

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

ADVANCED LIFE SYSTEMS, INC.

and

Cases 19-CA-096464
19-CA-096899

INTERNATIONAL ASSOCIATION OF EMTS AND
PARAMEDICS

**GENERAL COUNSEL'S
ANSWERING BRIEF**

Respectfully submitted,

Ryan Connolly
Counsel for Acting General Counsel
National Labor Relations Board
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

Ryan Connolly, Counsel for the General Counsel ("General Counsel"), pursuant to § 102.46(d) of the Rules and Regulations of the National Labor Relations Board, (the "Board") submits this Answering Brief to Respondent's Exceptions and Brief in Support to the decision of Administrative Law Judge Michael Rosas (the "ALJ"), issued on May 2, 2014, in the captioned cases.

I. INTRODUCTION

In finding Respondent violated §§ 8(a)(1), (3), and (5) of the National Labor Relations Act (the "Act") the ALJ specifically found General Counsel established a prima facie case and met the burden of persuasion for each allegation, and that Respondent failed to present any legitimate defense for its action. Specifically, the ALJ found, during the organizing campaign, Respondent, by its owner William Woodcock ("Woodcock"), told employees they would not receive wage increases if they organized. When employees did select a union to represent them, Woodcock promptly stopped Respondent's regular practice of granting wage increases and cancelled the employees' yearly Christmas bonus. When employees questioned why Respondent did this, Woodcock replied that it was because of the Union, National Emergency Medical Services Association ("NEMSA" or the "Union"). Each ALJ finding of a violation was well-reasoned and analyzed in-depth, based on the specific facts of this case and supported by well-established law.

By its Exceptions, Respondent proposes a flawed analytical framework to revisit its failed defenses. First, Respondent admits that it ceased granting wage increases and Christmas bonuses following certification, but argues, based on minor inconsistencies, that it did not have an established history of wage increases and Christmas bonuses. This defense is contrary to the overwhelming record evidence, as the ALJ found. Second, Respondent makes inconsistent arguments regarding its motivation; claiming it discontinued wage increases to maintain the status quo, but that it discontinued Christmas bonuses

because of financial pressures. Again, based on the overwhelming evidence establishing Respondent's anti-union motive, the ALJ correctly found otherwise.

As discussed below, Respondent's Exceptions to the ALJ's decision are wholly without merit, and the General Counsel respectfully requests that the Board affirm the ALJ's rulings, finding, and conclusions, and adopt the ALJ's recommended order, except to the extent requested in the General Counsel's previously filed Limited Exceptions.

II. FACTS

A. Background

Respondent provides emergency medical services and inter-facility transfer transportation throughout the Yakima, Washington area. (ALJD 2:13-15)¹ Respondent is a family held S corporation; Woodcock and his spouse are the majority shareholders. (ALJD 2:26-27) Woodcock is also Respondent's President and CEO, and oversees Respondent's daily operations. (ALJD 2:26-28) Respondent employs approximately 54 full and part-time employees operating out of its 6 stations in Yakima, including employees Matt Schauer ("Schauer"), Lenny Ugaitafa ("Ugaitafa"), and Cole Gravel ("Gravel"), who testified at hearing. (ALJD 2:34-35) In August of 2012, Respondent's paramedics and EMTs selected the Union as their collective bargaining representative following a Board election. (ALJD 3:4-5)

B. Wage Increases

Both paramedics and EMTs are paid on an hourly basis. (Jt Exh 1) Woodcock is entirely responsible for determining employees' wage rates; Respondent does not maintain a fixed wage scale or any written policies governing the timing or amount of wage

¹ References to the ALJ's Decision will be referred to by page number and line number as (ALJD __:__). Transcript citations will be referred to by page number and line number as (Tr. __:__); Respondent's Brief in Support of Exceptions to the Decision of the Administrative Law Judge will be referred to by page number and line number as as (R Br. __:__).

increases. (ALJD 3:13-15) According to Woodcock, Respondent's paramedics and EMTs are started at a relatively low wage rate at the time of hire and their wages are increased as they complete the significant initial training required by the positions. (ALJD 3:22-23; Tr. 80:3-22)

The ALJ found the employees that testified at hearing, Schauer, Gravel, and Ugaitafa credibly testified that when they were hired they were told by Woodcock or other managers to expect periodic wage increases once every six months. (ALJD 3:17 n.9) Joint Exhibit 1, the detailed wage history of the 54 bargaining unit employees employed by Respondent, illustrates this practice. (Jt Exh 1) A compilation of this data, shown as a calculation of the number of days between wage increases, is as follows.²

TABLE 1

Number of days from previous increase	Number of wage increases	% of total increases
0-59	22	5.90%
60-119	48	12.8%
120-179	146	38.8%
180-239	102	27.1%
240-300	21	5.60%
300-360	13	3.50%
360+	25	6.60%

The median number of days between wage increases is 173, while 180 days between wage increases occurred most often, 28 times. (Jt. Exh 1)³

In regard to when these increases occur temporally, the increases prior to 2008 occurred generally six months after employees received their previous raise and did not correlate to any

² Attachment 1 to this brief contains calculations based on the data contained in Jt Exh 1, in order to allow easier verification of Tables 1 and 2.

