UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31

DOUGLAS EMMETT MANAGEMENT, LLC

and **Cases 31-CA-206052 and 31-CA-211448**

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 501-AFL-CIO

RESPONDENT'S POST-HEARING REPLY BRIEF

Pursuant to an Order Granting Leave to File Reply Briefs issued by the Hon. Jeffrey D. Wedekind on July 18, 2019, Douglas Emmett, LLC ("Respondent" or "Douglas Emmett") files the following Reply Brief and respectfully requests dismissal of the above-captioned charges in their entirety.[1]

I. Introduction

599 days have passed since the International Union of Operating Engineers, Local 501 ("Union") filed Charge No. 31-CA-211448. In that time, the General Counsel has completed an investigation, issued a Complaint, investigated a charge against the Union, dismissed that charge, participated in a Hearing, and filed a Post-Hearing Brief. It has not, however, managed to articulate any cognizable theory explaining how Respondent's 2017-2018 wage increases and bonuses

[1] This Brief utilizes the following conventions: (JX-_) refers to Joint Exhibits offered and admitted into the record; (GC-_) refers to General Counsel Exhibits offered and admitted into the record; (UX-_) refers to Union Exhibits offered and admitted into the record; (RX-_) refers to Respondent Exhibits offered and admitted into the Record; and (GC Brief at __) refers to pages of the General Counsel's Post-Hearing Brief..

complied with its Section 8(a)(5) obligations, but nonetheless violated Section 8(a)(3). The General Counsel's Post-Hearing Brief leaves little hope for Day 600, or any day thereafter.

Specifically, the General Counsel's Brief suffers from the following deficiencies (all of which are fatal to its Section 8(a)(3) allegation), amongst others:

- The General Counsel does not even have its legal theory straight. At hearing, the General Counsel stated its theory rests upon *TXU Electric*, 343 NLRB 1404 (2004). Now, its Post-Hearing Brief does not even cite *TXU Electric* ***once.***

- The General Counsel devotes the heart of its Brief to arguing that a demonstrable past practice regarding wage increase and bonus amounts exists. Even incorrectly assuming the existence of the pattern the General Counsel asserts, a past practice would establish only a Section 8(a)(5) bargaining obligation, ***not*** unlawful motives under Section 8(a)(3).

- The General Counsel's Brief fails to meaningfully address the unrebutted record evidence that it implemented the wage increase and bonus amounts it chose ***because it believed Section 8(a)(5) required it to do so.*** Such a belief, even if mistaken, does not constitute an unlawful motive. Moreover, ***the General Counsel agrees that this belief was not mistaken***, because it has conceded Respondent complied with Section 8(a)(5).

- The General Counsel has simply failed to establish a non-discretionary past practice. The ***sheer volume of analysis*** the General Counsel's Brief requires to (unsuccessfully) jam the facts into its past practice box demonstrates that it cannot satisfy its burden of proof.

- Both parties conducted statistical analysis, resulting in one clear, yet "nuanced," difference in approach. As explained below, that difference further highlights the existence of discretion in Respondent's annual wage increase and bonus determinations.

The General Counsel's Brief fails at every step. Worse, its incomplete logic threatens to create an even more disconcerting fundamental failure: an internal inconsistency within Section 8 of the Act itself. The General Counsel argues an employer can violate Section 8(a)(3) of the Act through the very same actions it must take to comply with its duty to bargain under Section 8(a)(5). Congress intended no such paradox when it passed the Act in 1935, and neither Your Honor nor the Board can countenance such a result today.

II. The *Wright Line* Framework Provides a Laundry List of the General Counsel's Analytical Shortcomings Regarding Wage Increases and Bonuses.

The General Counsel insists Your Honor must apply the framework of *Wright Line*, 251 NLRB 1083 (1980), *enfd*. 662 F.2d 899 (1st Cir. 1981), *cert*. *denied* 455 U.S. 989 (1982) to its Section 8(a)(3) allegation. (GC Brief at 57–58, 61, 65). Respondent welcomes this approach.

A. The General Counsel Fails to Establish A *Prima Facie* Case Because It Does Not Demonstrate Two Factors Necessary for An Adverse Action.

The first threshold prerequisite for a *prima facie* case under *Wright Line* is that an adverse action occurred. *Lancaster Fairfield Community Hospital*, 311 NLRB 401, 403–04 (1993). Here, if the General Counsel cannot establish *both* that: (1) the implementation of the fruits of lawful bargaining can constitute an adverse action; and (2) Respondent's actions somehow harmed employees. The General Counsel accomplished neither result here, and its Brief fails to even address the absence of an adverse action.

