UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ADVANCED LIFE SYSTEMS INC., **Petitioner,** **v.** **NATIONAL LABOR RELATIONS BOARD,** **Respondent.**	**Case No.** 16-1405

ORIGINAL

PETITION FOR REVIEW OF DECISION AND ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

Advanced Life Systems Inc., hereby petitions the United States Court of Appeals for the District of Columbia Circuit for review of and requests that the court set aside the decision and order entered by the Respondent National Labor Relations Board on August 27, 2016 in case 19-CA-096464 and 19-CA-096899 which is reported at 364 NLRB No. 117 and which is attached as Exhibit A.

Dated: November 16, 2016

Respectfully submitted,

Gary E. Lofland #37080

Counsel for Petitioner
230 S. 2nd Street
Yakima, WA 98901
Phone: (509) 452-2828

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Petition for Review of Decision and Order of the National Labor Relations Board was placed in the United States mail, postage prepaid, on this date and addressed to:

Mark Arbesfeld, Office of Appeals
Division of Enforcement Litigation
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-0001

Date: November 16, 2016

Gary E. Lofland #37080
Counsel for Petitioner
230 S. 2nd Street
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Exhibit A

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Advanced Life Systems, Inc. *and* International Association of EMT's and Paramedics. Cases 19–CA–096464 and 19–CA–096899

August 27, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On May 2, 2014, Administrative Law Judge Michael A. Rosas issued the attached decision. The General Counsel and the Respondent both filed exceptions. The Respondent also filed a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions in part[2] and to adopt the recommended Order as modified and set forth in full below.[3]

Facts

The issues in this case arose after the National Emergency Medical Services Association (Union) initiated an organizing campaign among the Respondent's emergency medical technicians (EMTs), paramedics, and dispatchers in July 2012.[4] The Respondent starts its new hires at a relatively low wage rate because of the extensive amount of company-specific training required. The credited evidence shows that, as a result, the Respondent informed employees upon their hire to expect periodic wage increases once every 6 months plus Christmas bonus payments. In fact, a substantial majority of employees received wage increases of at least 25 cents an hour at least twice a year from August 2009 to January 2012. In addition, except for 1 year, the Respondent annually granted Christmas payments to employees ranging in value from $50 to $500. However, at some point after

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We reject the Respondent's challenges to the authority of the Regional Director and the Acting General Counsel to act in this case. In doing so, we do not rely on *Belgrove Post Acute Care Center*, 359 NLRB 633 (2013), and *Bloomingdale's, Inc.*, 359 NLRB 1015 (2013), cited by the judge. Instead, we note that the Respondent is incorrect in asserting that Regional Director Ronald K. Hooks was appointed on January 6, 2012. Although Regional Director Hooks's appointment was announced on January 6, 2012, the Board approved the appointment on December 22, 2011, at which time it had a quorum.

Regarding the Acting General Counsel's authority, in its answer to the complaint, the Respondent raised as an affirmative defense that the Acting General Counsel was improperly "appointed." For the reasons set forth below, we find no merit in that argument. At the outset, we note that under the Federal Vacancies Reform Act (FVRA), 5 U.S.C. §§ 3345 et seq., a person is not "appointed" to serve in an acting capacity in a vacant office that otherwise would be filled by appointment by the President, by and with the advice and consent of the Senate. Rather, either the first assistant to the vacant office performs the functions and duties of the office in an acting capacity by operation of law pursuant to 5 U.S.C. § 3345(a)(1), or the President directs another person to perform the functions and duties of the vacant office in an acting capacity pursuant to 5 U.S.C. § 3345(a)(2) or (3).

On June 18, 2010, the President directed Lafe Solomon, then Director of the NLRB's Office of Representation Appeals, to serve as Acting General Counsel pursuant to subsection (a)(3)–the senior agency employee provision. Under that provision, Solomon was eligible to serve as Acting General Counsel at the time the President directed him to do so. See *Hooks v. Kitsap Tenant Support Services, Inc.*, 816 F.3d 550, 556 (9th Cir. 2016); *SW General, Inc. v. NLRB*, 796 F.3d 67, 73 (D.C. Cir. 2015), cert. granted, 136 S. Ct. 2489 (2016). Thus, Solomon properly assumed the duties of Acting General Counsel and we find no merit in the Respondent's affirmative defense that the Acting General Counsel was improperly "appointed."

We acknowledge that the decisions in *Kitsap* and *SW General* also held that Solomon lost his authority as Acting General Counsel on January 5, 2011, when the President nominated him to be General Counsel. *Kitsap*, above, at 555; *SW General*, above, at 78. Although that question is still in litigation, we find that subsequent events have rendered moot any argument that Solomon's alleged loss of authority after his nomination precludes further litigation in this matter.

On September 25, 2015, General Counsel Richard F. Griffin, Jr., issued a Notice of Ratification in this case that states, in relevant part,

> I was confirmed as General Counsel on November 4, 2013. After appropriate review and consultation with my staff, I have decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under section 3(d) of the Act.
>
> My action does not reflect an agreement with the appellate court ruling in SW General. Rather, my decision is a practical response aimed at facilitating the timely resolution of the charges that I have found to be meritorious while the issues raised by SW General are being resolved. Congress provided the option of ratification by expressly exempting "the General Counsel of the National Labor Relations Board" from the FVRA provisions that would otherwise preclude the ratification of certain actions of other persons found to have served in violation of the FVRA. (Citation omitted.)
>
> For the foregoing reasons, I hereby ratify the issuance and continued prosecution of the complaint.

In view of the independent decision of General Counsel Griffin to continue prosecution of this matter, we reject as moot the Respondent's affirmative defense challenging the circumstances of Solomon's "appointment" as Acting General Counsel.

[3] We shall amend the remedy and modify the judge's recommended Order to conform to his unfair labor practice findings and conclusions and to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified.

[4] All dates hereinafter are in 2012 unless otherwise indicated.

employees began organizing, but before the August 15-16 election, the Respondent's owner and president, William Woodcock, told employee Matthew Schauer that "he wasn't for us going with the Union" and that the Respondent "would not be able to give us raises if we brought a union in."

The Union won the election, and on August 24, the Board's Regional Office certified it as the unit employees' exclusive collective-bargaining representative. Thereafter, the Respondent unilaterally discontinued granting unit employees wage increases of at least 25 cents an hour approximately every 6 months and Christmas payments yearly. In December, employee Lenny Ugaitaga asked Woodcock why he had not received his expected pay raise. Woodcock responded that his lawyer had advised him that he needed to freeze employees' terms and conditions of employment, including pay raises, "because of the whole Union deal." In January 2013, Schauer and fellow employee Cole Gravel questioned Woodstock about why the Respondent had stopped granting pay raises since employees unionized. The two employees explained that they understood it was to be business as usual until contract negotiations had concluded. Woodcock replied that the pay raises had been discretionary prior to the election, but the Respondent now had to negotiate them with the Union.

Discussion

I. 8(a)(1) and (3) Allegations

We agree with the judge that the Respondent violated Section 8(a)(1) by making coercive statements to unit employees before and after the representation election about discontinuing the periodic wage increases and Christmas payments.[5] The judge found, and we agree, that the Respondent also violated Section 8(a)(3) and (1) by discontinuing the wage increases and Christmas payments because of unit employees' union activity. An employer violates Section 8(a)(3) and (1) if it withholds promised wage increases for discriminatory reasons regardless of whether it had an established practice of granting such wage increases in the past. See *KAG-West, LLC*, 362 NLRB No. 121, slip op. at 3 & fn. 10 (2015); *Arc Bridges, Inc.*, 362 NLRB No. 56, slip op. at 5 (2015) (employer violated Section 8(a)(3) and (1) by withholding wage increase from represented employees because they chose to unionize). In *KAG-West, LLC*, above, the Board explained the underlying principle: an employer may not punish employees for selecting union representation by denying them planned increases. See *Aluminum Casting & Engineering Co.*, 328 NLRB 8, 16 (1999), enfd. in relevant part and remanded 230 F.3d 286 (7th Cir. 2000).

