UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

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 EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Jake Yocham
Counsel for the General Counsel
National Labor Relations Board, Region 31
11500 West Olympic Blvd, Suite 600
Los Angeles, CA 90064

On August 27, 2019, Administrative Law Judge Jeffrey Wedekind ("ALJ") issued his decision (JD-(SF)-27-19) in the above-captioned cases. Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the General Counsel hereby respectfully files the following exceptions:

1. The ALJ erred by concluding that General Counsel conceded that the amounts of Douglas Emmett Management, LLC's (Respondent) annual wage increases and bonuses were discretionary and not fixed, when the General Counsel acknowledged that Respondent's deviation from its Baseline Policy did not violate Section 8(a)(5) of the Act. (ALJD 13: 2-6).

2. The ALJ erred by analyzing the allegations concerning discriminatory reductions in wage increases and bonuses as if General Counsel had alleged that Respondent had violated Section 8(a)(5) of the Act. (ALJD 13:15-14:15).

3. The ALJ erred in concluding that the allegation that Respondent discriminatorily paid employees lower wage increases and bonuses in violation of Section 8(a)(3) of the Act is "inconsistent and legally incompatible with the General Counsel's theory that the Company complied with its 8(a)(5) bargaining obligations . . .." (ALJD 14: 17-25).

4. The ALJ erred by dismissing the allegations that Respondent violated Section 8(a)(3) of the Act by deviating from its Baseline Policy and reducing the amount of its employees' wage increases and annual bonuses in retaliation for their union activities and support. (ALJD 9:30-14:27).

Dated at Los Angeles, California, this 8th day of October, 2019.

Respectfully submitted,

Jake Yocham
Counsel for the General Counsel
National Labor Relations Board, Region 31
11500 West Olympic Blvd, Suite 600
Los Angeles, CA 90064

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

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 BRIEF IN SUPPORT OF THE EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Jake Yocham
Counsel for the General Counsel
National Labor Relations Board, Region 31
11500 West Olympic Blvd, Suite 600
Los Angeles, CA 90064

Table of Contents

Table of Authorities

Page(s)

Cases

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 April 30, 2018 ("Consolidated Complaint"). GC Ex. 1(x)[1]. 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. General Counsel and Respondent filed their respective reply briefs on July 29, 2019.

On August 27, 2019 the ALJ issued his decision and order. The ALJ concluded that the Respondent violated Section 8(a)(1) of the Act by: (1) interrogating an employee about his union activities during the union organizing campaign in June 2017; (2) soliciting grievances from employees and impliedly or expressly promising to remedy them during preelection antiunion meetings on July 31 and in August 2017; (3) threatening employees with discharge if they voted for the Union by telling an employee at a preelection antiunion meeting in mid-August 2017 that the employees' only option would be to strike and that the moment they did so it would fire them; (4) informing employees at antiunion meetings a day or two before the August 25, 2017 election that it would be futile to vote in favor of the Union by telling them that the Company would never agree to or sign the BOMA standard area union contract or any union contract that provided better health or other benefits to them than what the Company provided to its nonunion employees; and (5) threatening an employee on the day of the election with loss of pay or other unspecified reprisals if he voted in favor of the Union. (ALJD 15:3-15). The ALJ dismissed the

[1] References to the Record are abbreviated as follows: Transcript (Tr. Page: line/witness); ALJD page number followed by the line numbers (ALJ Wedekind Decision); 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).

allegation that the Respondent violated Section 8(a)(3) of the Act by reducing Unit employees' customary amount of annual wage increases and bonuses in retaliation for selecting the Union as their bargaining representative. (ALJD 14:17).

Based on the entire record in this matter and the arguments presented below, Counsel for the General Counsel respectfully excepts to the ALJ's findings and conclusions with respect to the allegation that the Respondent violated Section 8(a)(3) and 8(a)(1) by lowering annual wage increases and bonuses to retaliate against the engineers for voting in favor of the Union in the election.

