

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

**MADELAINE CHOCOLATE
NOVELTIES, INC.**

-And-

**LOCAL 1222, UNITED
PROFESSIONAL
SERVICE EMPLOYEES UNION.**

CASE 29-CA-222257

**POST-HEARING BRIEF OF RESPONDENT, MADELAINE CHOCOLATE
NOVELTIES, INC.**

On the brief:

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Dated: May 6, 2019

PRELIMINARY STATEMENT

Madelaine Chocolate Novelties, Inc. (“Madelaine” or “Employer”), a manufacturer of chocolate novelties and favors (TR 45)¹, has had a collective bargaining relationship with Local 1222, United Professional Service Employees Union (“Local 1222” or “Union”) dating back to at least 2004. Between 2004 and 2013, Madelaine and Local 1222 entered into three Collective Bargaining Agreements (“CBA”) (Ex GC-7; Ex R-3 ; Ex R-4) and one Memorandum of Understanding (Ex R-2).

In 2012, with approximately a year remaining in the duration of CBA 2010-2013, Superstorm Sandy struck the Rockaway Beach peninsula where Madelaine is located. Sandy catastrophically terminated Madelaine’s operations. (TR 47-48).

The termination of Madelaine’s operations had profound impact on the Employer, the Union and the Employees. Manufacturing ceased. (TR 47-48). Aside from a handful of Employees, all of the bargaining unit Employees were laid off indefinitely. (TR 175-178). That layoff exceeded six (6) months. (TR 175-178).

¹ The Transcript of the hearings before Jeffrey Gardner, Administrative Law Judge, is cited as “TR ____.”

Thus, under the terms of the CBA 2010-2013, in effect at the time, all Madelaine Employees contractually were terminated. (TR 175-178; GC-7, P 32-33)²

As mentioned above, the CBA 2010-2013 expired by its terms on March 31, 2013. Before the CBA 2010-2013 expiration, in late October, 2012, Superstorm Hurricane Sandy struck the Northeast, and in particular, Far Rockaway, New York, where the Employer has its manufacturing plants. The effect of Hurricane Sandy on Madelaine Chocolate was a total shutdown of business operations. Manufacturing operations ceased. Inventory and equipment were destroyed. The plants were substantially destroyed, and Madelaine Chocolate was, for all intents and purposes, out of business. Bargaining-unit employees were laid off. Business records of the employer (including but not limited to payroll at that time, which were managed in-house), were destroyed. (TR 175-178)

In the aftermath of Hurricane Sandy, the management personnel of the Employer undertook to determine whether or not the plants could be re-opened and/or and sales resumed.

It took approximately nine months after Hurricane Sandy, but with great effort and expense, the Employer reopened its doors and commenced a low-level

² The General Counsel disputes that the Employees were terminated, despite the indisputable fact that they were laid off more than six (6) months and the clear language of the CBA to that effect. Madelaine will show below that the applicable CBA 2010-2013 plainly states that the Employees were terminated as a matter of fact and contract application.

operation. The destroyed machines and equipment ultimately were replaced at enormous expense, and over the course of the last approximately twenty-four months, Madelaine Chocolate slowly built up operations. (TR 175-178)

During the period from, and even prior to, Hurricane Sandy to-date, the Employer has remained in active labor-management communication with the Union over a variety of issues. There have been negotiating sessions conducted. The Employer and the Union have exchanged written bargaining demands. As a result, at all times the Employer has continued to recognize the Union as the bargaining representative of Bargaining-unit employees. The Employer has continued to discuss with the Union issues relating to wage increases and many other terms and conditions of employment. Grievances were processed between the Employer and the Union. Union dues were deducted and remitted to the Union. The Employer expressed to the Union in negotiations its position that there is no mandatory shift differential, but that such differential, if any, was entirely incentive-based and within the discretion of the Employer to implement or not. The Union concedes all of the above ongoing activities between the Union and Madelaine. (TR 172-175; 189)

Despite the termination of operations and the mass termination, Madelaine respected the Union's position as Collective Bargaining Representative, both after Superstorm Sandy, and more imperatively, even after the CBA 2010-2013 expired

by its terms on March 31, 2013. That means that from that expiration date, until now, Madelaine recognized Local 1222 as Collective Bargaining Representative, and both Parties acted as if the CBA 2010-2013 was in effect. (TR 172-175; see generally TR 84)

This ongoing recognition of Local 1222 by Madelaine is a crucial fact when evaluating Madelaine's negotiating behavior with the Union. Madelaine may have disagreements with Local 1222 as to contract interpretation, but never disrespected the Union by not negotiating in an ongoing basis, albeit to deadlock, or in legal terms, impasse. This ongoing negotiation included discussion with the Union about the obligations and effects of the new huge minimum wage increases effective in New York City in 2017 and 2018.

The issue before the Administrative Law Judge ("ALJ") now relates to a set of facts unique to Madelaine, and guided by specific, persuasive language in CBA 2010-2013, and its predecessor CBA's. Madelaine contends in this case that all bargaining unit employees employed when Madelaine resumed operations, starting 9 months after Superstorm Sandy, are New Hires. In Madelaine's view, prior personnel hired after the nine months are New Hires. And, of course, actual New Hires at Madelaine are New Hires.

As New Hires, Madelaine contends that Madelaine had the right, in its sole discretion, to pay them minimum wage; both upon hire, and as the New York City minimum wage surged upward. Madelaine relies on a specific explicit article in the CBA 2010-2013 to so contend.

The General Counsel and charging party contend, in the face of absence of no shift differential language in the wage provisions of the CBA 2010-2012, that there was a “past practice” of such shift differential for second shift (afternoon) and third shift (night) employees. They contend the past practice, as to those two shifts, supersedes **Article 8, Paragraph B.**

Madelaine contends there was no binding past practice, but that any wage differential was voluntary. Moreover, the CBA 2010-2013 “in the Employer’s discretion” supersedes any alleged past practice, and as the minimum wage rises, gave express authority to Madelaine to pay the higher minimum wage without further differential.