The credited evidence shows that the Respondent assured employees, upon being hired, that they would receive periodic wage increases and Christmas payments and, in fact, regularly granted them. However, after the Union won the election, the Respondent ceased providing unit employees the periodic wage increases and Christmas payments. In determining whether the Respondent's conduct violated Section 8(a)(3) and (1), we agree with the judge that the appropriate analytical framework is *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). We further agree with the judge that the General Counsel satisfied his initial burden under *Wright Line* by showing union activity by the employees, employer knowledge of that activity, and union animus on the part of the employer. See *Mesker Door, Inc.*, 357 NLRB 591, 592 & fn. 5 (2011).[6] There is no dispute that the Respondent knew that employees had engaged in union activity. In finding that the Respondent demonstrated union animus, we rely on the Respondent's contemporaneous 8(a)(1) violations. See *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 4 (2014). In addition to showing animus generally, these inaccurate statements directly linked discontinuance of the wage increases with employees' unionization. Specifically, before the election, Woodcock told employees that the Respondent would be unable to give the periodic wage increases if employees voted for union representation. After the election, Woodcock again linked the employees' decision to unionize with the Respondent's discontinuance of the wage increases, stating that it could not

[5] We find, in agreement with the judge, that the Respondent violated Sec. 8(a)(1) by telling unit employee Schauer that the Respondent would be unable to give wage increases if unit employees voted for the Union. In doing so, however, we do not rely on the judge's citation to *Milum Textile Services Co.*, 357 NLRB 2047 (2011); no party excepted to the relevant finding in that case and therefore the issue was not before the Board. Instead, we rely on *Twin City Concrete, Inc.*, 317 NLRB 1313, 1318 (1995) (implied threat to withhold wage increases where employer told employees that it would have to negotiate over promised wage increases if the union won the election). For the same reason, although we agree with the judge that the Respondent unlawfully stated in December 2012 that the Respondent could not give a raise "because the Union was there" or "because of the whole Union deal," we do not rely on the judge's citation to *First Student, Inc.*, 341 NLRB 136 (2004), and *Illiana Transit Warehouse Corp.*, 323 NLRB 111 (1997). We find it unnecessary to pass on the judge's finding that the Respondent violated Sec. 8(a)(1) in January 2013 by telling employees that he did not need to give wage increases during contract negotiations, because it does not affect the remedy.

[6] Contrary to the judge's suggestion, however, it is not necessary for the General Counsel to also show as an element of the initial burden a connection, or nexus, between the employer's union animus and the adverse employment actions. Ibid.

give raises "because the Union was there" or "because of the whole Union deal." The Respondent made these statements aware that they could have an impact on employees' support for the Union. This evidence amply supports the inference that the Respondent's motivation for not providing the promised periodic wage increases and the Christmas payments was employees' union activity in selecting the Union as their bargaining representative.

We also agree with the judge that the Respondent failed to meet its rebuttal burden under *Wright Line*. As found by the judge, the Respondent's purported justifications about increased competition and health insurance costs and decreased governmental reimbursement rates were clearly pretextual. These vague explanations were not supported by any corroborating testimony or documentary evidence. Our dissenting colleague contends that the Respondent ceased granting the periodic wage increases and Christmas payments because Woodcock reasonably believed that the Respondent was required to bargain over them and had to discontinue granting them during negotiations. But even if Woodcock reasonably believed this was the case, the burden is on the Respondent to show that it would not have granted the wage increases and Christmas payments absent employees' union activity. See *Chinese American Planning Council, Inc.*, 307 NLRB 410, 414 (1992) (employer violated Section 8(a)(3) by failing to grant periodic wage increases to employees despite its assertion that doing so would have violated its contract with a municipal agency), review denied mem. 990 F.2d 624 (2d Cir. 1993). However, instead of showing that the Respondent would have discontinued the wage increases and Christmas payments absent employees' union activity, the evidence shows the opposite. In multiple statements to employees, the Respondent admitted that, as a consequence of employees' union activity, it was withholding future wage increases and Christmas payments from them. Moreover, even assuming that the dissent accurately characterizes Woodcock's belief, this does not excuse the Respondent's withholding of the wage increases and Christmas payments. The Respondent could have lawfully granted them without violating its duty to bargain if it had proposed doing so to the Union, and if the Union agreed. See *Arc Bridges*, 362 NLRB No. 56, slip op. at 5 & fn. 18.[7] Accordingly, we agree with the judge that the Respondent violated Section 8(a)(3) and (1) by discontinuing the wage increases and Christmas payments because of employees' union activity.[8]

II. 8(a)(5) Christmas Bonus Allegation

We agree with the judge that the Respondent had an established practice of granting annual Christmas payments, and that the Respondent violated Section 8(a)(5) and (1) by unilaterally discontinuing this practice.[9] For a number of years prior to the union election, the Respondent granted Christmas payments to unit employees. By discontinuing the Christmas payments after employees' selected the Union as their bargaining representative, the Respondent unlawfully instituted a unilateral change to employees' terms and conditions of employment without first bargaining to a valid impasse. See *Covanta Energy Corp.*, 356 NLRB 706, 706 fn. 1 (2011).

AMENDED REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order the Respondent to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing unit employees' terms and conditions of employment, specifically its practice of granting Christmas payments every year, without prior notice to the Union and without affording the Union an opportunity to bargain, we shall order the Respondent to rescind this action, and retroactively restore the status quo ante, until the Respondent

[7] That is exactly what transpired in December 2013. The Respondent informed the Union that it believed that it was appropriate to increase the wages of several employees. The Union responded that it would not oppose the wage increases but that it wanted to discuss them. Contrary to the dissent's contention, we are not finding that the Respondent's failure to grant the wage increases proves antiunion discrimination. As described above, the General Counsel demonstrated unlawful motive by satisfying its initial burden under *Wright Line*. Instead of merely informing employees about its view of the Act's prohibition on unilateral action, as suggested by the dissent, the Respondent told employees prior to the election that a promised benefit would be withheld from them because of their union activity. The Respondent then reiterated, after employees voted for the Union, that it was withholding their promised benefit because of their union activity. Nonetheless, the Respondent had the opportunity to rebut the General Counsel's showing but failed to do so.

[8] Because it would not materially affect the remedy, we find it unnecessary to pass on the judge's additional finding that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally discontinuing an established practice of granting periodic wage increases to employees. Accordingly, we see no need to address our dissenting colleague's interpretation of *NLRB v. Katz*, 369 U.S. 736 (1962), or his application of it to the facts of this case.

[9] In finding that the Christmas payments were wages, and therefore a mandatory subject of bargaining, we do not rely on the judge's finding that the payments were given only to those employees who attended the Respondent's Christmas party. In fact, the judge declined to credit the assertion by William Woodcock, the Respondent's co-owner, that employees had to be present at the Christmas party to receive the Christmas payment.

negotiates in good faith with the Union to agreement or to impasse.

Having found that the Respondent violated Section 8(a)(3) and (1) by discriminatorily denying employees periodic wage increases and Christmas payments every year, we shall also order the Respondent to make unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them. Backpay shall be computed as in *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, we shall order the Respondent to compensate unit employees for any adverse tax consequences of receiving a lump-sum backpay award and to file, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report with the Regional Director for Region 19 allocating the backpay awards to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).[10]

ORDER

The National Labor Relations Board orders that the Respondent, Advanced Life Systems, Inc., Yakima, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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

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

(c) Refusing to give unit employees their traditional Christmas payments because they chose to be represented by a union.

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

(e) Discontinuing its custom and practice of granting unit employees Christmas payments because unit employees chose to be represented by a union.

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

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

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

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

(b) On request of the Union, rescind the unilateral changes in terms and conditions of employment and restore the status quo ante with regard to its established practice of granting Christmas payments every year, until such time as the Respondent and the Union reach an agreement for a new collective-bargaining agreement or a lawful impasse based on good-faith negotiations.

