

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12**

TAMPA ELECTRIC COMPANY, a wholly
owned subsidiary of TECO ENERGY, INC.
d/b/a TECO PEOPLES GAS

and

Cases 12-CA-144359
12-CA-152306
12-CA-167550

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, AFL-CIO,
LOCAL UNION 108

**COUNSEL FOR THE GENERAL COUNSEL'S
BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

I. Statement of the Case

The Amended Consolidated Complaint (the Complaint) includes allegations of unlawful conduct that began with the first hints of union interest at Respondent's Sarasota Peoples Gas Division in September 2014 and have continued through the present, including Respondent's denial of annual merit wage increases to the Sarasota Division Unit employees, which should have taken effect in December 2014 and December 2015. The Regional Director issued the Complaint on February 16, 2016, and the Honorable Michael A. Rosas heard the case on March 7, 2016, and April 25, 2016.

In September 2014, employees working at Respondent's Sarasota Division started considering the possibility of seeking a union to represent them in collective-bargaining. Respondent quickly learned of the employees' interest in unionizing and promptly interrogated employee Jonathan Sinkler about his union sympathies and the sympathies of other employees. Respondent also promised Sinkler that it would increase employee wages if employees would abandon their union activity. Despite the interrogation and promise of benefits, the employees voted in favor of union representation on December 10, 2014, and on December 22, 2014,

International Brotherhood of Electrical Workers, Local Union 108 (the Union) was certified as the exclusive collective-bargaining representative of all full-time and regular part-time utility coordinators, senior utility technicians, utility technicians and apprentice utility technicians employed by Respondent at the Sarasota Division (Unit employees).

Each December, since at least 2009, Respondent has granted annual wage increases of about 3% to its employees. Immediately after the Unit employees selected the Union as their exclusive collective-bargaining representative on December 10, 2014, Respondent decided to withhold from the Unit employees the annual wage increase for 2015, while paying the increases to its unrepresented employees. Respondent made the decision to withhold the wage increase from the Unit employees because they selected the Union as their collective-bargaining representative, and it made the decision to withhold those wage increases without giving the Union prior notice and an opportunity to bargain about that decision. In December 2015, as was its practice, Respondent again granted its annual wage increases of about 3% to its unrepresented, non-Unit employees. However, it once again withheld wage increases from Unit employees, and it again did so without notifying the Union and giving the Union an opportunity to bargain about them. As discussed in depth below, Respondent's contention that wages could be frozen until a final contract is reached by the parties is incompatible with longstanding precedent. *NLRB v. Katz*, 369 U.S. 736 (1972); *Oneita Knitting Mills*, 205 NLRB 500 (1973).

After discussing the facts in greater detail, this brief will discuss why the testimony of employee Jonathan Sinkler (Sinkler) regarding the events of September 5, 2014, is to be believed over that of Eric Shryock (Shryock) and Steve Patterson (Patterson) – two admitted agents of Respondent whose testimony directly conflicted with each other about the events of that day. The brief will then analyze why Patterson's statements violated Section 8(a)(1) of the Act; why

Respondent's refusal to continue the annual merit wage program in December 2014 and December 2015, solely with respect to the Unit employees at the Sarasota Peoples Gas Division, was both an unlawful unilateral change to the established terms and conditions of their employment in violation of Section 8(a)(5) of the Act, and discriminated against the Unit employees because of their union activities in violation of Section 8(a)(3) of the Act; and why Respondent violated Section 8(a)(5) of the Act by failing and refusing to provide relevant information requested by the Union on May 8, May 11, and May 13, 2015.

The preponderance of the credible evidence demonstrates that Respondent violated the Act in all respects alleged in the Complaint. All appropriate remedies for Respondent's unlawful conduct should accordingly be ordered.

II. Statement of Facts

A. Background

At all material times, Respondent, a utility specializing in electric and gas delivery, has been a Florida corporation headquartered in Tampa, Florida, operating an office and place of business in Sarasota, Florida (the Sarasota Division or Sarasota PGS). [GCX¹ 1(jj), para. 2(a) and 1(mm), para. 2]. The Sarasota Division is headed by Division Manager Patterson, and includes the 19 apprentices, technicians, senior technicians, and utility coordinators in the Unit as well as four non-Unit professional and clerical employees. [GCX 1(jj), para. 4(a), 1(mm) para. 4, and GCX 8]. Although employees in some of Respondent's other business units are represented by unions, including the Union and other IBEW Locals, the Sarasota Division had not had a collective bargaining representative in the twenty-five years prior to the material events

¹ General Counsel's Exhibits are referenced herein as GCX (number); Joint Exhibits are referenced as JX (number). The hearing transcript is referenced as Tr. (page number). References to the Joint Stipulations, signed by the parties and admitted as Joint Exhibit 1, are referenced herein as JS (paragraph number).

in this case. [Tr. 58, 106-107, 222-223, 251, 263]. Respondent refers to employees covered by a union contract as “covered” employees, and all others as “non-covered” employees. [Tr. 136].

The Union filed a petition to represent the Unit employees on November 3, 2014.² The Board conducted a representation election at the Sarasota Division on December 10, 2014. [GCX 3(b)]. The Union won the election by a vote of 16 to 3, and was then certified as the collective-bargaining representative of the Unit employees on December 22, 2014.³ [GCX 3(b)].

B. Patterson interrogates Sinkler about his union interest and promises Sinkler benefits to discourage further interest and activity.⁴

The Sarasota Division holds weekly team meetings on Wednesday mornings, typically at 8:00 a.m. The first Wednesday of the month is the “general” meeting, at which many topics are discussed, in contrast to the specific issues such as safety which are the focus during other weeks. Guest speakers sometimes give presentations at the general meeting. [Tr. 19-20, 187-188, 251-252].

During the September 3, 2014 general meeting, Sarasota Division Manager Patterson was not present, so employees led the meeting as they had in the past when Patterson was absent. Human Resources (HR) Generalist Shryock gave a presentation on Respondent’s new pension system, then retreated to the back of the room to use his laptop while the employees continued the meeting. The employees discussed Respondent’s recent purchase of the New Mexico Gas Company (New Mexico), which was “unionized.” [Tr. 20-21, 55-56, 188-189, 192-193, 262].

Following the conclusion of the meeting, apprentice Sinkler⁵ approached Shryock where he was seated talking with a coworker, apprentice Cody Young (Young). [Tr. 21, 56, 193].

² The General Counsel respectfully requests that the Judge take judicial notice of the date of the filing of the Signed RC Petition, which is available to the public on the Board’s website at <https://www.nlr.gov/case/12-RC-140111>.

³ The General Counsel respectfully requests that the Judge take judicial notice of the official Tally of Ballots in Case 12-RC-140111, which is available to the public on the Board’s website at <https://www.nlr.gov/news-outreach/graphs-data/tally-of-ballots/12-RC-140111>.

⁴ As discussed in the Argument section below, where Shryock and Patterson’s testimony conflicts with Sinkler’s, it should be discredited, with all credibility disputes resolved in Sinkler’s favor.