B. The Evidence Demonstrates Compliance with the Act, Not Anti-Union Animus, Motivated Respondent's Actions.

Furthermore, the General Counsel's *prima facie* case requires a showing that unlawful animus substantially motivated the adverse action. *Wright Line* at 1089. Here, the only evidence in the record regarding Respondent's motives is its belief that the Act required implementation of the challenged increase and bonus amounts. (Tr. 403:22–404:1). While the General Counsel labors to advance alleged pre-election Section 8(a)(1) statements as evidence of animus, it fails to draw any causal nexus between such animus and Respondent's 2017-2018 wage increases and bonuses.

The General Counsel's burden at this stage requires particular emphasis in light of its voluminous and complex arguments regarding past practices. Nothing in Board law grants the General Counsel the latitude to manufacture a "past practice," rife with exceptions, statistical

weighting, and prorating, absent any documented reflection of such a policy in the record.[2] Douglas Emmett, not the federal government, possesses the right to promulgate and interpret its own policies. Consequently, Your Honor must hold the General Counsel to its high burden in attempting to create a policy out of thin air.

Moreover, Douglas Emmett's actions demonstrate that it did not violate the Act. Respondent complied with its duty to bargain and, as Director of Engineering Lutes explained without contradiction, implemented its last offer because that's what he understood the law required. (Tr. 403:22–404:1). This uncontradicted evidence of lawful motives overwhelms all of the General Counsel's assertions regarding animus. In *National Labor Relations Board v. Billen Shoe Company Co., Inc.*, 397 F.2d 801 (5th Cir. 1968), the Fifth Circuit discussed discipline of a union supporter and the potential that the employer may have been pleased to issue the discipline:

> When good cause for criticism or discharge appears, the burden which is on the Board is not simply to discover some evidence of improper motive, but to find an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one. The mere existence of anti-union animus is not enough. The fact that the employer may be pleased to effectuate the discharge does not mean that this was his primary motive. *See, NLRB v. Lowell Sun Publishing Co.*, 1 Cir., 1963, 320 F.2d 835, 842.

Here, even incorrectly taking as true the General Counsel's assertions regarding animus, this principle applies. Even if the General Counsel could show Respondent was pleased with the outcome of bargaining, such alleged animus – in light of Respondent's conceded compliance with Section 8(a)(5) of the Act – would not render the outcome of bargaining unlawful.

[2] In fact, employees' offer letters – stating that Respondent adjusts compensation on a discretionary basis – provide the only record evidence regarding written wage increase and bonus policies. (RX-2-5) (GX-4).

C. Even Absent Any Purported Animus, Respondent Implemented the Ultimate Wage Increase and Bonus Amounts Because the Union NEVER Made a Counter Proposal, and Section 8(a)(5) Required That Action.

Respondent's opportunity to overcome any purported *prima facie* case rests on its contention that it would have taken the same action even absent any unlawful motives. *NLRB v. Transportation Corp.*, 462 U.S. 393, 404 (1983). Here, Respondent's Section 8(a)(5) obligations, coupled with the Union's **failure to make any counter-proposal whatsoever**, *forced* Respondent to implement its last proposal at the normal time for implementation. *Daily News of Los Angeles*, 304 NLRB 511 (1991); *St. Mary's Hospital of Blue Springs*, 346 NLRB 776, 776 n.2 (2006); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), *enfd*. 15 F.3d 1087 (9th Cir. 1994); *Oneita Knitting Mills, Inc.*, 205 NLRB 500 (1973). In asserting Respondent cannot rebut its purported *prima facie* case, the General Counsel assumes that, absent anti-Union animus, Respondent would have violated Section 8(a)(5). Ironically, that assumption represents the precise converse of this case: the General Counsel asserts that Douglas Emmett's actions ooze animus, while it conceding Douglas Emmett complied with its duty to bargain.

The General Counsel's attempt to win such uphill battles at each stage of the *Wright Line* analysis requires it to come armed with both a clearly discernible past practice and on-point Board precedent. Its Post-Hearing Brief contains neither weapon. Indeed, as its abandonment of its prior legal theory (discussed below) demonstrates,, the center of its analytical line has already collapsed.

III. The General Counsel Lacks Any Applicable Precedent Supporting Its Contention that an Employer Can Violate Section 8(a)(3) by Acting to Comply with Section 8(a)(5).

A. The General Counsel Claimed at Hearing Its "Nuanced" Theory Relied on *TXU Electric*, But NEVER Cites That Case in Its Brief!

Despite failing to assert an 8(a)(5) allegation, the General Counsel devotes the heart of its Brief on this allegation to reviewing the Company's past practices regarding evaluations, wage increases, and bonuses. (GC Brief at 38–55). This approach contradicts its arguments at hearing. When asked by Judge Wedekind, "your theory is not that they are required to maintain the past practice?", the General Counsel responded with one word: "Exactly." (Tr. 392:4–7).