Thus, the Employer did not eliminate any so-called “wage shift differential” pay for employees working the afternoon and evening shifts as the General Counsel alleges. Madelaine emphasizes that it is the obligation of the General Counsel to prove the General Counsel's Case by a preponderance of the evidence. Madelaine

submits that the General Counsel has not proven any of the essential allegations of the Complaint by a preponderance of the evidence.

The failure of proof by the General Counsel is profound:

- The General Counsel has failed to prove that Madelaine had a required shift differential for the afternoon or evening shifts.
- The General Counsel failed to prove that the previously employed employees were not new employees, and therefore not subject to minimum wage limitations on pay.
- The General Counsel failed to prove the new hires (with no prior Madelaine employment experience) were not new employees, and therefore subject to minimum wage limitations on pay.
- The General Counsel failed to prove that as to those employees previously earning more than the new minimum wage, and who therefore were not impacted by the minimum wage increase(s), even if there was a shift differential, there was no change in their terms and conditions of employment by the minimum wage increase(s) and those have no claim even if a binding shift differential requirement is found.

- The General Counsel failed to prove Madelaine did not discuss these shift differential issues with the Union in good faith and indeed to impasse.
- The General Counsel failed to prove that for prior employees and for new employees, the shift differential was not subsumed into the minimum wage increases.
- The General Counsel ignores that Madelaine was in constant communication and negotiation with the Union over the shift differential (and all CBA issues). There was no surprise, or unilateral action by Madelaine at all.
- Plainly, the law and the facts, it is clear that the Employer acted appropriately, consistent with its contractual rights, negotiated in good faith and did not violate Section 8(a)(5) of the Act.

FACTS

Collective-Bargaining History:

United Professional Service Employees Union Local 1222 (“Union”), has been representing Madelaine’s Bargaining unit employees for nineteen or more years in the following Bargaining unit (GC-7, P-6):

INCLUDED: All full time and regular part time production, maintenance, shipping, receiving and office and clerical employees, employed by the EMPLOYER at its Rockaway Beach, New York facility.

EXCLUDED: Not including all salesman, guards and supervisors as defined in the Act.

The last CBA 2010-2013, between the Employer and the Union, effective April 1, 2010, and which expired on March 31, 2013, contains the applicable provisions at bar now.

The Employer has three shifts. The Bargaining-unit primarily is a production complement of employees manufacturing the Employer's chocolate products. The Bargaining-unit employees are paid hourly. Starting pay usually is the minimum wage. Based on longevity, hourly rates vary widely. (TR 171-173; see generally TR 50).

Prior to the expiration of CBA 2010-2013, during its last year, the Employer and the Union engaged in negotiations on and off, but with no terms of a new CBA reached. The CBA 2010-2013 continued in effect after its expiration. Periodic negotiations continued. The Employer honored its terms albeit that it expired more than 5 years ago. (TR 12-175; 189).

The CBA 2010-2013 contains no discussion of shift differential in its wage provisions. The relevant section of the CBA 2010-2013 is **ARTICLE 7, Hours of**

Work (Ex R-1). (PP. 10-11). **ARTICLE 7** discusses the various shifts. As stated, there is no provision for shift-differential pay in **ARTICLE 7**. It is the Employer's position that there is no binding existing shift-differential obligation in effect which ever was negotiated between the Employer and the Union.

The General Counsel points to two references to "shift differential" in non-wage provisions of the CBA 2010-2013 (GC-7, P-20). Both provisions simply state employees get time and a half or vacation pay, and such pay includes a shift differential. This means, if they get this pay they are getting a differential and not that such differential was a mandatory term and condition of employment. Madelaine's witness who testified of the shift differential conceded that it was paid, but insisted credibly it was voluntary. (TR 173).

Indeed, the shift differential was so discretionary and not required that Madelaine CFO, David Reifer, never even heard of it until the onset of this case. (TR 244-245). Thus, the obscure references to wage differential (as to benefits, if any) do not alter the fundamental fact that CBA 2010-2013 and all its predecessors, did not have that provision as part of the wage paragraphs.

The record shows no evidence of negotiations to incorporate a binding, as opposed to voluntary, shift differential. It is crucial to observe that on this record the

General Counsel offered no proof from any witness that there was an expectation of ongoing shift differential by the employees. This is a major failure of proof by the General Counsel as to the binding nature of the shift differential.³

The contention of the Employer that the afternoon/night pay was discretionary is borne out by the language of the CBA 2010-2012 and its predecessors. This contention is contained in **ARTICLE 8, Wage-Increases** (p. 12), whereby the

³ In light of the silence of the CBA 2010-2013 about a shift differential, the General Counsel must rely on oral testimony to prove a “past practice” establishing a binding shift differential. But, the General Counsel failed to do so. The only testimony offered by the General Counsel to support this claim was hearsay testimony of Union representative James Gangale. That testimony totally fails to meet the requirement of proving a binding past practice by proving Employee expectations, the standard of showing a past practice.

In contrast was the testimony of two Madelaine representatives with knowledge.

Scott Wright, the Chief Administrative Office of Madelaine, explicitly testified that the shift differential was discretionary with the Employer. (TR 173).

David Reifer, the Chief Financial Officer of Madelaine, testified he never even heard of the shift differential until litigation began. (TR 244-245).

The burden of proof to prove a past practice which modifies (or defines) the Contract is on the General Counsel.

This required direct, non-hearsay proof of employee expectations of a binding past practice. No Madelaine unit employee testified to that effect. There was no evidence to that effect on this record. The available witness, Alma Cruz, did not testify.

Thus, it is clear that: (i) the General Counsel failed to meet his its burden of proof to prove a past practice as a shift differential; and (ii) the Employer’s witnesses, testifying non-hearsay direct and candidly, persuasively show there is no shift differential in effect at Madelaine.