II. RELEVANT FACTS

A. Background

At all material times, Respondent has been a corporation with an office and place of business in in Santa Monica, California, and has been engaged in the business of leasing commercial and residential space. (ALJD 2). Respondent provides engineering services to eight properties in Woodland Hills, California, at which the Unit employees are employed.

Operating Engineers Local 501 began an organizing campaign to represent the approximately 20 engineers employed at eight commercial buildings owned and maintained by Douglas Emmett Management in Woodland Hills, California. (ALJD 1:1-4). Several months later, on July 28, the Union filed a petition for an NLRB-conducted representation election. (ALJD 1: 4-5). Over the next 4 weeks, several company managers and a hired antiunion consultant conducted a series of mandatory large, small, and one-on-one meetings with the engineers to persuade them to vote against the Union. (ALJD 1: 5-7). Nevertheless, a majority voted for the Union at the August 25 election and it was certified as the collective-bargaining

representative on September 5. (ALJD 1: 8-9) The Company and the Union began negotiating over an initial contract the following month, in late October 2017. (ALJD 1: 9-10).

B. Prior to the election, Respondent engages in extensive unlawful conduct evidencing animus toward the Union.

In June 2017, several months after the union campaign began but before the election petition was filed, Regional Engineer Hermanson interrogated Engineer Fernando Salazar in violation of Section 8(a)(1) of the Act. (ALJD 3:6-9-4:1-3).

Director of Engineering Lutes held a series of mandatory meetings with Labor Consultant Simon Jara beginning on July 31, the Monday after the union election petition was filed. (ALJD 4:7-21). Shortly thereafter, Labor Consultant Jara also began holding separate mandatory meetings with the engineers in the building conference rooms. (ALJD 4: 23-24). During the same time period Regional Engineer Hermanson also visited the engineers in their own offices every few days. (ALJD 5: 4-20). In each instance the Company solicited grievance, in violation of Section 8(a)(1) of the Act. (ALJD 6:31-32).

A day or two before the election, President/CEO Kaplan also held mandatory antiunion group meetings with the engineers. (ALJD 7: 15-16). During this meeting President/CEO Kaplan made statements of futility in violation of Section 8(a)(1) of the Act, (ALJD 8:2-4 and 11-12).

In a mid-August meeting between Director of Engineering Robert Lutes and Engineer Douglas Vaught, Lutes made threats of discharge in violation of Section 8(a)(1) of the Act. (ALJD 8: 21-26 and 29-30).

On August 25, the day of the election, Regional Engineer Hermanson, Director of Engineering Lutes, Labor Consultant Jara, and COO Panzer met with Engineer Juan Avina. (ALJD 9: 3-6). COO Panzer immediately took Avina aside, away from the group, to speak to

him privately where he made threats of unspecified reprisal in violation of Section 8(a)(1) of the Act. (ALJD 9 7-12 and 27).

C. Respondent had an established past practice of granting set wage increases and bonuses near the end of each year.

Prior to December 2017, the Respondent had a past practice of granting a 3% annual wage increase and a 5% bonus, during end of the year annual reviews, if a unit member received an overall performance rating of 3 or higher. Multiple Unit employees provided testimony confirming the existence of Respondent's past practice of giving employees 3% wage increase and 5% bonus whenever they achieved an overall performance review rating of 3 or higher. (GC Brief at 40-41; Tr. 104:3-105:8/Hall; Tr, 177:23-179:3/Antonio; Tr. 308:4-10/Vaught).