Young asked him how the New Mexico employees were able to unionize, and “if we could unionize.” [Tr. 21, 57]. Shryock hesitantly replied that it was a “tricky subject” with HR. [Tr. 21-22, 59]. Young asked what could a union do, and Sinkler asked how other divisions could, but Sarasota couldn’t, and what the difference was between having it [a union] and not having it. [Tr. 59-60]. Shryock explained that a union was like having someone, another element, that would stand between the employees and HR. [22, 60]. Young nudged Sinkler and told him to ask Shryock about the issue Sinkler was having. [Tr. 22, 60].

Sinkler told Shryock that he had had a performance issue⁶ about a month and a half prior, and asked him if there was a “statute of limitations on a... PD or possibly DML.” (PD is “positive discipline,” Respondent’s formal discipline process. DML is “decision-making leave,” one of the final PD steps prior to separation from employment, during which an employee is sent home while both he and Respondent decide whether to continue the employment relationship.) [Tr. 22, 60].

Sinkler said that he had received a verbal warning from Patterson and filled out a “Lessons Learned,” a form Respondent uses where employees reflect on their experience of doing something wrong. [Tr. 23]. Shryock replied that something that would turn into PD or DML would have been on his desk ASAP, and it wasn’t. [Tr. 23, 60-61].

Following the conversation with Shryock, a senior technician who had overheard Sinkler’s questions asked Sinkler if he had really just asked Shryock about the union. Sinkler said he had. The senior technician replied, “That’s not who you ask to start a union.” [Tr. 23].

⁵ In March 2015, Sinkler was promoted to utility technician. [Tr. 15-16].

⁶ Although not strictly relevant, the facts of Sinkler’s issue are that he responded to a gas leak call at a house adjacent to the one from which the call had been placed. On arriving at the scene, Sinkler used his “sniffer” tool to locate the reported leak and did not realize that the house where the leak was actually found was not the one that had placed the call, so he left the post-service door hanger at the “wrong” location. [Tr. 41-43].

On September 4, 2014, Shryock attended a biweekly HR team meeting and sought guidance on how to handle Sinkler's questions. Shryock was advised to meet with Patterson to get more information about the situation, because it was "weird" that so much time had passed without a final resolution from a disciplinary standpoint. Shryock then called Patterson and set up a meeting at the Sarasota Division the following morning. Patterson was "shocked" to hear that Sinkler had raised union and performance issues with Shryock. [Tr. 202-211],

On September 5, 2014, Patterson and Shryock met in the morning in Patterson's office and discussed both Patterson's investigation into Sinkler's issue and what Patterson knew about union questions being asked by his employees. [Tr. 211-216]. Shryock testified that Patterson "didn't know anything about it... there was no knowledge prior to this. Steve seemed very shocked that all those questions came up." [Tr. 215]. Shryock also testified that although questions about pay are "normal things" for employees to bring up throughout the state, "based on what Mr. Sinkler said, there was more going on and more that, you know, stir." [Tr. 215-16].

Patterson and Shryock went out to lunch, and when they returned to the Sarasota Division, Patterson indicated that he wanted to bring Sinkler in to get his Lessons Learned form from him. Patterson asked Shryock to stay and sit in on the meeting, saying, "I want to make sure that I'm doing this right." [Tr. 215-217]. Patterson then called Sinkler and asked him to come into the office from the field with a copy of his Lessons Learned. [Tr. 24, 218]. Sinkler did as instructed and, upon arriving in Patterson's office, made copies of the form for each of them to review. [Tr. 24-25]. Sinkler read the form out loud and he and Patterson discussed what step he had missed that had led to the error. [Tr. 25, 63]. Patterson then said, "Jonathan, I feel like I've been left a little in the dark." [Tr. 25, 63]. Sinkler looked confused, so Patterson

continued, “I end every meeting with a ‘do you all have any issues or concerns for me?’ And we just had midyear performance reviews, and I didn’t hear anything out of anybody.” [Tr. 25, 63].

Sinkler asked him what he meant and Patterson replied, “I heard from Eric [Shryock] that you were asking about unionizing the other day.” [Tr. 25, 63]. Sinkler said, “We were just joking around talking,” because he was intimidated. [Tr. 25, 63, 65]. Patterson asked who “we” was, saying, “that means there has to be someone else with you.” [Tr. 25, 63]. Sinkler stated that it was just he and Young joking around, talking to Shryock. [Tr. 25-26, 63].

They went back to discussing the performance issue for a few moments. [Tr. 63]. Patterson then asked, “Well, why are you wanting to unionize?” [Tr. 26, 63]. Sinkler confessed that he did not know much about unions; they had heard in the general meeting that New Mexico was unionized and were asking Shryock some questions because they were curious. [Tr. 26]. Patterson asked Sinkler, “What do you think a union could do for you?” [Tr. 26, 64]. Sinkler again replied that he did not know much about unions, and thought they were only for postal employees, people up north, and coal miners. [Tr. 26, 64]. Sinkler said he had heard from other employees of Respondent at their training school in Avon Park that Lakeland employees, covered by a union contract, had “a guaranteed 3%” raise. [Tr. 26, 64, 222-223]. Patterson replied, “Well, I can do that for you, bud.” [Tr. 26, 64, 65].

The meeting continued, with the topic of discussion alternating between Sinkler’s performance and unions. [Tr. 26]. Patterson said at some point, “If I don’t know anything that’s going on, I can’t help to know. If there’s anything that’s going on... if you tell me, then I can do something. If not – maybe, I can’t.” [Tr. 221, 241-242]. Sinkler listed other issues of concern, such as contracting out work from the Division and the pending switch to a “paid time off” (PTO) system combining vacation and sick leave into a single leave bank. [Tr. 221-222].

Shryock stepped in at least twice and said that it wasn't a "strong arm by HR," that it was just their job to hear what issues there were. [Tr. 26, 64]. Finally, Sinkler asked Patterson, "Man to man, am I going to lose my job?" Patterson replied that he didn't know and was going to have to run things by "the higher-ups." [Tr. 26-27].

Within ten to twenty minutes after Sinkler departed from the office, Patterson called him again and asked him to return to the office to change the date on his Lessons Learned form to that day, September 5, 2014, from the date he had originally turned it in weeks before. [Tr. 28, 73-74, 226-227, 243]. A few minutes later, Sinkler then called Shryock, who excused himself from Patterson's office to take the call. [Tr. 28-29, 75, 226-227, 243-244]. Sinkler told Shryock that he did not feel comfortable changing the date since he had already turned in the form. [Tr. 28-29, 75, 227, 243-244]. Sinkler was not required to change the date, and no discipline issued from his refusal to do so. [Tr. 29, 75, 228, 245-246].

