

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

In the Matter of)
)
ATLANTICARE MANAGEMENT)
LLC D/B/A PUTNAM RIDGE)
NURSING HOME)
)
 Respondent)
)
 and)
)
1199 SEIU UNITED HEALTHCARE)
WORKERS EAST)
)
)
 Charging Party)
_____)

**Case Nos. 02-CA-177329
 02-CA-193189
 02-CA-198370
 02-CA-206253
 02-CA-210245**

**CHARGING PARTY’S ANSWERING BRIEF TO RESPONDENT’S EXCEPTIONS TO
THE ADMINISTRATIVE LAW JUDGE’S DECISION**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
ARGUMENT	2
I. The ALJ Correctly Concluded That Respondent’s Reduction of Employees’ Annual Wage Increases, Shortly After Employees Voted in Favor of Unionization, Violated Section 8(a)(3) of the Act	2
II. The ALJ Also Correctly Concluded That Respondent’s Unilateral Reduction in Employees’ Annual Wage Increases Violated Section 8(a)(5) of the Act.....	6
CONCLUSION.....	12

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<i>Acme Die Casting v. NLRB</i> , 93 F.3d 854 (D.C. Cir. 1996)	9
<i>Advanced Life Sys.</i> , 364 NLRB No. 117 (2016)	4
<i>Allied Products Corp.</i> , 218 NLRB 1246 (1975)	10
<i>American Packaging Corp.</i> , 331 NLRB 482 (1993)	11
<i>Arc Bridges, Inc. v. NLRB</i> , 662 F.3d 1235 (D.C. Cir. 2011)	9
<i>Bannon Mills</i> , 146 NLRB 611 (1964)	6
<i>Camaco Lorain Mfg. Plant</i> , 356 NLRB 1182 (2011)	4
<i>Caterpillar, Inc.</i> , 355 NLRB 521 (2010)	7
<i>Covanta Energy Corp.</i> , 356 NLRB 706 (2011)	12
<i>Daily News of Los Angeles</i> , 315 NLRB 1236 (1994)	12
<i>Dish Network, LLC</i> , 363 NLRB No. 141 (2016)	4
<i>Eagle Express Co.</i> , 273 NLRB 501 (1984)	10
<i>Lafayette Grinding Corp.</i> , 337 NLRB 832 (2002)	10
<i>NLRB v. Katz</i> , 369 U.S. 736 (1962)	7
<i>NLRB v. Transportation Mngt.</i> , 462 U.S. 393 (1983)	4
<i>Porta-King Bldg. Sys.</i> , 310 NLRB 539 (1993)	10
<i>Raytheon Network Centric Sys.</i> , 365 NLRB No. 161 (2017)	8
<i>RCC Fabricators Inc.</i> , 352 NLRB 701, n. 5 (2008)	6
<i>Robert Orr/Sysco Food Servs., LLC</i> , 343 NLRB 1183 (2004)	4
<i>Stone Container Corp.</i> , 313 NLRB 336 (1993)	11
<i>T-Mobile USA Inc.</i> , 365 NLRB No. 23 (Feb. 2 2017)	10

<i>Tubular Corp.</i> , 337 NLRB No. 13 (2001)	4
<i>U.S. Can Co.</i> , 305 NLRB 1127 (1992)	10
<i>Wayron, LLC</i> , 364 NLRB No. 60 (August 2, 2016)	10
<i>Winn-Dixie Stores</i> , 243 NLRB 972 (1979)	10
<i>Wright Line</i> , 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981)	4

PRELIMINARY STATEMENT

Charging Party, 1199 SEIU United Healthcare Workers East (“the Union”), by its attorneys, Gladstein, Reif, & Meginniss, LLP, submits this answering brief in opposition to Atlanticare Management LLC d/b/a Putnam Ridge Nursing Home’s (“Putnam Ridge” or “Respondent”) Exceptions to the Administrative Law Judge Benjamin W. Green’s (“ALJ”) December 12, 2018 Decision and Order in the above-captioned cases. Herein, the Union addresses only some of Respondent’s Exceptions and relies on the brief of the Counsel for the General Counsel to address Respondent’s remaining Exceptions. Charging Party also relies on the statement of facts set forth in the brief of the Counsel for the General Counsel, except as supplemented herein.