Respondent's own business records demonstrate that it consistently implemented this Baseline Policy of at least 3% wage increases and 5% bonuses to the vast majority of its Unit employees in the four-year history prior to the union election. (GC Brief at 44-55, Tables 3 - 6).[2] 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 3% wage increases to all unit employees. (*Id).* Further, 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. (*Id).* The ALJ correctly found that there was a

[2] Tables 3-6 in GC's Brief show the relevant data for 2013-2016. The data is derived from the following sources:
Column A - Overall Rating: derived from J Ex. 9(a) through (t).
Column B - Raise %: J Ex. 7, 2 (Vol. 1 pdf, 25).
Column C - Bonus %: Calculated by dividing Column F by Column E.
Column D - Hourly Rate: J Ex. 7, 1 (Vol. 1 pdf, 23).
Column E - Annualized Salary: Calculated by multiplying Column D by 2080 annualized hours (40 hours by 52 weeks).
Column F - Bonus Amount: J Ex. 8, 1-4 (Vol. 1 pdf, 26-30).

past practice of granting unite employees a 3% annual wage increase and a 5% bonus. As aptly explained by the ALJ:

> The Company, however, had a practice of granting the engineers merit wage increases and bonuses at the end of each year. The amounts of each varied depending primarily on an engineer's performance during the year. If an engineer received an overall rating of at least 3 ("meets requirements") out of 5 on his evaluation—which almost everyone did in each of the four years prior to 2017—he would typically be given a 3 percent wage increase and a 5 percent bonus, prorated or reduced to account for periods during the year when he was not working at the facilities (e.g., where an engineer was hired in the middle of the year, took an extended leave of absence, or was transferred or promoted). **In a very few instances, the percentages would be higher or lower, but 3/5 was the general standard for the wage increases and bonuses during those years.**

ALJD 9:38-10:6 (emphasis added). The ALJ also properly noted that Respondent failed to refute the evidence establishing its Baseline Policy of providing 3% wage increase and 5% bonuses to those receiving an overall rating of at least 3 on their evaluations. *Id.* at n.23.

D. Respondent offered to bargain over wage increases and bonuses and eventually implemented a lower annual wage increase and bonus.

On about November 17, 2017, Respondent, initiated bargaining by email with the Union over the subjects of the annual wage increases and bonuses of Unit employees. (ALJD 10:8). Respondent proposed a 0% wage increase and a 2% bonus, without offering any further explanation of this position. (ALJD 10:9-11). On November 29, 2017, Union Representative Murphy replied by email to Counsel Adlong noting the Union's position that Respondent had an established past practice of issuing annual wage increases, and any changes to that past practice was a unilateral change and retaliatory in nature. (ALJD 10:16-21).

On about November 29, 2017, Respondent replied to this email chain clarifying that Respondent was willing to comply with its duty to bargain and was attempting to give notice and

an opportunity to bargain over changes to the annual wage increases and bonuses. (ALJD 10:29-30). On December 5, 2017, the Union replied to this email chain reiterating its position that Respondent had an established past practice on this subject and clarifying that the Union was not making any counterproposal on this subject. (ALJD 11:4-6).

On about December 11, 2017, Respondent revised its offer to the Union on this subject by raising its proposed wage increase from 0% to 1%, without offering any further explanation of its position. (ALJD 11:15-16 and J Ex. 12(f) (Vol. 2 pdf, 123)).

In late December Respondent implemented a 1% wage increase for the following year and a 2% bonus for unit employees. (ALJD 12:1-2). At no point during discussions between the parties on this subject did Respondent offer the Union an explanation or justification of how it calculated its initial proposal of 0% wage increases and 2% bonuses, and later revised proposal of 1% wage increases and 2% bonuses.

As usual, Respondent informed the engineers about these amounts during their December performance reviews. (ALDJ 12: 2-3).

The Region determined that because Respondent provided the Union with notice and an opportunity to bargain about its proposal to offer lower wage increases and bonuses than it had in the past, and Respondent subsequently implemented its latest offer to the Union, Respondent did not unilaterally change employees' wage increases and bonus amounts in violation of Section 8(a)(5) of the Act. (GC Brief at 64).

III. LEGAL ARGUMENT

A. Exception No. 1: The ALJ erred by concluding that General Counsel conceded that the amounts of Douglas Emmett Management, LLC's (Respondent) annual wage increases and bonuses were discretionary and not fixed, when the General Counsel acknowledged that Respondent's deviation from its Baseline Policy did not violate Section 8(a)(5) of the Act. (ALJD 13: 2-6).

