

**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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**BRIEF OF RESPONDENT, MADELAINE CHOCOLATE NOVELTIES,  
INC. IN SUPPORT OF EXCEPTIONS TO DECISION OF JEFFREY P.  
GARDNER, ADMINISTRATIVE LAW JUDGE**

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Dated: December 12, 2019

## PRELIMINARY STATEMENT

Jeffrey P. Gardner, Administrative Law Judge (“ALJ”) in his decision dated November 1, 2019 (“Decision”) totally missed the key points in this case. The Decision is completely off base and insupportable and must be reversed.

The question presented in this case is: did Madelaine Chocolate Novelties, Inc. (“Madelaine” or “Respondent” or “Employer”, as the context appears) have the legal and contractual right to elect not to pay a shift differential to its employees in its Afternoon and Night shifts after the New York Minimum Wage accelerated hourly pay well past existing wages? Madelaine so elected in good faith, based upon contract rights and language it had negotiated a decade earlier. The ALJ nevertheless decided Madelaine did not have such right of election asserting that a purported “Past Practice” overrode Madelaine’s contract rights. His Decision is wrong.

We demonstrate in detail in this Brief that despite a purported “Past Practice” allowing a “shift differential” for those two shifts, the existing Collective Bargaining Agreement (“CBA”) (GC-7)<sup>1</sup> provided Madelaine the option to pay the “shift differential” or not to pay it. We show that Madelaine had the right to rely on the CBA it negotiated with Local 1222, United Professional Service Employees Union (“Local 1222” or “Union”), and that Madelaine did nothing wrong when it relied on

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<sup>1</sup> References are to exhibits in evidence by the respective parties or to Transcript Reference (TR) at the trial.

its CBA. We show that the ALJ discounted or overlooked Madelaine's rights under the CBA and came to the wrong conclusion.<sup>2</sup>

This case turns on the application of Article 8, Paragraph B, the specific detailed provision in the CBA, (Ex GC-7) pursuant to which Madelaine always had the right at any time to pay the minimum wage to new employees, or current employees. Inexplicably, the ALJ did not evaluate that central paragraph. Indeed, he failed to even discuss the implications of that crucial provision of the applicable CBA in his flawed opinion. By ignoring this critical paragraph, which Madelaine in good faith had every right to rely on, the ALJ's opinion is flawed fundamentally. His Decision must be reversed and the Complaint dismissed.

### **THE FACTS**

From 2004, through 2013, and continuing to date, Madelaine and Local 1222, had a collective-bargaining relationship. Between 2004 and 2013, Madelaine and Local 1222 entered into three successive Collective Bargaining Agreements ("CBA") (Ex GC-7; Ex R-3; Ex R-4) and one Memorandum of Understanding (Ex R-2).

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<sup>2</sup> Indeed, the ALJ's review of the facts, and contractual analysis is so flawed, the ALJ not only ignored a crucial provision in the CBA Article 8.B. of the CBA, which is determinative of the issue, he also made serious and material factual errors. Those factual errors, which stem from an across-the-board failure to appreciate contract language and applicable bargaining history, permeates the Decision and renders it seriously and fatally flawed, requiring its reversal.

While the ALJ alluded to the Parties' bargaining history, ALJ failed to describe it with the detail required. Historically, the Madelaine-Local 1222 Collective Bargaining Agreements were the classic three-year Collective Bargaining Agreements. The first Collective Bargaining Agreement is dated April 1, 2004 to March 31, 2007. (Ex R-1). The relevant article discussing wages in the 2004-2007 CBA is, Article 8. That early CBA set forth no shift differential for any shift. To reinforce this point, in that first CBA, in Article 8, Subparagraph B, the parties agreed to a specific hourly wage rate for employees, but the CBA did not mention any incremental increase for any shift. Thus, in the very first CBA, the 2004-2007 CBA, there was no contractual shift differential pertaining to either a day shift or Night shift. (Ex R-1).