The extensive, and largely undisputed, record evidence reveals systematic efforts by Putnam Ridge to unlawfully strip employees of their statutory rights, punish employees for their support for the Union, and frustrate the collective bargaining process. As correctly found by ALJ Green, since the December 2015 representational election, Putnam Ridge has committed serious and pervasive unfair labor practices including failing to bargain, failing to produce information, terminating an employee because of her support for the Union, reducing employees’ wages because of their participation in protected activities, and prohibiting employees from conducting union business on Respondent’s property.

For all of the following reasons, and those set forth in the Counsel for the General Counsel’s brief, Respondent’s Exceptions are entirely without merit and should be rejected.

ARGUMENT

I. The ALJ Correctly Concluded That Respondent’s Reduction of Employees’ Annual Wage Increases, Shortly After Employees Voted in Favor of Unionization, Violated Section 8(a)(3) of the Act.

The undisputed record evidence establishes that, for many consecutive years prior to the December 2015 representation election, Respondent “maintained a long-standing past-practice of granting annual merit wage increases in a manner that was based on a fixed formula. Appraisal ratings of good, very good, and outstanding resulted in merit wage increases of 2%, 2.25% and 2.5% respectively.” ALJD at 7, 27.¹ This long-standing past-practice was established through undisputed employee testimony and Respondent’s own documents. *See* Tr. 31-36, 66-67, 232-233; GC Ex. 3-5, 8-12, 14; Jt. Ex. 25. Respondent did not dispute, nor could it, that as of December of 2015 it had a long-standing and consistent practice of awarding annual merit increases according to the formula described above. ALJD at 27.

Then, on December 4, 2015, employees voted to unionize. Almost immediately thereafter, Putnam Ridge changed the formula it used for awarding annual merit increases. Starting January of 2016, appraisal ratings of good, very good, and outstanding resulted in merit increases of only 1.25%, 1.5%, and 1.75% respectively: three-quarters of a percent less than before the union election. ALJD at 7, 29-30; *see also* Tr. 31-36, 66-67, 232-233; GC Exs. 3-5, 8-

¹ Herein, citations to the ALJ’s Decision and Order are cited as “ALJD,” citations to the transcripts are cited as “Tr.,” citations to the General Counsel’s Exhibits, Respondent’s Exhibits, Charging Party’s Exhibits, and Joint Exhibits are cited respectively as “GC Ex.,” R Ex.,” CP Ex.,” and “Jt. Ex.,” and citations to “Respondent’s Brief in Support of Exceptions” is cited as “Resp. Br.”

12, 14, 18; Jt. Ex. 25.² Again, this change was established through undisputed witness testimony, Respondent's own documents, and was entirely un rebutted. *Id.*

It is also undisputed that, prior to the election, Respondent was not even considering reducing employees' pay. Rather, Respondent's sole witness testified as follows:

JUDGE GREEN: So the election was December 4, 2015. Prior to that date, to your knowledge, do you know whether the employer was considering any cut in pay and benefits for employees who would ultimately become unit employees?

THE WITNESS: You said, cut in pay?

JUDGE GREEN: Cut.

THE WITNESS: No.

JUDGE GREEN: Any increase? Did they contemplate any increase in pay and benefits?

THE WITNESS: Yes.

JUDGE GREEN: Do you know why?

THE WITNESS: The competition. The healthcare facilities [sic] respond [sic] to what the going rates of pay are.

Tr. 674-675. Respondent "offered no reason *other than the Union's election* as an explanation" for why it reversed course and reduced employees' annual merit increases. ALJD at 29 (emphasis added).

Under Section 8(a)(3), it is "an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Accordingly, an employer violates Section 8(a)(3) if it withholds promised increases because of employees' decision to unionize. *See e.g.*,

² In addition to the payroll records, the performance evaluations used by Respondent identify the specific percentages that were awarded for each performance rating both before and after 2016. *See* GC Ex. 14.

Advanced Life Sys., 364 NLRB No. 117, slip op. at 2 (2016) (“an employer may not punish employees for selecting union representation by denying them planned increases”).