(c) Make unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them, in the manner set forth in the amended remedy section of this decision.

(d) Make unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral change, in the manner set forth in the amended remedy section of this decision.

(e) Compensate affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its six facilities in Yakima, Washington, copies of the attached notice marked "Appendix."[11] Copies of the

[10] The judge recommended, without setting forth any supporting rationale, that the Board impose a broad order requiring the Respondent to cease and desist from violating the Act "in any other manner." We find that a broad cease-and-desist order is not warranted under the circumstances of this case, and substitute a narrow order requiring the Respondent to cease and desist from violating the Act "in any like or related manner." See *Hickmott Foods*, 242 NLRB 1357 (1979).

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judg-

notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 2012.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 27, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

My colleagues find that the Respondent engaged in antiunion discrimination when it froze wages on the advent of the Union as the Respondent's employees' bargaining representative, in violation of Section 8(a)(3) of the National Labor Relations Act (NLRA or Act). In fact, however, the Respondent did precisely what the Act mandates. The Respondent's employees had chosen union representation, and the Respondent's duty under Section 8(a)(5) of the Act was to refrain from making unilateral wage changes pending bargaining with the Union for an initial collective-bargaining agreement. The Respondent told its employees that it could not grant raises now that the Union had arrived on the scene. It phrased some of these statements inartfully, and I agree with my colleagues that these statements violated Section 8(a)(1) of the Act. But given that the Respondent's duty under Section 8(a)(5) was to freeze wages, and given that its statements to employees were meant to convey that it was complying with that duty, I do not believe those statements constitute evidence of antiunion discrimination. Accordingly, I respectfully dissent from my colleagues' finding that the Respondent violated Section 8(a)(3) by freezing wages pending bargaining with the Union.[1]

Facts

The Respondent provides emergency medical transportation services out of six stations throughout Yakima, Washington. It employs about 55 employees. During the hiring process, the Respondent's CEO and president, William Woodcock, or another manager typically told employees to expect periodic wage increases. Employees were not told to expect a particular amount or that wage increases would be given on particular dates. The Respondent has no formal process for evaluating employee performance and no written policy regarding wage increases.

Figure 1 below lists the employees who received wage increases over a 10-year period spanning March 1, 2003, to February 2013. For each employee listed, a multicolored bar shows when the employee received wage increases and the intervals (in months) between those increases. The starting point of each bar—at its left edge—is either the date the employee was hired or, for employees hired before March 1, 2003, the date of the first wage increase documented in the record.[2]

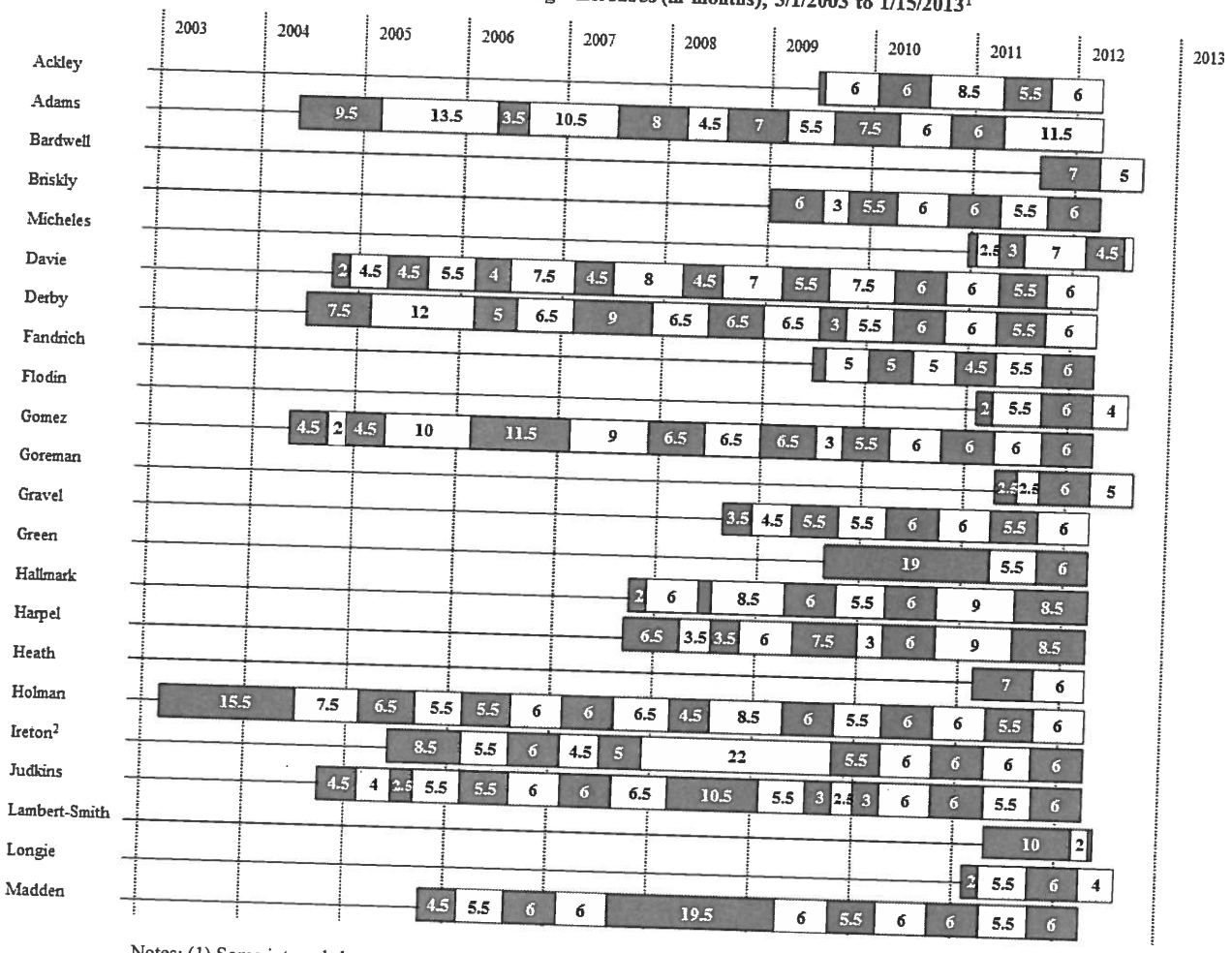
ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] For the reasons explained below, although I agree with my colleagues that the Respondent violated Sec. 8(a)(5) of the Act when it discontinued its established practice of granting its employees an annual Christmas bonus, I disagree that the discontinuation of the annual bonus also violated Sec. 8(a)(3).

[2] Figure 1 reflects the information set forth in Jt. Exh. 1, contained in the record, which shows the precise dates and amounts of raises received by each bargaining-unit employee (employed by the Respondent on February 20, 2013) from March 1, 2003 to February 20, 2013. (Jt. Exh. 1 also shows wage increases received by one nonunit employee, Jameson McDougall.) Figure 1 shows the intervals in months between wage increases given to each bargaining-unit employee, with each interval rounded to the nearest half-month. For purposes of rounding to the nearest half-month, increases received on days 1–7 are deemed to have occurred on the 1st of the month, increases received on days 8–22 are deemed to have occurred on the 15th of the month, and increases received on days 23–30 or 23–31 are deemed to have occurred on the 1st of the next month. (For the shorter month of February, increases received on days 1–7 are deemed to have occurred on the 1st of the month; on days 8–20, on the 14th of the month; and on days 21–28 or 21–29, on the 1st of March.) Figure 1 excludes employees hired after or shortly before the Union began its organizing campaign in July 2012

Figure 1

Intervals Between Wage Increases (in months), 3/1/2003 to 1/15/2013[1]



Notes: (1) Some intervals between wage increases were too brief to be legibly numbered. Unnumbered intervals are either one-half month, one month, or one-and-a-half months. (2) 22-month interval includes period of time during which Ireton's employment was interrupted.