Instead, the General Counsel represented it would rely on "TXU [Electric] . . . 343 NLRB 1404. It was a 2004 case." (Tr. 393:5). The General Counsel explained:

> [i]n that particular case, [the Board] did not find an 8(a)(3), but they did analyze why 8(a)(3) violation was not found, because there was a lack of animus, and there was a full explanation of the type of reasons why the proposals that were traded were lower than what was historically given. So the General Counsel is relying heavily, of course, on this case law from the Board, and ***it is nuanced***, this argument, so I – . . . we would like to reserve our right to fully explain this in the brief[.]

(Tr. 391:6–19) (emphasis added).

Although the General Counsel's brief consists of 72 pages, none of those pages cite *TXU*. Not one single time! Thus, the General Counsel essentially concedes no authority supports its theory. Despite stipulating at hearing that Douglas Emmett complied with its duty to bargain, it advanced *TXU* as the magic bullet that could reconcile actions that admittedly complied with Section 8(a)(5) and yet somehow violated Section 8(a)(3) at the same time. Apparently, upon further review of its Zapruder film, the General Counsel concluded that Section 8 does not contain a second shooter.

If the government cannot even explain *how* it believes a private party has violated the law, then it should not force that party to defend through litigation such amorphous allegations against it. Moreover, if the government later decides that even its "nuanced" theory does not hold water, it should immediately drop those allegations. At most, the General Counsel's continued pursuit of 31-CA-211448, despite abandonment of the core of its position, borders on an abuse of prosecutorial discretion. At least, Your Honor must dismiss that charge before the General Counsel's mistake imposes further unnecessary costs upon Douglas Emmett.

B. None of the Cases Cited by the General Counsel Support a Theory that Compliance with Section 8(a)(5) Can Create a Section 8(a)(3) Violation.

Instead of *TXU*, the General Counsel's Brief cites six cases in support of its argument that the Act permits it to walk this analytical tight rope. (GC Brief at 64–65). ***None*** of those cases found a Section 8(a)(3) violation based on conduct that complied with Section 8(a)(5) bargaining obligations. In three such cases, the Board found Section 8(a)(3) violations, but *only where* the Board also found a Section 8(a)(5) violation based upon the same conduct. *Covanta Energy Corp.*, 356 NLRB 706 (2011); *L & M Ambulance Corp.*, 312 NLRB 1153 (1993); *United Aircraft Corp.*, 199 NLRB 658 (1972) *enfd*. in relevant part 490 F.2d 1105, 1109–10 (2d Cir. 1973).

In two others cited by the General Counsel, the Tenth Circuit in one case and the Board in another *rejected* both Section 8(a)(3) and 8(a)(5) allegations. *Phelps Dodge Min. Co., Tyrone Branch v N.L.R.B.*, 22 F.3d 1493 (10th Cir. 1994); *Stone Container Corp.*, 313 NLRB 336 (1993). In fact, *Stone Container* stands for the propositions that: (1) discrete events such as annual "increases c[an] not await an overall impasse in negotiations[;]" (2) an employer must remain willing to bargain the amounts of such issues; and (3) it must implement its last offer to the union absent a counter-proposal. *Id*. at 336. There, as here, the union failed to make a counter-proposal to the employer's annual wage increases offer (of no increase). Far from bridging the General

Counsel's analytical gap, the nearly identical facts of *Stone Container* resulted in no violation *of any type*.

Finally, in the last case cited by the General Counsel, the Board found a Section 8(a)(5) violation and stated, "[w]e find it unnecessary to pass on the judge's further finding that this unlawful change also violated Sec. 8(a)(3) because this additional finding would not materially affect the remedy." *United Rentals*, 349 NLRB 853 (2007). Such authority fails to even remotely establish that conduct establishing compliance with Section 8(a)(5) can itself create an independent Section 8(a)(3) violation.

Unable to find any authority directly supporting its analytical contradictions, the General Counsel asks Your Honor to cobble together a violation from disconnected and inapposite cases. None of those cases shed any light on the "nuanced" positions it has adopted here. Thus, the General Counsel seeks the creation of new Board law. The Board has held, however, that an Administrative Law Judge must rely upon *existing* Board precedent. *Pathmark Stores, Inc.*, 342 NLRB 378, 378 n.1 (2004). As a result, Your Honor must reject whatever theory the General Counsel now pursues.

IV. Even Incorrectly Assuming *Arguendo* the General Counsel Could Establish a Past Practice Regarding Prior Wage Increases and Bonuses, Such a Past Practice Would Relate Only to Section 8(a)(5), Not 8(a)(3).

A. The General Counsel's Brief, Like Its Legal Theory, Conflates Section 8(a)(5) Concepts with Questions of Motivation under Section 8(a)(3).

