

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

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**MADELAINE CHOCOLATE  
NOVELTIES, INC.**

**-And-**

**LOCAL 1222, UNITED  
PROFESSIONAL  
SERVICE EMPLOYEES UNION.**

**CASE 29-CA-222257**

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**EXCEPTIONS OF MADELAINE CHOCOLATE NOVELTIES, INC. TO  
DECISION OF JEFFREY P. GARDNER, ADMINISTRATIVE LAW JUDGE,  
DATED NOVEMBER 1, 2019, AND RECEIVED NOVEMBER 4, 2019**

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**Submitted By:**

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By: Abraham Borenstein, Esq.  
Dated: December 12, 2019

Madelaine Chocolate Novelties, Inc. (“Madelaine” or “Respondent” as the context requires) hereby excepts to the Decision of Jeffrey P. Gardner, Administrative Law Judge (“ALJ”) dated November 1, 2019, and received by Respondent on November 4, 2019 (“Decision”).

The Exceptions herein are to specific comments, findings and determinations of the ALJ. A Brief in support of the Exceptions is provided under separate cover. Some Exceptions have explanatory comments as well.

1. The ALJ states on p.1-2 of the Decision that Madelaine is “engaged in the manufacture and retail sale of chocolate novelties and favors:

COMMENT:

Madelaine is engaged in the wholesale manufacture and distribution of chocolate products and novelties. Retail is a de minimus aspect of Madelaine’s business.

2. The ALJ describes the three applicable shifts at Madelaine as having “considerable variation in the verbiage used to describe these.” The ALJ offers as examples of his conclusion the following:

For example, the CBA refers to the shifts as the “First Shift,” “Second Shift” and “Third Shift.” (GC Exh. 7, Art. 7). By contrast, Respondent’s payroll records refer to them as the “Day,” “Afternoon” and “Night” shifts. (GC Exhs. 11-13). The Union’s Director of Field Service, James Gangale, testified that he refers to the two p.m. shifts, what he calls “off shifts,” as the “night shift” and overnight shift” (Tr. 50). However, when speaking with employees he would refer to the two p.m. shifts as the “afternoon” and overnight” shifts. (Tr. 52). Decision p.2, LL39-48.

COMMENT:

The Conclusion of the ALJ is misleading and irrelevant. This pertinent question is not what the shifts are called. The pertinent fact is that there were three distinct shifts, however they were identified, and the 3<sup>rd</sup> shift, known as the “night” shift was not the second, or “afternoon” shift. All involved knew this. Thus, the unfair labor practice clause (“ULP”) referring to the “Night” shift indeed was speaking of the third shift and not the second shift. Moreover, the entire case from General Counsel’s point of view is based on an alleged “Past Practice” of paying a 10% shift differential to designated employees.

The ALJ adopts that contention. He does not, however, adopt the undisputed fact that the Night (3<sup>rd</sup>) shift was not the Afternoon (2<sup>nd</sup>) shift. This inconsistency in approach toward “plant practice” undermines the ALJ’s entire opinion at the outset. The ALJ is attempting to create a false implication that the alleged variations in shift structure, as he describes them, undermine Madelaine’s strong position that the Complaint is impermissibly broader than the ULP charge filed.

3. The ALJ “found Gangale to be a very credible witness, straightforward in his answers on both direct and cross examination.” (Decision p.3, FN3)

COMMENT:

Ordinarily an ALJ’s credibility determinations are given deference. Here, the ALJ was flat-out wrong. Gangale was the Union’s chief negotiator for the time the Union represented employees at Madelaine. Of course, he was familiar with the issues; the wage differential issue was under discussion for years, and Madelaine was consistent that the wage differential was not required by the applicable collective-bargaining agreement (“CBA”) and was voluntary and not mandatory. The conclusion that “[h]e was familiar with the issues and seemed at all times to be speaking from his personnel knowledge” is meaningless. It is like saying, ‘The local TV meteorologist knows the weather.’ Maybe he/she does know the local weather. That does not mean he/she can talk about the impending storm authoritatively. In this case, Gangale could not and did not speak authoritatively about the employees’ expectations as related to the alleged past practice of shift differential. The source of his ‘knowledge’ was no unusual familiarity, i.e. no special knowledge about the wage differential issue. A key factor, in addition to Employer awareness, in deciding if a past practice exists is employee expectation. Gangale’s discussion of the foundation of the Madelaine employees’ expectations of the alleged shift differential was based on hearsay, not on firsthand knowledge. Madelaine’s witnesses knew the facts as well as Gangale, and they certainly knew Madelaine’s consistent position regarding application of the wage differential as voluntary and subordinate to contractual provisions making New York state minimum wage rates primary, on a historical level, as well as or better than Gangale.

