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 BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND RECOMMENDED ORDER

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Pursuant to Section 102.46 of the NLRB Rules and Regulations, Responding Party hereby provides its Brief in support of its Exceptions to the Administrative Law judge's ("ALJ") Decision and Recommended Order, as follows:

I. INTRODUCTION

The ALJ failed to make any findings and determinations on the allegations regarding Responding Party's acts of discrimination and retaliation in violation of Section 8(a)(3). Instead of relying on evidence submitted and Board precedent, the ALJ relied entirely on the General Counsel's decision not to pursue an 8(a)(5) violation. Such a decision is not relevant and does not negate the evidence in the record.

As such, Responding Party respectfully requests that the Board modify the ALJ's Decision and Recommended Order to correct the aforementioned errors.

II. CHARGING PARTY'S EXCEPTIONS

On October 8, 2019, under separate cover, Charging Party filed 8 numbered exceptions to the ALJ's decision pursuant to Section 102.46 of the NLRB's Rules and Regulations.

Exceptions Nos. 1-6, 8 pertain to the ALJ's findings and determinations on the allegations regarding Responding Party's acts of discrimination and retaliation in violation of Section 8(a)(3). Instead of relying on evidence submitted and Board precedent, the ALJ relied entirely on the General Counsel's decision not to pursue an 8(a)(5) violation. Such a decision is not relevant and does not negate the evidence actually in the record.

Exception No. 7 pertains to a decision of the ALJ that is derivative of his findings listed in Exceptions Nos. 1-6.

III. LEGAL ARGUMENT

Section 10(b) of the Act, 29 U.S.C. § 160(b), states: "Any [unfair labor practice] proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States." See also NLRB Rules and Regulations, Sec. 102.39, and Statements of Procedure, Sec. 101.10(a).

The Board holds that it is not required to apply the Federal Rules of Evidence (FRE) strictly. *International Business Systems*, 258 NLRB 181 n. 6 (1981), enfd. mem. 659 F.2d 1069 (3d Cir. 1981). In general, the courts agree. See *NLRB v. St. George Warehouse*, 645 F.3d 666, 674 (3d Cir. 2011) ("[W]e have recognized the Board's power to construe the rules of evidence liberally."); and *3750 Orange Place Ltd. Partnership v. NLRB*, 333 F.3d 646, 666 (6th Cir. 2003) ("[T]he ALJ was not obliged to strictly adhere to the Federal Rules of Evidence."), and cases cited there. However, where the Board purports to rely on the Federal Rules of Evidence, the reviewing court may evaluate whether it did so correctly. See *NLRB v. Augusta Bakery Corp.*,

957 F.2d 1467, 1479 (7th Cir. 1992) (finding that the Board correctly applied FRE 804(a)(5) to exclude an affidavit because the respondent failed to show that the declarant was unavailable to testify); and *NLRB v. United Sanitation Service,* 737 F.2d 936, 940–941 (11th Cir. 1984) (finding that the Board incorrectly relied on the residual hearsay exception in FRE 804(b)(5) [now 807] to admit the affidavit of a deceased alleged discriminatee, as the General Counsel failed to demonstrate the requisite guarantees of trustworthiness).

A. THE ALJ USED NON-EVIDENTIARY AND IRRELEVANT MATTERS AND INADMISSIBLE ATTORNEY WORK PRODUCT TO MAKE HIS DECISION (EXCEPTION NOS. 1, 2, AND 6)

The ALJ considered matters outside of the hearing to make his determination. The ALJ stated:

> "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." ALJD at p. 12, ("Exception No. 1")
>
> "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)." ALJD at p. 13, ("Exception No. 2")
>
> "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." ALJD at p. 14, ("Exception No. 6")

Initially, it is unclear what evidence was provided regarding the Regional Director's decision "not to issue a complaint" and that 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" to support the above statements. The ALJ does not cite to any evidence presented at trial or the testimony of the Regional Director as to her decision making. Moreover, it is not relevant in a case determining an 8(a)(3) violation as to whether the employer complied with 8(a)(5).

