UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DOUGLAS EMMETT MANAGEMENT, LLC

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

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

RESPONDENT'S ANSWERING BRIEF TO EXCEPTIONS

Pursuant to Section 102.46(b) of the Rules and Regulations of the National Labor Relations Board ("NLRB"), Douglas Emmett, LLC ("Respondent" or "Douglas Emmett") files this Answering Brief to Exceptions. As demonstrated in the Administrative Law Judge's Decision ("ALJD") and herein, none of the Exceptions filed by the International Union of Operating Engineers, Local 501 ("Union" or "Charging Party") or the General Counsel ("GC") possess merit.[1] Accordingly, for the reasons discussed below, Respondent respectfully requests that the Board affirm and adopt the August 27, 2019 Decision of Administrative Law Judge Jeffrey D. Wedekind ("ALJ") in its entirety.

[1] This Brief uses the following citation conventions: "(U __)" refers to page numbers of the Union's Brief in Support of Exceptions; "(GC __)" refers to page numbers of the General" Counsel's Brief in Support of Exceptions; "(ALJD __:__)" refers to page and line numbers of the ALJD; "(Tr. __:__)" refers to page and line numbers of the Transcript of Hearing; and "(JX-__)," "(RX-__)," and "(GX-__)" respectively refer to Joint, Respondent, and General Counsel Exhibits offered and admitted into the record.

I. UNION EXCEPTIONS 1, 2, & 6: The ALJ Correctly Relied upon the General Counsel's Concession that Respondent's Actions Complied with Section 8(a)(5) of the Act to Conclude Those Same Actions Did Not Violate Section 8(a)(3).

The Union devotes a substantial portion of its Brief in Support of Exceptions to the proposition that the ALJ somehow violated Board evidentiary standards by considering Respondent's compliance with its Section 8(a)(5) obligations regarding wage increases and bonuses. (U 3-5). This contention, resting in part on vaguely-described attorney work product principles, is easily dispensed. The ALJ's reliance on Respondent's compliance with Section 8(a)(5) obligations is not an evidentiary issue, but instead represents mere adherence to the parties' stipulations.

The parties' Joint Stipulations (JX-1), into which the Union as well as the General Counsel entered, confirm the admissibility of Joint Exhibit 4(b). That Exhibit is a dismissal letter in which NLRB Region 31 concedes Respondent complied with its Section 8(a)(5) obligations by bargaining in good faith over its 2017-2018 wage increases and bonuses. The General Counsel confirmed this stipulated position on the record, and again in its Brief in Support of Exceptions. (Tr. 20:20-24, 389:2-6) (GC 13). As the Board has previously explained, a party to Board proceedings is "bound by its stipulations" because they "constitute[] a judicial admission[,]" have "the effect of a confessory pleading, and its principal characteristic is that it is conclusive upon the party making it." *Academy of Art College*, 241 NLRB 454, 455 (1979).

Consequently, the ALJD's reliance on Respondent's compliance with its Section 8(a)(5) obligations reflects only the parties' stipulations, and not an evidentiary issue. The Board must therefore deny Union Exceptions 1, 2, and 6.

II. UNION EXCEPTIONS 3, 4, 5, & 7, AND GENERAL COUNSEL EXCEPTION 2: The ALJ's Examination of Section 8(a)(5) Standards Correctly Assessed the Implications of the General Counsel's Incompatible Positions.

The Union and the General Counsel both incorrectly criticize the ALJD's examination of Section 8(a)(5) standards in its explanation that Respondent did not violate Section 8(a)(3) of the Act. (U 5-7) (GC 10). Those Section 8(a)(5) standards control the manner in which employers must handle discrete and regularly recurring changes to terms and conditions of employment during first contract bargaining. The ALJD thus correctly explains that, because the Section 8(a)(5) governed Respondent's actions in these circumstances, and its actions satisfied 8(a)(5), Respondent could not have violated Section 8(a)(3). (ALJD 14-15). The ALJD's review of Section 8(a)(5) standards thus represents a necessary component of the proper analysis.[2]

In short, the analysis begins with the question of what the Union and the General Counsel believe Respondent should have done other than provide the Union with notice and an opportunity to bargain over increases and bonuses, make offers on those topics, and then implement its most recent offers when the time for implementation arrived. The General Counsel's Brief in Support of Exceptions identifies "two lawful options":

> 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.

(GC 13).

Both of those purportedly "lawful options" encounter the same insurmountable obstacle: Respondent's compliance with Section 8(a)(5) as interpreted in cases such as *Daily News of Los Angeles*, 304 NLRB 511 (1991); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), *enfd*. 15 F.3d 1087 (9th Cir. 1994); and *Stone Container Corp.*, 313 NLRB 336 (1993). If Respondent

[2] In fact, the General Counsel's own Brief in Support of Exceptions reviews these same standards at length. (GC 7-10).

sinned in failing to impose a fixed increase and bonus, then it violated Section 8(a)(5). *Southern California Permanente Medical Group*, 356 NLRB 783, 793 (2011). The General Counsel has conceded that it did not.