Nothing in the General Counsel's Brief solves the fundamental problem that its focus on a purported "past practice" implicates *the wrong subsection of Section 8*. Simply put, if the General Counsel could show Respondent deviated from non-discretionary past practices, that deviation would violate Section 8(a)(5), not 8(a)(3). The General Counsel can argue over past practices as much as it desires, but no such arguments alter the fact that only Respondent's *motives* bear on the

Section 8(a)(3) analysis. Here, Director of Engineer Robert Lutes testified, without contradiction, that Respondent implemented its last bargaining proposals on wage increases and bonuses because he believed "we were required to." (Tr. 403:22–404:1).

Nonetheless, the General Counsel advances Section 8(a)(5) arguments, even while conceding that Respondent complied with that Section of the Act. For example, its Brief argues:

> To date, Respondent has declined to give an explanation to the Union why it decided on a 1% wage increase and 2% bonus to all Unit employees in 2017. *See L & M Ambulance Corp.*, 312 NLRB 1153, 1157 (1993) (Board found an 8(a)(3) violation where employer offered no valid reason for the change and had other recent unfair labor practices). Given the totality of these facts, unlawful motivation should be inferred in Respondent's decision to take adverse action against the Unit employees.

(GC Brief at 61).

Nothing about "the totality of these facts" can lead to an inference of unlawful motives. Section 8(a)(3) does not impose an obligation on employers to explain their bargaining proposals. In *L & M Ambulance*, the Board affirmed an ALJ Decision which found *both* Section 8(a)(5) and Section 8(a)(3) violations. The Judge, in analyzing the Section 8(a)(5) allegation, noted, "no economic defense was raised to this change." That rationale echoes the General Counsel's arguments at hearing that Respondent did not cite any "economic constraints or exigency" in bargaining. (Tr. 44, 49).

The question of whether a party provided reasons for its proposals pertains to overall bad faith bargaining allegations. *See e.g., Rescar, Inc.*, 274 NLRB 1 (1985). Similarly, a party's reliance on "economic exigencies" affects unilateral change allegations. *See e.g., RBE Electronics of S.D., Inc.*, 320 NLRB 80, 82 (1995). Neither concept has any bearing on Section 8(a)(3) analysis. Nonetheless, the General Counsel continues to advance Section 8(a)(5) arguments in direct contradiction of its own concession that Respondent complied with Section 8(a)(5).

B. The General Counsel Misstates the Record Evidence Regarding Bargaining in an Attempt to Warp Compliance with Section 8(a)(5) into Unlawful Conduct under Section 8(a)(3).

The General Counsel's representations regarding Respondent's bargaining conduct "to date" on Page 61 of its Brief (above) fall far outside the record evidence. The record only contains evidence of the parties' bargaining exchanges through December 21, 2017. (JX-12(a-j)). Thus, the General Counsel's comment on bargaining conduct "to date" improperly exceeds the scope of the record. Furthermore, the record itself reflects no counter offers from the Union. (JX-12). Due to the Union's refusal to engage in the bargaining process, Respondent possessed no obligation (or logical purpose) to discuss the reasons for its proposals.

The General Counsel's Brief also substantially misconstrues the facts regarding Respondent's proposals in bargaining. It claims:

> In its November 17, 2017 email, Counsel Adlong initially proposed a 0% wage increase to the Union writing that Respondent "currently plans to bargain those [wage] increases with the union as part of the employees' overall economic package rather than piecemeal negotiations on economic issues. J Ex. 12(a) (Vol. 2 pdf, 105). Respondent maintained this same position until December 11, 2017, when it revised its propos[al] to a 1% wage increase. J Ex. 12(f) (Vol. 2 pdf, 123).

(GC Brief at 64).

The General Counsel appears to cast blame on Respondent for maintaining its initial proposal, despite the absence of any counter-proposal. In fact, when Responded increased its offer on December 11, 2017, it did so by ***bargaining against itself***. The General Counsel disingenuously fails to mention that, as in *Stone Container*, the Union never made any counter-proposal. Taking even more affirmative steps to engage in bargaining than the employer in *Stone*

Container, who committed no violation, Respondent here proactively bargained against itself in an unsuccessful attempt to obtain a counter-proposal.[3]

All of these misrepresentations regarding the bargaining process lead the General Counsel to its sole attempt to relate purported "past practices" and other bargaining concepts back to its Section 8(a)(3) allegation:

> By withholding or reducing the Baseline Policy of 3% wage increases and 5% bonuses for Unit employees, Respondent engaged in conduct that was inherently destructive of important employee rights.