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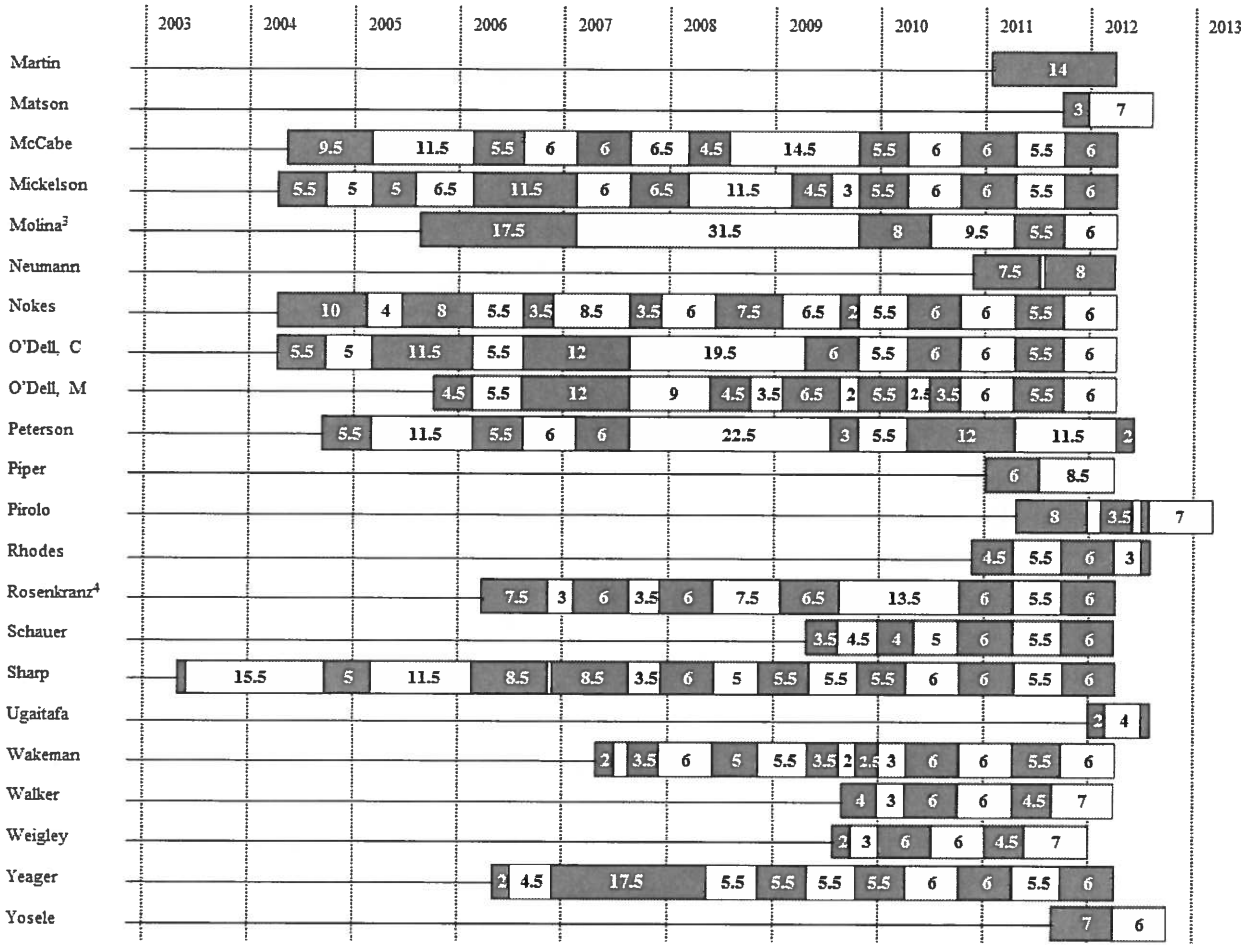
and employees for whom no wage increase is reflected in Jt. Exh. 1. In other words, Figure 1 makes the irregular wage increases implemented by Respondent during the 2003–2013 time period appear more regular than they really were, since the actual increases occurred on a wider range of dates, and Figure 1 does not list employees who received no increases.

Figure 1 (cont.)

Intervals Between Wage Increases (in months), 3/1/2003 to 1/15/2013



Notes: (3) 31.5-month interval includes period of time during which Molina's employment was interrupted.
(4) 13.5-month interval includes period of time during which Rosenkranz's employment was interrupted.

The above chart plainly demonstrates that the Respondent's history of wage increases during the 10-year period between 2003 and 2013 was irregular as to timing and unpredictable as to which employees received increases and which employees did not at any given time. At no time during the 2003–2013 period did the Respondent give a wage increase to all its employees at the same time, and the Respondent never gave wage increases at the same fixed interval for all employees. In addition to the irregular timing of the wage increases received by different employees, the amounts of the wage increases varied significantly, ranging from $0.25 to $2.50 an hour. President and CEO Woodcock testified that he made discretionary decisions regarding the timing of the wage increases received by various employees, and he stated the amount of each increase was based on "how I viewed they were performing."

In July 2012,[3] the Union began organizing the Respondent's employees. In July or August, Woodcock told employee Schauer that "he would not be able to give us raises if we brought a union in," After a representation election held on August 15 and 16, the Board certi-

[3] All remaining dates are in 2012 unless otherwise noted.

fied the Union as the collective-bargaining representative of the Respondent's EMTs, paramedics, and dispatchers on August 24. After the Union's certification, the Respondent stopped giving wage increases, apart from a few exceptions (none of which are alleged to violate the Act).[4] In December, Woodcock told employees Schauer and Ugaitafa that he could not give Ugaitafa a raise "because the Union was there" or "because of the whole Union deal." In January 2013, Woodcock told two employees that wage increases had previously been discretionary but now had to be negotiated with the Union.

Over the course of a number of years, the Respondent gave each of its employees a Christmas bonus. It did so every year but one. That year, the employees voluntarily agreed to forego their bonuses so that Woodcock could give $10,000 to an employee whose house had burned down. After employees selected the Union to represent them, the Respondent discontinued its past practice of giving Christmas bonuses.

Discussion

A. Under Section 8(a)(5), the Respondent Was Required to Freeze Wages after Its Employees Chose Union Representation, But It Violated Section 8(a)(5) When It Discontinued Christmas Bonuses.

Section 8(a)(5) of the Act requires employers to bargain over "mandatory" bargaining subjects—wages, hours, or other terms and conditions of employment[5]—whenever a union becomes the representative of employees in an appropriate bargaining unit. An employer violates Section 8(a)(5) of the Act if it unilaterally changes mandatory bargaining subjects without bargaining to an agreement or impasse. *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958); *Bottom Line Enterprises*, 302 NLRB 373 (1991), enfd. mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994).[6] Until bargaining is completed, the employer must preserve the status quo, which means *refraining* from making changes in mandatory bargaining subjects. Therefore, once employees have chosen to be represented by a union, the employer violates the Act if it unilaterally changes "wages," which Congress repeatedly placed first when enumerating bargaining subjects.[7]

Under a narrow exception recognized by the Supreme Court in *Katz*, unilateral wage changes are permitted if they are supported by a "long-standing practice" of giving the same "automatic increases" at fixed intervals in the past.[8] But the possibility of permitting these types of unilateral wage changes was stated as an exception to the rule in *Katz*, and the employer in that case was found not to have acted within that exception but to have violated the Act by unilaterally changing wages. Specifically, the employer had implemented selective "merit increases" that had been discussed in three bargaining sessions, even though "no final understanding had been reached."[9]

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[4] Eight employees received wage increases on October 6, and three employees received wage increases after that date.

[5] Sec. 8(d) of the Act defines the obligation to bargain collectively as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . ."