The General Counsel does not concede that the Respondent exercised discretion in determining the amounts of employees' annual wage increase or bonus amounts. The General Counsel's position has always been that the Respondent had a past practice of granting at least a 3% annual wage increase and 5% bonus based on Unit employees attaining at an overall performance rating of 3 or higher for their annual performance reviews. Despite Respondent's extensive argument that both annual wage increases and bonuses were discretionary and that there was not a pattern, the data clearly demonstrated that there was a set past practice of granting 3% wage increases and 5% bonuses to unit members who received an overall rating of 3 or higher. In fact, the ALJ found that the Respondent had a past practice and typically engineers were given a 3% wage increase and a 5% bonus in the manner the General Counsel presented, prorated or reduced to account for periods during the year when an engineer was not working at the facilities (e.g., where an engineer was hired in the middle of the year, took an extended leave of absence, or was transferred or promoted).

The General Counsel's acknowledgement that Respondent did not violate Section 8(a)(5) does not constitute a concession that the amounts of wage increases and bonuses were discretionary. Rather, it is solely an acknowledgment that Respondent complied with its obligations under extant Board law, which allow an employer during bargaining for an initial contract to make changes to discrete recurring events, provided the employer gives the union notice and an opportunity to bargain before implementing the change. In *Bottom Line*

Enterprises, the Board held that where parties are in negotiations for a collective bargaining agreement, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to provide the union with notice and opportunity to bargain. 302 NLRB 373, 374 (1991). In those circumstances, the duty to bargain encompasses refraining from implementing such changes at all, absent overall impasse on bargaining for an agreement as a whole. *Id.* However, the Board has noted limited exceptions to this general rule such as in *Stone Container Corporation.* 313 NLRB 336 (1993).

In *Stone Container*, the Board held that an employer may lawfully implement a proposal relating to terms and conditions of employment where the proposal concerns a discrete recurring event scheduled to occur during negotiations for an initial contract, as long as it first provides the union with notice and an opportunity to bargain about the change. *Id.* at 336. The Board applied and expanded on its holding in *Stone Container* in *TXU Electric Company. Id.;* 343 NLRB 1404 (2004). In *TXU Electric*, the employer, during negotiations for a first contract, continued to pay employees under a previous salary plan, instead of applying a new salary plan in December, as was its past practice. The Board held that the employer provided the union notice and opportunity to bargain when it twice told the union it did not intend to adjust the unit employees' salary plan for the upcoming year while the parties were in negotiations. The Board expanded its previous ruling in *Stone Container*:

> [W]here, as here, a discrete event occurs every year at a given time, and negotiations for a first contract will be ongoing at that time, an employer can announce in advance that it plans to make changes as to that event. "[T]he employer's bargaining position may be to continue the practice for that year, to modify it, or to delete it for that year." As long as the union is given notice and opportunity to bargain as to those matters, the employer can carry out the changes even if there is no overall impasse at the time of the change.

343 NLRB at 1407, *quoting Daily News of Los Angeles*, 315 NLRB at 1244. The Board in *TXU Electric* found that even though the employer had a past practice of granting wage increases in

January of each year, it did not violate 8(a)(5) by not granting unit employees the same wage increase because it provided the union with notice and an opportunity to bargain over the discrete event which was scheduled to occur during the bargaining process. *Id.* at 1406. Under *TXU Electric*, an employer can make changes to non-discretionary components of its discrete annually occurring events as long as it gives notice and an opportunity to bargain. *Id.* While the dissent in *TXU Electric* claimed that employers have a duty to bargain with the Union over the discretionary components of annual wage increases, the majority rejected that contention stating, "we concede nothing by recognizing that the Respondent's proposal involved a change in past practice". *Id.* at 1407,1414.