The General Counsel will contend that some employees received a wage bump for service in the night-shift. That differential was 10% of base wage as a wage bump. An employee earning \$9.00 per hour could be paid \$9.90 per hour for service in the night-shift. The payroll records reflect such a pay bump. But, that 10% wage bump, which Madelaine calls incentive pay, was entirely discretionary with the Employer.

Employer had discretion to pay more than the minimums required, either by the minimum wage or by the CBA.

Madelaine's core contention in this case is that it had the specific contractual right to pay new hires the minimum wage at any time, meaning at hire, or when the minimum wage increased as expressly stated in **ARTICLE 8, Paragraph B (GC-7, P-12)**, as follows:

All Employees hired after the effective date of the CBA (called herein "New Employees") may, in the sole discretion of the **EMPLOYER**, be paid the minimum wage prevailing under New York State or federal law, as applicable (called herein "Minimum Wage"). The **EMPLOYER** may elect to pay to none, some or all of the New Employees during any time this CBA is applicable, a wage rate greater than the Minimum Wage.

ARTICLE 8, Paragraph B, is clear and the applicable principles may be broken down into these component steps:

- 1. Step One: Article 8, Paragraph B** applies to Employees "hired after the effective date of the CBA."

FACT: The CBA was effective April 1, 2010.

FACT: Every employee hired after April 1, 2010 is covered by **Article 8, Paragraph B**--not after the CBA 2010-2013 expires, but after it starts.

FACT: Superstorm Sandy shut down Madelaine's operations at least nine months.

FACT: There are two categories of Employees hired by Madelaine after Superstorm Sandy, those Madelaine calls “terminated and rehired after six months” and totally “New Hires”. Therefore, every single Employee hired by Madelaine when the plant reopened, nine months after Superstorm Sandy, was a New Hire, hired after the effective date of the CBA⁴.

2. Step Two: Employees hired after the effective date of the CBA may, in the sole discretion of the Employer, be paid the minimum wage prevailing under New York State or federal law.

FACT: The Employer had sole discretion to apply the minimum wage.

FACT: No mention of any differential.

FACT: No time limitation when to apply minimum wage as pay scale. In other words, at any time a minimum became applicable.

3. Step Three: The **EMPLOYER** had sole and discretion to pay to none, some, or all of the New Employees during any time this CBA is applicable, a wage rate greater than the minimum wage.

FACT: The Employer had sole discretion elective rights, to pay minimum wage for some or all Employees.

FACT: No mention of applicable shifts.

FACT: No mention of shift differential.

⁴ We expect the General Counsel will quibble over up to 10 or so employees who returned immediately to aid in the clean-up. Most of those employees were highly paid mechanics, and therefore not affected by the minimum wage increases.

Further, the identity of those employees was never established at the Hearing. The burden is on the General Counsel to show any of those 10 were in the applicable shift. No such showing was made and therefore the General Counsel failed in its burden of proof to prove that of the Employees among the returns, 10 were affected by the alleged failure to pay the alleged differential.

FACT: Employer election rights are even when the CBA is applicable. “At any time.”

4. Step Four: The overwhelming conclusion is that **Article 8, Paragraph B**, was designed to deal with increases in the New York minimum wage, and gave the Employer sole discretion to decide how to apply such minimum wage to literally New Employees, and to ongoing Employees.

FACT: The General Counsel offered no evidence to disagree or contest Madelaine’s legitimate interpretation of its discretionary rights regarding application of the New York minimum wage.

It is the Employer’s position that as a matter of law, under explicit contractual provisions, **ARTICLES 7 and 8**, the Employer retained the authority under the CBA to elect to pay, or not to pay, minimum wage as it rose, with or without incentives for working on shifts other than the day shift. When Madelaine chose not to do so, it was entirely within its rights.⁵

There is more support for Madelaine’s position in the language of CBA 2010-2013. In contrast to the failure of the CBA to require (or even mention) a shift incentive for afternoon or night-shift employees, another CBA provision, **ARTICLE 42, Line-Leaders** (pp. 42-42), specifically in **Sub-paragraph B**,

⁵ Madelaine contends that under Articles 7 and 8, it did not have to negotiate its discretionary application of Articles 7 and 8. Still, Madelaine raised these issues with the Union repeatedly, to impasse. (See TR 109-110; 189).

provides an additional wage increase called “differential”, for such Line-Leaders of fifteen cents per hour. This specificity of wage differential demonstrates that the Union and the Employer had the opportunity to preserve a specific shift incentive differential in the wage section of the CBA, as the parties expressly did for Line-Leaders, but did not do so. The failure to do so, together with the Employer’s discretionary rights under the CBA, means that at all relevant times any differential in pay between a night-shift employee and other employees on other shifts was entirely voluntary, and not obligatory, on the Employer.

In short, it is true that certain employees on the afternoon and night-shifts did receive at one time, a 10% per hour increase in base wages as an Employer discretionary incentive to work on the night-shift. However, this incentive pay never was and continues not to be a mandatory obligation upon the Employer. Nor was it ever imposed or even referenced in the CBA. Nor was any employee’s wage ever reduced. Nor has the Employer refused to discuss the impact of current economics with the Union.

Minimum Wage Increase:

In or about December of 2016, New York City, implemented a sharp increase in minimum-wage requirements. Those requirements set out the following minimum wage schedule (Ex GC-2):

Location	12/31/16	12/31/17	12/31/18	12/31/19	12/31/20	2021*
NYC - Large Employers (of 11 or more)	\$11.00	\$13.00	\$15.00			
NYC - Small Employers (10 or less)	\$10.50	\$12.00	\$13.50	\$15.00		
Long Island & Westchester	\$10.00	\$11.00	\$12.00	\$13.00	\$14.00	\$15.00
Remainder of New York State	\$9.70	\$10.40	\$11.10	\$11.80	\$12.50	*

General Minimum Wage Rate Schedule

Even as Madelaine Chocolate was slowly increasing its production capacity after Superstorm Sandy and began to recall laid-off employees as well as hired new employees, the minimum-wage increase had the effect of increasing the wages of many of the day-time hourly employees to an amount equal to or greater than the wages of night-employees, even with the shift differential. To the extent that night employees, even with the prior shift differential, were entitled to receive wage increases due to the new minimum wage, those wages increases were implemented.⁶

⁶ Scott Wright credibly testified that the reason for the inclusion of Article 8, Paragraph B in the various CBAs was expressly to give Madelaine the ability to deal with increases in the minimum wage. This was a concern well before the current mega increases in New York City, and Madelaine bargained for and received these protections in the CBA expressly to address those concerns. (TR 172-173).