[6] There are several exceptions to the rule that an employer must refrain from unilaterally changing mandatory bargaining subjects. Courts have held that whenever bargaining has already taken place over a particular subject, as reflected in collective-bargaining agreement language that covers the subject, the employer is not required to engage in additional bargaining. *Department of Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992); *Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 936–937 (7th Cir. 1992). The Board has resisted adopting this "contract coverage" standard, and I express no opinion here regarding this issue. The Board has held that bargaining is not necessary when there has been a "clear and unmistakable waiver" of bargaining concerning the particular matter at issue. *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007); *American Diamond Tool, Inc.*, 306 NLRB 570, 570 (1992).

Other exceptions to normal bargaining requirements arise "'[w]hen a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining,'" *Bottom Line Enterprises*, 302 NLRB at 374 (quoting *M & M Contractors*, 262 NLRB 1472 (1982)), or "when economic exigencies compel prompt action," id. In addition, when an economic exigency compels prompt action but is not so urgent as to altogether relieve the employer of its duty to bargain, the employer may act unilaterally if it gives the union notice and opportunity to bargain over the discrete matter and "either the union waives its right to bargain or the parties reach impasse on the matter proposed for change." *RBE Electronics of S.D.*, 320 NLRB 80, 81–82 (1995). Similarly, where a discrete, recurring event—such as an annual wage adjustment—is scheduled to occur during bargaining for an initial labor contract, the employer may implement changes in that employment term provided it gives the union timely notice and an opportunity to bargain about that matter. E.g., *Stone Container Corp.*, 313 NLRB 336 (1993). Although I recognize that *Bottom Line Enterprises* and *RBE Electronics* are extant precedent, I do not pass on the soundness of these decisions.

[7] See NLRA Sec. 1 (describing the Act's policy of minimizing industrial strife "arising out of differences as to wages, hours, or other working conditions"); Sec. 8(d) (defining bargaining in part as conferring in good faith "with respect to wages, hours, and other terms and conditions of employment"); Sec. 9(a) (designated or selected union representatives, if supported by an employee majority, are the exclusive representatives "in respect to rates of pay, wages, hours of employment, or other conditions of employment"). Cf. *NLRB v. Katz*, supra, 369 U.S. at 745 ("[E]ven after an impasse is reached [an employer] has no license to grant wage increases greater than any he has ever offered the union at the bargaining table, for such action is necessarily inconsistent with a sincere desire to conclude an agreement with the union.").

[8] *Katz*, 369 U.S. at 746–747.

[9] Id. at 746.

The Supreme Court concluded that unilaterally changing wages constituted an unlawful refusal to bargain in violation of Section 8(a)(5):

> The respondents' . . . unilateral action related to merit increases . . . . must be viewed as tantamount to an outright refusal to negotiate on that subject, and therefore as a violation of § 8(a)(5), *unless* . . . the January raises were in line with the company's *long-standing practice of granting quarterly or semiannual merit reviews*—in effect, were a *mere continuation of the status quo* . . . . Whatever might be the case as to so-called "merit raises" which are in fact simply *automatic increases* to which the employer has already committed himself, *the raises here in question were in no sense automatic, but were informed by a large measure of discretion. There simply is no way in such case for a union to know whether or not there has been a substantial departure from past practice*, and therefore the union may properly insist that the company negotiate as to the procedures and criteria for determining such increases.[10]

The rule in *Katz* is that employers *cannot* deviate from the status quo by making unilateral changes in wages and other mandatory bargaining subjects. The *Katz* exception—often referred to as the "dynamic status quo"—permits unilateral wage increases that are supported by a "long-standing practice" of giving "automatic increases."[11] As the above chart graphically demonstrates, the rule of *Katz* applies here, not the exception.

The judge found otherwise. Although he acknowledged that "the intervals between wage increases . . . varied somewhat"—a stunning understatement—he found that the Respondent violated Section 8(a)(5) when it discontinued granting wage increases after the Union was certified[12] on the basis that the intervals between wage increases "were not random, as employees typically received wage increases every 6 months *or sooner*" (emphasis added). Thus, according to the judge, a "pattern" of regularly timed wage increases has been proven here, even though the purported "pattern" includes intervals between pay raises of 1/2 month,[13] 1 month,[14] 1 1/2 months,[15] 2 months,[16] 2 1/2 months,[17] 3 months,[18] 3 1/2 months,[19] 4 months,[20] 4 1/2 months,[21] 5 months,[22] 5 1/2 months,[23] and 6 months. Using this mode of analysis—which simply disregards the irregularity of wage increases by defining the pattern as "every 6 months *or sooner*"—evidence that wage increases were given at *irregular* intervals will "prove" that the increases were *regularly* timed. Such after-the-fact "pattern" analysis bears no resemblance to the Supreme Court's reference, in *Katz*, to a "long-standing pattern" of "automatic" increases that were given quarterly or semiannually.[24]

There is no reasonable way that one can extract a forward-looking statutory obligation to provide future wage increases from the patchwork of past wage adjustments that the Respondent provided at different times in varying amounts to some employees and not others.[25] The

[10] Id. at 745–747 (emphasis added; footnote omitted).

[11] Id. at 746. As described by Professors Gorman and Finkin in the most recent edition of their well-known treatise:

> [T]he case law (including the Katz decision itself) makes clear that conditions of employment are to be viewed dynamically and that *the status quo against which the employer's "change" is considered must take account of any regular and consistent past pattern of change*. An employer modification consistent with such a pattern is not a "change" in working conditions at all.

Robert A. Gorman, Matthew W. Finkin, LABOR LAW ANALYSIS AND ADVOCACY, at 720 (Juris 2013) (hereinafter "Gorman & Finkin") (emphasis added). See also *Westinghouse Electric Corp. (Mansfield Plant)*, 150 NLRB 1574, 1577 (1965) (referring to whether unilateral subcontracting decisions "vary significantly in kind or degree from what had been customary under past established practice").

[12] My colleagues do not pass on this finding.

[13] See Figure 1 (employees Lambert-Smith, Neumann, Sharp).

[14] Id. (employees Ackley, Micheles, Pirolo, Rhodes, Sharp, Ugaitafa).

[15] Id. (employees Fandrich Jr., Hallmark, Pirolo, Wakeman).

[16] Id. (employees Davie, Flodin, Gomez, Hallmark, Longie, Nokes, M. O'Dell, Petersen, Ugaitafa, Wakeman, Weigley, Yeager).

[17] Id. (employees Micheles, Gorman, Judkins, M. O'Dell, Wakeman).

[18] Id. (employees Brisky, Micheles, Derby, Gomez, Harpel, Judkins, Matson, Mickelson, Petersen, Rhodes, Rosenkranz, Wakeman, Walker, Weigley).

[19] Id. (employees Adams, Gravel, Harpel, Nokes, M. O'Dell, Pirolo, Rosenkranz, Schauer, Sharp, Wakeman).

[20] Id. (employees Davie, Flodin, Judkins, Longie, Nokes, Schauer, Ugaitafa, Walker).

[21] Id. (employees Adams, Micheles, Davie, Fandrich Jr., Gomez, Gravel, Holman, Ireton, Judkins, Madden Jr., McCabe, Mickelson, M. O'Dell, Rhodes, Schauer, Walker, Weigley, Yeager).

[22] Id. (employees Bardwell, Derby, Fandrich Jr., Gorman, Ireton, Mickelson, C. O'Dell, Schauer, Sharp, Wakeman).

[23] Id. (employees Ackley, Adams, Brisky, Davie, Derby, Fandrich Jr., Flodin, Gomez, Gravel, Green, Hallmark, Holman, Ireton, Judkins, Longie, Madden Jr., McCabe, Mickelson, Molina, Nokes, C. O'Dell, M. O'Dell, Petersen, Rhodes, Rosenkranz, Schauer, Sharp, Wakeman, Yeager).

[24] *Katz*, 369 U.S. at 746.

