

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Division of Administrative Law Judges  
San Francisco, CA**

**DOUGLAS EMMETT MANAGEMENT, LLC**

**And**

**Cases: 31-CA-206052**

**31-CA-211448**

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

**COUNSEL FOR THE GENERAL COUNSEL'S  
POST-HEARING REPLY BRIEF**

To: The Honorable Jeffrey D. Wedekind  
Administrative Law Judge  
National Labor Relations Board  
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## **I. INTRODUCTION**

This case was tried before the Honorable Judge Jeffrey D. Wedekind (“ALJ”) from April 23 through April 26, 2019 in Los Angeles, California, based on an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing issued by the Regional Director for Region 31 on March 20, 2018 (“Consolidated Complaint”). GC Ex. 1(x).<sup>1</sup> General Counsel and Respondent filed their respective post hearing briefs on May 31, 2019. By Order dated July 18, 2019, ALJ Wedekind permitted the parties to file reply briefs by July 29, 2019.

Counsel for the General Counsel respectfully submits this reply brief addressing Respondent’s arguments concerning the allegation that it violated Section 8(a)(3) and (1) of the Act by reducing the amount of employees’ customary wage increases and annual bonuses in retaliation for the employees’ selection of the Union as their collective bargaining representative. With respect to the numerous 8(a)(1) allegations in this case, Counsel for the General Counsel sees no need to reply to those portions of the Respondent’s post hearing brief.

## **II. RESPONDENT’S BRIEF FAILS TO REFUTE THE EXISTENCE OF A BASELINE POLICY FOR ANNUAL WAGE INCREASES AND BONUSES**

### **A. Introduction**

#### **1. Respondent’s Post Hearing Brief Is Flawed and Ignores the Evidence in the Record**

In Respondent’s Post Hearing Brief, it argues that it had no policy of granting set wage increases or bonuses, but rather that it exercised its discretion in determining the amount of employees’ wage increases and bonuses. Respondent provided no testimony from any

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<sup>1</sup> Citations to the record are as follows: Transcript (Tr. Page: line/witness); General Counsel Exhibits (GC Ex. #, page:¶ or line); Respondent Exhibits (R Ex. #, page:¶ or line); Joint Exhibits (J Ex., page:¶ or line (Vol. pdf, page)); General Counsel Brief (GC Brief at page); and Respondent Brief (R Brief at page).

management official who purportedly exercised discretion to determine any unit employee's bonus or wage increase for any particular year. Rather, Respondent called Property Managers Santiago and Walton who only made recommendations as to whether an employee should receive wage increases and an annual bonus at one of three levels: baseline, above baseline, or below baseline. GC Ex. 5; Tr. 617:14-20, 627:6-13. "After that, Property Managers receive the final wage increase and bonus amounts from upper management, and then present them to the employees at their evaluation meetings." R Brief at 20.

Notably, the record includes no evidence on how "upper management" exercised its purported discretion in determining the amounts of employees' wage increases and annual bonuses, before communicating these amounts to the Property Managers. Had Respondent's upper management officials routinely exercised discretion in determining employees' wage increases and annual bonuses, this easily could have been established through the testimony of such officials. Instead, Respondent elected to forego presenting direct evidence of this purported discretion and instead argues that Counsel for the General Counsel has failed to meet its burden of proving the existence of a policy or practice. Respondent rests its defense on its assertion that the examination of the data "establishes the absence of any set formula for wage increases and bonuses." R Brief at 20.

A cursory examination of the *relevant* data, however, clearly establishes the existence of Respondent's Baseline Policy. Focusing on the four year period before the December 2017 lowered wage increase and annual bonus amounts, the data reflect 45 instances where Respondent issued performance reviews for work performed at the Woodland Hills facilities: six in 2013; eight in 2014; 13 in 2015; and 18 in 2016. GC Brief at 42, Table 2. Of those 45

instances, 41 were consistent with the Baseline Policy. GC Brief at 42-50 and Tables 2 through 6.