³ Note that, in reading Jt Exh 1, the first date listed in the "raise date" column for some employees is not the date of the first wage increase, but merely a recording of the wage at the time of hire. For example, the first employee listed, Jason Ackley, was hired on May 4, 2009, and received a wage increase on December 7, 2009, 217 days later. The June 7, 2009, entry in the "raise date" column of Jt Exh 1 merely reflects his starting hourly wage rate of \$16.00; it does not reflect a wage increase on that date.

specific date. (Jt Exh 1) However, starting in 2009, employees' six month wage increases occurred on set dates with greater frequency:

TABLE 2

Date of Wage Increase	Number of employees receiving	Total employees	% of unit receiving
8/31/09	16	24	66.7%
2/13/10	23	28	82.1%
8/16/10	20	28	71.4%
2/9/11	20	40	50.0%
8/1/11	27	43	62.8%
1/28/12	39	44	88.6%

The small number of employees who did not receive a wage increase on the specific dates listed received wage increases in the same general time period. As shown above, on January 28, 2012, the last date on which Respondent granted wage increases, all but 5 bargaining unit employees were given a raise. (Jt Exh 1) All 5 that did not receive a raise, Emily Micheles, Guthrie Lambert-Smith, Aaron Matson, Dana Pirolo, and Ugaitafa, had received increases during the previous 3 months. (Jt Exh 1)

Respondent all but ceased granting wage increases to bargaining unit employees in 2012. (Jt Exh 1) Of the 54 employees listed in Joint Exhibit 1, only 14 (25%), have received any sort of increase in 2012 and, of those, only 4 employees (7%), received an increase after June 25, 2012. (Jt Exh 1) Additionally, these 4 employees were all relatively new, having been hired after January 1, 2011. (Jt Exh 1) Woodcock admits that he did not notify the Union he was ending wage increases after the election, or notify the Union of any change in Respondent's wage practice. (ALJD 4:16-18; Tr. 93:3-11)

In regard to amount, nearly all of the raises in the data as a whole are for either \$.25 per hour (46.1%) or \$.50 per hour (41.6%). (Jt Exh 1) Of the 39 employees that had a wage increase on January 28, 2012, 37 of the increases were for \$.25 per hour while two were for \$.50 per hour. (Jt Exh 1) On August 1, 2011, 17 employees received raises of

\$.25 per hour, while 10 received a \$.50 per hour increase. (Jt. Exh 1) On both February 9, 2011, and August 16, 2010, 16 employees each received a \$.25 per hour increase, while 4 received a \$.50 per hour increase. (Jt. Exh 1)

Addressing the wage data in the record, the ALJ concluded that, “[p]rior to July-August 2012, the intervals between wage increases and wage increase amounts varied somewhat, but were not random.” (ALJD 3:19-20) The ALJ found the record evidence established that, during this period prior to unionization, employees typically received wage increases of between 25 cents and 2 dollars and 50 cents “every 6 months or sooner.” (ALJD 3:21-22) However, between July-August 2012 and December of 2013, following unionization, the majority of the unit did not receive any wage increase. (ALJD 4:15-16)

C. Christmas Bonus

Respondent has no formal policy regarding bonuses, but in the mid-1990’s Respondent began holding a Christmas party for employees. (ALJD 4:25; Tr. 83:21-22) Although it started as a small potluck, over the years the event grew, with Woodcock distributing bonuses to employees in the form of cash or a check, as well as distributing prizes at the party, including televisions, cruises, and weekend hotel packages. (ALJD 5:1-4; Tr. 83:12-20)

Woodcock estimated that Respondent had begun the “big gift drawing” “four or five years” after the Christmas party started, or in approximately 2000. (Tr. 84:4-11) Woodcock estimated that, by 2008, he was spending \$10,000 to \$15,000 on bonuses and prizes for distribution at the Christmas party, and continued to do so in following years. (ALJD 5:1-4; Tr. 95:824) The ALJ credited Schauer and Gravel’s testimony that, at the time they were hired, they were told by Respondent’s General Manager that employees receive bonuses, around Christmastime; \$50 a year for every year worked for EMTs and \$100 a year for every year worked for paramedics, up to \$500. (ALJD 5:1 n.20)

The record establishes that employees received cash Christmas bonuses in 2008, 2009, and 2011, of between \$50 and \$500, based on their tenure with Respondent. (ALJD 5:8-9, 13-14) In 2010, Woodcock asked employees to forego their bonuses to instead donate \$10,000 to an employee whose home was destroyed in a mudslide. (ALJD 5:9-11) The ALJ did not credit Woodcock's assertion that employees needed to attend the Christmas Party held each year at Respondent's facility in order to receive a Christmas bonus. (ALJD 5:6 n.21) The ALJ found instead that, at least in some instances, payments were distributed by Respondent's dispatch office. (ALJD 5:6 n.21)