[25] The obligation to provide wage increases based on a "long-standing practice" of giving "automatic increases," *Katz*, 369 U.S. at 746, represents what might be called the reverse version of the *Katz* exception. As noted in the text, the *Katz* exception recognizes that if an employer implements unilateral wage changes, it can successfully defend against an allegation that it violated Sec. 8(a)(5) by showing that the changes were consistent with a "long-standing practice" of giving the same "automatic increases" in the past. Id. In some cases, in which a reverse version of the *Katz* exception was applied, the Board and the courts have found that the Act *required* employers to *make* unilateral wage changes—even though bargaining has not taken place regarding such changes—when the status quo encompasses a consistent practice of giving the same wage increases at fixed intervals. See, e.g., *Daily*

Respondent had no formal merit review program. There is no evidence establishing when the Respondent evaluated its employees' performance or what criteria it applied in doing so. It is uncontroverted that CEO and President Woodcock decided when to increase an employee's wages based on his own discretion, and he decided how much to increase an employee's wages based on "how I viewed they were performing." In addition, Respondent's wage increases were given to particular employees at highly irregular intervals, ranging from half a month to more than 20 months. The Respondent's practice of increasing wages was not fixed in amount *or* timing. Thus, just like the increases in *Katz*—which the Supreme Court stated could not be unilaterally implemented without bargaining—the wage increases at issue here "were in no sense automatic, but were informed by a large measure of discretion." *Katz*, 369 U.S. at 746. Indeed, if the Respondent had implemented unilateral wage changes, it would have clearly *violated* Section 8(a)(5).

In contrast, the Respondent did have a longstanding, established practice of giving its employees an annual Christmas bonus. As stated above, the record reveals that the Respondent had given employees a bonus every year except one—and that year, the employees voluntarily agreed to forego their bonuses so that Woodcock could give $10,000 to an employee whose house had burned down. Given that the only exception to the Respondent's past practice of giving out Christmas bonuses was consented to by the employees themselves, I agree that the bonuses were an established condition of employment, and the Respondent violated Section 8(a)(5) of the Act by discontinuing them after employees selected the Union.

B. Some of the Respondent's Statements Concerning Wage Increases Violated Section 8(a)(1), But Woodcock's January 2013 Statement Was Lawful.

I agree with my colleagues that some statements made by Woodcock violated Section 8(a)(1). According to the credited testimony of employee Matthew Schauer, in July or August 2012 Woodcock told Schauer that "he would not be able to give us raises if we brought a union in." And according to the credited testimony of employees Schauer and Lenny Ugaitafa, in December 2012 Woodcock told Ugaitafa that he could not give Ugaitafa a raise "because the Union was there" or "because of the whole Union deal." Although these statements might conceivably be interpreted to reflect a lawful sentiment—i.e., electing the Union precludes raises because Woodcock's duty is to maintain the status quo pending collective bargaining—they would more likely be understood by employees to mean, first, that Woodcock would withhold raises if employees selected a union, and second, that Woodcock was withholding raises because employees selected the Union. In other words, employees would reasonably hear the message that raises would be withheld or are being withheld in retaliation for selecting the Union, which would unlawfully interfere with, restrain, or coerce employees in the exercise of their Section 7 rights regardless of whether that was the message Woodcock meant to convey.

My colleagues do not pass on whether the Respondent violated Section 8(a)(1) when Woodcock told two employees, in January 2013, that wage increases had previously been discretionary but now had to be negotiated with the Union. I would find that the Respondent did not violate the Act when Woodcock made this statement. In my view, this was a clear, correct and lawful statement of the Respondent's obligations under the Act.

C. The Respondent Did Not Engage in Antiunion Discrimination in Violation Section 8(a)(3) by Refraining from Giving Unilateral Wage Increases and Christmas Bonuses.

For the reasons stated above, I believe that Section 8(a)(5) clearly did not permit the Respondent to give unilateral wage increases after the Union's certification, when wage increases had not been agreed upon and when the parties had not even commenced collective bargaining. Because the Respondent would have violated Section 8(a)(5) by giving unilateral wage increases in these circumstances, the Board cannot reasonably find that Respondent's failure to implement such increases constituted antiunion discrimination in violation of Section 8(a)(3).

I addressed a similar scenario in *Arc Bridges, Inc.*, 362 NLRB No. 56 (2015). There, after the D.C. Circuit rejected the Board's finding that annual wage increases were an established condition of employment, the issue before the Board on remand was whether the employer, which had given a wage increase to its unrepresented employees, was motivated by antiunion animus and violated Section 8(a)(3) when it decided *not* to give a wage

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News of Los Angeles, 315 NLRB 1236 (1994) ("*Daily News II*"), enfd. 73 F.3d 406 (D.C. Cir. 1996). The Board has gone so far as to require the employer to continue granting wage increases even though past increases have varied in amount based on the employer's exercise of discretion. E.g., *Mission Foods*, 350 NLRB 336, 337 (2007).

In my view, the Board must exercise considerable care when interpreting *Katz*—where the Supreme Court described a *defense* against an allegation that an employer's unilateral changes violated Sec. 8(a)(5)—to mean that Sec. 8(a)(5) imposes an obligation on employers to *make* unilateral changes in wages, particularly since the Act explicitly states that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession." Sec. 8(d); see also *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970).

increase to its represented employees while it was engaged in negotiations with their bargaining representative, even though such an increase would have violated Section 8(a)(5) if given. I wrote:

> [T]he Respondent's legal duty was to maintain the status quo unchanged while it bargained in good faith with the Union to agreement or impasse. Annual wage increases were *not* the status quo, as the D.C. Circuit has made clear. Thus, refraining from giving unit employees a wage increase in October 2007, while bargaining was ongoing, was what the Respondent was *supposed* to do. Otherwise, the Respondent would have violated Section 8(a)(5). Especially in this context, before deciding that the withholding of a wage increase violates Section 8(a)(3), the Board must require strong and convincing evidence sufficient to *prove* unlawful motivation. Otherwise, parties would run the risk of violating the Act whenever they exercise their legal right—and their legal obligation—to refrain from automatically giving represented employees whatever increases are granted to other employees.

Arc Bridges, 362 NLRB No. 56, slip op. at 12 (Member Miscimarra, dissenting).

Here, as discussed above, the Respondent faced the same situation: it would have violated Section 8(a)(5) if it gave the wage increases at issue. This precludes a reasonable finding that the Respondent, by exercising the restraint required by Section 8(a)(5), engaged in prohibited discrimination in violation of Section 8(a)(3), which makes it unlawful for an employer to engage in "discrimination . . . to . . . discourage membership in any labor organization." As a result, I disagree with my colleagues' finding that the General Counsel sustained his initial burden under *Wright Line*[26] of showing that the Respondent bore animus towards the Union.

Nor do I believe the Board can reasonably find that the Respondent's violations of Section 8(a)(1) support a finding that the Respondent's treatment of wages was unlawfully motivated by antiunion considerations. I agree that the Respondent violated Section 8(a)(1) when, as described by employee Schauer, Respondent's CEO and President Woodcock (i) stated that "he would not be able to give . . . raises if we brought a union in," and (ii) told employees Schauer and Ugaitafa that he could not give Ugaitafa a raise "because the Union was there" or "because of the whole Union deal." I believe these statements violated Section 8(a)(1) because Woodcock's imprecise wording would reasonably be interpreted by employees as an expression of retaliation for supporting the Union, but I do not believe these statements prove that Woodcock was motivated by an actual desire to discriminate against employees. Section 8(a)(1) legality turns on what employees would have reasonably understood, but a Section 8(a)(3) violation requires proof that the employer actually engaged in *discrimination motivated by a desire to "discourage" union membership*. Especially in light of Woodcock's lawful statement that wage increases had previously been discretionary but now had to be negotiated with the Union, I believe the record supports a finding that Woodcock reasonably—indeed, correctly—believed that the Respondent was required to bargain over wages and could not increase wages until an agreement (or impasse) was reached.[27]

For similar reasons, I disagree that the Respondent's treatment of Christmas bonuses constituted unlawful discrimination in violation of Section 8(a)(3). Although I agree the Respondent violated Section 8(a)(5) when it discontinued the Christmas bonuses, I believe the record does not preclude the possibility that the Respondent, in good faith, mistakenly believed that it had to refrain from continuing to pay bonuses pending negotiations with the Union. Under the circumstances presented here, I do not believe the record establishes that antiunion animus motivated the Respondent's decision not to provide Christmas bonuses following the Union's certification, particularly given that the Respondent was *not* mistaken in believing that Section 8(a)(5) required it to suspend wage increases pending bargaining with the Union.