In order to prove unlawful discrimination under Section 8(a)(3), the General Counsel must establish that employees’ participation in protected activities was a motivating factor in an employer’s discriminatory conduct. *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981); *see also Robert Orr/Sysco Food Servs., LLC*, 343 NLRB 1183, 1184 (2004). “Proof of such discriminatory motivation can be based on direct evidence of such union animus or can be inferred from circumstantial evidence based on the record as a whole.” *Robert Orr/Sysco Food Servs., LLC*, 343 NLRB at 1184. The Board has long held that unlawful motive can be inferred from the timing of an employer’s discriminatory conduct. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1185 (2011); *Tubular Corp.*, 337 NLRB No. 13, slip op. at 1 (2001); *Wright Line*, 251 NLRB 1083, 1089 (1980). Once the General Counsel establishes that employees’ participation in protected activities was a motivating factor in the employer’s decision, “the burden shifts to the employer to persuade by a preponderance of the evidence, not merely that it could have taken the same action for legitimate reasons, but that it actually would have done so in the absence of the protected conduct.” *Dish Network, LLC*, 363 NLRB No. 141, slip op. at 1, n.1 (2016); *see also NLRB v. Transportation Mngt.*, 462 U.S. 393 (1983).

Here, the ALJ correctly concluded that employees’ participation in protected activities was a motivating factor in Putnam Ridge’s decision to reduce employees’ annual merit increases. ALJD at 29. In reaching this conclusion, the ALJ relied on the timing of the wage reductions (almost immediately after employees voted in favor of unionization), the fact that Respondent had no plans to reduce employee compensation prior to the union vote (and, instead was considering increasing employees’ pay and benefits), and Respondent’s well-established

antiunion animus.³ *Id.* Given that Respondent introduced *no evidence* to suggest, let alone establish, that it would have reduced employees' wages absent their decision to unionize, Board law compels the ALJ's conclusion that the wage reductions violated Section 8(a)(3). ALJD at 29.

As Respondent's exceptions lack any citation to the record, or Board law, they are easily dismissed. *See* Resp. Br. at 23. Respondent argues, in one baffling paragraph in their exceptions brief, that the ALJ erred by "mistaken[ly] finding that the merit pay changes occurred one month after the election of the Union." *Id.* As the merit pay changes were, in fact, implemented in January of 2016, the month following the representational election, Respondent's exceptions are entirely without merit. Nor can there be any doubt that the ALJ was well aware of the relevant dates.⁴

³ There is ample record evidence of Respondent's antiunion animus. ALJD 6, 29. The numerous contemporaneous unfair labor practices, including Respondent's termination of a known union supporter and prohibition of union business on company property, show evidence of Respondent's hostility towards employees' participation in protected activities. ALJD at 29. Further, it is undisputed that Putnam Ridge ran a vigorous antiunion campaign in the lead up to the 2015 election. Respondent hired antiunion consultants, held numerous meetings with employees to communicate Respondent's antiunion message, and sent employees numerous letters that urged them to vote against unionization. *See e.g.*, ALJD at 6, 29; Tr. 46-47, 64-66, 71-72, 546-547; CP Ex. 3.

⁴ Respondent's claim that the ALJ was confused about the applicable dates is frivolous and rests exclusively on two typos in the ALJD. On page 6, Judge Green incorrectly refers to the December 2016 election. On page 7, Judge Green incorrectly refers to January 2017. The remainder of the very same paragraph correctly references January 2016 as the month and year that the wage reductions were implemented. *Id.* No good faith reading of the ALJD, and the record evidence, could leave any doubt of the applicable dates and the Judge's understanding of them. *See e.g.*, ALJD at 7 ("In January 2016, the Respondent changed its practice of providing wage increases of 2%, 2.25%, and 2.5%..."); ALJD at 3 ("Thus, the annual increases associated with overall appraisal ratings were as follows before January 2016..."); ALJD at 7 ("Additional payroll records confirm that employees stopped receiving wage increases above 1.75% in January 2016); ALJD at 28, n. 22 (emphasis added) ("Respondent proposed the change in question [in January 2017] *a year after it was implemented* and during the pendency of an unfair labor practice regarding the same."); ALJD at 5 ("The parties stipulated to an election on December 4, 2015."); ALJD at 25 (Ms. Thomas was denied the opportunity to work "on the day

For all of the forgoing reasons, and those set forth in the brief of the Counsel for the General Counsel, the ALJ correctly concluded that Putnam Ridge violated Section 8(a)(3) of the Act by reducing the amount of employees' annual merit increases.