In 2012, the year employees unionized, Respondent stopped holding a Christmas party and distributed no bonuses or prizes. (ALJD 5:15-17) Woodcock testified that the reason for this was not the Union election, but, instead, a combination of assisting a family member in need, increased competition in the Yakima market, and declining Medicare and Medicaid disbursements. (ALJD 5:17 fn.25) When questioned regarding whether he notified the Union he would no longer be holding the Christmas party and distributing bonuses, Woodcock admitted he did not, as it "wasn't any of their business." (Tr. 93:16-21)

The ALJ credited Woodcock's assertion that the payments were made by cash or personal check, and that Woodcock did not keep records of the amounts. (ALJD 5:6 n.21) However, the ALJ did not find that the amount received by employees was unknown as a result, as the ALJ credited Schauer and Gravel's testimony that they received bonuses ranging from \$50 to \$500 in the years when bonuses were distributed. (ALJD 5:4-6 n.21)

D. Woodcock's Statements Regarding Wage Increases

1. August 2012

Shortly before the Board election in August of 2012, Woodcock travelled to Station 4 and had a lengthy conversation with employee Schauer and supervisor Jameson McDougall. (ALJD 3:24-25; 4:1-3; Tr. 25:5-8, 14-15) The ALJ credited Schauer's

recollection of the discussion over Woodcock's denials, finding that Woodcock told Schauer one implication of union certification would be the need to negotiate wage increases before the company could give raises. (ALJD 4:1-3)

2. December 2012

In December of 2012, after the Union was certified and Respondent had stopped wage increases, employee Ugaitafa approached Woodcock about his overdue raise, with Schauer present. (ALJD 4:5:-7) The ALJ credited Ugaitafa and Schauer's version of this conversation, over Woodcock's "vague denial," and found that Woodcock replied he had been advised by counsel to freeze all terms and conditions of employment, including pay raises. (ALJD 4:7-8 n15)

3. January 2013

Shortly after the December conversation, Gravel and Schauer approached Woodcock and asked about the lack of pay raises since the Union was certified, adding that these increases should have continued. (ALJD 4:10-11) The ALJ found Woodcock replied that the pay raises were discretionary and now needed to be negotiated. (ALJD 4:12-13 n.16)

III. ANALYSIS

A. The ALJ's Conclusion that Respondent Ceased to Grant Established Wage Increases, in Violation of § 8(a)(5), is Supported by the Facts and Law

Section 8(a)(5) of the Act makes it "an unfair labor practice for an employer ... to refuse to bargain collectively with the representative of his employees...." 29 U.S.C. § 158(a)(5). Both the Board and courts have long recognized that an employer must notify and consult with its employees' chosen union before imposing changes in wages, hours, and conditions of employment. See *NLRB v. Katz*, 369 U.S. 736, 747 (1962); *Coventa Energy Corp.*, 356 NLRB No. 98, 22 (2011). Unilateral changes strike at the heart of a

union's ability to represent unit employees and are antithetical to the statutory objective of establishing working conditions through collective bargaining. See *The Little Rock Downtowner, Inc.*, 168 NLRB 107, 108 (1967), *enfd.*, 414 F.2d 1084 (8th Cir. 1969). See also *Stone Boat Yard v. NLRB*, 715 F.2d 441 (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984). It is not a defense that unilateral changes were made without antiunion motivation. *Jensen Enterprises*, 339 NLRB 877, 877 (2003) (citation omitted).

Following employees' selection of an exclusive bargaining representative an employer is obligated to maintain the "status quo," maintaining what it has already given its employees, but also implementing benefits that have become conditions of employment by virtue of prior commitment or practice. *Jensen Enterprises*, 339 NLRB at 877-78. Periodic wage increases become conditions of employment if they are "an established practice ... regularly expected by the employees." *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)); *Daily News of Los Angeles*, 315 NLRB 1236 (1994), *enfd.*, 73 F.3d 406 (D.C. Cir. 1996). The Board also recognizes the corollary; an employer is not obligated to maintain a practice that is not regular and whose occurrence is instead "purely discretionary." *Jensen Enterprises*, 339 NLRB at 877-78.

The Board has recognized a limited exception to the general rule in what is referred to as the "*Stone Container* exception," where discretionary elements exist within an established practice. *Stone Container Corp.*, 313 NLRB 336 (1993). The *Stone Container* exception applies when the employer has an established recurring event, such as annually scheduled wage review, and that event falls during the post-certification period. *Id.* Under these circumstances, the employer may lawfully implement a change if it provides the union with reasonable advance notice and an opportunity to bargain about the intended change, and does not merely propose eliminating the practice, but bargains over the change.

Neighborhood House Assn., 347 NLRB 553, 554 (2006); *TXU Electric Co.*, 343 NLRB 1404 (2004). Taken together, an employer availing itself of the *Stone Container* exception maintains the fixed elements of the practice and negotiates with the union over the discretionary element. *Mission Foods*, 350 NLRB 336, 337-38 (2007).

In the present case, Respondent maintains that whether wage increases were granted was a purely discretionary event, and it was privileged to discontinue the practice entirely. Respondent does not claim its actions fall within the *Stone Container* exception and, indeed, it would be unable to do so as it admits it never provided notice to the Union of its change, a critical first step in claiming the exception.