Then, as now, Madelaine had three shifts. The bargaining-unit primarily is a production complement of employees manufacturing the Employer's chocolate products. The bargaining-unit employees are paid hourly. Starting pay usually is the minimum wage. Based on longevity, hourly rates vary widely. (TR 171-173; see generally TR 50).

The following crucial provision was included in Article 8 of the 2004-2007 CBA: "[I]t is expressly agreed that any employee who will receive the benefit of an increase in the New York State or Federal minimum wage in the period which

increases equal to or greater than the proposed increase," (applicable to that CBA), "will not receive any increase in contract year two other than the minimum wage." That means, shift differential or not, no increase other than the minimum wage. That bargaining history was ignored by the ALJ. This important information establishes that from the outset of the bargaining relationship between these parties, there was an understanding, an agreement, that as the minimum wage rose, the minimum wage rate was going to control how much employees could be paid, in Madelaine's discretion, irrespective of wage differentials. Unwritten non-contractual differentials, even if they did exist, did not require commensurate increases as the minimum wage rose.

It should once again be emphasized that there is no mention of Shift Differential for Afternoon or Night shifts anywhere in any CBA.<sup>3</sup>

In the 2007-2010 CBA, Article 8 was again present, granting wage increases. Preceding this CBA was a heated lockout between the parties, which was ultimately settled. (Ex R-1). Article 8 granted two types of wage increases as a result of the lockout settlement. These two types of wage increases were incorporated into that CBA, and further into a Memorandum of Understanding settling the lockout. The

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<sup>3</sup> The ALJ incorrectly (Decision P.3 LL 20-25) refers to references to shift differential in the CBA as a source of making such differential a binding past practice. Madelaine strongly disputes that conclusion. We discuss such incorrect findings below.

first was a \$750.00 lump sum payment, broken into two subdivisions of \$375.00 over different years. There is no evidence in the record that a wage differential for Afternoon or Night shift employees was paid to supplement the lump sum payment. Every employee got the lump sum. The Union never questioned it. The Union never grieved it. The Union offered no contrary evidence at the trial.

The second type of wage increase in the 2007-2010 CBA was hourly wage increases; once again with no reference at all to wage differentials.

Importantly, to show how conscious the Parties were of the need explicitly to create a differential where they agreed to such differential, in the 2007-2010 CBA the Parties created a new classification, called a “line-leader”. A line-leader was an Employee, in any shift, who was granted more responsibility than others to make sure that the product is being made and wrapped and packaged properly. In Article 42 of the 2007-2010 CBA, the position of a line-leader was established, and there specifically, the line-leader got a contractual pay differential.

This specific description of a pay differential for line leaders establishes two important facts, ignored or misinterpreted by the ALJ. First, these parties could and did insert specific pay differentials, such as for line leaders, where they agreed to it. Second, all of the tangential references to including differentials in vacation, etc.,

were to specifically-granted differentials that existed, such as line leaders, such inclusions did not create an obligation to pay shift differentials.

The 2007-2010 CBA was replaced by the CBA that applies here, the 2010-2013 CBA, which continues in effect, unmodified. "All employees hired after the effective date of this CBA may, in the sole discretion of the employer, be paid the minimum wage prevailing, under New York or Federal law, as applicable, the minimum wage. The Employer may elect to pay none, some, or all of the new hires, during any time this CBA is applicable, with a wage rate greater than the minimum wage". "...may elect at any time" needs to be emphasized. "...in the sole discretion of the Employer" needs to be emphasized. "...new hires" needs to be emphasized. (Ex R-1).

In 2012, with approximately a year remaining in the duration of the 2010-2013 CBA, Superstorm Sandy struck the Rockaway Beach, New York, peninsula where Madelaine is located. Sandy catastrophically terminated Madelaine's operations. (TR 47-48). This period of layoff is a crucial and determinative fact.