C. Respondent has a longstanding practice of granting Merit Raises to its non-covered employees.

Respondent has historically implemented annual merit wage increases (Merit Raises) for its non-covered employees in December of each year, which appear on employees' first paychecks in January.⁷ [Tr. 161; GCX 1(jj), para. 8(a), 1(mm), para. 8(a); JS 1; JX 2(a) through 2(e), 3(a) through 3(e), 4(a) through 4(h), 5(a) through 5(f), 6(a) through 6(h), 7(a) through 7(i), 8(a) through 8(f), and 9(a) through 9(h)]. Raise percentages are determined by each employee's direct supervisor, called the performance coach (Coach) by Respondent, based on that year's merit budget established by corporate, the employee's performance throughout the year, and the

⁷ Covered employees' raises are implemented according to the terms of their collective bargaining agreements.

employee's status relative to the salary "midpoint" for their job classification.⁸ [Tr. 17-19, 60, 69, 142, 145, 224, 286-287]. The Compensation Department publishes a salary chart each year for the annual merit process, indicating the range of acceptable salaries for each job classification, based on purchased surveys of industry standards in the vicinity. [Tr. 136-139, 141-142; JX 2(a), 3(e), 4(h), 5(f), 6(d), 7(h), 8(d), and 9(f)]. For the Unit employees' job classifications, B-1, C-1, C-3, and D-1, the range is from 80% to 120% of the midpoint. [Tr. 139-141, GCX 7; JX 2(c), 3(e), 4(h), 5(f), 6(d), 7(h), 8(d), and 9(f)]. The Unit employees' job classifications are coded as non-covered employee classifications. [Tr. 151-152].

The Compensation Department guidelines indicate that only exceptional employees should earn over 110% of the midpoint, and that Coaches should consider giving any employee at "the top of the third quartile" (110%), a lump sum bonus in lieu of a raise that would move them into the next quartile. The goal of Respondent's Compensation Department is to keep employees' salaries at or near the midpoint. [Tr. 141, 153; JX 2(c), 3(e), 4(h), 5(f), 6(d), 7(h), 8(d), and 9(f)].

Respondent's year-round employee performance evaluation process culminates in the year-end performance review meeting between each employee and their Coach. The Coach rates the employee on whether they have met the targets in various performance "dimensions" established at the beginning of the year, then gives an overall rating. Since 2011, the ratings have been, in ascending order, "U" for Unacceptable, "E" for Effective, "C" for Commendable, and "X" for Exceptional.⁹ Coaches input the overall ratings into Respondent's "MSS" system, and the ratings are reviewed for consistency by managers in the chain of command in the

⁸ Prior to about 2010, the "midpoint" was called "JMV," or job market value. This term is still in use by employees and managers alike and refers to the same concept: the midpoint is 100% JMV; employees may be anywhere from 80% to 120% of the midpoint, just as they would be at 80% to 120% of JMV. [Tr. 17, 60, 140-141].

⁹ Prior to the 2012 annual merit process, the ratings were "B" for Below Expectations, "M" for Meets Expectations, and "E" for Exceeds Expectations. [Tr. 144].

business unit. Then, the Coaches input their Merit Raise percentage recommendations. As with the performance ratings, the Merit Raise percentages are also reviewed up the chain of command, as well as reviewed by Respondent's Compensation Department for company-wide consistency and fairness. [Tr. 17-19, 143-145, 163-164, 172-173; JX 2(b), 3(c), 4(c), 5(c), 6(c), 7(c), 8(c), and 9(b)].

Patterson is the Coach for the entire Sarasota Division; next up the chain is Southern Territory Manager Jesus Vega (Vega), then Director of Gas Operations Rick Wall (Wall). [GCX 1(jj), para. 4(a), 1(mm) para. 4; Tr. 18, 69, 207-208, 259, 283-284, 297]. Senior Vice President William "Bill" Whale (Whale) is the penultimate step of review before the Compensation Department seeks final approval from the CEO of TECO Energy, John Ramil (Ramil).¹⁰ [GCX 1(jj), para. 4(a), 1(mm), para. 4; Tr. 163-164, 172-173, 284, 296]. Vega rarely changes Patterson's recommended performance ratings, and has never changed his Merit Raise percentage recommendation in the three or four years which Vega has been Patterson's manager. [Tr. 295]. Patterson's recommended percentages for the Sarasota Division Unit employees have been between 2.7% and 3.2% for each of the past five years, with one outlying exception.¹¹ [GCX 7]. The company-wide budget for raises has been 3% for each of the last eight years. [Tr. 142-143; JX 4(g), 6(b), 7(g), 8(h), and 9(e)].

¹⁰ Mr. Ramil's name was misspelled in the transcript as "Remiel." His first name did not appear in the official record. [Tr. 284].

¹¹ In December 2009, Cindy Thayer received a 13% raise for 2010. [GCX 7]. To date, Thayer is at only 88% of the 2015 salary midpoint for her job classification, below the industry median for employees with similar job duties. [GCX 5; JX 8(d)]. At the time of her 13% raise, her pre-raise salary was approximately \$24,193, 76% of the 2009 midpoint of \$31,788. Coaches are advised each year to keep employees above 80% of the midpoint, thus likely explaining Thayer's anomalously large raise that year to \$27,154, 83.7% of the 2010 midpoint. (This was calculated by taking the most recent salary data from GCX 5, applying the raise percentages from GCX 7, and reducing the 2010 salary chart (JX 3(e)) by 2% to discover the 2009 salary ranges, which were not part of the Joint Exhibits.)

D. Respondent withholds 2015 Merit Raises from the Unit employees within days of the employees selecting the Union as their collective-bargaining representative.

On October 24, 2014, Respondent's Compensation Department emailed Coaches an initial memorandum regarding the 2015 annual merit process, including an initial timeline indicating that the raises would take effect on December 22, 2014. [JX 8(a), 8(b), 8(c)]. On November 13, 2014, the Compensation Department emailed Coaches another memorandum indicating that the merit budget of 3% had been created "effective November 10th," and that the "Compensation Planning Tab" in the computer system would open on November 18, 2016. [JX 8(g)].

In November 2014, Patterson conducted year-end performance review meetings with the Sarasota Division employees and input his overall performance rating for each employee into Respondent's MSS system. [Tr. 279-282]. After the Compensation Planning Tab opened, Patterson also made his Merit Raise percentage recommendations and submitted them for review by Vega. [Tr. 285, 292-293]. According to the timeline, Patterson was supposed to have finished his inputs by December 1, 2014, and Vega was to finish reviewing them by December 8, 2014. [JX 8(c)].

The Board conducted a representation election at the Sarasota Division on December 10, 2014. [GCX 3(b)]. According to the timeline, the next layer of review by Wall and Whale was supposed to be completed by December 12, 2014. [JX 8(c)]. By December 11, 2014, a status of "Completed" had been assigned to the Sarasota Division raise percentages, which were unchanged from Patterson's initial recommendations. [Tr. 150-151, 292-293; GCX 8]. On December 15, 2014, the Sarasota Division recommendations were "Rejected." [GCX 8].

On December 19, 2014, the Compensation Department issued its final memorandum of the year, indicating that the annual merit process was complete and that the 2015 Merit Raises had been approved. That same day, Patterson read a different memorandum to the employees of the Sarasota Division, signed by Vice President Whale and Senior Vice President – Corporate Services and Chief Human Resources Officer Phil Barringer, including the following passages:

Please be advised that the Company expects the NLRB to certify the results of the representation election conducted December 10, 2014. As a result of this election, all Sarasota Division Apprentices, Utility Technicians, Sr. Utility Technicians, and Utility Coordinators will be exclusively represented by the International Brotherhood of Electrical Workers (IBEW), Local 108.