Further, any such internal deliberations by the Regional Director as to whether it should pursue Section 8(a)(5) and why is attorney work product and should not be relied upon at a hearing that involves only charges related to Section 8(a)(3). An attorney's mental process work product including impressions, conclusions, opinions, or legal theories is afforded nearly absolute privilege. *See In re Seagate Tech., LLC*, 497 F.3d 1360, 1375 (Fed. Cir. 2007); *See also, In re Cendant Corp*., 343 F.3d at 663 ("Rule 26(b)(3) establishes two tiers of protection: first, work prepared in anticipation of litigation by an attorney or his agent is discoverable only upon a showing of need and hardship; second, 'core' or 'opinion' work product that encompasses the 'mental impressions, conclusions, opinion, or legal theories of an attorney or other representative

of a party concerning the litigation' is "generally afforded near absolute protection from discovery.").

The purpose of the work product doctrine "is to establish a zone of privacy for strategic litigation planning and to prevent one party from piggybacking on the adversary's preparation." *United States v. Adlman*, 68 F.3d 1495, 1501 (2d Cir. 1995) (purpose of doctrine is to establish "zone of privacy").

"Piggybacking" on the Regional Director's preparation is exactly what the ALJ allowed in the instant matter. The ALJ used irrelevant "evidence" that violates the Attorney Work Product Doctrine to make his decision. Such a decision cannot stand.

B. THE ALJ MADE HIS DETERMINATION USING 8(a)(5) STANDARDS RATHER THAN THE CHARGED 8(a)(3) (EXCEPTION NOS. 3, 4, 5, AND 7)

The ALJ's analysis on the following considered Section 8(a)(5) instead of 8(a)(3) in the following statements:

> "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." ALJD at p. 13, ("Exception No. 3").
>
> "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)." ALJD at p. 13-14, ("Exception No. 4").

"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." ALJD at p. 14, ("Exception No. 5").

"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." ALJD at p. 14, ("Exception No. 7").

The ALJ makes his decision in the above by using standards as if Respondent was charged with an 8(a)(5) violation. Terms such as "good faith" and "hard negotiating" are peppered throughout the analysis. However, Respondent was charged with an 8(a)(3) violation. The ALJ's analysis fails to discuss 8(a)(3) in the least.

The Third Circuit has provided a brief snapshot of what an 8(a)(3) analysis should nool

like:

> "Section 8(a)(3) of the NLRA prohibits an employer from taking adverse employment actions against an employee in retaliation for union membership or activities. 29 U.S.C. § 158(a)(3). The Board applied the burden-shifting analysis articulated in a case called *Wright Line*, 251 NLRB 1083, 1087 (1980), which was approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 402, 103 S. Ct. 2469, 76 L. Ed. 2d 667 (1983). Under *Wright Line*, 'the employee must establish that the protected conduct was a 'substantial' or 'motivating' factor [for the employer's action]. Once this is accomplished, the burden shifts to the employer to demonstrate that it would have reached the same decision absent the protected conduct.' 251 NLRB at 1087."

1621 Route 22 West Operating Co., LLC v. NLRB (3d Cir. 2016) 825 F.3d 128, 145-146.

The ALJ makes no such analysis. As such, his decision should be modified to conform to the charges against Respondent. Based on the foregoing, the ALJ's Conclusion of Law No. 3 at ALJD p. 15 is clearly erroneous, when he states, "The Company did not otherwise violate Sections 8(a)(1) and 8(a)(3) of the Act as alleged in the complaint."

IV. CONCLUSION

Based on the foregoing, Responding Party respectfully requests that the Board modify the ALJ's Decision and Recommended Order to correct the aforementioned errors.

Respectfully submitted,

MYERS LAW GROUP, APC

Date: October 8, 2019

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Justin M. Crane, Esq.
Attorneys for Charging Party

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2019, I served the foregoing document described as **BRIEF IN SUPPORT OF ITS 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
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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