The ALJ correctly analyzed Respondent’s history of wage increases and rejected out of hand the contention they were purely discretionary. The ALJ concluded the evidence instead established that Respondent had a “longstanding” practice of granting wage increases mainly between \$.25 and \$.50 per hour once every six months or sooner, depending on employee tenure and performance. The record provides ample evidence to support this finding. Table 1, repeated below, shows the number of days between wage increases:

TABLE 1

Number of days from previous increase	Number of wage increases	% of total increases
0-59	22	5.90%
60-119	48	12.8%
120-179	146	38.8%
180-239	102	27.1%
240-300	21	5.60%
300-360	13	3.50%
360+	25	6.60%

Sixty-six percent of the total wage increases given by Respondent occurred within the bands highlighted above, 60 days before or after the six month point. This reflects neither a

random distribution, nor does it show Woodcock distributing raises when an employee's particularly good work caught his attention. Rather, the data clearly demonstrates that Woodcock acted consistently with the policy described by Respondent's employees: Respondent raised employees from a self-described "low" wage rate at the time of hire to a market rate with wage increases of \$.25 or \$.50 per hour every six months.

Respondent's well-defined pattern of providing wage increases every six months is further reinforced by looking at the wage history data in other ways. As noted, the median number of days between wage increases is 173, corresponding almost exactly with a six month interval. Further, the most common number of days between wage increases in this data set is 180, appearing 28 times, which is exactly a six month interval. Finally, as the data in Table 2 illustrates, starting in 2009 a significant portion of the EMTs and paramedics were receiving wage increases on the same days in August and February of each year.

Having found this record evidence established a longstanding practice of regular wage increases, and that these increases unilaterally stopped without notice or discussion with the Union upon certification, the ALJ applied the established Board principles identified above and concluded that Respondent had violated § 8(a)(5). Respondent disputes in its Exceptions that its history of wage increases was sufficiently regular to become a reasonable expectation of employees, a defense both unsupported by the record and rejected by the ALJ. In addition, Respondent invites the Board to apply a legal analysis without basis and arguably contrary to the well-established law relied upon by the ALJ.

Despite recognizing that its "continuing validity is in question" in light of the recent U.S. Supreme Court decision in *NLRB v. Noel Canning*, No. 12-1281, ___ S. Ct. ___, 2014 WL 2882090 (June 26, 2014), Respondent argues the Board should apply an analysis derived from *Alan Ritchey, Inc.*, 359 NLRB No. 40 (2012), to the instant case. The Board held in *Alan Ritchey* that during the period after a union is recognized, but before a first

contract or interim grievance procedure is in place, an employer must bargain with the union before exercising its discretion to impose certain discipline such as suspension, demotion, or discharge, so as not to run afoul of the prohibition on unilateral action. *Id.*, at 1. In addressing the status quo obligation that exists following certification, the *Alan Ritchey* Board used wage increases and layoffs as examples of “core” terms and conditions of employment; where § 8(a)(5) requires an employer to maintain established practices while bargaining discretionary aspects of these practices during the status quo period. *Id.*, at 5-6. In doing so the Board cited to the cases that explain this framework in the wage increase context; the same cases cited above, such as *Daily News of Los Angeles*, 315 NLRB 1236 (1994), *enfd.*, 73 F.3d 406 (D.C. Cir. 1996).

In *Alan Ritchey*, the Board essentially added discipline -- that is, where an employer has an established disciplinary procedure but retains discretion as to the specific discipline for a particular incident -- to this class of “core” terms and conditions of employment. However, in its Brief in Support Respondent seems to read the case to create a different analytical framework instead of simply adding to the core terms and conditions. (R Br. 11) This is incorrect, as the framework Respondent apparently argues should be adopted from *Alan Ritchey* and applied to the present case (the status quo requires maintenance of existing practices and bargaining over discretionary elements of those practices) is precisely the obligation that *already exists* in regard to wage increases. Thus, what Respondent is urging is actually the framework set forth in the *Stone Container* exception.⁴

To the extent Respondent maintains *Alan Ritchey* has any applicability here it is mistaken, and its defenses are without merit. Even if *Alan Ritchey* were applicable and

⁴ The distinction that appears to be missing from Respondent's argument is between a practice that is purely discretionary, neither regular nor expected, with no obligation to continue, and an established practice with discretionary elements, which must be maintained and bargained with the Union, as set forth in the *Stone Container* exception.

somehow changed the analytical framework, Respondent admits that it never notified or bargained with the Union prior to discontinuing wage increases. Since this is the primary factor that prevents it from arguing the *Stone Container* exception, Respondent would still be in violation of § 8(a)(5).

B. The ALJ's Conclusion that Respondent Ceased to Grant Established Christmas Payments in violation of § 8(a)(5) is Well Supported by the Record and Applicable Law

As described above in detail, an employer and the representative of its employees are obligated to bargain with each other in good faith with respect to mandatory subjects of bargaining; wages, hours, and other terms and conditions of employment. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). The same obligation does not attach to non-mandatory subjects of bargaining, such as gifts to employees by their employers. *North American Pipe* 347 NLRB at 837; citing *Benchmark Industries*, 270 NLRB 22 (1984), *affd.* *Amalgamated Clothing v. NLRB*, 760 F.2d 267 (5th Cir. 1985).