Accordingly, I would find that the General Counsel has not met his burden of proving that the Respondent

[26] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[27] I disagree with my colleagues' contention that antiunion discrimination is proven by Woodcock's statements because the Respondent "could have lawfully granted" the increases if the Respondent had proposed them and "if the Union agreed." I believe this contention is plainly without merit. If this argument were accepted, it would mean that whenever an employer described the Act's prohibition against unilateral action (preventing immediate wage increases), the Board could find that the employer engaged in antiunion discrimination based on the employer's failure to propose the increases at issue and to assume the union would accept them. I believe this is plainly insufficient to prove unlawful antiunion motivation, given that the Respondent reasonably understood (as explained in the text) that the duty to bargain prevented it from unilaterally implementing discretionary wage increases. Indeed, in another decision issued today, the Board in *DuPont* has squarely held that discretionary employer actions can *never* be taken unilaterally based on past practice, even though the employer may have *always* taken precisely the same actions previously. See 364 NLRB No. 113 (2016). The Board cannot reasonably find that the Respondent here engaged in unlawful antiunion discrimination based on statements that, in fact, were consistent with the Board's own holding in *DuPont*.

bore animus toward the Union, and I would dismiss the Section 8(a)(3) allegations.

CONCLUSION

To the extent and for the reasons stated above, I respectfully dissent.

Dated, Washington, D.C. August 27, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT tell you that you will not get raises if you choose, or because you have chosen, to be represented by a union.

WE WILL NOT refuse to give you wage increases because you chose to be represented by a union.

WE WILL NOT refuse to give you your traditional Christmas payments because you chose to be represented by a union.

WE WILL NOT unilaterally cease to grant established Christmas payments to you.

WE WILL NOT discontinue our custom and practice of granting you Christmas payments because you chose to be represented by a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

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

WE WILL, on request of the Union, rescind the unilateral changes in terms and conditions of employment and restore the status quo ante with regard to our established practice of granting Christmas payments every year, until such time as we reach an agreement with the Union for a new collective-bargaining agreement or a lawful impasse based on good-faith negotiations.

WE WILL make unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them, plus interest.

WE WILL make unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral change, plus interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

ADVANCED LIFE SYSTEMS, INC.

The Board's decision can be found at www.nlrb.gov/case/19–CA–096464 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

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

DECISION

STATEMENT OF THE CASE

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

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

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

FINDINGS OF FACT

I. JURISDICTION

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

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Parties

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

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

B. The Parties' Collective-Bargaining Relationship

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

C. Wage Raises

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

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

[2] 29 U.S.C. §§ 151–169.

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

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

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

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

[7] R. Exh. 1–2.

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

[9] Schauer, Gravel, and Ugaitafa credibly testified that, upon being hired, they were told by South, Woodcock, or other managers to expect periodic wage increases once every 6 months. Starting out, employees

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

At some point after the organizing campaign began in July and before the representation election in August 2012, Woodcock spoke with Schauer at station 4 about the implications of unionization. McDougall, Schauer's supervisor, was present. One implication of union certification, Woodcock told Schauer, would be the need to negotiate wage increases before the Company could give raises.[14]

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

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

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

D. Christmas Bonus

The Company also has no formal written employee policy regarding bonuses.[19] However, prior to December 2012, unit employees regularly received Christmas payments in different forms and amounts. In fact, this practice evolved to the point where unit employees, upon being hired by the Company, were notified to expect such future payments.[20] Woodock generally gave unit members payments ranging in amounts from $50 to 500 each (totaling around $10,000-15,000) in the form of cash, check, tangible raffle chances, gifts, or trip prizes at the annual Christmas party hosted by the Company. Since the Company's inception in 1996, the payments were usually distributed at the annual Christmas party and the gifts increased in value as the business prospered.[21]

More recently, unit employees received some form of Christmas payments in 2008 and 2009.[22] In 2010, after an employee's home was destroyed in a mud slide, Woodcock asked unit employees if they would agree to forego their Christmas

typically received $1-per-hour raises and then the raises decreased in 25- or 50-cent increments. (Tr. 23-24, 51–52, 63, 67.)

[10] Jt. Exh. 1.

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

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

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

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

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

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

[17] Jt. Exh. 1.

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

[19] R. Exhs. 1, 2.

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

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

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

payments in return for a $10,000 contribution by Woodcock to the affected employee. Unit employees agreed, the affected employee was given a $10,000 check, and there were no Christmas bonuses. Some employees, however, randomly received gifts through a raffle.[23] In 2011, most employees received Christmas payments in the form of checks. New employees, however, were allowed to take part in a raffle for gift cards and other products.[24] In 2012 and 2013, Woodcock did not give Christmas payments to unit employees. Nor did he notify the Union that he would cease giving the customary Christmas bonuses or gifts.[25]

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

Legal Analysis

I. THE 8(A)(5) VIOLATIONS

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

Section 8(a)(5) of the Act provides that "[i]t shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees," 29 U.S.C. § 158(a)(5); and Section 8(d) identifies the subject matters of such bargaining as including "wages, hours, and other terms and conditions of employment." Id. § 8(d). An employer violates the Act when it unilaterally alters wages, hours, or other terms or conditions of employment without first negotiating to a valid impasse with the union representing the employees. *Covanta Energy Corp.*, 356 NLRB 706, 727 (2011), citing *NLRB v. Katz,* 369 U.S. 736, 742–743 (1962) ("Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy.")

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

A. Wage Raises

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

On the other hand, if an employer "retain[s] total discretion to grant [wage] increases based on any factors it chooses," it is doubtful that discontinuing the policy would violate Section 8(a)(5)." *Daily News of Los Angeles v. NLRB,* 73 F.3d 406, 412 fn. 3 (D.C. Cir. 1996). Indeed, wage increases that "are fixed as to timing but discretionary in amount do not become part of the employees' reasonable expectations and thus are not considered 'terms and conditions' of employment." *Acme Die Casting*, 93 F.3d 854, 857 (D.C. Cir. 1996), citing *Phelps Dodge,* 22 F.3d at 1496 (holding that payments to employees were not a condition of employment where the payments varied in time, recipients, amounts and manner in which calculated). See *also Daily News,* 73 F.3d at 412 fn. 3 ("fixed timing alone would be sufficient to bring the program under *Katz*"). Further, the company's periodic wage increase must establish a discernable pattern or practice in regard to timing, amount and selection of employees to receive the increases. *Phelps Dodge,* 22 F.3d at 1497, citing *Ithaca Journal-News, Inc.*, 259 NLRB 394, 395 (1981); *UARCO, Inc.,* 283 NLRB 298, 300 (1987) (employer unlawfully discontinued an established 17-year annual wage increase to newly represented employees); *Southeastern Michigan Gas Co.,* 198 NLRB 1221, 1222–1223 (1972) (employer violated § 8(a)(5) by discontinuing established 20-year practice of biannual wage increases).

Prior to the Union's representation of unit employees, the Company had a longstanding practice of granting hourly wage increases mainly between 25 to 50 cents once every 6 months or sooner, depending on tenure and performance. Its cessation of such a practice since that time, without notice to the Union, amounts to a unilaterally discontinuation of an expected term of employment. *Jensen Enterprises*, 339 NLRB 877, 877 (2003) (by withholding customary increases during a potentially long

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

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

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

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

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

period of negotiations for an agreement covering overall terms and conditions of employment, employer unlawfully changes existing terms and conditions without bargaining to agreement or impasse). Moreover, the unilaterally imposed change was "material, substantial, and significant," thus impacting the employees or their working conditions in violation of Section 8(a)(5). *Toledo Blade Co.*, 343 NLRB 385 (2004).