We and your management team are disappointed in this outcome. ...

[...]

For your information, with the IBEW elected as your exclusive representation [sic], Peoples Gas can no longer routinely convey status on certain items without first bargaining with the IBEW; like future wage increases, hours of work, and changes in working conditions. During the collective bargaining process, the company must maintain the status quo related to these matters. This will be a change from our past routine.

[...]

2. A 2015 wage increase cannot be implemented because the increases were not determined as of the date of certification and therefore are not part of the status quo.

3. Your 2014 Performance Sharing Program (PSP) potential payout will be awarded during the first quarter of 2015, as this program was determined before the date of election certification and therefore is part of the status quo.

[...]

[JX 10; Tr. 17, 285].

On December 22, 2014, the 2015 Merit Raises took effect for Respondent's employees not covered by a collective bargaining agreement, except those in the new bargaining unit at the Sarasota Division. [JS 13]. Respondent received notice of the Union's certification on

December 23, 2014, and on December 29, 2014, emailed a letter from Paul Davis (Davis), Director – Employee Relations, addressed to Union Assistant Business Manager Robert Thomas (Thomas), to Thomas, who was on vacation at the time, Business Manager Floyd Suggs (Suggs), and Assistant Business Manager Doug Bowden (Bowden). [Tr. 85-86; GCX 3(a), 3(b)]. Suggs responded that afternoon, requesting bargaining dates, certain information to prepare for bargaining, and that “if any pay raise [sic] or bonus are schedule [sic] please pay these employees theirs.” [GCX 3(a)].

When Thomas returned from vacation on January 5, 2015, he saw Davis’ letter, Suggs’ response, and a copy of the December 19, 2014 memo that had been issued to the Sarasota Division Unit employees. When the Unit employees received their first paychecks following the December 22, 2014 effective date of the non-covered employees’ Merit Raises and discovered that they had not received raises, unlike years past, they called Thomas, who then filed the original charge in Case 12-CA-144359 on January 13, 2015. [Tr. 85-86, 99-104, 130].

Respondent did not reply to Suggs’ December 29, 2014 email until late January 2015, when it furnished the information requested. [Tr 87, 132]. The parties eventually began to discuss bargaining dates, and the initial bargaining session occurred on March 23, 2015. [Tr. 131-132, JS 11]. The parties did not discuss Merit Raises at that session. [Tr. 88].

E. Respondent denies the Union’s requests for raise data about Tampa Peoples Gas employees.

The second day of bargaining took place on May 8, 2015. [Tr. 87-88; JS 11]. Respondent’s counsel and chief spokesperson at bargaining, Thomas Gonzalez (Gonzalez), opened the session by announcing that with a hearing date approaching, the company wanted to know what it would take to settle Case 12-CA-144359.¹² The Union offered that a 5%

¹² As indicated in GCX 1(jj), the hearing date in this matter was initially set for June 1, 2015.

retroactive raise for 2015, and a 5% raise for 2016 if no contract was reached by the end of the year, could settle the matter. The parties went back and forth until the Union would offer no lower than 3% and Respondent would offer no higher than 2.5%. [Tr. 88-89, 105-106, 114-118].

The Union requested the high, low, and average raise percentages given to the non-Unit Sarasota Division employees for 2015, and Respondent furnished those numbers. Davis mentioned that there were only four people not in the Unit, so the numbers were not really comparable. Bowden then requested that Respondent furnish the high, low, and average Merit Raise percentages given to unrepresented employees at the Tampa Division of Peoples Gas for 2015, and Davis asserted that they were not relevant to the negotiations. Bowden replied that they were relevant as a gauge to what the Union should be asking for in negotiating wages. Respondent did not furnish the requested information, and bargaining moved on to other topics. [Tr. 89-90, 122-127].

On May 11, 2015, Bowden reiterated the Union's request for the Tampa Merit Raise data in an email to Davis. Davis replied on May 12, 2015, explaining why Respondent felt the information was not relevant. Bowden replied on the morning of May 13, 2015, explaining that the Tampa data would give the Union a larger sample for comparison. Davis did not reply to the email. [GCX 1(jj), paras. 9(a) and 9(c), 1(mm) para. 9; JS 15; JX 11; Tr. 91].

The parties also bargained on May 13, 2015. [JS 11]. During a break, Bowden approached Davis in the lobby of the hotel where the bargaining was happening and asked him if he planned to provide the requested data for Tampa. Davis replied that he was not going to provide it because his counsel had instructed him that he did not have to do so. Bowden told Davis that the Union would file a Board charge, and on May 14, 2015, Thomas filed the charge

in Case 12-CA-152306 on behalf of the Union. As of March 7, 2016, the Union had not received the requested information from Respondent. [Tr. 91-92; GCX 1(p)].

F. Respondent withholds 2016 Merit Raises from the Unit employees.

On August 25, 2015, the parties met for bargaining and Respondent announced its intention to pay the 2015 Merit Raises to the Unit employees, retroactive to December 22, 2014, based on the percentages that had been recommended as of December 10, 2014. [Tr. 92-94, 111-112, 119-120; JS 11; GCX 4]. Respondent paid the raises in late September 2015. [JS 13].

Respondent did not communicate its intention with respect to 2016 Merit Raises to the Union at any time. [Tr. 95]. Respondent never asked the Union what it should do with respect to the 2016 annual merit process. [Tr. 95]. The Compensation Department issued its memoranda regarding the 2016 annual merit process on October 23, 2015, November 13, 2015, and December 16, 2015. [JS 9; JX 9(c), 9(d), 9(g)]. Patterson performed the year-end performance evaluations for the Unit employees in November 2015, but did not enter any Merit Raise percentages into the computer system for them. [Tr. 286, 299]. No Merit Raises were paid to the Unit employees for 2016, although the raise took effect for Respondent's other employees who were not covered by union contracts on December 21, 2015. [Tr. 16, 155; JS 14; JX 9(b)].

III. Argument

A. Sinkler's consistent testimony should be credited over the inconsistent and contradictory testimony offered by Patterson and Shryock. Thomas' uncontroverted testimony should also be credited.

In making credibility determinations, administrative law judges may rely on a number of factors, including "the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable

inferences that may be drawn from the record as a whole.” *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op. at 7 (2014). The Board has long held that there are a number of inferences that may be drawn from the circumstances of the testimony. One such inference is the Board’s recognition “that the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests.” *Flexsteel Industries, Inc.*, 316 NLRB 745, 745 (1995), citing *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978) and *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961).

Sinkler’s testimony regarding the events of September 3 and 5, 2014, was clear and consistent, and is largely supported by the testimony of HR Generalist Shryock. For example, Sinkler and Shryock both testified that a significant portion of the September 5, 2014 meeting was devoted to Patterson’s attempt to ascertain what was going on so he could “help.” [Tr. 26, 63-65, 221, 241-242]. Although Shryock’s testimony regarding the meeting stopped short of describing any exact questions that Patterson asked Sinkler, or precise promises made, Shryock admitted that Patterson continued discussing Sinkler’s union interest, contradicting Patterson’s testimony that he simply asked Sinkler if he had any more questions for them. [Tr. 221, 241-242, 277]. This comports with Sinkler’s account that Patterson first asked, “What do you think a union could do for you?” and then replied, “Well, I can do that for you, bud,” when Sinkler said that he had heard about the guaranteed 3% raise in the Lakeland Division collective bargaining agreement – a topic that Shryock admitted was addressed during the meeting. [Tr. 26, 64, 222-223].