This testimony reinforces Madelaine's position that its rights under Article 8, Paragraph B superseded the shift differential past practice, if there was one.

The result of the implementation of the minimum-wage increases to \$13 and \$15, was that the wages of prior and returning employees were flattened out and became in many cases, equal, even though the recalled employees, prior to the minimum wage increase, may have had a higher hourly-rate compensation than new employees. (See generally 172-178)

For example, if a returning employee (recalled post-Sandy) was earning \$10.50 per hour in 2015, that employee was increased to \$11.00 per hour as of January 1, 2017 due to the minimum-wage increase. A new employee, who might have started at \$9.00 per hour, instead also started at \$11.00 per hour due to the minimum-wage increase, the same hypothetical wage as the long-term employee. (See generally 172-178)

Similarly, a hypothetical night-shift employee earning \$9.90 per hour in 2014, which already included the discretionary 10% per hour incentive of \$0.90 cents, was increased to \$11.00 per hour on January 1, 2017 due to the minimum-wage increase. A hypothetical day-shift employee earning no incentive, earning \$9.00 per hour was increased as well on January 1, 2017 to \$11.00 per hour. Thus, the two wages were “flattened out” or equalized, and no further differential was, or had to be, paid to the night-shift employee. (See generally 172-178)

This flattening out of wage levels had the result in some cases of eliminating the discretionary-shift differential:

1. Day-shift employees earning less than the new minimum wage were raised due to the minimum-wage increase. That increase often equaled night employees' wages previously below the prior minimum wage because the prior discretionary differential was merged into such night-shift new wages under the increased minimum wage; and/or
2. Afternoon or Night shift employees previously below the new minimum wage even with the discretionary differential, also were raised to the new higher minimum wage. Those wage increases more than made up for the voluntary differential.

A. RELEVANT COLLECTIVE BARGAINING PROVISIONS WITH REGARD TO 2004-2007 CBA, 2007-2010 CBA, AND 2010-2013 CBA

For convenience of the ALJ, we provide the following relevant sections of applicable CBAs:

CBA 2004-2007(Ex. R-1):

ARTICLE 8
WAGES-INCREASES

A. All Employees' wages shall be paid in the hourly amounts reflected on the books of the EMPLOYER as may be changed or amended by the EMPLOYER from time to time.

B. All Employees hired after the effective date of the CBA may, in the sole discretion of the EMPLOYER, be paid the minimum wage prevailing under New York State or federal law, as applicable (called herein "Minimum Wage"). The EMPLOYER may elect to pay to none, some or all of the new hires during any time this CBA is applicable, a wage rate greater than the Minimum Wage.

C. Commencing with Contract Year 1, and annually thereafter, all Employees who have completed their probationary period by the respective effective dates shall receive the following wage increases;

EFFECTIVE AS OF APRIL 1, 2004:

All Employees on the Payroll of the EMPLOYER both on April 1, 2004 and the actual date of execution of this CBA, as and for their wage increase for Contract Year 1 shall receive the following wage increase: Forty (\$.40) cents per hour.

EFFECTIVE AS OF APRIL 1, 2005:

Employees employed on April 1, 2005 and thereafter, as and for their wage increase for Contract Year 2, shall receive the following increase: An increase of \$.40 per hour. However, it is expressly agreed that any Employee who has received the benefit of an increase in the New York State (or federal) Minimum Wage in the period January-March 31, 2005, which increase is equal to or greater than the proposed increase in April 2005, will not receive any increase in Contract Year 2.

EFFECTIVE AS OF APRIL 1, 2006:

Employees employed on April 1, 2006 and thereafter, as and for their wage increase for Contract Year 3, shall receive the following increase: An increase of \$.40 per hour. However, it is expressly agreed that any Employee who has received the benefit of an increase in the New York State (or federal) Minimum Wage in the period January-March 31, 2006, which increase is equal to or greater than the proposed increase in April 2006, will not receive any increase in Contract Year 3.

Under no circumstances under the terms of this CBA will any Employee's hourly wage increase more than \$1.20 over the course of the contract period.

CBA 2007-2010 (Ex-R-3):

ARTICLE 8
WAGES-INCREASES

A. All Employees' wages shall be paid in the hourly amounts reflected on the books of the EMPLOYER as may be changed or amended by the EMPLOYER from time to time.

B. All Employees hired after the effective date of the CBA may, in the sole discretion of the EMPLOYER, be paid the minimum wage prevailing under

New York State or federal Law, as applicable (called herein "Minimum Wage"). The EMPLOYER may elect to pay to none, some, or all of the new hires during any time this CBA is applicable, a wage rate greater than the Minimum Wage.

C. Commencing with Contract Year 1, and annually thereafter, all Employees who have completed their probationary period by the respective effective dates shall receive the following wage increases and/or bonuses as applicable:

1. CONTRACT YEAR 1 (April 1, 2007 to March 31, 2008)

A \$750 lump sum payment will be made to each "Eligible Employee" as defined below as and for a one time bonus in accord with the following payment schedule:

October 1, 2007: \$375.00

December 1, 2007: \$375.00

To receive the October 1, 2007, bonus, an "Eligible Employee" is an Employee who was employed by and (i) is on the Payroll of Employer (ii) or was in layoff status by the Employer on April 1, 2007, and, was actively employed on October 1, 2007. To receive the December 1, 2007, bonus, an "Eligible Employee" is an Employee who was employed by and (i) is on the Payroll of Employer (ii) or was in layoff status by the Employer on April 1, 2007, and was actively employed on December 1, 2007.