B. Christmas Payments

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

The Board has found that an employer cannot unilaterally discontinue a bonus if it is of a fixed nature and has been paid over a sufficient length of time or with an explicit promise of future payments, thereby creating a reasonable expectation among employees that the payment will be received as part of their remuneration from employment. *North American Pipe Corp.*, 347 NLRB at 838. Thus, a holiday bonus is a mandatory bargaining subject if the employer's conduct raises the employees' reasonable expectation that the bonus will be paid. *Waxie Sanitary Supply*, 337 NLRB 303, 304 (2001) (unlawful discontinuance of a holiday bonus where the employer based the amount in part on individual performance and company profits, and posted the monthly gross profits in the employee lunchroom so that employees could monitor the size of their anticipated bonus for the prior 3 consecutive years). See, e.g., *E.C. Waste, Inc.*, 348 NLRB 565 (2006) (unlawful discontinuance of a supplemental bonus, given on top of statutorily mandated bonus, which was given at Christmas, every year until Union was elected, and in a significant amount, $900, per employee); *Sykel Enterprises.,* 324 NLRB 1123, 1124–1125 (1997) (unlawful discontinuance of a Christmas bonus where it was given to different employees in different amounts, determined solely by the employer, and based in part on "how the Company operated that year" for the prior four consecutive years).

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

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

These Christmas payments were given in the context of the employment relationship. The Company insists that these payments were "gifts" made on behalf of Woodcock family's personal funds and are, therefore, not attributable to the Company. Its claim is bolstered by the absence of any documentary evidence to refute Woodcock's credible testimony that the cash and checks given, and gift cards and prizes procured came from personal funds. However, the remaining circumstantial evidence strongly supports the charge that the Christmas payments were distributed on behalf of the Company. See *H.S.M. Machine Works, Inc.*, 284 NLRB 1482, 1494 (1987) (cash payments and personal gifts given by owner of 95 percent of company deemed given by the company), citing *NLRB v. Rubatex Corp.*, 601 F.2d 147, 150 (4th Cir. 1979). First, Woodcock and his wife were majority owners of the Company. Secondly, the payments were given at the Christmas party, which was held at the Company's facility (since an employee always had to be on shift) or by the dispatch office. Employees only received a payment if they attended the party. Lastly, while Woodcock denied that the purpose of the party and payments were employee retention-based, it was no doubt aimed at boosting employee morale, since employees had to be present to receive a gift and the event made them interact.

Additionally, it appears that all unit employees who attended the party received a Christmas payment in some form or another. Only employees who recently started working for the Company were ineligible for cash payments. For example, Ugaitafa only received a $50 coffee gift card instead of being entered into the drawing, since he had only worked for the Company

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

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

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

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

II. THE 8(A)(1) VIOLATIONS

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

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

Statements that the Company would not be able to give employees raises if they voted for the Union and, subsequently, if a union represented them, would certainly run afoul of the Act. Such statements would be unlawful because they constitute threats of reprisal. *Winkle Bus Co.,* 347 NLRB 1203, 1205 fn. 12 (2006). In this case, Woodcock told Schauer, prior to the representation election, that he would be unable to give raises if employees voted in favor of the union. That statement effectively restrained protected Section 7 activity. See *Milum Textile Services Co.,* 357 NLRB 2047, 2058 (2011) (implicitly threatening to reduce wages if employees selected union). Similarly, Woodcock's statement that he would freeze pay raises because employees were now represented by a union, constituted a threat of reprisal. *Teksid Aluminum Foundry,* 311 NLRB 711, 712–713 (1993) (explicit threat of wage freeze).

Similarly, Woodcock told employees unit employees that pay raises had always been discretionary and, since they selected a union to represent them, now needed to be negotiated. *Jensen Enterprises*, 339 NLRB 877, 877 (2003) (employer's statement that wages would be frozen until a collective-bargaining agreement is unlawful if employer has a past practice of granting periodic wage increases). *First Student, Inc.,* 341 NLRB 136, 141 (2004) (employer's announcement to employees that there would be no wage increase during negotiations, notwithstanding history of providing annual wage increases, violated Sec. 8(a)(1)); *Illiana Transit Warehouse Corp.*, 323 NLRB 111, 113–114 (1997); *299 Lincoln Street, Inc.*, 292 NLRB 172, 174 (1988); *More Truck Lines*, 336 NLRB 772, 773–775 (2001), enfd. 324 F.3d 735 (D.C. Cir. 2003). Such an announcement suggested to employees that the employer intends to unilaterally take away benefits and require the union to negotiate to get them back. See also *Covanta Energy Corp.,* 356 NLRB 706, 717 (2011). Under the circumstances, the Company violated Section 8(a)(1) of the Act.

III. THE 8(A)(3) VIOLATION

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

An employer violates Section 8(a)(3) by taking adverse action against an employee because the employee engages in, or is suspected of engaging in, union activities. *Mays Electric Co.*, 343 NLRB 121, 134 (2004). Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 602 F.2d 899 (1st Cir. 1981, cert. denied 455 U.S. 989 (1982), the General Counsel has the burden of establishing that union activity was a motivating factor in the Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3) of the Act. The elements required to support such prima facie violations of Section 8(a)(3) are union or other protected concerted activity by employees, employer knowledge of the activity, and a connection between union

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

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

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

The burden thus shifts to the Company to demonstrate that it would have, even in the absence of union certification, frozen wages and Christmas payments. Woodcock attributed the wage freeze to increased competition and health insurance costs, and decreased governmental reimbursement rates. However, his vague explanation was insufficient to overcome the clearly pretextual nature of his actions and fell short of meeting the Company's rebuttal burden. See *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB 633, 637 (2011), enfd. sub nom. *Mathew Enterprises. v. NLRB*, 498 Fed.Appx. 45 (D.C. Cir. 2012) (finding of pretext defeats an employer's attempt to meet its rebuttal burden).

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

IV. STANDING TO ISSUE COMPLAINT

Finally, the Company asserts as an affirmative defense that the Regional Director of Region 19 and then-Acting General Counsel were improperly appointed based, in part, on a lack of quorum and, thus, lacked standing to issue this complaint, under *Noel Canning v. NLRB,* 705 F.3d 490 (D.C. Cir. 2013), pet. for cert. pending, No. 12–1281 (filed Apr. 25, 2013). The Board rejected that argument in *Belgove Post Acute Care Center*, 359 NLRB 633 (2013), and *Bloomingdale's, Inc.*, 359 NLRB 1015 (2013).

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

REMEDY

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

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

ORDER

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

1. Cease and desist from

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

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

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

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

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

[28] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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

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

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

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

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

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

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

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

(e) Within 14 days after service by the Region, post at its six facilities in Yakima, Washington, copies of the attached notice marked "Appendix."[29] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Company's authorized representative, shall be posted by the and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Company customarily communicates with its employees by such means. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since July 2012.

(f) Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since July 2012.

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

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

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ADVANCED LIFE SYSTEMS, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/19–CA–096464 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
NOV 22 2016
RECEIVED

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED NOV 22 2016
CLERK

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ADVANCED LIFE SYSTEMS INC., **Petitioner,** **v.** **NATIONAL LABOR RELATIONS BOARD,** **Respondent.**	**Case No.** 16-1405

ORIGINAL

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1 and to enable Judges of the Court to evaluate possible disqualifications or recusal, the undersigned counsel for Advanced Life Systems, Inc. states that Advanced Life Systems, Inc. has no other parent corporations and no other publicly held company has a 10% or greater ownership interest in Advanced Life Systems, Inc. Advanced Life Systems, Inc. provides emergency response, medical transport and first aid training in Yakima County, Washington.

Date: November 16, 2016

Gary E. Lofland WSBA #37080
Counsel for Petitioner
230 S. 2nd Street
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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Rule 26.1 Corporate Disclosure Statement was placed in the United States mail, postage prepaid, on this date and addressed to:

Mark Arbesfeld, Office of Appeals
Division of Enforcement Litigation
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-0001

Date: November 16, 2016

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