(GC Brief at 64–65) (citing *United Aircraft Corp.*, 199 NLRB 658, 662 (1972) *enfd*. in relevant part 490 F.2d 1105, 1109–10 (2d Cir. 1973); *Covanta Energy Corp.*, 356 NLRB 706 (2011).

One cannot help but wonder: inherently destructive of ***what*** rights? Surely the General Counsel cannot refer to Section 7 rights. Respondent can hardly imagine conduct more consistent with employees' Section 7 rights than bargaining with their union and implementation of the results of that bargaining! The "inherently destructive" theory applied in *United Aircraft* and *Covanta* because those employers ***violated Section 8(a)(5)*** through the same conduct challenged under Section 8(a)(3). Here, the General Counsel's manipulation of the record evidence does not alter Respondent's undisputed compliance with Section 8(a)(5). Respondent acted out of a desire for such compliance in December 2017. This lawful motive requires rejection of the Section 8(a)(3) allegation, regardless of the General Counsel's flawed past practice claims.Moreover, even putting aside the *prima facie* case analysis, the General Counsel's past practices claims have no analytical impact on Douglas Emmett's legitimate business reason (compliance with Section 8(a)(5)) for its actions.

[3] It is also worth noting that, like the employer in *Stone Container*, Respondent's initial 0% wage increase proposal represented only a starting offer that the union never countered.

C. The General Counsel Impermissibly Seeks an Adverse Inference Based on the Deficiencies in Its Own Legal Theory.

The General Counsel attempts to prove its alleged Section 8(a)(3) violation by claiming that Douglas Emmett did not present witnesses to describe all levels of its wage increase and bonus process. (GC Brief at 68). This request for an adverse inference, however, represents only a concession that the General Counsel failed to meet its burden of proof. Respondent need not cover every aspect of past practices when the General Counsel has advanced only a Section 8(a)(3) allegation against it. The unrebutted evidence in the record shows that compliance with Section 8(a)(5) motivated Respondent's wage increase and bonus decisions. (Tr. 403:22–404:01). Such lawful motives provide a complete defense to the General Counsel's Section 8(a)(3) allegation.

The General Counsel, not Respondent, claims past practices are relevant to this case. If the General Counsel wished to examine an executive with knowledge of high-level decisions in support of its theory, it could have utilized its subpoena authority. Instead, the General Counsel failed to call a witness for testimony relevant *only to* its own theory of a violation, not to Respondent's defense. Such circumstances cannot possibly warrant an adverse inference against Respondent. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (finding Judge abused his discretion by drawing an adverse inference from the respondent's failure to call a manager whose testimony was unnecessary to its defense).

Respondent possesses no obligation to present its case in accordance with the General Counsel's flawed theories. Moreover, the documentary evidence demonstrating significant variation in wage increase and bonus amounts says more than any witness ever could. (JX-7, 8). Indeed, that evidence makes clear the General Counsel cannot even show a past practice, which eviscerates its ability to establish a *prima facie* case. As a result, Your Honor cannot grant the General Counsel's request for an adverse inference. Instead, this acknowledgement of the absence

of evidence related to the General Counsel's theory further demonstrates it cannot meet its burden of proof.

V. The General Counsel Fails Even to Satisfy the Factual Predicate of Its Own Deficient Theory Because the Data Establish No Defined Past Practice on Wage Increases and Bonuses.

A. The General Counsel's Articulation of Respondent's Past Practice Relies Upon Imprecise Standards Such As, "At Least," "Above," and Rough Prorating.

Page 42 of the General Counsel's Brief provides the clearest articulation Respondent has yet received of the past practice the General Counsel asserts, but its explanation leaves much to be desired. That page describes the Brief's summary table (Table 2) as "demonstrat[ing] that Respondent issued wage increases and bonuses **at, above, or prorated** percentages of the Baseline Policy [the General Counsel's own shorthand for 3% wage increases and 5% bonuses] to the vast majority of its Unit employees; 41 out of 45 cases[.]" (GC Brief at 42) (emphasis added). This description, even aside from the fact that it contains far more detail than typical past practices such as, "x% every year," contains so much internal imprecision as to defeat itself.

The General Counsel's use of the terms, "at, above, or prorated," acknowledges that ***the precise amount each employee receives is subject to discretion***, and, therefore, requires bargaining. *Stone Container*, 313 NLRB at 336; *St. Mary's Hospital of Blue Springs*, 346 NLRB at 776 n.2. Indeed, the General Counsel says nothing about whether any employees, under its view of the past practice, should have received ***more*** than 3% wage increases or 5% bonuses in 2017-2018, how Respondent should have identified any such employees, or precisely how much Respondent should have granted those employees.