While the General Counsel recognizes that Respondent had the right under 8(a)(5) to propose and implement a lower increase to wages and bonuses, it did not and does not concede that the amounts of the increases were discretionary. Just as in *TXU Electric*, where the Board recognized that the Employer's proposal involved a change in past practice, the General Counsel determined that here, Respondent departed from its past practice. 343 NLRB at 1407. Just as the Board in *TXU Electric* relied on the fact that the proposed change involved an annually occurring employment term, scheduled to recur in the midst of collective bargaining, here, General Counsel found the annual wage increases and bonuses to be an annually occurring employment terms, scheduled to recur during collective bargaining. *Id.* Finally, because here, as in *TXU Electric*, Respondent notified the Union and made a bargaining proposal to deal with the recurring event, there was not an 8(a)(5) violation. However, General Counsel's acknowledgement that Respondent complied with its obligation under 8(a)(5) of the Act is not equivalent to conceding that the annual wage increase and bonus amounts were discretionary and

the case law that the General Counsel relied on in making this determination contains no such inference.

Further, the Respondent's choice to implement the lower annual wage increase and bonus amount was not its only choice, it could have implemented its past practice without running afoul of section 8(a)(5). When it was time to finalize the bonus and wage increase amounts, the Respondent was privileged to either implement its past practice or its last offer even in the absence of overall impasse. 343 NLRB at 1407, *quoting Daily News of Los Angeles*, 315 NLRB at 1244. The Respondent chose to implement its last offer instead of continuing its past practice, Under *TXU Electric*, the Respondent fulfilled its obligations as they relate to 8(a)(5). As such, the ALJ erred when he concluded that the General Counsel's decision not to authorize complaint for an 8(a)(5) unilateral change was a concession that annual wage increases and bonuses were discretionary.

B. Exception No. 2: The ALJ erred by analyzing the allegations concerning discriminatory reductions in wage increases and bonuses as if General Counsel had alleged that Respondent violated Section 8(a)(5) of the Act. (ALJD 13:15-14:15).

The ALJ spent a considerable amount of time focusing on a hypothetical analysis of an unalleged 8(a)(5) unilateral change. However, the Complaint contained no 8(a)(5) allegation and the General Counsel neither argued that an 8(a)(5) violation had occurred nor that an 8(a)(3) analysis was contingent on any 8(a)(5) theory.

C. Exception No. 3: The ALJ erred in concluding that the allegation that Respondent discriminatorily paid employees lower wage increases and bonuses in violation of Section 8(a)(3) of the Act is "inconsistent and legally incompatible with the General Counsel's theory that the Company complied with its 8(a)(5) bargaining obligations . . .." (ALJD 14: 17-25).

The ALJ erred in relying on *VOCA Corp.* to find that the 8(a)(3) allegations in the complaint are inconsistent and legally incompatible with the General Counsel's theory that the Company complied with its 8(a)(5) bargaining obligations. *See* 329 NLRB 591, 593 (1999); (ALJD 14: 17-25). Generally, the purpose Section 8(a)(5) is to ensure that parties' bargain with each other in good faith, whereas the purpose of Section 8(a)(3) is prohibit an employer from discriminating against employees because of their union activities or support. Each section serves its own specific purpose within the Act. In the factually specific instance of *VOCA*, the two sections were at odds, however, this is not the case here.

In *VOCA*, the employer adopted a corporate-wide bonus program that was distributed to employees at the same time each year, however union represented employees were not qualified for the program. One of the union represented units at VOCA voted to decertify the union and while the union's objections to the decertification election were still pending before the Board, the VOCA sent the union a letter asking for permission to distribute the bonuses to the employees in the aforementioned unit at the usual time the bonuses were distributed to the other non-unit employees. *Id.* at 592. Under the parties' existing contract, unit employees were ineligible for the corporate-wide bonus. The administrative law judge in that case agreed with the General Counsel that VOCA: (a) violated Section 8(a)(5) of the Act by failing to bargain with the Union concerning its proposal to waive provisions of the extant contract so that the employees in the unit that had voted on decertification could be eligible for a corporate wide bonus; and (b) violated Section 8(a)(3) of the Act by changing its bonus eligibility policy to

encourage employees to reject the union. The Board disagreed with the judge and found that in offering to bargain with the union over a proposed change, VOCA had not in fact changed employees' terms and conditions of employment in violation of Section 8(a)(3). "To conclude, as the judge did, that the July 8 offer constituted both a request for bargaining and a discriminatory change in policy to reward the Huntington employees for voting to decertify the Union seems to us inconsistent." *Id*. at 593.