Aside from Patterson’s admissions that he found out from Shryock that Sinkler had been asking questions about unions and that he was the one who raised the topic of unions in the

September 5, 2014 meeting with Sinkler, Patterson flatly denied that there was any discussion of unions in that meeting beyond his query, “[Do you] have any more questions [in regards to the Union] that [you] would like for us to answer?” [Tr. 277]. Patterson’s self-serving denial is directly contradicted by both Sinkler’s and Shryock’s testimony and should be discredited.

Moreover, Patterson also incorrectly recalled other details from that timeframe, including his testimony that he called Sinkler to come in before lunch, whereas Sinkler and Shryock both testified that the call was placed in the early afternoon and Sinkler came in immediately after receiving it. [Tr. 24, 215-218, 276]. Patterson also failed to recollect that he had called Sinkler after the meeting and asked him to return, which Sinkler and Shryock both recounted. [Tr. 28-29, 73-75, 226-228, 243-246]. Patterson’s recollection that the new PTO system was announced by Shryock “a handful of months prior to this meeting” and implemented “maybe like the following month after we initially learned about PTO being implemented” is controverted by the memorandum he read to his Division employees on December 19, 2014, indicating that the PTO system had in fact been announced in September, and would take effect January 1, 2015 – a “handful” of months *after* Patterson’s meeting with Sinkler on September 5, 2014. [Tr. 272-273; JX 10].

The credibility of Sinkler’s testimony should also be entitled to a favorable inference due to the fact that he is a current employee testifying against his current immediate supervisor. As Board precedent indicates, such testimony is by its nature contrary to the employee’s pecuniary interest. This is especially true in the present matter, because there are no financial remedies available for the unlawful statements Patterson is alleged to have made, and therefore no incentive for Sinkler to be untruthful in recounting the events of September 5, 2014. Patterson and Shryock should therefore be discredited to the extent that their relevant testimony conflicts

with Sinkler's consistent account of the meeting, and thus, all credibility disputes should be resolved in favor of Sinkler.

B. Supervisor Patterson's questioning of and promises to employee Sinkler violate Section 8(a)(1) of the Act.

"It is well-established Board law that 'an employer violates Section 8(a)(1) of the Act if its conduct may reasonably be said to have a tendency to interfere with the free exercise of employee rights.'" *Corporate Interiors, Inc.*, 340 NLRB 732, 732 (2003), quoting *Frontier Hotel & Casino*, 323 NLRB 815, 816 (1997); see also *American Freightways Co.*, 124 NLRB 146, 147 (1959). The intent or motive of the employer is not relevant to this analysis, and "does not turn on whether the coercion succeeded or failed." *American Freightways Co.*, 124 NLRB at 147 (1959); see also *EF International Language Schools, Inc.*, 363 NLRB No. 20, slip op. at 11 (2015); *Corporate Interiors, Inc.*, 340 NLRB at 732; *Frontier Hotel & Casino*, 323 NLRB at 816. The standard of inquiry is an objective one, examining the effect of the employer's actions on a reasonable employee. *Rocky Mountain Eye Center, P.C.*, 363 NLRB No. 34, slip op. at 7 (2015); *EF International Language Schools, Inc.*, supra; *Miller Electric Pump*, 334 NLRB 824, 825 (2001).

In determining whether questioning of an employee about that employee's protected, concerted activity violates the Act, the Board considers whether, under all the circumstances, the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise rights guaranteed by the Act. *United Services Automobile Assn.*, 340 NLRB 784, 786 (2003); *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Among the factors that may be considered in this analysis are the identity of the questioner, the place and method of the interrogation, the background of the questioning, and the nature of the information sought. *Stevens Creek Chrysler Jeep Dodge*,

353 NLRB 1294, 1295 (2009), enf'd. sub nom. *Mathew Enterprise, Inc. v. NLRB*, 771 F.3d 812 (D.C. Cir. 2014).

In *United Services Automobile Assn.*, supra, the Board found a violation of Section 8(a)(1) where the employer's interrogation of an employee included questions that the employer already knew the answer to, such as asking whether the employee had been at the building at a particular time even though it had both video surveillance footage and security turnstile data showing when she had entered and exited the building to engage in protected, concerted activity. The questioning, performed by a human resources professional, turned then to the protected, concerted activity, the distribution of fliers on employees' desks regarding the recent layoff of their colleagues. The Board found that "[t]he employees would reasonably perceive that the Respondent had only one objective in questioning [the employees] – to identify who had been engaged in the flier distribution" and that "such questioning would reasonably tend to interfere with or deter the exercise of employees' Section 7 rights." 340 NLRB at 786.

In *Clinton Electronics Corp.*, the Board found an unlawful interrogation where the supervisor's statement to an employee that she knew the employee went to a union meeting over the weekend "clearly sought, even compelled a response" noting that "[j]ust because a statement does not have a question mark at the end does not detract from its coercive potential... certainly, a reasonable person, confronted by her supervisor saying that she knew that the employee had attended a union meeting, would think twice and likely would be disinclined to engage in further union activities." 332 NLRB 479, 480 (2000).

The circumstances of the September 5, 2014 meeting were highly coercive. Patterson, Sinkler's direct supervisor and Coach, is responsible for directing and evaluating his work, and

retains discretion over Sinkler's continued progression as a technician. [Tr. 40-41, 287-289]. Patterson also had discretion over Sinkler's annual Merit Raise.

When Sinkler was called into Patterson's office to go over his Lessons Learned form for a second time, he was still not sure whether further discipline would issue for a weeks-old performance issue, which Shryock agreed was a "weird" amount of time to have elapsed. [Tr. 203]. After reviewing the form with the uncertainty still looming over Sinkler, Patterson then confronted him about his questions to Shryock at the September 3 general meeting, expressing his shock at Sinkler's union interest and beginning to fish for information about any union interest among other employees: "I feel like I've been left a little bit in the dark." [Tr. 25, 63]. Sinkler, intimidated, responded, "We were just kind of joking around." [Tr. 25, 63]. Patterson pressed him, directly asking, "Who's we?" [Tr. 25, 63]. Sinkler said, "Just me and Cody." [Tr. 25, 63]. As the meeting went on, Patterson asked why Sinkler was interested in a union to try and address Sinkler's concerns himself – which even Shryock admits was the "tone" of Patterson's questioning – and asked Sinkler what he thought a union could do for him. In response to Sinkler's concern about having a guaranteed 3% annual raise, Patterson promised, "Well, I can do that for you, bud." [Tr. 26, 63-65, 221, 241-242]. The meeting only ended when Sinkler asked his boss, "Man to man, am I going to lose my job?" [Tr. 27].