II. The ALJ Also Correctly Concluded That Respondent's Unilateral Reduction in Employees' Annual Wage Increases Violated Section 8(a)(5) of the Act.

As is detailed above, it is undisputed that for many consecutive years prior to January 2016, Respondent had awarded employees annual merit increases that ranged from 2% to 2.5% based on employees' individual performance ratings. ALJD at 27; *see* Tr. 31-36, 66-67, 232-233; GC Ex. 3-5, 8-12, 14; Jt. Ex. 25. The performance evaluations and wage data provided by Respondent (as well as undisputed testimony from multiple employees) establishes that Respondent used this fixed formula for awarding annual merit increases since taking over the facility. *Id.*⁵ It is also undisputed that, in January of 2016, Respondent changed this long-standing practice without providing the Union with notice or an opportunity to bargain. ALJD at 28. Since then, employees have received annual merit increases that range only from 1% to 1.75%. ALJD at 7.

On this undisputed record, the ALJ correctly concluded that Respondent's unilateral change to its long-standing formula for awarding merit increases violated Section 8(a)(5). It is well-settled that Section 8(a)(5) prohibits employers from making unilateral changes to

of the election, December 4, 2015."); Tr. 674 (Judge Green: "So the election was December 4, 2015.").

⁵ Respondent did not produce all of the performance evaluations and wage data subpoenaed by the Union or the General Counsel. *See* CP Ex. 1, paragraphs 1 and 2; GC Ex. 2, paragraphs 10 and 11. Only a handful of evaluations from certain years, and none from other years, were provided. *See* GC Ex. 14. While the record evidence is more than sufficient to establish the long-standing past-practice, all appropriate inferences should be drawn that the withheld information would have fully supported the allegations. *See e.g., RCC Fabricators Inc.*, 352 NLRB 701, n. 5, 711-712, 726 (2008); *Bannon Mills*, 146 NLRB 611, n. 4 (1964).

employees' terms and conditions of employment without first giving the union notice and an opportunity to bargain. *See e.g., NLRB v. Katz*, 369 U.S. 736 (1962); *Caterpillar, Inc.*, 355 NLRB 521, 522-523 (2010).

Despite the conclusive and un rebutted record evidence to the contrary, Respondent argues it did not have a past practice of granting annual merit increases that ranged from 2% - 2.5% based on employees' performance ratings. In support of this claim, Respondent points only to the fact that the *prior owner* did not give raises for a number of years,⁶ and that Putnam Ridge gave certain employees *additional* wage increases in 2013 and 2015. These facts are wholly insufficient to establish that Respondent's reduction in the formula used for granting annual merit increases did not constitute an unlawful unilateral change. ALJD at 28.

First, the *prior owner's* conduct is irrelevant to whether *Putnam Ridge* had an established practice of granting merit increases according to a fixed formula. Second, that Respondent gave *additional* across-the-board increases to certain employees in 2013 and 2015 provides no support for its claim that it could unilaterally change the long-standing formula it used for awarding annual merit increases.⁷ While Respondent was not required to award any *additional* increases in 2016, or thereafter, it was required to continue awarding merit increases according to the formula it had used for many years prior. ALJD at 28. Nor does Respondent claim, nor could it, that it gave employees any *additional* increases since 2016 in lieu of the annual merit increases. Rather, since 2016, Respondent has continued its practice of granting annual merit increases

⁶ Respondent claims that the prior owner did not give raises in 2007, 2008, 2009 and 2010, citing Jt. Ex. 38. Resp's Br. at 19. While this claim is irrelevant, for the reasons explained above, it is also not supported by the record. Jt. Ex. 38 states only that the prior owner did not provide increases for three unspecified years. Jt. Ex. 38.

⁷ Notably, in 2013 and 2015, Respondent continued to give employees annual merit increases according to the fixed formula (*i.e.* appraisal ratings of good, very good, and outstanding resulted in merit wage increases of 2%, 2.25% and 2.5% respectively). See GC 14.

based on employees' performance ratings only, since that time, according to a different formula. On these facts, the ALJ correctly held that the change to the formula used for awarding annual merit increases constituted an unlawful unilateral change.

