UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DOUGLAS EMMETT MANAGEMENT, LLC **and** **INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 501, AFL-CIO**	**Case No. 31-CA-206052** **31-CA-211448**

CHARGING PARTY'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND RECOMMENDED ORDER

THE MYERS LAW GROUP, A.P.C.
Adam N. Stern, Esq., State Bar No. 134090
laboradam@aol.com
Justin M. Crane, Esq., State Bar No. 251107
jcrane@myerslawgroup.com
9327 Fairway View Place, Suite 100
Rancho Cucamonga, CA 91730
Telephone: (909) 919-2027
Facsimile: (888) 375-2102

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DOUGLAS EMMETT MANAGEMENT, LLC **and** **INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 501, AFL-CIO**	**Case No. 31-CA-206052** **31-CA-211448**

CHARGING PARTY'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND RECOMMENDED ORDER

Pursuant to Section 102.46 of the NLRB Rules and Regulations, Charging Party, by and through its counsel of record, files these Exceptions to the Administrative Law Judge's Decision and Recommended Order, issued by Administrative Law Judge, Jeffrey D. Wedekind, ("ALJ") on August 27, 2019. Responding Party takes exception to the following:

1. The following statements at ALJD p. 12:

> "Following an investigation, the Regional Director decided not to issue a complaint on the charge's 8(a)(5) allegation. Although agreeing with the Union that the Company had a past practice of awarding substantially higher merit wage increases and bonuses to the engineers, the Regional Director concluded that the Company fully satisfied its obligations under Section 8(a)(5) of the Act before implementing the lower 2017 amounts. Accordingly, the Regional Director dismissed that allegation."

2. The following statements at ALJD p. 13:

"First, the General Counsel's concession that the Company did not violate Section 8(a)(5) of the Act necessarily means: (a) that the amounts of the annual raises and bonuses were discretionary rather than fixed and therefore the Company did not have an obligation to maintain the status quo by awarding the same amounts for 2017 as it had in prior years, i.e., the Company's failure to do so was not an unlawful "unilateral change" as asserted by the Union; (b) that the annual raises and bonuses were discrete recurring events and therefore the Company could lawfully modify their amounts during contract negotiations without an overall impasse provided it gave the Union reasonable notice and an opportunity to bargain over the intended modifications; and (c) that the Company did, in fact, give the Union sufficient notice and an opportunity to bargain over the 2017 amounts before implementing them. See *Covanta Energy Corporation*, 356 NLRB 706, 719–720 (2011) (summarizing Board precedent regarding an employer's legal obligations and rights with respect to such discrete recurring events that arise during contract negotiations)."

3. The following statements at ALJD p. 13:

"Second, it is neither abnormal nor necessarily bad faith for an employer to open with a low wage and benefit offer or proposal. As stated in *American Express Reservations, Inc*., 209 NLRB 1105, 1118 (1974):

> "[I]t is the nature of collective bargaining or any other bargaining and negotiating by people of experience, that, according to their respective positions, one party starts high and the other low. If a union is prepared to settle for a 20- or 25-cent increase, it may initially demand 80. The employer, although [it] may be willing to ultimately agree to 15 or 20 cents, may initially offer 5 cents. They then bargain out their differences.

"See also *Merck, Sharp & Dohme Corp.,* 367 NLRB No. 122, slip op. at 4 (May 7, 2019) ("The [collective-bargaining] process, by its nature, may involve hard negotiation, posturing, brinkmanship, and horse trading over a long period of time."). And, as indicated above, the General Counsel has effectively conceded that the Company's initial proposal for a 1 percent raise and 2 percent bonus did not constitute bad faith bargaining."

4. The following statements at ALJD p. 13-14:

"Third, given the Union's failure to test the Company's good faith by making any counterproposals, it would be speculative to conclude that the Company would not have moved off its initial proposal and increased the amounts to past levels. See *PSAV Presentation Services*, 367 NLRB No. 103, slip op. at 6 (2019) ("The Board will not find that an employer failed to bargain in good faith if the union failed to test the employer's willingness to bargain."), citing *Captain's Table*, 289 NLRB 22 (1988) (employer's conduct during contract negotiations could not be found unlawful under Section 8(a)(5) of the Act given that the union failed to test

the employer's willingness to bargain by offering counterproposals and timely providing requested information before filing its unfair labor practice charge)."