In its brief, Respondent relies on a variety of charts, graphs and a correlation analysis in support of its argument that Respondent exercised discretion when granting wage increases and annual bonuses. However, this amounts to little more than statistical smoke and mirrors, because its analysis of the data is fundamentally flawed in several regards. As described more fully below, Respondent uses the “average rating” rather than the employees’ “overall rating” in its various charts; Respondent includes wage increase and bonus data for the period 2008 to 2013 without corresponding evaluation data; Respondent does not distinguish between data pertaining to employees who were working at the Woodland Hills facilities and those who were working at other facilities; and Respondent ignores the fact that it prorated wage increases and bonuses for employees based on the percentage of the year they worked in the Woodland Hills facilities. Respondent’s attempts to obfuscate its clear past practice and should be rejected.

## **2. In the Post-Hearing Briefs, General Counsel and Respondent Organized the Same Wage Increase and Bonus Data Differently**

There is no dispute that when employees receive their performance evaluation in December of each year, they are also informed of the amount of their annual bonus for that year and their wage increase for the following year. For example, in December 2013, employee Jose Antonio received an overall performance rating of three, a 3% raise, and a 5% bonus.<sup>2</sup> The performance rating and bonus both occurred in 2013. The wage increase took effect the

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<sup>2</sup> Derived from the following sources: Overall Rating: derived from J Ex. 9(a) through (t); Raise %: derived from J Ex. 7, 2 (Vol. 1 pdf, 25); and Bonus %: Calculated by dividing: Bonus Amount (derived from J Ex. 8, 1-4 (Vol. 1 pdf, 26-30)) by Annualized Salary (J Ex. 7, 1 (Vol. 1 pdf, 23)).

following year, 2014. Counsel for the General Counsel included this data in *Table 3: Summary of 2013 Wage Increases and Bonuses of 10 Unit Employees*, despite the fact that the wage increase took effect in 2014. GC Brief at 44, Table 3. Counsel for the General Counsel did this because employees are informed of their wage increase in December of the year prior to the year the wage increase goes into effect. In contrast, Respondent included the same data in its *Employee-by-Employee and Year-by-Year Chart* in the row with the “rate date” of January 1, 2014, despite the fact that the bonus and performance appraisal occurred in 2013.<sup>3</sup> R Brief at 6, line 11 of Chart. Accordingly, data summarized in the Counsel for the General Counsel’s brief in tables labeled 2013, 2014, 2016 and 2016 are reflected in Respondent’s chart with rate dates of 2014, 2015, 2016 and 2017, respectively.

**B. In Its Post Hearing Brief, Respondent Does Not Address Employees’ Overall Ratings**

With respect to the employees’ evaluation score, Counsel for the General Counsel’s theory of the case is that when an employee’s **overall rating** on the performance evaluation is three or higher, the Baseline Policy is to grant wage increases and bonuses at 3% and 5%, respectively. Overall ratings are whole numbers: 2 is “Improvement Needed,” 3 is “Meets Requirements,” and 4 is “Exceeds Requirements.” J Ex. 9 (a)-(t). Employees’ overall ratings are reflected in Tables 1, and 3 – 6. GC Brief at 40-52.<sup>4</sup> In contrast, Respondent’s charts do not reflect employees’ overall ratings. Rather, Respondent uses the “average rating” that is calculated by averaging the ratings in 10 categories. Average ratings are calculated to one decimal point (i.e, 2.8, 2.9, 3.2, etc.). R Brief at 6-15. The distinction is critical. As discussed

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<sup>3</sup> Respondent acknowledges this on Page 6, footnote 4.

<sup>4</sup> Derived from J Ex. 9(a) through (t).

more fully below, several employees characterized by Respondent as receiving evaluations under three (based on the average rating), had in fact received overall ratings of three.

The Respondent's arbitrary use of an average rating instead of the overall rating listed on employee performance evaluations, results in the Respondent incorrectly noting nine instances where employees received a rating under three. R Brief at 12-13.<sup>5</sup> In fact, when looking at the correct data set which lists the employees' overall rating, there are only three employees who received an overall rating under three in the five-year period between 2013 to 2017 for years they worked at the Woodland Hills facilities.<sup>6</sup> Of those three employees, none received a wage increase for the following year, and none received a baseline 5% bonus. This is consistent with Respondent's Baseline Policy, where the low overall rating on the performance review results in employees not receiving a baseline 3% wage increase or a 5% bonus.<sup>7</sup> Thus Respondent's assertion that sometimes employees receive a 3% wage increase and a 5% bonus even when they score less than three is demonstrably false. R Brief at 11-12.