The cases cited by Respondent provide no support for its exceptions. In *Raytheon*, the Board held that while employers are required to bargain before making changes to mandatory subjects, when "an employer takes actions that are not materially different from what it has done in the past, no 'change' has occurred and the employer's unilateral actions do not violate Section 8(a)(5) of the Act." *Raytheon Network Centric Sys.*, 365 NLRB No. 161, slip op. at 26 (2017). In that case, in the twelve years prior to the alleged unilateral change, the employer had made modifications to employees' health benefits of a similar kind and at the same time as the changes that were the subject of the unfair labor practice charge. *Id.* at 1. On those facts, the Board concluded that the employer had a well-established past-practice of making unilateral changes to employees' health benefits and, as such, the modifications at issue did not constitute a "change" to employees' terms and conditions of employment *Id.* at 2.

This case is nothing like *Raytheon*. Here, prior to January of 2016, Respondent had *never* changed the formula it used for awarding annual merit increases. Rather, it had a "long-standing past-practice of granting annual merit increases in a manner that was based on a fixed formula." ALJD at 27. As of December of 2015, this past-practice was part of the status quo and "employees would reasonably conclude" that it would continue. *Id.* at 28. As such, *Raytheon* compels the result reached by the ALJ in this case.

The District of Columbia Circuit court cases Respondent cites are similarly inapt. In *Arc Bridges*, the Board held an established past practice existed where an employer, "[f]or 8 consecutive years . . . annually reviewed its finances in June, and if sufficient funds existed,

implemented across-the-board wage increases” of varying amounts. 355 NLRB 1222, 1222 (2010). The D.C. Circuit disagreed, finding no evidence that the employer utilized any objective criteria in determining whether to give a wage increase in any given year and noting that employees had only received raises in three of the preceding five years. *Arc Bridges, Inc. v. NLRB*, 662 F.3d 1235, 1238–39 (D.C. Cir. 2011).

Under the reasoning of either the *Arc Bridges* Board or the D.C. Circuit, the ALJ here correctly concluded that, prior to the Union’s certification, Respondent had a clear and uniformly applied past-practice of granting annual wage increases according to a fixed formula. Employees who received an appraisal rating of good received a 2% increase, employees who received an appraisal rating of very good received a 2.25% increase, and employees who received an appraisal rating of outstanding received a 2.5% increase. The undisputed record evidence establishes that Respondent adhered to this system, without deviation, since it assumed operations of the facility.⁸

Respondent’s next argument, that it lawfully implemented the change at issue in January 2017, is also easily dismissed. In January of 2017, *a year after Respondent implemented the wage reductions and months after the ULP in this case was filed*,⁹ Respondent wrote to the

⁸ Respondent also cites the D.C. Circuit’s decision *Acme Die Casting v. NLRB*, 93 F.3d 854, 857 (D.C. Cir. 1996) for the proposition that “an employer who retains total discretion to deny raises” likely would not “be in violation of Section 8(a)(1) and (5) if it chose to discontinue raises during collective bargaining” Resp. Br. at 19. There is, however, no support for this claim in the D.C. Circuit’s decision. *Acme Die Casting* concerned an employer who gave employees across-the-board increases of varying amounts “at relatively regular intervals” over the course of 7.5 years. 317 NLRB 1353, 1354 (1995). The D.C. Circuit made no finding concerning whether sufficient evidence supported the Board’s conclusion that the employer had an established past practice of giving employees regular wage increases. 93 F.3d at 859. Rather, the court refused to enforce the Board’s order because it believed the Board had not articulated a clear enough rule regarding “when the frequency and quantity of wage increases constitute a settled practice.” *Id.* This decision has no bearing whatsoever on the instant case.

⁹ The Union filed the ULP alleging this unilateral change on May 27, 2016. GC Ex. 1(a).

Union and “proposed to [sic] provide wage increases for eligible bargaining unit employees on their anniversary” that ranged from “0 - 1.75%.” Jt. Ex. 31. In response, the Union told Respondent that the Union did not consent to any reduction in the annual merit increases employees received, that there was a pending ULP on that very issue, and that the Union expected Respondent to restore the status quo ante. Tr. 159-161, 311, 612. Respondent’s year’s-late offer to meet and confer on an already implemented unilateral change does not shield the Respondent from legal liability. It is well-settled that an employer must provide notice and an opportunity to bargain *prior to* implementing a unilateral change. ALJD at 28, citing *Allied Products Corp.*, 218 NLRB 1246, 1246 (1975); *see also Porta-King Bldg. Sys.*, 310 NLRB 539, 539 (1993). Providing notice after the fact does not cure the violation. *See e.g., Allied Products Corp.*, 218 NLRB at 1246; *Porta-King Bldg. Sys.*, 310 NLRB at 539.