If credibility is to be determined, in part, by being direct and forthright, Madelaine’s witnesses fulfilled that requirement. Even the ALJ acknowledged

the directness and honesty of Madelaine's Chief Administrative Office through the following statement:

"Respondent's Chief Administrative Officer Scott Wright acknowledged on cross-examination that for as long as he has worked for Respondent (since late 2001), it has always paid this shift differential. (Tr. 208). Wright acknowledged that Respondent did not cease paying the shift differential until December 31, 2017, when the minimum wage reached \$13.00 an hour. He also testified that the shift differential was voluntary."

This testimony is as open, forthright, and honest as Gangale's testimony. Indeed more-so, because it includes admissions of a fact, none of which Gangale is reported to have made.

Despite this, the ALJ inexplicably stated the following:

"I found Wright less credible in much of his testimony. He sounded rehearsed when pressed on the apparent contradictions in his testimony, and appeared not to sincerely believe his own testimony regarding the voluntariness of the payment of the shift differential." Decision p.3, FN4)

This finding is absurd. Wright "sounded rehearsed [?]." "Appeared not to sincerely believe his own testimony [?]." Such findings are a pure bootstrap to support the ALJ's pre-determined outcome. To explain: How can Wright be rehearsed, and not to believe his own testimony? What is wrong with preparation? Where does the ALJ derive that Wright did not believe the shift differential was voluntary? Just because the ALJ in a conclusory manner says so? Why didn't the ALJ observe in the context that the detailed CBA does not require a shift differential, but other differentials were explicitly stated?

4. The ALJ's statement "Although this ten percent shift differential is not separately outlined in the parties' CBA, it is specifically referenced multiple times in the CBA (GC Exh. 7), including in the definition of employees' "regular hourly wage rate" (Art. 9(c)) and in provisions relating to vacation pay (Art. 13(B)), sick leave (Art. 14(A)(1) and (B)(1)), bereavement leave (Art. 15), jury duty (Art. 16) and call-in-pay (Art. 17)" (Decision p.3, LL21-25) is incomplete, misleading and wrong.

COMMENT:

See Brief.

5. The ALJ incorrectly stated the following:

“Respondent maintains that, following the post-Sandy temporary suspension of operations, it considered all of its employees as newly hired, rather than merely rehired, and that the CBA permits it to pay those new hires the prevailing minimum wage. It’s actions at the time show otherwise.” Decision p.3, LL41-43; p.4, L1.

COMMENT:

See Brief.

6. The ALJ misinterpreted the actions of Madelaine regarding its treatment of previously employed employees, by stating the following:

“In addition, Respondent never treated its rehired employees as new hires. In Wright’s words, “we chose to bring people back and not have them sacrifice anything.” (Tr. 198). The employees returned to work with no reductions in their rates of pay, which still include the shift differential for afternoon and evening employees. They did not have to sign new Union authorization cards, they maintained their Union seniority, and they had the same vacation benefits based on their original tenure and previous accrual. Indeed, employees’ original pre-storm hire dates and payroll information were provided to its current payroll company after the storm, and those original hire dates were still included in Respondent’s payroll records through all of 2018, even after the alleged unilateral change.” Decision p.4, LL1-13.

COMMENT:

This observation falls squarely under the rubric of ‘no good deed goes unpunished’. The employees previously employed before the nine-month lay-off of Hurricane Sandy could have been paid the then applicable minimum wage. As detailed in the Brief, the Collective Bargaining Agreement (“CBA”) expressly allowed for this.

“All Employees hired after the effective date of the CBA (called herein “New Employees”) may, in the sole discretion of the **EMPLOYER**, be paid the minimum wage prevailing under New York State or federal law, as applicable (called herein “Minimum Wage”).