**C. The Overbroad Data Contained In Respondent's Employee-by-Employee/Year-by-Year Analysis Renders the Chart of Little Probative Value**

Here, the General Counsel's theory is that the since 2013, the Respondent has had a consistent history of issuing annual baseline increases to Unit employees at the Woodland Hills

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<sup>5</sup> Respondent lists Alejandro Montenegro's 2016 Eval. as 2.9 (R Brief at 8 and 13), when in 2016 he received an overall rating of 3 (J Ex. 9(h), 12 (Vol. 1 pdf, 146)); Respondent lists Fernando Salazar's 2013 and 2014 Eval. as 2.9 (R Brief at 9 and 13), when in both 2013 and 2014 he received an overall rating of 3 (J Ex. 9(p), 2, 4 (Vol. 2 pdf, 28, 30); and Respondent lists Cesar Valadez's 2013 and 2015 Eval. as 2.7 and 2.9 respectively (R Brief at 10, 12-13), when in both 2013 and 2015 he received an overall rating of 3 (J Ex. 9(k), 2, 9 (Vol. 1 186, 190), note that Valadez did not begin working at the Woodland Hills facility until 2014(J Ex. 9(K),4 (Vol. 1 pdf, 186).

<sup>6</sup> Jose Antonio in 2015 (J Ex. 9(a), 7, (Vol. 1 pdf, 40)); Cary Ward Johnson in 2015 (J Ex. 9(s), 6 (Vol. 2 pdf, 76); and Edwin Santos in 2014 and 2016 (J Ex. 9(q), 4, 10 (Vol. 2 pdf, 44, 50)).

<sup>7</sup> In 2014 Edwin Santos did not receive a raise or bonus; in 2015, neither Jose Antonio or Cary Johnson received a raise or bonus; and in 2016 Edwin Santos did not receive a raise and received only a 3% bonus. As previously noted, each employee received an overall rating of 2 in their corresponding annual review year.

facilities in the form of at least 3% wage increases and 5% bonuses. The record contains the performance review ratings for review years 2013-2017 for employees that, at some point in the relevant period, worked at a Woodland Hills facility. There are only 45 performance reviews for unit employees working at a Woodland Hills facility within the relevant period. GC Brief at 42, Table 2. However, in its Employee-by Employee/Year-by Year analysis, Respondent includes 118 instances of employees receiving wage increases and/or bonuses over a 10-year period. R Brief at 6-10. While Respondent contends that the varied wage increases and bonuses contained in its expansive chart establishes the absence of any formula for wage increases and bonuses, there is insufficient information in the record to draw the conclusion Respondent asserts.

Respondent includes 51 instances of employee wage increases and bonuses that fall outside the relevant four-year period.<sup>8</sup> R Brief at 6-10. Moreover, for these 51 instances, the record does not include, and Respondent's table does not reflect, the following critical information: employee performance evaluations; overall employee performance ratings; and data reflecting leaves of absence, promotions, transfers, etc. Respondent's chart also includes 20 instances where raises and bonuses were based on work performed at facilities other than Woodland Hills.<sup>9</sup> R Brief at 6-10.

Accordingly, it is impossible to determine whether variances in bonuses and wage increases for years prior to 2013 and for employees working outside Woodland Hills are consistent with the Baseline Policy, as explained in the General Counsel's brief. Even if there were not the above infirmities, the data preceding 2013 is not relevant as the General Counsel is

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<sup>8</sup> Jose Antonio 2007-2013; Juan Avina 2012-2013; Gilberto Burgos 2012-2013; Marco Interiano 2009-2013; Cary Ward Johnson 2007-2013; Alejandro Montenegro; 2011-2013; Luis Perez-Limon 2007-2013; Fernando Salazar 2007-2013; Edwin Santos 2007-2013; Cesar Valdez 2007-2013;

<sup>9</sup> Abramson 2015-2017; Avina 2014-2015; Bauer 2016-17; Castro 2015; Hall 2015; Jones 2015; Montenegro 2014-2016; Moreno 2016; Santos 2014-2015; Strawn 2016; Valadez 2014; and Vaught 2015.

proceeding on theory that the period between 2013-2017 established an expectation that, if employees received an annual review overall rating of three or higher, they would receive a 3% wage increase and 5% bonus.