Equally frivolous is Respondent’s claim that the parties reached impasse on the issue in January of 2017. The parties could not reach impasse on the subject until Respondent rescinded the unlawful change, remedied the violation, and then bargained to a lawful impasse. ALJD at 28, citing *Wayron, LLC*, 364 NLRB No. 60, slip op. at 8 (August 2, 2016); *see also Lafayette Grinding Corp.*, 337 NLRB 832, 833 (2002). Further, even *had* Respondent restored the status quo and then requested bargaining over the issue, which it did not, a lawful impasse could not be reached on this one discrete issue in the context of bargaining for a first contract. *See e.g., T-Mobile USA Inc.*, 365 NLRB No. 23, slip op. at 3 (Feb. 2 2017); *Winn-Dixie Stores*, 243 NLRB 972, 974-75 (1979). Nor does Respondent have an even colorable claim that lawful impasse could be reached after only one discussion. It is well-settled that “[o]ne meeting is not enough to support a finding of impasse.” *Eagle Express Co.*, 273 NLRB 501, 506 (1984); *see also U.S. Can Co.*, 305 NLRB 1127, 1143 (1992).

Not surprisingly, Respondent cites no authority in support of its claim that it lawfully implemented the wage reductions, nor does any exist. *American Packaging Corp.*, 331 NLRB 482 (1993), which Respondent cites at length, is inapposite. In that case, the employer had a past-practice of determining each year whether to give employees an annual bonus. *Id.* at 482. After the union was certified, the employer gave the union notice and an opportunity to bargain over whether to defer the bonus while the parties were negotiating a CBA. *Id.* When the union insisted that the bonus be paid according to the method that had been used in the past, the employer “followed procedures used in the past and legitimately determined that no year-end bonus was earned for 1990.” *Id.* at 483. Thus, the Board held, the employer did not unilaterally change any term and condition of employment when it withheld the 1990 bonus. *Id.*

Likewise, in *Stone Container Corp.*, 313 NLRB 336, 336 (1993), cited by Respondent, the employer had a practice of granting annual wage increases of varying amounts, based on an annually scheduled wage review. After the union was certified, the employer notified the union that it wished to bargain about the wage increases. *Id.* The parties met and discussed the issue, at which time the employer proposed giving no wage increase because, according to its analysis, financial circumstances did not justify a wage increase. *Id.* The union declined to pursue the issue further. On those facts, the Board held that the employer had satisfied its bargaining obligation. *Id.* at 336–37.

The facts of *American Packaging Corp.* and *Stone Container Corp.* do not bear even a passing resemblance to the facts of this case, where Respondent *did not* give the Union notice and an opportunity to bargain prior to unilaterally reducing employees’ raises, and *did not* follow

the procedures it had used in the past.¹⁰ See *Daily News of Los Angeles*, 315 NLRB 1236, 1240 (1994) (“The absence of increases in *Stone Container* and *American Packaging* flowed from the employers' application of their merit review program, not, as here, from the respondent's unilateral decision to withhold raises even if the raises would have been given under an application of the preexisting merit raise program.”); *Covanta Energy Corp.*, 356 NLRB 706, 720 (2011) (same).

For these reasons, and those set forth in the brief for the Counsel for the General Counsel, the ALJ correctly concluded that Respondent’s unilateral reduction in employees’ annual wage increases violated Section 8(a)(5) of the Act.

CONCLUSION

For the forgoing reasons, and those set forth in the brief of Counsel for the General Counsel, Respondent’s Exceptions to the ALJD should be rejected in full.

Dated: New York, New York
March 29, 2019

Respectfully submitted,

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¹⁰ For similar reasons, *Alltell Kentucky, Inc.*, 326 NLRB 1350 (1998), relied upon by Respondent, is also inapt. There, the Board held that an employer met its obligation to provide the union with notice and an opportunity to bargain over annual wage increases when it notified the union, prior to taking any action, that it did not intend to propose a wage increase. *Id.* Once again, the Board’s holding there has no bearing on this case, where Respondent did not give the Union notice and an opportunity to bargain prior to unilaterally decreasing employees’ raises.