The termination of Madelaine's operations had profound impact on the Respondent, the Union and the Employees. Manufacturing ceased. (TR 47-48). Aside from a handful of Employees, all of the bargaining unit employees were laid off indefinitely. (TR 175-178). That layoff exceeded six (6) months. (TR 175-178).

The effect of Hurricane Sandy on Madelaine Chocolate was a total shutdown of business operations. Manufacturing operations ceased. Inventory and equipment were destroyed. The plants were substantially destroyed, and Madelaine Chocolate was, for all intents and purposes, out of business. Bargaining-unit employees were laid off. Business records of the employer (including but not limited to payroll at that time, which was managed in-house), were destroyed. (TR 175-178) Thus, under the terms of the 2010-2013 CBA, all Madelaine Employees contractually were terminated. (TR 175-178; GC-7, P 32-33).

In the aftermath of Hurricane Sandy, the management personnel of the Employer undertook to determine whether or not the plant could be re-opened and operations resumed.

It took approximately nine months after Hurricane Sandy, but with great effort and expense, Madelaine reopened its doors and commenced a low-level operation around July 2013. The destroyed machines and equipment ultimately were replaced at enormous expense, and over the course of the last approximately twenty-four months, Madelaine Chocolate slowly built up operations. (TR 175-178).

The fact that Madelaine was shut down for nine months is a point of emphasis in this case. The ALJ, failed to find that the Employees who were contractually laid off for nine months after Hurricane Sandy were terminated. The ALJ made his

finding despite the indisputable fact that they were laid off, i.e., terminated for more than six (6) months, which six (6) months layoff in the clear language of the CBA was a per se termination. The applicable CBA 2010-2013 plainly states that the Employees were terminated as a matter of fact after six (6) months of layoff. The ALJ wrongly looked to whether or not severance was paid to those laid off employees. The payment of severance to the laid off employees, or not, is irrelevant to the overwhelming conclusion that employees laid off more than six months are treated as terminated employees. The Union knew Hurricane Sandy terminated Madelaine as a going concern. It did not grieve non-payment of severance. It did not complain. Nor did it contest rehire rates of such terminated employees. Thus, upon rehire they are “new” employees.

Prior to the expiration of the 2010-2013 CBA, during its last year, the Employer and the Union engaged in negotiations on and off, but with no terms of a new CBA reached. The 2010-2013 CBA continued in effect after its expiration. Periodic negotiations continued. The Employer honored its terms albeit that it expired more than 5 years ago. (TR 12-175; 189).

The testimony at the hearing established that there were numerous sessions and negotiations between the Union and the Respondent over the past six years, and more. There has been no change to even one CBA term. We submit as a matter of

fact, these parties have been at an impasse for years, over every conceivable matter in the CBA.

Now we get to the heart of the contract language at issue. The 2010-2013 CBA contains no discussion of shift differential in its wage provisions. Article 7, Hours of Work (Ex R-1). (PP. 10-11). The relevant section of the CBA discusses the various shifts. As stated, there is no provision for shift-differential pay in Article 7.<sup>4</sup>

The 2010-2013 CBA expired by its terms on March 31, 2013. The ongoing recognition of Local 1222 by Madelaine is a crucial fact when evaluating Madelaine's negotiating behavior with the Union. Madelaine may have disagreements with Local 1222 as to contract interpretation, to the point of impasse, but never disrespected the Union by not negotiating in an ongoing basis, albeit to deadlock, or in legal terms, impasse. This ongoing negotiation included discussion with the Union about the obligations and effects of the new huge minimum wage increases effective in New York City in 2017 and 2018.