Patterson's questions were asked in a coercive environment – in his office and with Sinkler confronted not only by his manager, but also Shryock, another agent of Respondent. Sinkler was not an open Union supporter; he had only asked a few questions about unions on September 3. These circumstances of Patterson's interrogation of Sinkler about not only his own, but also his coworkers' union sympathies and activities, had the impact of intimidating and restraining a reasonable employee. That the drive to organize the Sarasota Division employees

ultimately succeeded is irrelevant to the analysis. The key inquiry is the immediate impact on a reasonable employee. With the threat of progressive discipline looming, any reasonable employee would have tried to deflect the questioning, as Sinkler did by stating that he and a coworker were just “joking around” about it.

Patterson’s promise that he “could do that for you, bud,” in response to Sinkler’s mention of the 3% guaranteed raise received by the represented Lakeland employees clearly implies to any reasonable listener the message that a union is not necessary to attain such a benefit, and was intended to induce employees to abandon support for any union organizing. As Shryock admitted, Patterson used the meeting to discover Sinkler’s concerns to eliminate the “stir” of union talk at the Sarasota Division.

Patterson’s interrogation and promise of benefits during the September 5, 2014 meeting interfered with, restrained, and coerced employees in the free exercise of their Section 7 rights, and therefore violated Section 8(a)(1) of the Act, as alleged in paragraphs 6 and 7 of the Complaint.

C. Respondent’s withholding of the 2015 and 2016 Merit Raises from the Unit employees violates Section 8(a)(5) and (1) of the Act because Respondent failed to give the Union notice or the opportunity to bargain over the discontinuation of an established term and condition of employment.

Respondent will hinge its defense in this case on *NLRB v. Katz*, 369 U.S. 736 (1972), and *Oneita Knitting Mills*, 205 NLRB 500 (1973). These precedents, it will argue, constricted it from simply continuing the annual merit process for the Unit employees because they oblige employers to bargain with the employees’ collective bargaining representative, rather than simply continuing the discretionary raise program. This is true. However, by the same token, the lesson to be drawn from *Katz*, *Oneita*, and more recent precedents such as *Daily News of Los Angeles*, 315 NLRB 1236 (1994), is that employers are required to give *advance* notice to the

unions representing their employees, before taking action that departs from its established past practice – regardless of whether discretion is exercised as to the amount of each individual’s raise. Respondent gave no notice to the Union in advance of its decision to discontinue the Merit Raises; ignored the Union’s request that the Merit Raises should be paid; and then failed to satisfy its obligation to bargain about the implementation of the annual merit process, including Merit Raises, during the parties’ negotiations for a collective-bargaining agreement.

i. Respondent’s Merit Raises are an established term and condition of employment.

Discretionary raises become fixed terms and conditions of employment when, as here, they have occurred at the same time each year for a number of years, they are based on fixed criteria like budgets and salary guidelines, and employees have come to expect them to be tied to their annual performance reviews. *United Rentals, Inc.*, 349 NLRB 853 (2007), citing *Daily News of Los Angeles*, supra. Respondent’s Merit Raises have been in place for at least the last eight years, and are so routinely fixed that little changes on the Compensation Department memoranda from year to year besides the dates and the salary range updates. [Tr. 142-143, 161; GCX 1(jj), para. 8(a), 1(mm), para. 8(a); JS 1; JX 2(a) through 2(e), 3(a) through 3(e), 4(a) through 4(h), 5(a) through 5(f), 6(a) through 6(h), 7(a) through 7(i), 8(a) through 8(f), and 9(a) through 9(h)¹³].

¹³ In fact, on JX 9(c), Compensation Analyst Milca Rodriguez forwarded the initial memorandum with the following commentary:

“Below is the first of several email communications that will be sent to our Performance Coach population regarding the Merit process.

It will give you an idea of the communications we typically send throughout this process.

I will forward the other communications as well once sent.. they [sic] are scheduled for mid-November and late December.”

Although Coaches exercise some minimal discretion in recommending Merit Raise percentages, Respondent's priorities in the annual merit process are clear: to keep employees' salaries in line with the midpoint for their job classification. [Tr. 141, 153; JX 2(c), 3(e), 4(h), 5(f), 6(d), 7(h), 8(d), and 9(f)]. Coaches are advised to use the Merit Raises to reward good performance, but are also instructed that only the most exceptional employees should actually exceed 110% of their midpoint and that they must allocate all raises for the employees under them from within the same 3% budget unless they seek special approval. [Tr. 153, 166, 169; JX 2(c), 3(e), 4(h), 5(f), 6(d), 7(h), 8(d), and 9(f)]. In the five years of history presented for the Unit employees' Merit Raises, only one (1) raise out of 95 exceeded the range of 2.7% to 3.2%. [GCX 7]. Employees know that the raises average out to 3% each year, and may be a little above or a little below, depending on their performance. [Tr. 68-69].

Respondent's raises are even more fixed than those in *Daily News of Los Angeles*. 315 NLRB at 1236. Whereas the *Daily News of Los Angeles* raises occurred around each individual's employment anniversary, Respondent's Merit Raises are given at the end of the annual merit process, which always begins in October, ends in December, and takes effect in time to appear on the first paycheck issued in January. Furthermore, while the *Daily News of Los Angeles* raises varied from 3% to 5%, Respondent's raises are clustered tightly around the 3% mark at the Sarasota Division. Finally, nearly 20% of the *Daily News of Los Angeles* employees did not even receive a raise in any given year, whereas the evidence demonstrates that virtually all of Respondent's non-covered employees receive a Merit Raise as a result of the annual merit process. [Tr. 18-19, 139, 145, 149; GCX 7; JS 13, 14; JX 2(a), 4(a), 5(b), 6(b), 7(g), 8(h), 9(e)].

- ii. *Respondent did not communicate notice of its intention to discontinue the Merit Raises to the Union.*

On December 19, 2014, nine days after the Unit employees voted for the Union as their collective bargaining representative and three days before the Union's certification as their representative, Respondent notified the Unit employees of its final decision to discontinue their Merit Raises. Respondent issued a memorandum, addressed solely to the bargaining unit members, indicating that they would not receive a 2015 Merit Raise because wages would now have to be bargained over with the Union. Division Manager Patterson also read the memorandum aloud to the employees. [JX 10; Tr. 17, 285].

Ten days later, on December 29, 2014, Respondent emailed the Union an invitation to bargain that still did not mention its discontinuance of the Merit Raises. Nonetheless, Union Business Manager Suggs emailed back that same day and requested that any raises or bonuses due to the employees be paid. Respondent did not reply to that request, nor did it reverse its decision to deny the Merit Raises to the Unit employees. [Tr. 85-86; GCX 3(a), 3(b)].