Likewise, establishment of a "non-discriminatory motive for departing from its past practice" represents a defense to unilateral change allegations. *See e.g., RBE Electronics of S.D., Inc.*, 320 NLRB 80, 82 (1995). The existence of such a defense does not, however, operate to impose an additional bargaining obligation on employers by way of Section 8(a)(3). Consequently, Respondent availed itself of the only lawful option available to it when it bargained (or attempted to bargain) in good faith with the (unresponsive) Union. A finding that such actions violated Section 8(a)(3) would create a fundamental inconsistency between these two provisions of Section 8 of the Act.

Furthermore, to the extent the Union and the General Counsel suggest 3% wage increases and 5% bonuses represented a "floor" for employees who received at least a 3.0 evaluation score, such a contention would run directly afoul of Section 8(d)'s admonition that the Act "does not compel either party to agree to a proposal or require the making of a concession." Likewise, the Supreme Court explained in *H.K. Porter v. NLRB*, 397 U.S. 99, 102 (1970), the Board "is without power to compel a company or a union to agree to any substantive provision of a collective-bargaining agreement." The Board thus must reject this attempt to impose a minimum substantive bargaining outcome on Respondent.

The Board's Section 8(a)(5) standards are therefore inextricably intertwined with the Section 8(a)(3) allegation here. That analytical relationship necessitated the ALJD's review of Section 8(a)(5) standards. As a result, the Board must deny Union Exceptions 3, 4, 5, and 7 and General Counsel Exception 2. Additionally, for these reasons and those discussed above regarding

Union Exceptions 1, 2, and 6, the Board must deny the Union's general Exception 8 to the ALJD's overall Section 8(a)(3) conclusion.

III. GENERAL COUNSEL EXCEPTION 1: The ALJ Correctly Relied Upon the Discretionary Nature of Respondents' Annual Wage Increases and Bonuses.

The General Counsel's Exception 1 attempts to sidestep its own concession of Section 8(a)(5) compliance by arguing that Respondent grants wage increases and bonuses on a fixed, rather than discretionary, basis. That effort encounters the same fundamental analytical roadblock described above and in the ALJD. If the General Counsel's contention is true, then Respondent violated Section 8(a)(5). The General Counsel concedes Respondent committed no such violation. This basic obstacle dooms the General Counsel's assertion of fixed increase and bonus amounts.

Furthermore, the record does not support the General Counsel's assertion of fixed increase and bonus amounts. The parties stipulated to historical data on increases, bonuses, and performance evaluations. (JX-7-9). A brief review of this data confirms Director of Engineering Lutes' 2017 assessment, based on both those numbers and the clear language of Respondents' offer letters, that Respondent historically granted annual wage increase and bonus determinations on a variable and discretionary basis. (Tr. 398:11-399:14) (RX-2-5) (GX-4). The numbers quite obviously vary from year-to-year on their face. Illustrative of this at-a-glance analysis, Joint Exhibit 7 reflects the following average annual absolute and percentage wage increases for all unit employees:

2017 %	2017 Inc.	2016 %	2016 Inc.	2015 %	2015 Inc.	2014 %	2014 Inc.	2013 %	2013 Inc.
6.4%	$1.05	1.9%	$0.47	3.8%	$0.90	$10.7	$1.51	1.9%	$0.46

2012 %	2012 Inc.	2011 %	2011 Inc.	2010 %	2010 Inc.	2009 %	2009 Inc.	2008 %	2008 Inc.

2.6%	0.75	2.0%	$0.58	0.0%	$0	3.2%	$0.84	4.7%	$1.12

The individual employee data on Joint Exhibits 7 and 8 similarly demonstrate significant year-over-year variation for each individual employee. (JX-7, 8). This variation cannot co-exist with the General Counsel's assertion that wage increases and bonuses are somehow fixed or non-discretionary. It is particularly noteworthy that employees received **no** wage increases whatsoever during the economic recession in 2010.

The General Counsel's Brief in Support of Exceptions focuses on *TXU Electric Company*, 343 NLRB 1404 (2004) ("*TXU*") regarding its argument against discretionary increases and bonuses, but that case provides no path around its concession that Respondent complied with Section 8(a)(3). (GC 8-10). Importantly, the Board found **no violation** in *TXU*. Specifically, it determined the employer there, like Douglas Emmett here, complied with Section 8(a)(5) by giving the union notice and an opportunity to bargain over discrete and recurring events.