Worse, the General Counsel's articulation of the past practice does not stop there. In acknowledgment of the facts showing wide variation in annual wage increases and bonuses, the General Counsel then adds caveat after caveat to its articulation of the past practice:

> In the case of the two mid-year raises/promotions, Respondent utilized a weighted average of the Unit employees to calculate a 5% bonus for their respective year. In the case of the ten mid-year hires or leaves of absences, Respondent still issued at least the 3% wage increase and 5% bonus, but simply prorated to account for the percentage of the year that Unit employee actually worked at the Woodland Hills Facilities. In the case of the three low performance reviews, consistent with the Baseline Policy, the Unit employees did not receive the baseline 3% wage increase and 5% bonus.
>
> There were only two categories where Respondent did not issue the Baseline Policy to Unit employees at Woodland Hills Facilities. The first category included a Unit employee who was demoted while the other negotiated a higher raise in exchange for no bonus. That leaves only two unexplained situations in a four-year window where a Unit employee's annual wage increase or bonus was not consistent with the Baseline Policy.

(GC Brief at 42–43).

So, in addition to the "Baseline Policy," the General Counsel *also* asserts Respondent's past practice includes (based upon only a handful of examples for each) exceptions for: (1) mid-year promotions; (2) mid-year hires; (3) leaves of absence; (4) low performance reviews; (5) demotions; and (6) other salary negotiations. Even with all those exceptions, the General Counsel still leaves two examples unexplained.

Based on its articulation of the past practice, the General Counsel asks Your Honor to find that a hard and fast rule existed, but: (1) Respondent only established minimums rather than precise amounts; (2) six types of exceptions to the rule existed; and (3) sometimes, for unexplained reasons, neither the rule nor its exceptions applied. On the other hand, Respondent offers the far superior (and simpler) explanation that its annual wage increase and bonus determinations involved the use of discretion, and thus required bargaining, which it undisputedly conducted in

compliance with Section 8(a)(5). The fact that the documentary evidence supports only Respondent's explanation should leave no doubt as to the correct view. (RX-2–5) (GX-4).

B. Because the General Counsel's Articulation of Respondent's Past Practice Acknowledges the Use of Discretion, and Therefore the Need for Bargaining, It Walks Down a Dead-End Road the Board Encountered Five Decades Ago.

The General Counsel's acknowledgment of discretion, and therefore the need for bargaining, within its own "at, above, prorated" articulation of past practices leads to an inevitable and insurmountable round block. Its theory rests upon its dissatisfaction with the ***results*** of bargaining that occurred pursuant to Respondent's Section 8(a)(5) obligation. According to the General Counsel, the purported "Baseline Policy" also set a "Baseline" for bargaining. The Act, as interpreted by the Supreme Court, does not permit the Board to establish any such minimum bargaining outcomes.

In other words, the General Counsel acknowledges Section 8(a)(5) required Respondent to bargain, but also asserts Section 8(a)(3) prohibited it from proposing any amounts below 3% wage increases and 5% bonuses (lest the Union fail to respond, thus leaving that proposal as the fruits of bargaining). Nearly 50 years ago, the Supreme Court unequivocally prohibited the Board from imposing substantive bargaining outcomes. *H.K. Porter v. NLRB*, 397 U.S. 99 (1970). By acknowledging the existence of discretion *within its own articulation of the past practice*, the General Counsel has doomed its Section 8(a)(3) theory to crumble at the venerable feet of *H.K. Porter*.

C. The Sheer Volume of Analysis the General Counsel Relies Upon in Its Attempt to Establish a Past Practice Demonstrates the Absence of Such Historical Standards.

Not counting its review of evaluation scores, the General Counsel's attempt to establish a past practice spans ***eleven pages*** of its Brief (pages 45–55) and uses ***six different tables***. If

Respondent truly possessed a definitive past practice, then the General Counsel would not have required such in-depth analysis to demonstrate it.

The number of examples requiring additional explanation for deviations from the General Counsel's "Baseline Policy" overwhelm its contentions. Based upon the General Counsel's own tables, the number of exception explanations necessary for increases below 3% and bonuses below 5% break down each year as:

Wage Increases

Year (Unit Size)	Exceptions Requiring Explanation	% of Bargaining Unit
2014 (10)	1	10%
2015 (10)	2	20%
2016 (15)	9	60%
2017 (19)	5	26%

Bonuses

Year (Unit Size)	Exceptions Requiring Explanation	% of Bargaining Unit
2014 (10)	1	10%
2015 (10)	3	30%
2016 (15)	8	53%
2017 (19)	9	47%

A review of the tables above show that, for at least the last three years, exceptions to the General Counsel's "baseline" theory applied to at least 20% of the Unit for both wage increases and bonuses. This volume of exceptions shows no uniform policy could have applied.