Madelaine slowly increased its production capacity after Superstorm Sandy, and, as a result, began to recall permanently laid-off (i.e. terminated) employees, and also hired many entirely new employees. While Madelaine was regrouping and

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<sup>4</sup> It is the Employer's position that there is no binding shift-differential obligation in effect ever negotiated between the Employer and the Union.

rehiring prior employees as new employees, minimum-wage increases in New York State<sup>5</sup> had the effect of increasing the wages of many of the day-time hourly employees to an amount equal to or greater than the wages of Night-employees, even with the shift differential.<sup>6</sup>

The result of the implementation of the minimum-wage increases to \$13 and \$15, was that the wages of prior and returning employees were flattened out and became in many cases, equal, even though the recalled employees, prior to the minimum wage increase, may have had a higher hourly-rate compensation than new employees. (See generally 172-178).

<sup>5</sup> **Minimum Wage Increase:**

In or about December of 2016, New York City, implemented a sharp increase in minimum-wage requirements. Those requirements set out the following minimum wage schedule (Ex GC-2):

Location	12/31/16	12/31/17	12/31/18	12/31/19	12/31/20	2021*
NYC - Large Employers (of 11 or more)	\$11.00	\$13.00	\$15.00			
NYC - Small Employers (10 or less)	\$10.50	\$12.00	\$13.50	\$15.00		
Long Island & Westchester	\$10.00	\$11.00	\$12.00	\$13.00	\$14.00	\$15.00
Remainder of New York State	\$9.70	\$10.40	\$11.10	\$11.80	\$12.50	*

**General Minimum Wage Rate Schedule**

<sup>6</sup> Scott Wright credibly testified that the reason for the inclusion of Article 8, Paragraph B in the various CBAs was expressly to give Madelaine the ability to deal with increases in the minimum wage. This was a concern well before the current mega increases in New York City, and Madelaine bargained for and received these protections in the CBA expressly to address those concerns. (TR 172-173).

This testimony reinforces Madelaine’s position that its rights under Article 8, Paragraph B superseded the shift differential past practice, if there was one.

We discuss the ALJ’s extraordinarily incorrect and inappropriate credibility analyses regarding Mr. Wright below.

For example, if a returning employee (previously permanently laid off after six months but recalled post-Sandy) was earning \$10.50 per hour in 2015, that employee was increased to \$11.00 per hour as of January 1, 2017 due to the minimum-wage increase. A new employee, who might have started at \$9.00 per hour, instead also started at \$11.00 per hour due to the minimum-wage increase, the same hypothetical wage as the long-term employee. (See generally 172-178).

Similarly, a hypothetical Night-shift employee earning \$9.90 per hour in 2014, which already included the discretionary 10% per hour incentive of \$0.90 cents, was increased to \$11.00 per hour on January 1, 2017, due to the minimum-wage increase. A hypothetical day-shift employee earning no incentive, earning \$9.00 per hour was increased as well on January 1, 2017, to \$11.00 per hour. Thus, the two wages were “flattened out” or equalized, and no further differential was, or had to be, paid to the Night-shift employee. (See generally 172-178).

This flattening out of wage levels had the result in some cases of eliminating the discretionary-shift differential:

1. Day-shift employees earning less than the new minimum wage were raised due to the minimum-wage increase. That increase often equaled Night employees’ wages previously below the prior minimum wage because the prior discretionary differential was merged into such Night-shift new wages under the increased minimum wage; and/or

2. Afternoon or Night shift employees previously below the new minimum wage even with the discretionary differential, also were raised to the new higher minimum wage. Those wage increases more than made up for the voluntary differential.

Regarding application of the minimum wage, Madelaine's rights are settled: from time to time, Madelaine paid some new or current employees, as appropriate, more than the minimum wage. If the Employer felt that certain employees were qualified, or doing a very good job, the Employer could elect to pay and at times did pay, more than the minimum wage. This was done with the knowledge and consent of the Union. There has never been an objection to that process. There has never been a grievance filed by the Union. There has never been anything complained of by the Union. The result is that there is a long bargaining history between these Parties, proving that Madelaine reserved the right in the applicable CBAs to pay minimum wage, or more than the minimum wage as circumstances dictated. And, as the minimum wage increased, Madelaine had the same right to pay the minimum wage with no requirement of differential pay.