The ALJ ignored this critical paragraph in the CBA throughout the decision.

Further, that same Provision of the CBA explicitly acknowledges Madelaine’s right to pay more than the minimum wage to the returning employees.

The **EMPLOYER** may elect to pay to none, some or all of the New Employees during any time this CBA is applicable, a wage rate greater than the Minimum Wage.” CBA, Article 8, (B) , P.12.

Madelaine chose to pay those returning employees their prior wage. That was an act of generosity by Madelaine.

But, that act of generosity did not undermine Madelaine’s consistent CBA-based, legal position that the returning employees were new hires.

Paying employees laid off as result of Hurricane Sandy, which layoff exceeded six months, any severance, or not, was a situation the Union could have grieved—but waived by inaction. The ALJ’s conclusion that not paying severance meant they are not new employees is legally and factually wrong.

7. Madelaine excepts to this finding and conclusion:

“This case involves Respondent’s elimination of a shift differential that it had historically paid to its afternoon and evening shift workers, without giving the Union notice or an opportunity to bargain. I find that Respondent’s actions constitute an unlawful unilateral change of a well-established past practice in violation of Section 8(a)(5) and (1) of the Act.” Decision p.4, LL20-23.

COMMENT:

See Brief.

8. Madelaine excepts to this finding and conclusion:

“In cases where a collective bargaining agreement is in effect, an employer’s modification of a contractual provision which relates to a mandatory subject of bargaining without the union’s consent violates 8(a)(5).” Decision p.4, LL31-33.

COMMENT:

See Brief.

9. Madelaine excepts to this finding and conclusion:

“I find Respondent’s consistent and uninterrupted 18+ year practice of paying a ten percent shift differential to its afternoon and evening shift employees constitutes an established past practice and a mandatory subject of bargaining that Respondent was not privileged to unilaterally alter. While the General Counsel demonstrated with Respondent’s own payroll records that the shift differential was consistently paid, Respondent offered not a single example of any afternoon or evening employee to whom it was paid.” Decision p.5, LL20-25.

COMMENT:

We detail in The Brief that the wage differential was not and established past practice, the General Counsel failed to prove that it was, and Article 8(B) of the CBA, supra, controls Madelaine’s right to pay minimum wage at times (if not a reduction) as a matter of law.

10. Madelaine excepts to this finding and conclusion:

“Moreover, I find the CBA’s multiple references to employees’ shift differentials being included in the calculation of various benefits bolsters the argument that employees were entitled to and expected to receive the shift differential Respondent had always paid. Indeed, it had always been understood by all parties that the afternoon and evening shift employees were paid ten percent more than the day shift.” Decision p.5, LL27-31.

COMMENT:

See Brief.

11. Madelaine excepts to this finding and conclusion:

“I also find no merit to Respondent’s assertion that all shift differentials it previously instituted were subsumed by the New York State minimum wage increase. Employees’ wage rates were historically adjusted to reflect minimum wage increases, and the ten percent shift differential had always been added above that new rate. Again, Respondent’s own witness acknowledged on cross examination that Respondent had not previously considered this to be the case, and that the only time Respondent took this position was when the minimum wage increased effective December 31, 2017.” Decision p.5, LL 33-39.

COMMENT:

See Brief.

12. Madelaine excepts to this finding and conclusion:

“Instead, Respondent argues, in the face of clear evidence to the contrary, that it never had a past practice of paying a shift differential to its employees. Rather, it maintains that it was always entirely discretionary whether it paid a shift differential.” Decision p.5, LL42-45.

COMMENT:

Exception is taken to “in the face of clear evidence to the contrary.” Madelaine contends the evidence did not prove the existence of the alleged past practice under applicable criteria. As detailed in the Brief, the General Counsel failed to prove the criteria for a binding past practice. Only hearsay and third-party testimony as to employee reliance and expectations were shown. Respondent submits that is inadequate to prove reliance, and thus as a matter of evidence, the General Counsel failed to meet its burden of proof on that crucial issue.