**D. Respondent's Examples of Employees Purportedly Disproving the General Counsel's Theory, In Fact, Show the Contrary**

In its brief, Respondent highlights nine examples of employees receiving a three or greater score and a less than 3% wage increase. R Brief at 14. Although Respondent erroneously uses employee average ratings instead of their overall rating, in each of the nine instances that Respondent highlights where an employee received an average rating above three, the employee also received an overall score of three or higher. However, as explained in General Counsel's Brief, seven of the nine examples actually received prorated wage increases and bonuses from the 3% and 5% baseline figures because the employees only worked part of the year due to a leave of absence or the fact that they were hired or promoted mid-year.<sup>10</sup> GC Brief at 45-53. Rather than undermining the General Counsel's theory, the fact that wage increases were prorated pursuant to a discernable formula (i.e., the percentage of the year worked multiplied by 3%) supports that these wage increases were in line with Respondent's Baseline Policy. As for the remaining two unit members, Employees Abramson and Santos, Abramson worked outside

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<sup>10</sup> Avina was promoted on August 31, 2015 and received a prorated raise for 2016 reflecting his promotion (J Ex. 11, 3 (Vol. 2 pdf, 97); Tr. 247:11-21/Avina; GC Brief at 49); Jones was hired on May 18, 2015 and received a prorated raise for 2016 for working 62% of the year (J Ex. 8, 2:Column DOH (Vol. 1 pdf, 28); GC Brief at 48); Hall was hired on May 11, 2015, and received a prorated raise for 2016 for working 64% of the year (J Ex. 8, 3:Column DOH (Vol. 1 pdf, 29); GC Brief at 48); Castro was hired on April 20, 2015, and received a prorated raise for 2016 for working 70% of the year (J Ex. 8, 1:Column DOH (Vol. 1 pdf, 26); GC Brief at 48); Interiano took a leave of absence from June 28, 2016- September 30, 2016, and received a prorated raise for 2017 for working 74% of the year (J Ex. 10, 1:Row 2016 (Vol. 1 pdf, 92); GC Brief at 53); Vaught was hired on March 23, 2015, and received a prorated raise for 2016 for working 78% of the year (J Ex. 8, 4:Column DOH (Vol. 1 pdf, 30); GC Brief at 48, 49); and Perez-Limon took a leave of absence beginning October 13, 2016, and received a prorated raise for 2017 for working 78% of the year (J Ex. 10, 1:Row 2016 (Vol. 1 pdf, 92); GC Brief at 53).

of the Woodland Hills facility for half of 2015 and Santos was demoted in 2015, thus explaining why they did not receive the baseline 3% wage increase.<sup>11</sup>

Similarly, in its brief, Respondent highlights twelve examples of an employee receiving a three or greater score and a less than 5% bonus. R Brief at 15. However, 10 of the 12 examples cited by Respondent support the General Counsel's theory that bonuses were prorated from the baseline figures when employees only worked part of the year due to being hired or promoted mid-year or taking a leave of absence.<sup>12</sup> GC Brief at 44-55. There are only two exceptions. The first is Employee Vaught, who was hired March 23, 2015, and received a prorated annual wage increase, but who received a 2.9% bonus, when his prorated bonus should have been approximately 3.9%.<sup>13</sup> The Second is Employee Salazar who in 2016 received the baseline 3% raise prorated, but less than the baseline 5% bonus prorated for an unknown reason. GC Brief at 54, 55.

In summary, although Respondent claims that during the relevant four year period there were nine instances of employees receiving an overall rating of three or higher and not receiving a 3% wage increase, when factoring in proration because employees were subject to mid-year

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<sup>11</sup> J Ex. 8, 1:Column DOH (Vol. 1 pdf, 26) and J Ex. 11, 3 (Vol. 2 pdf, 97).