2. CONTRACT YEAR 2

(i) (April 1, 2008 to September 30, 2008): Increase of .20 per hour.

(ii) (October 1, 2008 to March 31, 2009): Increase of .25 per hour.

3. CONTRACT YEAR 3

(i) (April 1, 2009 to September 30, 2009): Increase of .20 per hour.

(ii) (October 1, 2009 to March 31, 2010): Increase of .20 per hour.

(iii) Starting wages for New Employees remain unchanged.

ARTICLE 42
LINE LEADERS

A. (1) There is established within the Bargaining Unit covered by this CBA

job classification of "Line Leader" with responsibilities and duties as follows:

(a) In addition to production and maintenance responsibilities, the Line Leader will have a higher degree of responsibility for quality control and maintenance of production records. This includes assistance of the shift supervisor for placement of production employees and quality control, assistance to management for quality control as required, reporting to engineering personnel in connection with operation and/or malfunction of equipment and machinery, maintenance of required records regarding quality control and production tracking, reporting to the shift supervisor and management as required regarding employee performance, quality assurance and production tracking.

(b) The position of Line Leader will be made available to all employees willing to do the job and deemed capable in the sole discretion of management. The EMPLOYER'S selection of applicants for Line Leader shall be final.

(c) There is no seniority applicable to selection or retention for this position (except that each Line Leader shall maintain Bargaining Unit seniority accumulated prior to selection and shall continue to accrue Bargaining Unit seniority for all periods of this employment). There is no Line Leader seniority.

(d) Selection and/or retention for this position are not subject to grievance and/or arbitration (provided the selection and/or retention for this position is not grossly arbitrary, unreasonable or capricious. The UNION shall have the burden of proof in any such grievance and/or arbitration).

B. Line Leaders shall receive an additional hourly wage increase for performance as Line Leaders of fifteen (15¢) cents per hour.

CBA 2010-2013 (Ex-GC-7):

ARTICLE 8
WAGES-INCREASES

A. All Employees' wages shall be paid in the hourly amounts reflected on the books of the **EMPLOYER** as may be changed or amended by the **EMPLOYER** from time to time.

B. All Employees hired after the effective date of the **CBA** (call herein "New Employees") may, in the sole discretion of the **EMPLOYER**, be paid the minimum wage prevailing under New York state or federal law, as applicable (called herein "Minimum Wage"). The **EMPLOYER** may elect to pay none, some or all of the new employees during any time this **CBA** is applicable, a wage rate greater than the minimum wage.

C. Commencing with October 1, 2011, and thereafter, as indicated below, all employees who are employed and have completed their probationary period by the respective effective dates shall receive the following wage increases and/or bonuses as applicable;

- (i) Period covering October 1, 2011 to March 31, 2012: Increase of .40 per hour;
- (ii) Period covering April 1, 2012 to September 30, 2012: Increase of .20 per hour;
- (iii) Period covering October 1, 2012 to March 31, 2013: Increase of .20 per hour;
- (iv) Starting wages for New Employees remains unchanged.

ARTICLE 33
SEVERANCE PAY

A. Any employee who is employed five (5) years or more and (i) whose employment is terminated by the **EMPLOYER** for any reason other than those stated in **ARTICLE 30(B) (1)** through **(8)** above, on the part of the employee or (ii) retires after twenty-five (25) years of service, shall, upon such termination or retirement, receive a severance allowance equivalent to one week's pay at the employee's regular rate of pay multiplied by the number of weeks as follows:

5 years, but less than 6 years	1 week
6 years, but less than 7 years	2 weeks
7 years, but less than 8 years	3 weeks
8 years, but less than 10 years	4 weeks
10 years, but not less than 15 years	5 weeks
15 years and over	10 weeks

B. Employees identified in paragraph A(i) above, laid off for a period in excess of six (6) months, or who are laid off for an indefinite period with no expectation of recall within six (6) months, shall be entitled to this severance allowance as if their employment had been terminated. Should such employee there after return to work for the **EMPLOYER**, upon any future termination of employment, the amount already received by the employer shall be credited in computing the subsequent severance allowance.

The credible testimony of David Reifer shows that all Employees, even those with hire dates prior to Superstorm Sandy, were not on the books of Madelaine until July 31, 2013— that means that Employees, rehired or literal New Hires, where not formally hired until July 31, 2013. Everyone was a “New Hire”, rehire or literal New Hire. The prior Employees were deemed to have been terminated under Article 33B above because they were laid off more than six (6) months. This six-month layoff is an undisputed fact, under Article 33B, that they were “laid off for a period in excess of six (6) months...as if their employment had been terminated.” Thus, a six-month layoff under the CBA 2010-2013 is termination.

**B. FACTUAL HISTORY RELATING TO COLLECTIVE
BARGAINING.**

The General Counsel has not proved its case alleging unilateral action by the Employer by a preponderance of the evidence. A full understanding of the facts requires a look-back into the bargaining history of the relationships between these parties.

Historically, the Collective Bargaining Agreements were the classic three-year Collective Bargaining Agreements. The first Collective Bargaining Agreement in evidence is dated April 1, 2004 to March 31, 2007. (Ex R-1). The relevant article discussing wages in the 2004-2007 CBA is, Article 8. As early as the first Collective Bargaining Agreement, in Article 8, Subparagraph B, the parties agreed to a specific hourly wage rate with no mention of any incremental increase for any shift. No Shift Differential was mentioned pertaining to either a day shift or night shift.

The following was added in Article 8 of the CBA 2004-2007: "however, it is expressly agreed that any employee who will receive the benefit of an increase in the New York State or Federal minimum wage in the period", in this case, January through March 31, 2006, "which increases equal to or greater than the proposed increase," in April 2005, "will not receive any increase in contract year two other than the minimum wage." From the very outset of the bargaining relationship between these parties, therefore, there was an understanding that the minimum wage was going to control, in the discretion of the Employer, how much employees would be paid.