5. The following statements at ALJD p. 14:

"Fourth, under Board law, an employer is prohibited from implementing amounts substantially different from its pre-impasse proposals to the union. See *FirstEnergy Generation, LLC*, 366 NLRB No. 87, slip op. at 11 (2018), enfd. in relevant part 929 F.3d 321, 329–332 (6th Cir. 2019), and cases cited there (employer's changes must be "reasonably comprehended" within its prior proposals). Thus, the Company would have violated Section 8(a)(5) of the Act if it had not implemented raises and bonuses in December 2017 that were consistent with its prior proposals to the Union."

6. The following statements at ALJD p. 14:

"In sum, the General Counsel's 8(a)(3) discrimination allegation regarding the 2017 wage increases and bonuses is inconsistent and legally incompatible with the General Counsel's concession that the Company complied with its 8(a)(5) bargaining obligations with respect to those wage increases and bonuses. Cf. Voca Corp., 329 NLRB 591, 593 (1999) (judge's finding that the employer violated Section 8(a)(3) of the Act by requesting the union's permission to give a corporate-wide bonus to the bargaining unit employees notwithstanding their ineligibility for such bonuses under the extant contract was "inconsistent" with his finding that the employer's request constituted a request for bargaining and was "legally incompatible" with the employer's continuing obligation under Section 8(a)(5) to bargain with the union pending the Board's ruling on the union's objections to the recent decertification election). Accordingly, the allegation will be dismissed."

7. The following statements at ALJD p. 14:

"Finally, the General Counsel also alleges that Lutes's statements to the engineers during 30 the December 2017 performance reviews about the lower wage-increase and bonus amounts and the negotiations with the Union independently violated Section 8(a)(1) of the Act. The theory of this alleged violation is that Lutes unlawfully blamed the Union for the lower amounts. However, the cases cited by the General Counsel in support of this theory are distinguishable because they involved situations where the employer had an obligation under the Act but failed to maintain the status quo with respect to the subject terms. See *Salvation Army Williams Memorial Residence*, 293 NLRB 944, 969 (1989); *Larid Printing*, 264 NLRB 369 (1982); and *Halo Lighting Division of McGraw Edison Co*., 259 NLRB 702, 703–704 (1981). See also *Richfield Hospitality*, 368 NLRB No. 44, slip op. at 2 n. 4, and 21 (2019); and *More Truck Lines, Inc*., 336 NLRB 772 (2001), enfd. 324 F.3d 735 (D.C. Cir. 2003). As discussed above, the General Counsel does not allege that the Company had such an obligation or violated it

here with respect to the wage-increase and bonus amounts. Further, Lutes's statements were essentially accurate. Accordingly, this allegation will be dismissed as well."

8. Conclusion of Law No. 3 at ALJD p. 15: "The Company did not otherwise violate Sections 8(a)(1) and 8(a)(3) of the Act as alleged in the complaint."

Respectfully submitted,

MYERS LAW GROUP, APC

Date: October 8, 2019

Adam N. Stern, Esq.
Justin M. Crane, Esq.
Attorneys for Charging Party

CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2019, I served the foregoing document described as **CHARGING PARTY'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND RECOMMENDED ORDER** to the Board and Region in the matter of Douglas Emmett Management, Inc., Case Nos. 31-CA-206052 and 31-CA-211448, upon the following persons by the means set forth below:

By Electronic Filing to:

National Labor Relations Board, Office of the Executive Secretary
1015 Half Street SE
Washington, DC 20570-0001

Mori Rubin, Yerrik Moy, Nayla Wren, and Jake Yocham
National Labor Relations Board, Region 31
11500 W. Olympic Blvd., Suite 600
Los Angeles, CA 90064

By Electronic Mail to:

Daniel A. Adlong
Harrison C. Kuntz
Ogletree Deakins
695 Town Center Drive, Suite 1500
Costa Mesa, CA 92626
Daniel.adlong@ogletree.com
Harrison.Kuntz@ogletree.com

I declare under the penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed on October 8, 2019 at Rancho Cucamonga, California.

Justin M. Crane