Assistant Business Manager Thomas testified credibly and without contradiction that he did not learn of Respondent's decision not to pay the 2015 and 2016 Merit Raises to the Unit employees until he received calls from the Unit employees about it, in the first weeks of January 2015 and January 2016, respectively. The Union did not receive any notice from Respondent, and had no other knowledge of the elimination of the Unit employee's Merit Raises prior to the implementation of its decision not to pay the 2015 and 2016 Merit Raises to the Unit employees at the Sarasota Division, while continuing to pay them to other employees not covered by any collective-bargaining agreement. [Tr. 85-86, 95, 130].

iii. *Respondent's conduct violated Section 8(a)(5) of the Act.*

Under the Board's longstanding precedent, Respondent's proper course of action following the election with respect to the Merit Raises, an established term and condition of employment at the Sarasota Division and company-wide, would have been to consult with the Union and find out whether it should continue or discontinue the raises while the parties bargained. *Katz*, *Oneita*, *Daily News*, and *United Rentals* definitively establish this baseline obligation of communication in advance of taking any action that deviates from past practice. As stated by the Fifth Circuit in *NLRB v. Dothan Eagle*, 434 F.2d 93, 98 (1970):

The cases make it crystal clear that the vice involved in both the unlawful increase situation and the unlawful refusal to increase situation is that the employer has *changed* the existing conditions of employment. It is this change which is prohibited and which forms the basis of the unfair labor practice charge.

....

In other words, whenever the employer by promises or by a course of conduct has made a particular benefit part of the established wage or compensation system, then he is not at liberty unilaterally to change this benefit either for better or worse during ... the period of collective bargaining.

Respondent's obligation to preserve its established terms and conditions of employment attached as soon as the Union won a majority of the employees' votes in the Board-conducted election on December 10, 2014. See, e.g., *Mike O'Connor Chevrolet*, 209 NLRB 701, 703-704 (1974), enf. denied on other grounds, 512 F.2d 684 (8th Cir. 1975). Respondent has admitted that it did not pay Sarasota Division Unit employees timely Merit Raises for either 2015 or 2016, while continuing its historic practice of making them effective for all other non-covered employees in December of each year. Furthermore, Respondent has presented no evidence that it notified or sought to bargain with the Union prior to making the change. Respondent was not

privileged to unilaterally discontinue the Merit Raises for the Unit employees without first seeking the Union's input as to how to treat this established term and condition of employment, and accordingly violated Section 8(a)(5) and (1) of the Act, as alleged in paragraphs 8(h) and 12 of the Complaint.

D. Respondent's withholding of the 2015 and 2016 Merit Raises from the Unit employees violated Section 8(a)(3) and (1) of the Act because it is inherently destructive of employees' Section 7 rights.

As discussed in detail above, Respondent's Merit Raises constituted an established term and condition of employment for the Sarasota Division Unit employees. When an employer withholds from its represented employees an existing benefit, the Board utilizes the analytical framework established in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). Unilaterally withholding an established condition of employment from only represented employees, while continuing to grant it to non-represented employees, is "inherently destructive" of represented employees' Section 7 rights, obviating the need to demonstrate specific antiunion animus. See *United Aircraft Corp.*, 199 NLRB 658, 662 (1972), *enfd.* in relevant part 490 F.2d 1105 (2d Cir. 1973); *Eastern Maine Medical Center*, 253 NLRB 224, 242 (1980), *enfd.* 658 F.2d 1 (1st Cir. 1981).

In *United Aircraft Corp.*, 199 NLRB at 661-662, the Board found conduct strikingly similar to Respondent's to be "inherently destructive" of employee rights, consequently discouraging union activity in violation of Section 8(a)(3) and (1). In that case, the employer denied a scheduled wage increase to newly represented employees, four days after the employees' selection of a union as their collective-bargaining representative – and its vice president admitted that it did so because it was in negotiations with the union. The Board found that because the increase was an established condition of employment, its denial was "inherently

destructive' of important employee rights," even absent proof of antiunion motivation. 199 NLRB at 662, citing *Great Dane Trailers*, 388 U.S. at 34. The Board then rejected the employer's proffered business justification, that the promised wage increase was based on the assumption that other matters of compensation would remain the same, reasoning that if the belief that bargaining with the union will have negative financial consequences could justify discrimination, "the proscriptions and protections of the Act would be rendered largely nugatory." *Id.*

Here, Respondent withheld the planned, routine Merit Raises from the represented employees at the Sarasota Division, while granting them to unrepresented employees throughout the rest of the company who, like the Unit employees did not have their terms and conditions of employment set forth in a collective-bargaining agreement. Although the 2015 merit process was not quite finalized as of December 10, 2014, when the employees voted for the Union, the commencement of the annual merit process with year-end performance reviews in November 2014 had signaled to the Unit employees that their Merit Raises were forthcoming. As in *United Aircraft Corp.*, the employees were specifically told in the December 19, 2014 memorandum, read aloud to them by Division Manager Patterson, that they were not receiving the Merit Raises during bargaining, *because* of the company's obligation to bargain with their newly-selected bargaining representative. Respondent's conduct signaled clearly to the Unit employees that selection of the Union as their collective-bargaining representative would have negative consequences for their established terms and conditions of employment, and therefore was inherently destructive of employees' Section 7 rights. Such conduct, as alleged in paragraphs 8(f) and 11 of the Complaint, violated Section 8(a)(3) and (1) of the Act.

E. Respondent failed to furnish information that is relevant and necessary to the Union's exercise of its duties as the collective bargaining representative of Respondent's employees.

Respondent admits both that the Union requested information on May 11, 2015, and that it denied the request on May 12, 2015. Respondent contends that the requested information is irrelevant to the Union's performance of its bargaining duties. An employer has a statutory obligation to provide, on request, relevant information that a union needs for the proper performance of its duties as a collective-bargaining representative. *Disneyland Park*, 350 NLRB 1256, 1257 (2007); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956). While information concerning unit employees' terms and conditions of employment is ordinarily considered to be presumptively relevant to the union's fulfillment of its representational duties, the burden is on the union to demonstrate the relevance of requested information concerning non-unit employees. *Disneyland*, 350 NLRB at 1257. A union has satisfied its burden when it demonstrates a reasonable belief, supported by objective evidence, that the requested information is relevant. *Id.* at 1258.; *Knappton Maritime Corp.*, 292 NLRB 236, 238-239 (1988).

The Board utilizes a broad, discovery-type standard in determining the relevance of requested information. *Disneyland*, 350 NLRB at 1258. Potential or probable relevance is sufficient to give rise to an employer's obligation to provide information. *Id.*; *Brazos Electric Power Cooperative, Inc.*, 241 NLRB 1016, 1023. The General Counsel carries an additional burden in proving the Section 8(a)(5) violation when the information requested is not presumptively relevant because it concerns non-unit employees; the General Counsel must present evidence that either 1) the union demonstrated the relevance of the non-unit information to the employer, or 2) the relevance of the information should have been apparent to the Respondent under the circumstances. *Disneyland*, 350 NLRB at 1258; citing *Allison Co.*, 330

NLRB 1363, 1367 fn. 23 (2000) and *Brazos Electric*, 241 NLRB at 1018-1019, *enfd.* in relevant part 615 F.2d 1100 (8th Cir. 1980). “The question to be addressed in every case in which non-unit personnel are involved, is essentially whether a sufficient showing of relevance has been made. In practical terms, this means that *the probable need for the information, in the particular circumstances, will justify the demand.*” *New York Post Corp.*, 283 NLRB 430, 435 (1987) [emphasis added].