It should be emphasized that there is no mention of Shift Differential for afternoon or night shifts in any CBA.

We continue now to the next CBA 2007 – 2010. Article 8, again, is present, granting wage increases. Preceding this CBA was a heated lockout between the parties, which was ultimately settled. (Ex R-1). In Article 8 of CBA 2007-2010, there were two types of wage increases which were granted as a result of the settlement of the lockout. These two types of wage increases were incorporated into the contract, and further into a memorandum of understanding settling the lockout. The first was a \$750.00 lump sum payment, broken into two subdivisions of \$375.00 over different years. We note that from time-to-time in the CBA relationship, the Employer would pay lump sum bonuses as a wage increase. Importantly, there was no wage differential for afternoon or night shift employees ever paid for the lump sum payment. Every employee got the lump sum. The Union never questioned it. The Union never grieved it.

The second type of wage increase in the CBA 2007-2010 were increases in payments made periodically, once again with no reference at all to wage differentials. In the CBA 2007-2010 the Parties created the classification, called a “line-leader”. A line-leader was an Employee, on any shift, who is granted more responsibility than others to make sure that the chocolate is being made and wrapped and packaged properly. In Article 42 of the CBA 2007-2010, the position of a line-leader was established, and there specifically, the line-leader gets a pay

differential. The CBA 2007-2010 uses that term, “differential”, but as we have emphasized, no CBA ever used that term with respect to the various shifts.

In Article 8, the section called Wage Increases, in subparagraph B, the crucial Paragraph in this case, was inserted. That clause, repeated in the current CBA, the CBA 2010-2013, contained the crucial provision discussed above which contained the following: "All employees hired after the effective date of this CBA may, in the sole discretion of the employer, be paid the minimum wage prevailing, under New York or Federal law, as applicable, the minimum wage. The Employer may elect to pay none, some, or all of the new hires, during any time this CBA is applicable, with a wage rate greater than the minimum wage". “...may elect at any time” needs to be emphasized. “...in the sole discretion of the Employer” needs to be emphasized. “...new hires” needs to be emphasized. (Ex R-1).

CBA 2007-2010 was replaced by the one that is applicable at this time, the CBA 2010-2013. As we have established, it continues in effect, to date. It has not been modified. The testimony at the hearing established that there were numerous sessions and negotiations between the Union and the Employer over the past six years, and more. There has been no change. We submit as a matter of fact, these parties have been at an impasse for years, over every conceivable matter in the CBA.

Regarding application of the minimum wage, Madelaine's rights are settled: from time to time, Madelaine paid some new or current employees, as appropriate, more than the minimum wage. If the Employer felt that certain employees were qualified, or doing a very good job, the Employer could elect to pay and at times did pay, more than the minimum wage. This was done with the knowledge and consent of the Union. There has never been an objection to that process. There has never been a grievance filed by the Union. There has never been anything complained of by the Union. The result is that there is a long bargaining history between these Parties, proving that Madelaine reserved the right in the applicable CBAs to pay minimum wage, or more than the minimum wage as circumstances dictated. And, as the minimum wage increased, Madelaine had the same right to pay the minimum wage with no requirement of differential pay.

ARGUMENT

POINT I

THE COMPLAINT SHOULD BE DISMISSED BECAUSE IT DOES NOT PROPERLY ALIGN ITSELF WITH THE CHARGE, AND NEITHER THE CHARGE NOR THE COMPLAINT WAS AMENDED.

The second page of the Charge contains the description of the 8(a)(5) allegation. The Charge states: "within the previous six months, the Employer failed and refused to bargain in good faith with the Union as the collective bargaining

representative of its employees by making unilateral changes in terms and conditions of employment."⁷ Underneath that language, the Charge states, "List Changes" followed by "Revoke Night Shift Differential."⁸ The Employer responded, and cooperatively supplied all of the information requested in response to the various requests and subpoenas of the General Counsel.

Following the investigation, the Complaint was issued. In Paragraph 8 of the Complaint, on page two (2) of five (5), "The General Counsel alleges, effective in employee paychecks dated January 11, 2018, Respondent eliminated the wage Shift Differential pay for employees working in the afternoon shift and evening shift." All concede those are two separate shifts and the afternoon shift significantly larger than the night (third) shift. The "afternoon shift", however, was not referred to in the charge. They are not the same thing.

We anticipate the General Counsel will argue in response that 'no harm, no foul', it is the same thing, that they do not have to be so specific in the charge. Madeleine vehemently disagrees. We submit that in a specific case like this where you have three defined shifts, and where the General Counsel refers to them as three defined shifts, where the issue is comparative wages among the three shifts, the Charge cannot simply state that the Employer violated the act because it did

⁷ We have disputed this contention as a matter of fact.

⁸ This contention is disputed as a matter of fact.

something in the night shift, and then allege in the Complaint that the afternoon shift is to be included as well. That violates due process.

This is a serious – and we believe – fatal flaw in this proceeding as to the afternoon shift.. In the US Supreme Court case, Labor Board v. Fant Milling Co., 360 U.S. 301 (1959), the Court held that “in finding a refusal to bargain collectively, the Board was not precluded from considering conduct on the part of the employer which was related to that alleged in the charge **and grew out of it while the proceeding was pending** before the Board.” (See National Licorice Co. v. Labor Board, 309 U.S. 350).

In Fant Milling Co., the Court held that, just as in National Licorice, the unilateral wage increase was “of the same class of violations as those set up in the charge...”. The Court held that the wage increase was “related to” the conduct alleged in the charge and developed as one aspect of that conduct “**while the proceeding was pending before the Board.**” Fant Milling Co. at 307 (emphasis added). We emphasize, the new conduct occurred while the NLRB case was ongoing, and is not the case here.