Using that holding, the General Counsel argues only that it can concede compliance with Section 8(a)(5) while not conceding that Respondent grants increase and bonus amounts on a discretionary basis. (GC 9). While the General Counsel may concede whatever it wishes, nothing in *TXU* suggests it can dodge the necessary implication of discretionary increases and bonuses that follows from its position on Section 8(a)(5) compliance. (ALJD 13:1-6). The General Counsel has provided no basis to disrupt the ALJD's proper recognition of this implication. As a result, the Board must deny General Counsel Exception 1.

IV. GENERAL COUNSEL EXCEPTION 3: The General Counsel Cannot Divorce Respondent's Legal Right and Obligation to Advance Bargaining Proposals from the Section 8(a)(3) Allegation.

General Counsel Exception 3 appears to serve two purposes. First, the General Counsel clarifies that it challenges Respondent's *implementation* of its 2017-2018 wage increase and bonus amounts, rather than the offers it advanced to the Union. (GC 12). This clarification is appropriate because a mere offer does not, in and of itself, affect terms and conditions of employment.

Second, the General Counsel uses that distinction to challenge the ALJD's citation of *Voca Corp*., 329 NLRB 591, 593 (1999) ("*Voca Corp.*") in support of its conclusion that the Section 8(a)(3) allegation "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." (ALJD 14:17-26). This attack falls short for several reasons.

First, the General Counsel frames the ALJD's citation of *Voca Corp.* as much more central to the analysis than it is. The ALJD cites *Voca Corp.* merely as a "Cf." citation in support of the overall conclusion, and as another example where a Section 8(a)(3) allegation conflicted with a Section 8(a)(5) allegation. (*Id*.). This summary of the ALJD's conclusion followed ***four*** specifically enumerated and well-supported reasons why the Section 8(a)(3) allegation and Section 8(a)(5) concession cannot co-exist. (ALJD 13:1-14:15). The General Counsel does not, and cannot, provide any explanation undermining those four underlying reasons for the ALJD's conclusion.

Second, the General Counsel's emphasis on the offer in *Voca Corp.* as compared to its now-clarified focus on implementation here presents a distinction without a difference. The distinction between offers and implementation had no bearing on the *Voca Corp.* Board's finding of legal incompatibility between that Section 8(a)(3) allegation and Section 8(a)(5) obligations. To the contrary, the Board reasoned that the employer, by participating in the bargaining process as a whole, "was simply fulfilling its legal obligation." 329 NLRB at 593.

Additionally, the *Voca Corp.* Board *did* examine an allegation related to implementation of the challenged action – specifically, a delay in implementation – and likewise concluded:

> [T]he Union did not waive its bargaining rights on this subject. Nor . . . had the parties reached agreement on the issue. In these circumstances, by waiting [to implement], the Respondent was simply fulfilling its legal obligations.

Id. at 594. The parallels between the *Voca Corp.* Board's rationale and Respondent's actions in compliance with Section 8(a)(5) here are unavoidable.

Third, and consistent with the deficiencies in General Counsel Exception 4 discussed below, *Voca Corp*. also illustrates the *Wright Line* implications of compliance with Section 8(a)(5). It explained:

> Respondent has met its *Wright Line* burden of showing that it would not have distributed the bonus to the [unit] even absent that [unlawful] motivation. The Respondent could not lawfully have [implemented] without the Union's consent. The Respondent's continuing duty to bargain with the Union . . . acts as a *Wright Line* defense to the 8(a)(3) allegations.

Id.

In *Voca Corp.*, as here, the General Counsel presented a Section 8(a)(3) allegation that threatened to create a fundamental conflict between Section 8(a)(5) and Section 8(a)(3). The Board there, as it must here, preserved the Act's internal consistency by rejecting that allegation. The ALJD's citation to *Voca Corp.* is thus appropriate and supportive of its numerous well-reasoned grounds for dismissing the General Counsel's Section 8(a)(3) allegation. As a result, the Board must deny General Counsel Exception 3.

V. GENERAL COUNSEL EXCEPTION 4: The ALJ Correctly Applied the *Wright Line* Framework.

The General Counsel acknowledges the Board 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 13-14). The ALJ properly found that analysis cannot establish a violation of the Act here.[3]

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

As a threshold matter, the General Counsel must show such an impact on terms and conditions of employment as a prerequisite to establishing an adverse action. *Lancaster Fairfield Community Hospital*, 311 NLRB 401, 403–04 (1993) (dismissing Section 8(a)(3) allegation regarding a "conference report" because such reports "constituted nothing more than counseling and no[t] discipline," and thus "did not affect 'any term of condition of employment' within the meaning of Section 8(a)(3)"). Here, if the General Counsel's allegation fails unless it can establish *both* that: (1) the implementation of the fruits of lawful bargaining can constitute an adverse action as a legal matter; and (2) Respondent's actions somehow harmed employees as a factual matter.