Because Respondent admits it discontinued Christmas bonuses following unionization, the inquiry, again, is whether such bonuses were regular and expected, and whether Respondent's Christmas bonus constituted an element of employee "wages" or was a token gift. *North American Pipe*, 347 NLRB at 837. The Board, when faced with such an inquiry, considers whether "the ostensible gifts are so tied to the remuneration which employees receive for their work that they are in reality wages" *Id.* Where the bonus at issue is tied to employment related factors such as "work performance, wages, regularity of payment, hours worked, seniority and production," a sufficient relationship to remuneration exists. *Id.* at 837-38, citing *Niles-Bement-Pond Co.*, 97 NLRB 165, 166 (1951), *enfd.*, 199 F.2d 713 (2nd Cir. 1952) (Christmas bonus found to constitute wages where calculated, in part, for each year in service).

Having found the Christmas bonuses regular and expected based on the extensive record evidence establishing the practice, the ALJ then turned to the question of whether Respondent's bonuses to employees constituted wages or mere gifts. Based on the evidence the ALJ correctly concluded that, as significant cash payments, the Christmas bonuses constituted a mandatory subject of bargaining consistent with the cases cited above. The ALJ also specifically rejected Respondent's contention that these cash payments were analogous to the "token gifts," hams and holiday dinners, at issue in *Benchmark Industries*, 270 NLRB 22 (1984), and similar cases.

The ALJ also rejected Respondent's defense that, because these cash payments and prizes were paid for by Woodcock's personal funds, they were outside the employment relationship. In reaching this conclusion the ALJ specifically noted that Woodcock and his wife were majority owners of Respondent, the payments were given to employees at a Christmas party held at Respondent's facility (or were distributed by Respondent's dispatch office), and the purpose of the payments was clearly retention-based. Finally, the ALJ astutely noted that, in trying to argue its unilateral discontinuation was not motivated by an anti-union animus, but instead motivated by a downturn in Respondent's business, relevant to the § 8(a)(3) analysis that follows, Respondent essentially concedes the point that the Christmas bonuses were remuneration from Respondent, not a personal gift.

In sum, the ALJ correctly concluded the record evidence established Respondent imposed significant, unilateral changes in employees' wages when it eliminated its practice of providing its regular six month wage increases and Christmas bonuses. Both practices were long-established, with years of history respectively, and Respondent does not dispute that it ended these benefits without as much as notice to the Union. Given that these actions occurred right after the Union election, when Respondent had an obligation to maintain the status quo, both constitute violations of § 8(a)(5).

C. The ALJ's Conclusion That Respondent Discontinued its Custom and Practice of Granting Unit Employees Periodic Wage Increases and Christmas Bonuses in Violation of § 8(a)(3) is Supported by the Record and Applicable Law

An employer violates § 8(a)(3) of the Act when it takes an adverse action against employees because of their union activity. The Board requires the General Counsel to make a prima facie showing, by sufficient evidence, that the activity leading to the adverse action was protected, that the employer was aware of the protected activity and that anti-union animus, or hostility to that activity, was a motivating factor in the decision to take the action in question. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). If the General Counsel makes a showing of discriminatory motivation by proving these factors, then the burden of persuasion shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct. *W.E. Carlson Corp.*, 346 NLRB 431, 432-33 (2006).

1. Wage Increases

As found by the ALJ, there is no dispute regarding several of the prima facie factors: employees selected the Union to represent them, Respondent had knowledge of this, and it immediately implemented a wage freeze. The only question remaining was whether Respondent was motivated by hostility to the Union in making its decision. In reaching his conclusion, the ALJ noted that, by discontinuing of wage increases immediately following the Union's certification, "Woodcock was clearly making a statement that the injection of the Union into the employer-employee relationship would have repercussions." (ALJD 11:13-14). Accordingly, the timing of the change, combined with threats to freeze wages prior to certification discussed in the following section, demonstrated an unlawful motive. Having made this finding, the ALJ turned to Respondent's claimed motivation and concluded Woodcock's "vague explanation" that the wage freeze was motivated by increased

competition and other factors was insufficient to demonstrate that it would have taken the same action even in the absence of the protected conduct. (ALJD 11:26-28)

By its Brief in Support, Respondent maintains that its motivation in stopping wage increases was not based on its hostility to employees' voting for the Union, but instead rooted in its belief that it was maintaining the status quo. This defense fails as an initial matter because, for the reasons described above, Respondent was not maintaining the status quo by ceasing wage increases; it was changing its well-established practice of six month wage increases of at least \$.25 per hour. The evidence, including Woodcock's repeated statements to employees that the reason he stopped the wage increases was because of the Union, demonstrates that the motivation for this change was hostility to the Union. While motivation is not an element of proving a § 8(a)(5) violation of the Act, the facts supporting the § 8(a)(5) violation, together with the strong evidence tying cessation of the employees' wage increases to the Union activity, make the change a violation of § 8(a)(3) of the Act as well.