In *Brazos Electric*, the Board reversed the ALJ’s finding of no violation for the employer’s failure to provide non-unit wage information – specifically, raise percentages – because, under the circumstances, the employer should have realized that information was relevant to the union’s ability to formulate unit wage proposals in future contract bargaining. In that case, the historical practice of the employer had been to grant non-unit employees an annual wage increase equivalent to that included in the one-year or two-year contracts it negotiated with the union. The union heard that the employer had departed from this practice and granted the non-unit employees a much larger increase in 1978, and sought information relevant to confirming the rumor and formulating its wage proposals for the next contract bargaining, which had not commenced as of the time of the request. The employer denied the request as irrelevant.

The Board wrote:

[W]e have no hesitation in concluding that the data were relevant to the Union’s preparation of a collective bargaining proposal for upcoming negotiations. It is not surprising that the Union was concerned with the compensation granted nonunit personnel, given the similarity of skills and job classifications between the unit and nonunit employees over the years. In addition, the record discloses that the Respondent has maintained a degree of wage parity or equivalency between the two groups.

...

...[W]here the circumstances surrounding the request are reasonably calculated to put the employer on notice of a relevant purpose which the union has not

specifically spelled out, the employer is obligated to divulge the requested information.

241 NLRB at 1018.

Here, the Union made a request, first verbally on May 8, 2015, and repeated in an email sent on May 11, 2015, for the high, low, and average 2015 Merit Raise percentages awarded by Respondent to non-Unit employees in the Tampa Peoples Gas Division. The Union argued the relevancy of the requested information and renewed its request on May 13, 2015, both by email and verbally at bargaining that day, to no avail. As explained in that email, the Union requested the information to help it evaluate its bargaining proposals with respect to wages. Although Respondent's Merit Raises average 3%, knowing the individual raise percentages that Respondent finds acceptable – ascertained through the “high” and “low” percentage requested – would help the Union formulate and support its wage proposals advanced at the bargaining table. The average raise percentage at the Tampa Peoples Gas Division, where employees are in the same job classifications as those in nearby Sarasota, would also help the Union gauge the reasonableness of its proposals.

Through Union agent Bowden's May 13, 2015 email, Respondent was given notice of the Union's reasonable belief in the information's relevance to its bargaining duties. Moreover, similarly to the information requested in *Brazos Electric*, Respondent should have known that the requested data regarding raises for employees in similar job classifications outside the unit would be relevant to the Union's wage proposals. Therefore, even though the high, low, and average Merit Raise percentages given at the Tampa Peoples Gas Division for 2015 is not presumptively relevant information, Respondent was nonetheless obligated to provide it in a timely fashion to the Union for the effective performance of its duties as a collective bargaining representative. Its failure to do so violates Section 8(a)(5) and (1) of the Act, as alleged in

paragraphs 9 and 12 of the Amended Consolidated Complaint, and should be remedied accordingly.

IV. Conclusion

For the foregoing reasons, Counsel for the General Counsel respectfully submits that the Administrative Law Judge should find that Respondent violated Sections 8(a)(1), 8(a)(3), and 8(a)(5) of the Act in all respects alleged in the Complaint. Counsel for the General Counsel seeks a Board Order requiring Respondent to immediately:

1. Cease and desist its illegal conduct in all respects.
2. Fully remedy Respondent's coercive and restraining statements made to employees.
3. Fully remedy Respondent's unlawful and discriminatory unilateral decision to withhold employees' Merit Raises in 2015 and 2016, including appropriate backpay, interest, and excess tax liability, as applicable.
4. Fully remedy Respondent's failure to furnish relevant and necessary information requested by the Union.
5. Post a Notice to Employees in English and at its Sarasota, Florida location.¹⁴

Counsel for the General Counsel also requests that the Administrative Law Judge order any other relief deemed just and proper to effectuate the purposes of the Act.

Dated this 3rd day of June, 2016.

Respectfully submitted,

/s/ Caroline Leonard
Caroline Leonard, Esq.
Counsel for the General Counsel
National Labor Relations Board, Region 12
201 E. Kennedy Blvd., Suite 530
Tampa, Florida 33602

¹⁴ A proposed Notice To Employees is attached hereto as Appendix A.

APPENDIX A

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 a representative 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 interrogate you about your union activities or sympathies, or other employees' union activities or sympathies.

WE WILL NOT promise you wage increases or other benefits to encourage you to abandon your support for the International Brotherhood of Electrical Workers, AFL-CIO, Local Union 108 (the Union) or any other union.

WE WILL NOT eliminate annual merit wage increases or make other changes to the terms and conditions of employment of our employees in the below appropriate bargaining unit, without first notifying the Union and giving the Union the opportunity to bargain with us:

All full-time and regular part-time utility coordinators, senior utility technicians, utility technicians and apprentice technicians employed by the Employer at its facility in Sarasota, Florida excluding: all other employees, professional, warehouse and office clerical employees, engineers, managers, guards and supervisors as defined in the Act.

WE WILL NOT eliminate your annual merit wage increases because you selected the Union as your exclusive collective-bargaining representative.

WE WILL NOT fail or refuse to furnish the Union with information it requested that is necessary for and relevant to the Union's performance of its duties as your exclusive collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with employees' exercise of the rights guaranteed in Section 7 of the Act.

WE WILL make our employees in the above unit for any loss of earnings and other benefits suffered as a result of our elimination of their annual merit wage increases for the years 2015 and 2016, with interest, to the extent that we have not already done so.

WE WILL compensate employees entitled to backpay under the terms of the Board's Order for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, whether by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

WE WILL bargain in good faith with the Union as the exclusive collective-bargaining representative or our employees in the above unit concerning wages, hours and other terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement.

**TAMPA ELECTRIC COMPANY
d/b/a TECO PEOPLES GAS**

(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. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy 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 or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlr.gov.

National Labor Relations Board, Region 12
201 E Kennedy Blvd., Suite 530
Tampa, FL 33602-5824

Telephone: (813)228-2641
Hours of Operation: 8 a.m. to 4:30 p.m.

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.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, Counsel for the General Counsel's Brief to the Administrative Law Judge, was served on June 3, 2016 as follows:

VIA Electronic Filing:

National Labor Relations Board
Hon. Robert A. Giannasi
Chief Administrative Law Judge
Division of Judges
1015 Half Street SE
Washington, D.C. 20570-0001

VIA Electronic Mail:

Thomas M. Gonzalez, Esq.
Thompson, Sizemore, Gonzalez
& Hearing, P.A.
201 N. Franklin Street, Suite. 1600
Tampa, FL 33602
tgonzalez@tsghlaw.com

Robert Thomas
International Brotherhood of Electrical
Workers, AFL-CIO, Local Union 108
10108 US Highway 92 East
Tampa, FL 33610
rthomas@ibew108.org

/s/ Caroline Leonard
Caroline Leonard, Esq.
Counsel for the General Counsel
National Labor Relations Board, Region 12
201 E. Kennedy Blvd., Suite 530
Tampa, Florida 33602
Telephone No. (813) 228-2662
Email caroline.leonard@nlrb.gov