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 REPLY 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, Charging Party hereby provides its Brief in support of its Exceptions to the Administrative Law judge's ("ALJ") Decision and Recommended Order, as follows:

I. LEGAL ARGUMENT

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

Respondent claims that the use of a document in which the General Counsel dismissed the 8(a)(5) allegation prior to hearing is, in essence, not evidentiary, but merely a stipulation. We agree. There is no question that the General Counsel dismissed the 8(a)(5) charge and instead pursued the 8(a)(3) charge and that it should not be used as evidence.

However, the ALJ considered it as evidence in coming to his decision, when he stated:

> "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")

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). 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)

Respondent argues that the 8(a)(3) and 8(a)(5) factors are so intertwined that the ALJ had no choice but to fail to mention 8(a)(3) in his decision. Respondent cites cases and reasons for such a finding that the ALJ failed to in his decision.

The ALJ makes his decision without ever discussing 8(a)(3) and focuses in on using standards as if Respondent was charged with an 8(a)(5) violation. Respondent argues that because the ALJ found a non-discriminatory motive, that further analysis was not needed. In

other words, it was fine for the ALJ to skip step one of the burden-shifting analysis and focus on part two without mentioning it in his decision.

The Third Circuit has provided a brief snapshot of what an 8(a)(3) burden-shifting analysis should look 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."

II. 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: November 5, 2019

Adam N. Stern, Esq.
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Attorneys for Charging Party

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2019, I served the foregoing document described as **REPLY 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:

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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 November 5, 2019 at Rancho Cucamonga, California.

Justin M. Crane