Furthermore, these exception counts rest upon the General Counsel's dubious approach of ignoring exceptions in which an employee received *greater than* a 3% wage increase or a 5% bonus. Factoring in these additional exceptions, which the General Counsel does not even attempt to address, the absence of any definitive past practice grows even clearer:

Wage Increases

Year (Unit Size)	Exceptions Requiring Explanation	% of Bargaining Unit
2014 (10)	3	30%
2015 (10)	3	40%
2016 (15)	9	60%
2017 (19)	10	53%

Bonuses

Year (Unit Size)	Exceptions Requiring Explanation	% of Bargaining Unit
2014 (10)	1	10%
2015 (10)	4	40%
2016 (15)	9	60%
2017 (19)	10	53%

The tables above demonstrate a point of vital importance. ***Even under the General Counsel's theory, Douglas Emmett needed to bargain*** because the possibility existed that employees could have received more than the so-called "baseline." The General Counsel can hardly claim, under the dictates of *H.K. Porter* discussed above, that an employer must bargain about giving more potential money to employees, but that the Act also sets a minimum floor on the outcome of that bargaining.

Moreover, the General Counsel's arguments regarding these exceptions involve convoluted calculations of "weighted average hourly wages," "weighted average" bonus amounts, and prorations based upon uneven blocks of time. (GC Brief at 42–55). Still, its numbers do not universally reach the precise 3% increase and 5% bonus outcomes the General Counsel's theories rely upon. Meanwhile, for some exceptions, the General Counsel ceases its analytical contortions, throws up its hands, and concedes the absence of any potential explanation for deviations from the asserted past practice. (GC Brief at 42, table 2, p. 49, 54–55).

These analytical machinations demonstrate the non-existence of the very "past practice" they purport to demonstrate. If a "past practice" requires so much explanation, for so many exceptions, and still does not yield uniform results, then it is not a definitive "past practice" at all.

Again, its inability to establish a past practice dooms the General Counsel's attempt to establish a *prima facie* case. Even if Your Honor somehow finds a past practice exists, the General Counsel's argument stops there. The General Counsel does nothing to address the simple legitimate business reason Douglas Emmett advances for its actions: compliance with Section 8(a)(5) under all existent Board law.

VI. The Parties' Briefs Reflect a Fundamental Disagreement on the Relevant Evaluation Scores, and that Disagreement Further Demonstrates the Discretionary Nature of Respondent's Wage Increases and Bonuses.

Your Honor will notice that Respondent's Post-Hearing Brief states, "Furthermore, the available data is far too small for the General Counsel to perform any analysis establishing a set formula or past practice. For example, the complete list of years in which employees received less than a 3.0 evaluation score includes only ***nine*** examples[.]" (Respondent's Brief at 12) (emphasis in original). In contrast, the General Counsel's Brief states, "In the five year period between 2013 and 2017, Respondent has issued an overall performance review of less than 3 only ***four*** times." (GC Brief at 39) (emphasis added).

Initially, Respondent notes the General Counsel's position that only **four** examples of evaluation scores under 3 have occurred validates Respondent's fundamental point. How can the General Counsel assert a "past practice" based on the purported rewards for achieving at least a score of 3, when it argues that **employees failed to reach that mark on only four occasions?** Such a small data set hardly provides the basis for conclusions meaningful enough to meet the General Counsel's burden of proof.

Moreover, even putting aside the small data set's impact on the General Counsel's inability to meet its burden of proof, the explanation for this discrepancy provides further insight into the deficiencies of its approach. The difference in these figures results from Respondent's use of the employees' "Average Rating" in their evaluations (the average, to the tenth decimal point, of all categorical scores). In contrast, the General Counsel has chosen to rely upon the "Overall" Rating listed on evaluations. In most instances, this distinction makes no difference because Average Ratings roughly round to the nearest whole number. (JX-9). The difference in the parties' figures here, however, demonstrates that ***even the rounding process involves discretion.***

By way of illustration, the following table reflects the four instances in which the parties agree an employee received less than a 3.0 evaluation score:

Name	Eval. Year	Rate Inc.	Bonus %	Resp. Eval. Score	GC Eval. Score	Eval. Pg. (JX-9)
Santos, Edwin	2016	-17.54%	3.01%	2.60	2	9(q), pg. 9
Antonio, Jose M.	2015	0.00%	0.00%	2.70	2	9(a), pg. 6
Johnson, Cary W.	2015	0.00%	0.00%	2.70	2	9(s), pg. 6
Santos, Edwin	2014	-4.97%	0.00%	2.90	2	9(q), pg. 3

Additionally, the below table illustrates the five instances in which the parties disagree as to whether the employee received less than a 3.0 evaluation score:

Name	Eval. Year	Rate Inc.	Bonus %	Resp. Eval. Score	GC Eval. Score	Eval. Pg (JX-9)
Valadez, Cesar F.	2013	-3.09%	2.51%	2.70	3	9(k), pg. 1
Salazar, Fernando	2013	3.00%	5.02%	2.90	3	9(p), pg. 1
Salazar, Fernando	2014	3.00%	5.02%	2.90	3	9(p), pg. 3
Valadez, Cesar F.	2015	3.00%	5.02%	2.90	3	9(k), p. 7
Montenegro, Alej.	2016	11.80%	0.00%	2.90	3	9(h), p. 15

These examples show **no pattern exists** to govern when an Average Rating is rounded up or down to reach an Overall Rating. For example, Responded rounded a 2.7 up to a 3 for Cesar Valadez in 2013, but down to a 2 for both Antonio and Johnson in 2015. Meanwhile, on four

occasions, Respondent rounded a 2.9 Average Rating up to a 3 Overall Rating, but rounded it down to a 2 for Edwin Santos in 2014.

So, after all of the General Counsel's analysis regarding hire dates, transfers, leaves of absence, promotions, demotions, and other special circumstances, the parties must now take variation in *rounding* into account? At a certain point, enough is enough. The General Counsel cannot create a "explanation" for dozens upon dozens of exceptions, leave other variations unexplained, and still assert a past practice (which somehow implicates Section 8(a)(3) but not Section 8(a)(5)). Eventually, the exceptions swallow the "rule."

As one of its exceptions, the General Counsel acknowledges an employee negotiated an individual approach to wage increases and bonuses with Respondent. (GC Brief at 43). The mere possibility of such an individualized negotiation demonstrates the discretionary nature of Respondent's wage increases and bonuses. Additionally, the General Counsel's blessing of individualized negotiations pre-representation does not comport with its challenge to Respondent's reliance on the collective bargaining process now.

Furthermore, even examination of the wage increases and bonuses within the groups of the parties' four agreements on one hand, and five disagreements on the other, shows variation and discretion. Within the four examples where the parties agree the employee scored less than 3.0, Edwin Santos received a 4.94% wage decrease in 2014 and a 17.54% decrease in 2016, while neither Jose Antonio nor Cary Johnson saw any increase in 2015. No pattern explains these variations. Meanwhile, regarding bonuses, Santos received 3% in 2016, while none of the others received a bonus in these years. Again, no pattern can explain these results.

Similarly, even accepting as true the General Counsel's position that the five instances in which the parties disagree should count as 3.0 evaluation scores, no pattern emerges within that

group either. For example, Cesar Valadez received a 3.09% wage decrease and 2.51% bonus in 2013. Then, in 2016, Alejandro Montenegro received an 11.8% increase with no bonus. Respondent's exercise of its discretion provides the only reasonable explanation for these results.

No matter how many turns the General Counsel makes, all roads lead back to discretion. Even when the parties disagree about an aspect of the numbers, that disagreement itself illustrates the presence of discretion. The Act, as interpreted by the Board, teaches that bargaining is the mechanism for resolution of issues such as discretionary annual wage increase and bonus amounts. Respondent, as the General Counsel concedes, bargained in good faith over these issues. The General Counsel cannot now use Section 8(a)(3), or incomplete statistical analysis, as a sword against Respondent merely because it does not like the results created by the Union's inaction.

/ / /

/ / /

/ / /

VII. Conclusion

For all of the reasons stated above, as well as the reasons articulated in Respondent's Post-Hearing Brief, Respondent has not violated the Act in any manner. As a result, Respondent respectfully requests dismissal of the Charges in their entirety.

Respectfully submitted this 29st day of July, 2019.

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

/s/ *Daniel A. Adlong*
Daniel A. Adlong
Harrison C. Kuntz
Park Tower, Fifteenth Floor
695 Town Center Drive
Costa Mesa, CA 92626
Telephone: (714) 800-7902
Facsimile: (714) 754-1298
Daniel.Adlong@ogletree.com
Harrison.Kuntz@ogletree.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29st day of July 2019, this **RESPONDENT'S POST-HEARING REPLY BRIEF** was filed electronically and service copies sent via electronic mail to:

Adam N. Stern, Esq.
laboradam@aol.com
The Myers Law Group
9327 Fairway View Place, Suite 100
Rancho Cucamonga, CA 91730-0969

Counsel for Charging Party
International Union of Operating
Engineers, Local 501, AFL-CIO

Mori P. Rubin, Regional Director
mori.rubin@nlrb.gov
Yeerik Moy
Yeerik.Moy@nlrb.gov
Nayla Wren
Nayla.Wren@nlrb.gov
Jake Yochman
Jake.Yocham@nlrb.gov
National Labor Relations Board, Region 31
11500 West Olympic Blvd., Suite 600
Los Angeles, CA 90064

Daniel A. Adlong