Notably, the Board in *VOCA* did not state that an employer may not be found liable for changing employees' terms and conditions in retaliation for their union activity as long as its actions do not run afoul of Section 8(a)(5). Rather, based on the facts before it at the time, it argued that it was inconsistent to find that an employer, in the same letter where it offered to bargain over a proposed change to a policy with the union, was at the same time discriminatorily changing that same policy. The employer could offer to bargain with the union over a proposed change – or it could announce that it had made a change – but it could not do both at the same time.

Were the General Counsel arguing that Respondent violated Section 8(a)(3) of the Act when on November 17, 2017, it offered to the Union that it depart from its past practice and pay employees a 0% wage increase and 2% bonus at the end of 2017, then *VOCA* would be on point. Here, in contrast, the General Counsel alleges that the reduced wage increases and bonus amounts <u>actually paid</u> to employees in December 2017 and January 2018 constitutes the discriminatory change. While Respondent might argue that it had no choice but to implement its final offer that it made to the Union prior to the payment of the wage increases and bonuses, such an argument addresses only an 8(a)(5) allegation. Notably, 8(a)(3) does not prohibit the payment

of reduced wage increase or bonus amounts, unless the reduction was discriminatorily motivated. That is the case here.

Here, Respondent had two lawful options to consider that would have avoided both a violation of 8(a)(3) and 8(a)(5) of the Act. The Respondent could have continued its past practice of granting a 3% annual wage increases and 5% bonus or it could have established that it had a non-discriminatory motive for departing from its past practice. Here, the Respondent implemented a lower wage increase and lower bonus without establishing any non-discriminatory motive for doing so. The Respondent avoided violating 8(a)(5) of the Act, but unlike in *VOCA*, here the 8(a)(3) conduct is the implementation of the lowered wage increases and bonuses, not the offer itself, meaning there is no inconsistency. For these reasons, the ALJ erred in concluding that that 8(a)(3) discrimination allegation is inconsistent and legally incompatible with the General Counsel's theory that the Company complied with its 8(a)(5) bargaining obligations.

D. Exception No. 4: The ALJ erred by dismissing the allegations that Respondent violated Section 8(a)(3) of the Act by deviating from its Baseline Policy and reducing the amount of its employees' wage increase and annual bonuses in retaliation for their union activities and support.

In order to establish a violation under Section 8(a)(3) and (1) of the Act, the General Counsel must make a *prima facie* showing sufficient to support the inference that protected activity was a motivating factor in an employer's decision to take adverse action. On such a showing, the burden shifts to the employer to establish that it would have taken the same action even in the absence of protected activity. *See In re C.P. Associates, Inc.*, 336 NLRB 167, 167-68 (2001); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management*, 462 U.S. 393, 395, 403 n.7 (1983).

In order to meet its burden under *Wright Line*, an employer must do more than merely proffer a legitimate reason for its action. Rather, the employer must show by a preponderance of the evidence that it would have taken the same action even in the absence of protected activity. *Monroe Mfg.*, 323 NLRB 24 (1997); *Hicks Oil & Hicksgas*, 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991). The employer has the burden of establishing this affirmative defense. *See Transportation Management*, *supra* at 401.