The General Counsel accomplished neither result here. It identifies no legal support for the former proposition, and no evidentiary support for the latter. In fact, the record does not establish that any particular employee would have received a higher wage increase or bonus amount absent implementation of Respondent's last offer. Indeed, it is possible that many employees would have received *lower* amounts had Respondent exercised its usual discretion. Therefore, the General Counsel has not shown any specific employee experienced an adverse action. As a result, the absence of an adverse action provides an independently sufficient basis to affirm and adopt the ALJD.

---

[3] The General Counsel's Brief in Support of Exceptions repeatedly refers to the wage increases and bonuses as granted on a "discriminatory" basis. (GC 10-13). This characterization appears to reflect the General Counsel's misunderstanding of its own Section 8(a)(3) allegation. The record contains no evidence whatsoever regarding non-unit employees or other groups against whom the Board could compare amounts in a "discrimination" analysis. To the contrary, the General Counsel's Section 8(a)(3) allegation more properly reflects an (unsustainable) allegation that Respondent *retaliated* against unit employees for organizing.

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. 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 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). Director of Engineering Lutes explained without contradiction that he directed implementation of Respondent's last offer to the Union because that is what he understood the law required. (Tr. 403:22–404:1). This testimony directly refutes the General Counsel's erroneous contention that Respondent "has never given an explanation" for the increase and bonus amounts. (GC 16).

Likewise, the General Counsel inaccurately accuses the ALJ of "speculating as to Respondent's rationale" and asserts the record lacks evidence of the reason for its increase and bonus offer amounts. This argument contradicts the General Counsel's protestations elsewhere that it challenges only Respondent's *implementation* of the increase and bonus amounts, rather than its mere offers. (GC 13). If the General Counsel focuses only on implementation of the challenged amounts, then Respondent's rationale for its offers lacks any relevance. Additionally, the General Counsel wrongly ignores Lutes' uncontradicted testimony that Respondent offered these amounts in order to leave room for upward movement in the course of bargaining. (Tr. 403:12-21).

This unrebutted evidence of lawful motives overwhelms all of the General Counsel's assertions regarding animus. Moreover, its allegations appear to rely on a belief that a favorable bargaining outcome somehow equates to anti-union 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, such animus is insufficient to establish a Section 8(a)(3) violation. 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.

In sum, the General Counsel cannot establish a *prima facie* case because the uncontradicted evidence establishes that compliance with its Section 8(a)(5) obligations, rather than anti-Union animus, motivated Respondent to implement 1% wage increases and 2% bonuses.

C. Even Absent Any Purported Animus, Respondent Implemented the Ultimate Wage Increase and Bonus Amounts Because It Correctly Believed 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 under well-established Board

law. See *Daily News of Los Angeles*, 304 NLRB 511; *St. Mary's Hospital of Blue Springs*, 346 NLRB 776, 776 n.2 (2006); *Bottom Line Enterprises*, 302 NLRB 373; *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). Neither the record nor Board law provides any support for that assumption.

Furthermore, **even incorrectly assuming *arguendo* that Respondent was wrong about its understanding that annual wage increase and bonus amounts are discretionary, such an assumption does not establish anti-union animus**. No evidence suggests Respondent, absent purported animus, would have taken any action other than implementing the fruits of bargaining, even if it somehow misperceived its Section 8(a)(5) obligations. As a result, Respondent has rebutted any alleged *prima facie* case.

Due to the absence of an adverse action or a a *prima facie* case, as well as Respondent's ability to rebut any purported *prima facie* case , the ALJ correctly found the General Counsel has not established a Section 8(a)(3) violation under *Wright Line*. The Board must therefore deny General Counsel Exception 4.

VI. CONCLUSION

For all of the reasons stated above, as well as the reasons articulated in the ALJD, Respondent has not violated Section 8(a)(3) of the Act. As a result, Respondent respectfully requests that the Board affirm and adopt the ALJD in its entirety.

Respectfully submitted this 22nd day of October, 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 22nd day of October 2019, this **RESPONDENT'S ANSWERING BRIEF TO EXCEPTIONS** was filed electronically and service copies sent via electronic mail to:

Adam N. Stern, Esq.
laboradam@aol.com
Justin M. Crane, Esq.
jcrane@myerslawgroup.com
The Myers Law Group, A.P.C.
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
Jake Yochman, Field Attorney
Jake.Yocham@nlrb.gov
National Labor Relations Board, Region 31
11500 West Olympic Blvd., Suite 600
Los Angeles, CA 90064

Daniel A. Adlong