In the alternative, even if the practice of six month wage increases of at least \$.25 an hour did not exist and there were no § 8(a)(5) violation, Respondent's actions still violate § 8(a)(3) of the Act. Respondent maintains it granted only periodic, discretionary wage increases to employees prior to the Union elections, and admits that it completely ceased providing those wage increases between 2012 and early 2014. Respondent's complete cessation of wage increases was clearly linked to the employees' union activity; Woodcock said as much to employees on repeated occasions. Respondent cannot be allowed to hide behind an assertion that it was merely trying to maintain the status quo when the clear implication of the timing and the repeated statements it admits making were that union activity would be punished.

2. Christmas Bonus

The § 8(a)(3) analysis applied to discontinuing wage increases is equally applicable to Respondent's cessation of the Christmas bonus. It is undisputed that bonuses ended in 2012, just months after the election. As the ALJ found, the clear implication of Respondent cancelling the Christmas bonus in 2012 was that it was in retaliation for the employee's selecting the Union to represent them. Yet, at hearing, Woodcock maintained the it was mere coincidence, that 2012 happened to be the year, after Respondent had been in business in Yakima for 16 years, that personal financial obligations, increased competition, and declining Medicare and Medicaid disbursements required him to end the party and bonuses.⁵

This alternative explanation of motivation is unbelievable on its face, but all the more so when Woodcock admits he was spent \$10,000 to \$15,000 on bonuses and gifts *in 2008, 2009, 2010, and 2011.*⁶ In short, Woodcock asserts that in one year, coincidentally the year of the Union election, Respondent's fortune changes so severely that he went from spending lavishly on gifts and bonuses to completely obliterating the event. Yet Respondent provided no substantiation of these claims, documentary or otherwise, sufficient to overcome the timing. *Rogers Electric*, 346 NLRB 508, 519 (2006) (Respondent's failure to provide documentary evidence supporting a claim of economic justification is, itself, evidence of pretext). As found by the ALJ, such an unsubstantiated claim is "clearly pretextual." (ALJD 11:27-28)

⁵ As recognized by the ALJ, in making this argument Woodcock demonstrated the fallacy of the distinction between a payment by Woodcock and a payment by Respondent. (ALJD 9:30-32) As set forth above, in explaining why he ended the Christmas party, Woodcock lists one personal problem, a family member in financial need, and two problems facing Respondent's fortunes, increased competition and decreasing reimbursements.

⁶ In 2010 \$10,000 was spent on a donation and gifts were minimal, but this difference in form does not diminish the point: Respondent was spending significant resources around the time of the Christmas party.

Woodcock's assertions regarding the Christmas bonus also lack credibility given his statements regarding wage increases. By his own admission, Woodcock repeatedly told employees he could not give them wage increases because of the Union and the need to maintain the status quo. Yet, when he wanted to cancel a benefit, the Christmas Party, Woodcock was not concerned about changing the status quo and felt no obligation to notify the Union, stating it "wasn't any of [the Union's] business." Clearly, Woodcock was willing to use the Union as an excuse, but wasn't willing to actually recognize his bargaining obligations. Such a double standard demonstrates that it was hostility toward employee's unionization that led to the end of the Christmas bonus. The ALJ correctly found as much.

D. The ALJ's Credibility Resolutions, and Finding that Respondent Violated §8(a)(1) of the Act When Woodcock Told Employees that They Would Not Receive Raises because of Union Representation, are Well Supported by the Record and Applicable Law

Respondent's Exceptions and Brief in Support challenge credibility resolutions made by the ALJ, particularly in regard to Woodcock's statements in August and December 2012, and January 2013. The ALJ credited employees Schauer, Ugaitafa, and Gravel, concluding that Woodcock told unit employees on these occasions that they would not or could not get raises because they selected the union as their collective bargaining representative. To the extent Woodcock tried to deny these statements, the ALJ did not credit his assertions.

The Board affords ALJ's credibility resolutions a high level of deference, only overturning such resolutions when the clear preponderance of all the relevant evidence establishes they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.*, 188 F.2d 362 (3rd Cir. 1951). The ALJ's credibility resolutions here are well-supported by the record evidence, as discussed above. In arguing a contrary result Respondent merely asserts Woodcock should have been credited instead, failing far short of the Board's standard for overturning an ALJ's credibility resolutions.

Having made these factual findings, the ALJ relied on well-established Board law to conclude that Respondent's assertion that it would not be able to give employees raises if they voted for the Union violated § 8(a)(1). Similarly, having found Respondent had a past practice of granting periodic wage increases, as described above, the ALJ found that Woodcock's statements that wage increases were discretionary and required negotiation were similarly unlawful.