1. Implementing wage increases and bonuses below the Baseline Policy was an adverse action.

There is overwhelming record evidence supporting the fact that Respondent had a clearly established past practice of granting a 3% annual wage increase and a 5% bonus if a unit member received an overall performance rating of 3 or higher. As found by the ALJ, this past practice had occurred for four years before Respondent departed from this policy in late 2017. In late December Respondent implemented a 1% wage increase for the following year and a 2% bonus for unit employees. As usual, it informed the engineers about these amounts during their December performance reviews. There can be no doubt that a reduction of set wage increases constitutes an adverse action. *See Covanta Energy Corp.* , 356 NLRB 706 (2011) (the Board found an adverse action where the employer eliminated the existing corporate bonus and the corporate recommended annual wage increase for bargaining unit employees); and *See Arc Bridges, Inc.*, 355 NLRB 1236, 1238–1239 (2010) (the employer's decision to withhold a regular annual wage increase from its newly unionized employees while continuing the same for its nonunion employees was "inherently destructive" of employees' rights).

2. Respondent's managers at all levels expressed clear animus toward employees' union organizing drive

The Union began its organizing drive in the summer of 2017, which led to the Union's RC petition filed on about July 28, 2017 to represent Unit employees. In the three to four weeks leading up to the Board election, Respondent hosted numerous captive audience meetings with Unit employees to persuade them to vote against Union representation. On August 25, 2017, Unit employees voted in favor of Union representation at a Board election and Region 31 issued a Certificate of Representative on September 5, 2017. Respondent had direct knowledge of Unit employees' protected activities during these months.

As noted above, the ALJ found that during the weeks leading up to the election, Respondent engaged in numerous serious Section 8(a)(1) violations of the Act including: (1) interrogations; (2) soliciting grievances; (3) threats of discharge and reprisal; and (4) statements of futility. Given the totality of these facts, the Respondent demonstrated clear animus towards the employees' union drive.

3. Respondent's departure from the Baseline Policy occurring only months after Unit employees voted to unionize establishes animus against the Union.

Respondent's final decision to implement 1% wage increases and 2% bonuses to Unit employees occurred in December 2017 and January 2018. This change occurred during the first opportunity Respondent had to change annual wage increases and bonuses after the Union was certified, only three months later, and less than two months after the Union and Respondent first met for its initial bargaining session around October 24, 2017.

4. Respondent cannot show that it would have taken the same actions absent the Unit employees' protected activities

The General Counsel has established a strong *prima facie* case, and therefore, the burden shifts to the Respondent to establish that it would have taken the same action in the absence of employees' union activities and support. However, Respondent failed to make out any defense, let alone a defense sufficient to meet its burden. Respondent has not provided any evidence that it would have implemented lower annual wage increases and bonuses in the absence of its employees' union activities. Respondent did not claim that it was experiencing financial hardship; nor did it provide evidence that it had offered similar reductions to employees at non-union facilities. Respondent has never given 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 a Section 8(a)(3) violation where employer offered no valid reason for the change and had other recent unfair labor practices).

The only thing close to an explanation the Respondent has given is that annual wage increases and bonuses are discretionary and that it satisfied its obligation to bargain with the Union. Although the ALJ stated that Respondent is free to make low offer in bargaining – perhaps speculating as to Respondent's rationale – it is notable that there is no support in the record for that proposition. Despite a lengthy hearing, Respondent called no witness to provide any explanation for why it had drastically reduced employees annual wage increases and bonuses.

By failing to analyze the Section 8(a)(3) allegation under the correct legal framework, and by dismissing the allegations that Respondent violated Section 8(a)(3) of the Act by lowering employees' wage increases and bonuses in retaliation for their union activities and support, the ALJ erred.

IV. CONCLUSION

Based on the entire record in this matter and on the foregoing argument, Counsel for the General Counsel respectfully requests that the Board grant these exceptions and amend the Conclusions of Law, Remedy, recommended Order, and Notice to Employees to reflect that the Respondent also violated Section 8(a)(3) and (1) the Act by lowering annual bonuses and wage increases to retaliate against the engineers for voting in favor of the Union in the election.

Dated at Los Angeles, California this 8th day of October 2019.

Respectfully submitted,

Jake Yocham
Counsel for the General Counsel
National Labor Relations Board, Region 31
11500 West Olympic Blvd, Suite 600
Los Angeles, CA 90064