13. Madelaine excepts to this finding and conclusion:

“Respondent’s claim that it was privileged to change the wages for its employees following its temporary shutdown following hurricane Sandy because the employees were all “new hires” is similarly unpersuasive. “New hires” in 2013 do not have hire dates in the 1900s, as multiple employees on the day, afternoon and evening shifts do as reflected in Respondent’s own payroll records as late as 2019. Significantly, Respondent never treated its

rehired employees as new hires. The employees returned to work with no reduction in their rates of pay, they did not have to sign new Union authorization cards, they maintained their Union seniority, and they kept their previously-accrued vacation benefits.” Decision p.6, LL1-8.

COMMENT:

See Brief.

14. Madelaine excepts to this finding and conclusion:

“Accordingly, I find that Respondent did make a unilateral change when it ceased paying a ten percent shift differential to its afternoon and evening employees, and that none of Respondent’s explanations for its actions justify that unilateral change.” Decision p.6, LL10-12.

COMMENT:

See Brief.

15. Madelaine excepts to this finding and conclusion:

“I find that the parties did not reach a lawful impasse in overall bargaining which would privilege Respondent to have made the unilateral change to its practice of paying a shift differential to its afternoon and evening employees.” Decision p.6, LL36-38.

COMMENT:

See Brief.

16. Madelaine excepts to this finding and conclusion:

“While this varied verbiage might seem superficially confusing, I find that there was no confusion among the parties as to the existence of these three shifts, no confusion as to which shifts were historically paid the shift differential at issue in this case (the 3:00 p.m. and 11:00 p.m. shifts), and no confusion as to which shifts Respondent ceased paying a shift differential to on January 11, 2018. The General Counsel’s decision to refer to those two shifts at issue as the “afternoon and evening” shifts was therefore reasonable, and made it clear to Respondent precisely what was being alleged.” Decision p.7, LL14-20.

COMMENT:

See Brief.

17. Madelaine excepts to this finding and conclusion:

“All three factors are clearly satisfied here where (1) the conduct alleged is exactly the same with regard to the afternoon employees as it is regarding the evening employees; (2) they share an identical set of facts and sequence of events; and (3) Respondent’s evidence and defenses are identical with regard to both groups.

Thus, I find no support for the argument that the Respondent was denied due process by the Region’s failure to solicit an amended charge based on the facts adduced in its investigation. To the contrary, Respondent was fully aware that it formerly paid a shift differential to its afternoon and evening shift employees, and no longer does so. I find it inconceivable that Respondent could have understood the Union to be challenging its elimination of that shift differential for one group of p.m. worker but not the other.” Decision p.7, LL42-43; P.8, LL1-8.

COMMENT:

See Brief.

18. Madelaine excepts to this finding and conclusion:

“Accordingly, as Respondent has offered no factually supported or legally sufficient defense to the unilateral change allegation, I find that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally eliminating the shift differential without providing notice and an opportunity to bargain to the Union and without reaching agreement or overall good faith impasse in bargaining.” Decision p. 8, LL9-13.

COMMENT:

See Brief.

19. Madelaine excepts to this finding and conclusion:

“3. Since on or about January 11, 2018, Respondent has committed unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by refusing to bargain collectively with the Union, by unilaterally eliminating the shift differential for its afternoon and evening shift employees without giving notice or an opportunity to bargain to the Union, or reaching a valid impasse.

4. The Respondent’s above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.” Decision p.8, LL24-31.

COMMENT:

See Brief.

20. Madelaine excepts to this finding and conclusion:

The entire Remedy section, p.8, LL33-46; p.9, LL 1-3.

COMMENT:

See Brief.

21. Madelaine excepts to this finding and conclusion:

The entire Order section, p.9, LL5-41; p.10, LL 1-19.

COMMENT:

See Brief.

22. Madelaine excepts to this finding and conclusion:

The entire Appendix, p.11-12.

COMMENT:

See Brief.

## CONCLUSION

The Decision of the ALG should be reversed and NO ULP by Madelaine found by the Board.

Respectfully submitted:

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(Respondent)

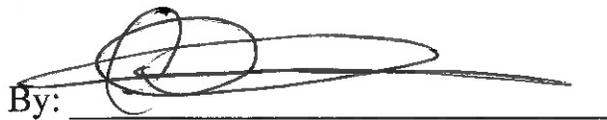
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