E. Respondent's Argument Regarding Standing and the Regional Director's Appointment is Without Merit

The Amended Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (the "Complaint") was issued by the Regional Director of Region 19 of the Board, Ronald K. Hooks, on September 12, 2013. Respondent asserts that Regional Director Hooks lacked the authority to issue the Complaint because he was not appointed by a validly constituted Board, and additionally argues that the appointment of Acting General Counsel Lafe Soloman, under whose authority a Regional Director issues complaints, had expired on July 31, 2010.⁷ Respondent bases both arguments on the decision of the U.S. Supreme Court in *NLRB v. Noel Canning*, No. 12-1281, ___ S. Ct. ___, 2014 WL 2882090 (June 26, 2014), which issued after the ALJ's Decision in the instant case.⁸

Respondent's arguments are without merit. Regional Director Hooks was appointed as Regional Director for Region 19 in 2011 by Chairman Pearce and Members Becker and Hayes. Chairman Pearce and Member Hayes held confirmed appointments, See 156 Cong. Rec. D706-01 (June 22, 2010), while Member Becker received a recess appointment on March 27, 2010. Member Becker received this appointment during a 17-day intra-

⁷ Respondent incorrectly states Regional Director Hooks was appointed January 6, 2012; the appointment at issue occurred on December 22, 2011.

⁸ Respondent made the same argument to the ALJ based on the D.C. Circuit Court's Decision in *Noel Canning*, 705 F.3d 490 (D.C. Cir 2013). The ALJ dismissed this argument based on Board decisions that pre-dated the Supreme Court's *Noel Canning* decision.

session recess of the Senate occurring from March 26 to April 12, 2010. 156 Cong. Rec. S2180 (daily ed. Mar. 26, 2010); 156 Cong. Rec. S2181 (daily ed. Apr. 12, 2010).

In *Noel Canning* the Court held that three Board members who received recess appointments in January of 2012, not 2011, were not validly appointed. See 2014 WL 2882090 at *16, *23. The Court held that intra-session recess appointments are valid when an intra-session recess lasts at least 10 days. *Id.* at *16, *23. Member Becker's appointment was not one of the January 2012 appointments and, as it occurred during 17-day recess of the Senate in 2010, his appointment was valid under *Noel Canning*.

Respondent does not articulate a basis for its assertion that the authority of the Acting General Counsel had lapsed, or how this impacts on the authority of a validly appointed Regional Director to issue complaints. Absent arguments, and salient case law in support, Respondent's attacks on the Regional Director's standing to issue the Complaint must fail.

IV. CONCLUSION

General Counsel respectfully submits that the Board find Respondent's Exceptions without merit and affirm the ALJ's rulings, findings and conclusions, and adopt the ALJ's recommended order, except to the extent General Counsel has requested a modification by his Limited Exceptions.

Signed at Seattle, Washington, on July 11, 2014.

Respectfully submitted,



Ryan Connolly
Counsel for General Counsel
National Labor Relations Board
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

Calculations Regarding Days Between Wage Increases

	A	B	C	D	E	F	G	H
1	Employee	Raise 1	Raise 2	Raise 3	Raise 4	Raise 5	Raise 6	Raise 7
2	Jason Ackley	217	175	254	173	180		
3	Kelly Adams	3248	416	100	329	245	137	209
4	Cara Bardwell	205	161					
5	Ian Barrett	78						
6	Jason Boitano							
7	Dwight Brisky	176	97	166	184	177	173	180
8	Emily Micheles	36	64	92	217	144	26	
9	Jeffrey Davie	3061	55	128	152	154	129	235
10	Dwight Derby	1304	363	163	201	267	195	197
11	Abraham Fandich	43	159	140	155	134	173	180
12	Lucas Flodin	49	173	180	126			
13	George Gomez	126	68	128	306	364	267	195
14	Greta Gorman	80	81	180	149			
15	Cole Gravel	106	139	172	166	184	177	173
16	Terrance Green	581	173	180				
17	Craig Hallmark	62	181	53	252	185	166	184
18	Alex Hanby	78						
19	Steven Harpel	196	109	101	182	224	96	184
20	Josephine Heath	210	180	355				
21	Gerald Holman	699	195	168	168	196	168	210
22	Brian Ireton	252	168	196	133	148		
23	Brian Ireton	135	184	177	173	180		
24	William Judkins	136	125	70	168	168	196	168
25	Guthrie Lambert-Smith	306	58	14				
26	James Longie	56	173	180	126			
27	Ronald Madden	128	168	196	168	599	185	166
28	Megan Martin	423						
29	Aaron Matson	101	211					
30	Matthew McCabe	954	348	168	196	168	210	137
31	James McDougall	265	131	96	90	137	134	173
32	Devin McWhirter	29						
33	James Mickelson	2622	141	153	195	364	168	210
34	Arthur Molina	1489						
35	Arthur Molina	25	289	173	180			
36	Evan Neumann	223	13	248				
37	John Nokes	770	125	238	168	107	257	113
38	Christopher O'Dell	3095	141	348	168	364	599	185
39	Mary O'Dell	133	168	364	277	148	93	205
40	James Petersen	161	348	168	196	168	687	97
41	Jack Piper	171	261					
42	Dana Pirolo	248	41	101	43	26	210	
43	Bren Rhodes	139	173	180	100	26		
44	John Rosenkranz	228	99	168	113	181	224	205
45	John Rosenkranz	161	173	180				
46	Matthew Schauer	107	131	126	154	177	353	

