* determines whether the ostensible gifts, regardless of their value, are based on work performance, wages, and regularity of the payment, hours worked, seniority, and production. Setting aside the fact that the gifts were not given by ALS, and that neither ALS nor the employees treated the gifts as wages, the General Counsel presented no evidence at all connecting the gifts to work performance, wages, hours worked or production. Schauer testified that the gifts were tied to seniority, but the other employees did not corroborate Schauer's supposed longevity bonus program. Further, neither Schauer's testimony nor that of his co-workers supported Schauer's conception of the program. As shown above, the testimony presented at the hearing indicated a gift-giving practice that was far from regular – of the 5 years for which the employees testified, all three employees received a gift for only one year. The General Counsel failed to establish that the gifts were in fact wages.

- iii. Even if the gifts are “wages,” the amount of the gifts was within the Woodcocks’ discretion and subject to bargaining.

Finally, even if 1) the General Counsel had met its burden to establish that the Christmas gifts were a past practice, and 2) the General Counsel had established that the gifts were in fact wages and mandatory subjects of bargaining, ALS would still have been barred from unilaterally exercising its discretion to choose the amount and recipients of the gifts. See *Alan Ritchey, Inc.*, 359 NLRB No. 40 (Dec. 14, 2012) (“If the employer has exercised and continues to exercise discretion in regard to the unilateral change at issue . . . it must first bargain with the union over the discretionary aspect.”).

As with the merit increases, had ALS acted in accordance with the ALJ's decision, it would have subjected itself to an unfair labor practices charge based on failure to bargain. For all of these reasons, the charge based on ALS's discontinuance of the Christmas gifts must be dismissed.

**d. Because ALS was acting in accordance with the Act when it refrained from unilaterally granting wage increases or giving Christmas gifts, the charges based on Section 8(a)(1) and 8(a)(3) must be dismissed.**

Given the above analysis, the allegations in the complaint for violations of Section 8(a)(1) and 8(a)(3) of the Act must be dismissed. Under Section 8(a)(1), it is an unfair labor practice 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). Under Section 8(a)(3), it is an unfair labor practice if an employer takes adverse action against an employee because the employee engages in, or is suspected of engaging, in union activities. 29 U.S.C. § 158(a)(3); *Mays Electric Co.*, 343 NLRB 121, 127 (2004). The testimony presented at the hearing indicated that conversations between William Woodcock and ALS employees were not intended to "interfere with, restrain, or coerce employees." The testimony shows that Mr. Woodcock told employees that he was unable to give wage increases unilaterally during negotiations – a true statement of ALS's obligations under the Act. Further, though ALS was aware that its employees were engaged in union activities, the General Counsel could not show *any* adverse action because by refraining from unilaterally implementing wage increases or Christmas bonuses, ALS was not taking adverse action – it was complying with the Act. Therefore, the charges based on Sections 8(a)(1) and 8(a)(3) must be dismissed.

- i. The testimony presented at the hearing indicated that William Woodcock truthfully told employees that wage increases were subject to bargaining.

### **1. The Station 4 Conversation.**

Employee Matt Schauer testified that while he was at Station 4 he had a “very long conversation” with Mr. Woodcock. (TR 26:21). The conversation lasted some twenty minutes. (TR 47:16). Mr. Schauer could not recall the specifics of the conversation. (TR 26:24-25). Mr. Schauer testified that Mr. Woodcock told him words “to the effect” that he [Woodcock] would not be able to give us raises if we brought the union in. (TR 27:1). Mr. Schauer testified that he responded that he (Schauer) did not know if that was true or not and that he would have to look into it... he was unsure if it was valid or not. (TR 27:7-9).

Mr. Woodcock provided greater detail and background to the conversation with Mr. Schauer. He indicated there was a conversation at Station 4 that included Mr. Schauer and a supervisor Jameson McDougal (now deceased), Schauer regularly worked with McDougal. In that conversation they “discussed pros and cons of the employees forming a union versus not forming a union”. (TR 74:20). Mr. Woodcock testified that he stated in that conversation “if you organize with a labor union, then a lot of the things that we normally did day to day would have to be all negotiated”. (TR 74:24-75:1). Mr. Woodcock specifically denied making the statement alleged in the complaint or as claimed by Mr. Schauer. (TR 75:4-7).