<sup>12</sup> Avina was promoted on August 31, 2015, and received a 5% bonus for 2015 when his weighted average hourly rate was analyzed (J Ex. 11, 3 (Vol. 2 pdf, 97); Tr. 247:11-21/Avina; GC Brief at 49); Abramson began working at the Woodland Hills facility on June 22, 2015 and received a prorate bonus in 2015 for working 53% of the year at Woodland Hills (J Ex. 8, 1:Column DOH (Vol. 1 pdf, 26); GC Brief at 50); Jones was hired on May 18, 2015 and received a prorated bonus for 2015 for working 62% of the year (J Ex.. 8, 2:Column DOH (Vol. 1 pdf, 28); GC Brief at 48); Hall was hired on May 11, 2015, and received a prorated bonus for 2015 for working 64% of the year (J Ex. 8, 3:Column DOH (Vol. 1 pdf, 29); GC Brief at 48); Castro was hired on April 20, 2015, and received a prorated bonus for 2015 for working 70% of the year (J Ex. 8, 1:Column DOH (Vol. 1 pdf, 26); GC Brief at 48); Jones took a leave of absence from April 19, 2016 - August 5, 2016, and received a prorated bonus for 2016 for working 70% of the year (J Ex. 10, 1:Row 2016 (Vol. 1 pdf, 92); GC Brief at 53); Interiano took a leave of absence from June 28, 2016- September 30, 2016, and received a prorated bonus for 2016 for working 74% of the year (J Ex. 10, 1:Row 2016 (Vol. 1 pdf, 92); GC Brief at 53); Strawn was hired on March 28, 2016, and received a prorated bonus for 2016 for working 76% of the year (J EX. 8, 4:Column DOH (Vol. 1 pdf, 30); GC Brief at 52); Moreno was hired on February 29, 2016, and received a prorated bonus for 2016 for working 84% of the year (J Ex. 8, 3:Column DOH (Vol. 1 pdf, 29); GC Brief at 52).

<sup>13</sup> JE 8, 4: Column DOH (Vol. 1 pdf, 30); GC Brief at 48, 49.

hiring, promotions, and leaves of absence, Respondent implemented its Baseline Policy of at least 3% wage increases to all unit employees. Further, although Respondent claims that during the relevant four year period there were twelve instances of employees receiving an overall rating of three or higher and not receiving a 5% bonus, when factoring in proration because employees were subject to mid-year hiring, promotions, and leaves of absence, Respondent implemented its Baseline Policy of at least a 5% bonus in all but two instances. Therefore, Respondent's examples of employees purportedly disproving the General Counsel's theory, in fact, demonstrate the opposite and prove the General Counsel's theory.

#### **E. Respondent's Correlation Analysis Is a Red Herring**

A correlation analysis is not the proper tool to prove or disprove the General Counsel's theory. Respondent argues that if General Counsel's theory were true, then there should be a near perfect correlation between increases in employees' performance evaluation scores and increases in employees' wage increases and annual bonuses. R Brief at 18. However, General Counsel's theory does not posit that an employee's annual wage increase and bonus would increase as an employee's overall rating increased. Rather, the General Counsel argues that when a particular condition was met (i.e., obtaining a 3 or higher overall evaluation score), Respondent's Baseline Policy provided for wage increases of 3% and annual bonuses of 5% (unless those amounts were prorated based on the percentage of the year the employee worked in the unit). Accordingly, Respondent's correlation analysis lends no support to its argument.

Even if a correlation analysis were proper, Respondent's analysis is based on faulty data because it uses an employee's *average* rating instead of an employee's *overall* rating. Examining the correlation between increases of tenths of a point in the employees' average rating and their corresponding bonuses and wage increases is meaningless when the any analysis should have

focused on the correlation between the overall rating and the corresponding bonuses and wage increases. Given that overall ratings are whole numbers, Respondent's analysis is fundamentally flawed. Respondent's analysis further fails because it does not account for prorated annual wage increase and bonus amounts based on employee transfers, mid-year hire dates, leave of absences, and mid-year promotions.

### **III. CONCLUSION**

Based on the entire record in this matter and on the foregoing argument, Respondent has failed to rebut the existence of its Baseline Policy. As the record testimony makes clear that Respondent departed from its Baseline Policy and reduced employees' customary wage increases and annual bonuses in response to the employees' selection of the Union as their collective bargaining representative, Counsel for the General Counsel respectfully submits that Respondent violated Section 8(a)(3) and (1) as alleged.

Dated this 29<sup>th</sup> day of July 2019.

Respectfully submitted,

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