Calculations Regarding Days Between Wage Increases

	A	B	C	D	E	F	G	H
47	Donald Sharp	495	154	348	265	10	257	113
48	Daniel Taylor	162						
49	Lenny Ugaitafa	59	128	26				
50	Brian Wakeman	63	35	113	181	154	164	111
51	Tucker Walker	123	96	184	177	141	212	
52	Kasey Weigley	67	85	96	184	177	141	212
53	Casey Yeager	53	135	534	171	164	172	166
54	Robert Yoesle	218	178					

Calculations Regarding Days Between Wage Increases

	A	I	J	K	L	M	N	O
1	Employee	Raise 8	Raise 9	Raise 10	Raise 11	Raise 12	Raise 13	Raise 14
2	Jason Ackley							
3	Kelly Adams	167	227	184	177	353		
4	Cara Bardwell							
5	Ian Barrett							
6	Jason Boitano							
7	Dwight Brisky							
8	Emily Micheles							
9	Jeffrey Davie	133	245	137	209	167	227	184
10	Dwight Derby	196	97	166	184	177	173	180
11	Abraham Fandich							
12	Lucas Flodin							
13	George Gomez	197	196	97	166	184	177	173
14	Greta Gorman							
15	Cole Gravel	180						
16	Terrance Green							
17	Craig Hallmark	269	261					
18	Alex Hanby							
19	Steven Harpel	269	261					
20	Josephine Heath							
21	Gerald Holman	137	252	185	166	184	177	173
22	Brian Ireton							
23	Brian Ireton							
24	William Judkins	210	308	169	97	70	96	184
25	Guthrie Lambert-Smith							
26	James Longie							
27	Ronald Madden	184	177	173	180			
28	Megan Martin							
29	Aaron Matson							
30	Matthew McCabe	437	166	184	177	173	180	
31	James McDougall	180						
32	Devin McWhirter							
33	James Mickelson	346	131	97	166	184	177	173
34	Arthur Molina							
35	Arthur Molina							
36	Evan Neumann							
37	John Nokes	181	224	205	61	166	184	177
38	Christopher O'Dell	166	184	177	173	180		
39	Mary O'Dell	61	166	72	112	177	173	180
40	James Petersen	166	361	353	57			
41	Jack Piper							
42	Dana Pirolo							
43	Bren Rhodes							
44	John Rosenkranz							
45	John Rosenkranz							
46	Matthew Schauer							

Calculations Regarding Days Between Wage Increases

	A	I	J	K	L	M	N	O
47	Donald Sharp	181	154	164	172	166	184	177
48	Daniel Taylor							
49	Lenny Ugaitafa							
50	Brian Wakeman	61	70	96	184	177	173	180
51	Tucker Walker							
52	Kasey Weigley							
53	Casey Yeager	184	177	173	180			
54	Robert Yoesle							

Calculations Regarding Days Between Wage Increases

	A	P	Q	R	S	T	U
1	Employee	Raise 15	Raise 16	Raise 17			
2	Jason Ackley					113.7844	48.41414
3	Kelly Adams						
4	Cara Bardwell						
5	Ian Barrett						
6	Jason Boitano						
7	Dwight Brisky						
8	Emily Micheles						
9	Jeffrey Davie	177	173	180			
10	Dwight Derby						
11	Abraham Fandich						
12	Lucas Flodin						
13	George Gomez	180					
14	Greta Gorman						
15	Cole Gravel						
16	Terrance Green						
17	Craig Hallmark						
18	Alex Hanby						
19	Steven Harpel						
20	Josephine Heath						
21	Gerald Holman	180					
22	Brian Ireton						
23	Brian Ireton						
24	William Judkins	177	173	180			
25	Guthrie Lambert-Smith						
26	James Longie						
27	Ronald Madden						
28	Megan Martin						
29	Aaron Matson						
30	Matthew McCabe						
31	James McDougall						
32	Devin McWhirter						
33	James Mickelson	180					
34	Arthur Molina						
35	Arthur Molina						
36	Evan Neumann						
37	John Nokes	173	180				
38	Christopher O'Dell						
39	Mary O'Dell						
40	James Petersen						
41	Jack Piper						
42	Dana Pirolo						
43	Bren Rhodes						
44	John Rosenkranz						
45	John Rosenkranz						
46	Matthew Schauer						

Calculations Regarding Days Between Wage Increases

	A	P	Q	R	S	T	U
47	Donald Sharp	173	180				
48	Daniel Taylor						
49	Lenny Ugaitafa						
50	Brian Wakeman						
51	Tucker Walker						
52	Kasey Weigley						
53	Casey Yeager						
54	Robert Yoesle						

CERTIFICATE OF SERVICE

I hereby certify that a copy of General Counsel's Answering Brief was served on the 11th day of July, 2014, on the following parties:

E-File:

Gary Shinnars, Executive Secretary
National Labor Relations Board
1099 14th Street, N.W., Room 11602
Washington, DC 20570-0001

E-Mail:

Gary E. Lofland , Attorney
Halverson Northwest Law Group PC
PO Box 22550
Yakima, WA 98907-2550
glofland@glofland.net

Torren K. Colcord, Executive Director
National EMS Association (NEMSA)
4701 Sisk Rd., Ste. 104
Modesto, CA 95356-9320
tkcolcord@nemsaua.org


Kristy Kennedy, Office Manager