### **2. The Ugaitafa Conversation.**

Lenny Ugaitafa testified about another conversation with Mr. Woodcock. Ugaitafa initiated the conversation and approached Mr. Woodcock with a question about

sick time and its accrual. (TR 64:17; 65:7-11). He also asked about a wage increase because he had passed his anniversary date. (TR 64:19). Mr. Ugaitafa testified that Mr. Woodcock stated that “he couldn’t because of the whole union deal.” (TR 65:14-15). Mr. Ugaitafa responded “okay.” (TR 65:25). Mr. Woodcock was asked if he made the statement that he “cannot or will not give raises because the union was there” (TR 75:13) his response was “not exactly like that, no” (TR 75:16). Mr. Woodcock explained:

I don’t recall who was in the room at the time. I remember having a conversation with some employees that had asked about raises since they -- pardon me -- had voted in the union. And I, through the course of the conversation, had explained to them that we’re in union negotiations. And I can’t just do something unilaterally without bargaining it with the union.

(TR 75:19-25).

### **3. The January 2013 Conversation.**

Finally, the General Counsel presented testimony that in January 2013 two employees, Matt Schauer and Cole Gravel, sought out Mr. Woodcock and initiated a conversation about raises and why they had not received raises. (TR 31:11-12; 54:11). Mr. Schauer did not recall the discussion clearly, admitting that he did not “...remember exactly who said what” but only recalled the “gist of the meeting.” (TR 31). Mr. Gravel provided more detail in that he and Schauer asked about wage increases, expressed that no one had received a wage increase since the union won the election and that it was their impression that it was “business as usual” up until contract negotiations were complete. (TR 54:11-17). Mr. Gravel stated that Mr. Woodcock responded that he would check with counsel and get back to them. (TR 54:15). Mr. Gravel did not testify that Mr. Woodcock made any response other than he would get back to them. Mr.

Woodcock testified that in the January 8th conversation with Schauer and Gravel he explained “whatever we had done in the past was discretionary and that, now, everything had to be negotiated. Everything had to go through a negotiation process or I’d be in just as much difficulty as I am for not doing it”. (TR 76:11-13).

ii. ALS did not violate Section 8(a)(1) or Section 8(a)(3) of the Act.

The testimony described above simply does not demonstrate that ALS or Mr. Woodcock were attempting to interfere with, coerce, restrain, or discriminate against employees because of their choice to be represented by the Union. Mr. Woodcock correctly recognized that ALS could not unilaterally exercise its discretion with regard to wage increases – the Union was entitled to bargain over the timing, amount, and benefitted employees. To the extent that the General Counsel’s charges are based on Woody and Billie Woodcock’s failure to continue giving Christmas gifts, that too cannot be the basis for violations because ALS had no obligation to continue the tradition -- if it had it would have unilaterally exercised its discretion in violation of the Act. Thus, the charges based on Sections 8(a)(1) and 8(a)(3) of the Act should be dismissed.

**V. CONCLUSION**

For the reasons set forth above, the ALJ’s decision and recommended order should be rejected in their entirety, and the General Counsel’s Consolidated Complaint should be dismissed.

Dated at Yakima, Washington this 27<sup>th</sup> day of June, 2014.

Respectfully submitted,



Gary E. Lofland, WSBA #12150  
Kellen J. Holgate, WSBA #46787  
Counsel for Employer  
Advanced Life System, Inc.

## CERTIFICATE OF SERVICE

I certify that on this day I served the attached *Brief in Support of Exceptions* to the parties of this proceeding and their attorneys or authorized representatives, as listed below. A true copy thereof was sent via U.S. Mail and facsimile and/or email to the following as stated below:

Ronald K. Hooks, Regional Director  
National Labor Relations Board  
Region 19  
915 2<sup>nd</sup> Avenue, Suite 2948  
Seattle, WA 98174-1006  
Via Fax: 206-220-6305

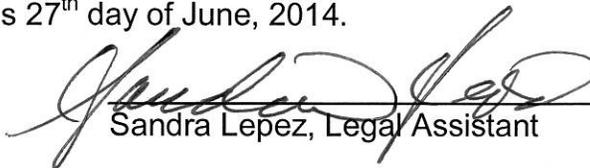
Torren Colcord, Executive Director  
National EMS Association (NEMSA)  
4701 Sisk Rd. Suite 104  
Modesto, CA 95356  
Via Email: tkcolcord@nemsausa.org

Ryan Connolly  
Counsel for General Counsel  
National Labor Relations Board  
2948 Jackson Federal Building  
915 Second Avenue  
Seattle, WA 98174  
Via Email: ryan.connolly@nlrb.gov

### **E-File:**

Gary Shinnars, Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street, NW, Room 11602  
Washington, DC 20570-0001

Dated at Yakima, Washington this 27<sup>th</sup> day of June, 2014.

  
Sandra Lepez, Legal Assistant