The Court made it clear that this decision to give the Board a more expansive interpretation of the charge, is not simply that the Board is, in the words of the Court of Appeals, to be left “carte blanche to expand the charge as they might please, or to

ignore it altogether.” Id. at 309 (quoting Labor Board v. Fant Milling Co., 258 F.2d 851, 856 (5th Cir. 1958)). There, the Court held that the Board is not precluded from “dealing adequately with unfair labor practices which are related to those alleged in the charge and **which grow out of them** while the proceeding is pending before the Board.” Id. at 309.

The applicable law therefore shows that it is the obligation of the Charge to be reasonably consistent with the Complaint. Inclusion is for alleged acts while a case is pending; not for actions before the original Charge was filed. We emphasize the willingness of the Board to expand the Charge usually applies to activities that occur after the filing of the charge, but within the scope of the charge, as opposed to two distinct events and facts. In this particular case, there are two distinct events and facts relating to allegations that there had to be some type of incremental pay for the afternoon shift. Therefore, at this time, the Employer moves to dismiss the Complaint in its entirety as to the afternoon shift.

POINT II

THE GENERAL COUNSEL HAS NOT MET ITS BURDEN THAT THERE WAS A BINDING PAST PRACTICE REGARDING SHIFT DIFFERENTIAL.

The General Counsel has the burden of proof of proving every element of its case. That is black letter law. In this case, that means the General Counsel must prove the existence of a past practice of wage differentials for the afternoon and night shifts. National Steel and Shipbuilding Co., 348 NLRB 320, 326(2006), enfd. Mem, 256 Fed Appx. 360 (D.C. Cir. 2007); Regency Heritage Nursing and Rehabilitation Center, 353 NLRB 1027(2009). Further, the Party being asked to honor it must be aware of it as binding. BASF Wyandotte Corp., 278 NLRB 173, 180(1980). The CBA 2010-2013 does not grant such shift differential. Thus, it can only be proved by a persuasive showing of past practice. Madelaine has always treated it as voluntary, not binding The General Counsel has, thus, utterly failed to meet its burden of proof.

The only evidence offered by the General Counsel to prove existence of a binding past practice was the hearsay testimony of the president of the Union, James Gangale (“Mr. Gangale”). In his testimony, Mr. Gangale claimed that he became aware of this so-called unilateral change by receiving a few phone calls from employees of the Employer. (TR 58-59) But, he never received those calls.

More specifically, the admittedly sarcastic Mr. Gangale stated “we had some, as you can imagine, some employees called us.” (TR 58-59). But, Mr. Gangale stated that he was not called directly. Rather, it was pure hearsay: Alma (Cruz), the Union representative who had responsibility with regard to the Employer, was the person called, and then she supposedly told him. That testimony is hearsay, and incredible. We do not know who allegedly complained. We do not know how many Employees complained. We do not know what they complained about. Alma was identified as in the hearing room. (TR 169). But, she did not testify. No excuse or reason was proffered why Alma, or the employees, could not testify. In opposition to this hearsay, is the clear testimony of Scott Wright, who testified the wage differential was voluntary. (TR 173).

David Reifer, who had reason and responsibility to know about all wage issues, including wage differentials, never even heard of the wage differential until this case started. (TR 244-245).

In Consolidated Communications Holdings, Inc., 366 NLRB 1, 154, 3-4 (2018), the Board set forth the established framework for proving a binding past practice that requires employee Proof, not presented here. There, the Board stated:

The Board has held that, “[u]nder the unilateral change doctrine, an employer’s duty to bargain under the Act includes the obligation to refrain from changing its employees’ terms and conditions of employment without first bargaining to impasse with the employees’

collective-bargaining representative concerning the contemplated changes.” Lawrence Livermore National Security, LLC, 357 NLRB 203, 205 (2011). The Act bars employers from taking unilateral action on mandatory bargaining topics such as rates of pay, wages, hours of employment and other conditions of employment. Garden Grove Hospital & Medical Center, 357 NLRB 653, 653 fn. 4, 5 (2011). It is well established that health benefits are mandatory bargaining topics. See, e.g., Mid-Continent Concrete, 336 NLRB 258, 259 (2001), enfd. 308 F.3d 859 (8th Cir. 2002). An employer’s regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment, even where such practices are not expressly set forth within a collective-bargaining agreement. Garden Grove Hospital, supra. **The party asserting the existence of a past practice bears the burden of proof on the issue; specifically, the evidence must show that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to reoccur on a consistent basis.** Palm Beach Metro Transportation, LLC, 357 NLRB 180, 183–184 (2011), enfd. 459 Fed. Appx. 874 (11th Cir. 2012) (emphasis added).

In DMI Distribution of Delaware, 334 NLRB 409, 411 (2001), the Board did not find a past practice when the policy of the employer giving bonuses was in effect for 11 years, but bonuses were only actually given to employees “a couple of times.” See B & D Plastics, Inc., supra (Board found it a random event rather than a past practice when, only three times in the past 5 years, an employer held cookouts for employees and gave the employees paid time off to attend these cookouts.) See also Exxon Shipping Co., 291 NLRB 489, 493 (1988). (Board found that when the union participated twice in government investigations regarding the possible death

of one of its members, 3 years apart, too remote in time and too intermittent in their occurrence to be a past practice especially when there was no union participation in three similar investigations).

The above case law provides some insight as to what constitutes a binding past practice. In DMI Distribution of Delaware, 334 NLRB at 411, the Board did not find a past practice when, over the course of an 11-year period, a certain practice on the part of the Employer was intermittent at best. In B & D Plastics, Inc., the Board found a random event as opposed to a past practice.

These cases all have a common theme pertaining to “consistency and frequency” for a long period of time when it comes to establishing a past practice. The criteria is the reasonable expectation of the employees, (Sunoco Inc., 349 NLRB 240, 244 (2007)), and not the vague hearsay testimony of a Union representative that some employees were disappointed. This is extremely important when, in the present case, hearing the testimony of Union president James Gangale, in which he stated “some of the employees called us”(TR 58-59), but that turned out to be inadequate and hearsay. Mr. Gangale could not provide any other testimony as to a basis for establishing the expectations of the employees. The General Counsel has provided no evidence of any grievances relating to a wage shift pay differential other than the current charge and Complaint. Therefore, the

General Counsel has not even come close to establishing and meeting its burden of proof as to a “consistent and frequent” past practice on the part of the Employer.

POINT III

ASSUMING ARGUENDO THERE WAS AN ENCFORCEABLE WAGE DIFFERENTIAL, THE MINIMUM WAGE INCREASE SUBSUMED ALL DIFFERENTIALS PREVIOUSLY INSTITUTED BY THE EMPLOYER.

When New York State decided to implement an aggressive minimum wage policy effective December 31, 2016, which really meant January 1, 2017, the minimum wage in New York City was increased to \$11.00, Madelaine has every right to assert its contractual, discretionary rights. Madelaine decided to enforce its rights. It did not have to renegotiate this right. Conclusively, it was largely in CBA 2010-2013, Article 8, Paragraph B. Madelaine did discuss and did try to deal with the Union, even though it did not have to. And Madelaine got nowhere. The parties were at an impasse.

Further, even in 2018, and later in 2019, There were already many employees as of January 1, 2017, earning more than the new minimum wage. Some were earning \$13.06 or \$14.00, some \$15.00, some \$18.00, some \$30.00 and so on. Those employees were not impacted by the increase and personally had differentials built in before 2017. They should not even be in this case at all. In

contrast, the claim from the General Counsel seems to be that everybody, even if they were earning greater than the minimum wage increase, should have gotten some type of increment increase, even though they already got it. Even though they were already making \$1.00, \$2.00, \$3.00, or \$5.00 more, as the minimum wage increased. That contention of the General Counsel is absurd on its face.

In short, the so-called unilateral change, to the extent that there even was one, could only apply to employees making less than \$13.00 as of January 1, 2018. Employees making \$13.06, for example, or \$13.01 or more, are not in this case.

Additionally, Madelaine contends that for all those employees who were making \$12.10 prior to the bump to \$13.00 already had differentials built into their wage. Those employees already received a 10% bump. When the employees went from \$12.10 to \$13.00, they had incorporated, into their wages, a prior 10% bump. So the best case scenario, for the General Counsel, in the Employer's view, is not that these employees now are obligated to be increased to \$14.30, but that these employees are to be increased to the difference between \$12.10 and \$13.00, \$0.90, with 10% of \$0.90 being \$0.09 increase as their "missing shift differential."

Therefore, even under the General Counsel's best case scenario, the maximum that any person who was increased to \$13.00 as a result of the January 1, 2018 minimum wage increase, could receive as the "missing shift differential" is

\$0.09, not \$1.30, because these same employees already received a \$1.10 increase the year before, and the employee is not entitled to a duplicative, and/or compounding 10% increase.

In relation to the actual night shift, there are no employees who were affected by the Employer's decision. At the relevant time in the night shift, there were approximately eleven employees in the night shift at that time. There were employees making \$16.25, \$16.83, \$17.00, \$19.12, \$17.00, and \$13.06. In fact, five of the six night-shift workers, Garcia (\$16.25 per hour), Pean (\$16.25 per hour), Ticona (\$16.83 per hour), Philogene (\$17.00 per hour), and Bolton (\$19.12 per hour), are above the new minimum wage by a factor of more than 10% per hour over \$13.00 per hour, i.e. \$1.30 per hour. (Ex GC 12; GC 13). Those five employees therefore, in any case, cannot have a claim, as they continue to be paid more than the minimum wage by a 10%-plus factor. Further, given that all other employees in the night shift were already making more than \$13.00, there was and could be no unilateral change. There was no change at all. Further, the payroll records will reflect the aforementioned numbers, one way or the other.

POINT IV

THE ONLY FAIR READING OF THE CBA IS THAT ALL THE EMPLOYEES WERE NEW HIRES AFTER 2010 AND THEREFORE MADELEINE HAD DISCRETION TO APPLY MINIMUM WAGE WITHOUT REGARD TO SHIFT DIFFERENTIAL.

We have detailed above that pursuant to CBA 2010-2013, the Employer purposely treated both returning employees and the literal new employees as “new employees.” Thus, the Minimum Wage Application of Article 8, Paragraph B applies.

CONCLUSION⁹

We have emphasized that the burden of proof is on the General Counsel to prove all phases of its case. Any failure in the house of cards topples the entire claim. Madelaine submits that the General Counsel has failed to meet its burden of proof for each and every alleged illegal claim asserted against Madelaine. The house of cards is lying flat on the floor.

In contrast to that failure, Madelaine has proved:

- The shift differential was a non-binding voluntary extension of benefits.

⁹ Madelaine incorporates all arguments made at Trial on the record as if stated herein at length.

- There is no credible, non-hearsay evidence on the record that the employees on the afternoon or night shifts relied on the alleged shift differential as a binding, past practice.
- Madelaine had the right, in its sole discretion, to apply the minimum wage to newly hired employees, or existing employees, even mid-contract.
- All Madelaine employees on all three shifts were, as a matter of contract and/or fact, new hires subject to the employer's minimum wage rights.
- Madelaine properly paid the \$13.00 minimum wage and \$15.00 minimum wage without obligation of a shift differential to afternoon or evening employees.
- The \$13.00 minimum wage "subsumed" a previously given \$1.10 differential, and therefore, the most Madelaine owes any employees for 2017 is \$0.09.
- Madelaine, in any event, without obligation, discussed and negotiated all these issues, with the Union, to impasse.
- The Complaint cannot be allowed to apply to afternoon employees, when no charge was filed covering afternoon employees.

We respectfully submit the Complaint should be dismissed.

Respectfully,

By: _____
/s/ ABRAHAM BORENSTEIN, ESQ.
BORENSTEIN MCCONNELL & CALPIN, PC

Dated: May 6, 2019

Served by electronic means and UPS overnight mail on the General Counsel and Union.

/s/ Abraham Borenstein, Esq.