The bottom line financial and legal issue before the Board is whether Madelaine was required to pay a wage differential to employees on the second and/or third shifts, in the face of an aggressive New York state increase in Minimum Wage

to \$15.00 per hour when Article 8.B. of the CBA allowed Madelaine to pay minimum wage – and not more.

Madelaine emphasizes the CBA expressly allowed payment of minimum wage rates to its employees as the minimum wage rose. As we have described, above, that right was negotiated and inserted into the CBA by mutual agreement. Therefore, there was not, and could not be, any impediment to Madelaine from utilizing and implementing a contractual clause designed to protect its financial interests, we state emphatically: an employer is not required to negotiate about a CBA Provision that already exists. To the extent Madelaine is accused of not negotiating about the effects of implementation of that clause, Madelaine contends it did not have to, but it did do so. There were numerous ongoing negotiations between these parties, as even the ALJ agrees. Decision P. 2, LL 25-34.<sup>7</sup>

With Madelaine's rights under Article 8.B. established, evaluation of the practical implications of Article 8.B. requires a two-step process. First, what or who is a "new" employee? i.e., which employee is "hired" after the effective date of the

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<sup>7</sup> The ALJ's credibility determinations (D.P3, FN 3 FN 4, FN 5) should not be accorded the usual deference allowed administrative law Judges' credibility determinations in NLRB cases. The ALJ's evaluation of credibility, as briefly discussed in The Exceptions, are not based on observations of witnesses' behavior, demeanor and the like. Such observations usually are accorded deference. The ALJ's credibility determinations here are based on his (mis)interpretation and (mis)application of the CBA and of historic payroll history at Madelaine. That means, the ALJ decided how he wants to interpret the CBA and payroll history and bootstrapped his conclusions into a credibility finding. That method is merely a cheap trick to disguise a faulty analysis of the evidence in the cloak of a credibility determination. We therefore urge the Board to look beyond the usual credibility reliance on the ALJ, to reject his determinations, and to find the two Madelaine witnesses credible.

CBA? Such “New Employees” may be paid minimum wage. Madelaine’s core contention in this case is that it had the specific contractual right to pay new hires the minimum wage at any time, meaning at hire, or when the minimum wage increased as expressly stated in Article 8, Paragraph B (GC-7, P-12), repeated now, as follows:

“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 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.”

The second step of analysis is, what rights does Madelaine have to pay Minimum Wage to “New Employees” as the CBA continues to be in effect as here, and the minimum wage rises (as it did here)? In such cases, Madelaine submits, the Employer has every right under the last sentence in 8.B. to pay to “none, some or all of the New Employees, during any time this CBA is applicable, a wage rate higher than the Minimum Wage.”...or to pay to New Employees the Minimum Wage.

Madelaine showed conclusively at the trial that there were two categories of New Employees: (i) those employed as original Employees; (ii) those employed as

original Employees after reopening post-Sandy; and (iii) those prior employees laid off for more than six months due to Sandy—because by such lengthy lay off, their employment was per se terminated. Ex GC7-, CBA, p.33, Article 33(B). Over time, employees on the second and third shifts did receive a 10% bump in pay.<sup>8</sup> Madelaine contends that the shift differential was:

- (i) Entirely voluntary; and
- (ii) Subject and subordinate to, Madelaine's explicit contractual right under the CBA, as described above to pay new employees the minimum wage, both as new employees, and as ongoing employees when the minimum wage in New York increased.

In the set of facts unique to Madelaine, and guided by specific, persuasive language in the 2010-2013 CBA, and its predecessor CBA's, all bargaining unit employees employed when Madelaine resumed operations, starting nine (9) months after Superstorm Sandy, are New Hires. The language of the CBA supports Madelaine's good faith contention that prior personnel hired after the nine months

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<sup>8</sup> Even if a failure to bargain effects of the non-payment of shift differential as of 2017 is found, that is a technical violation, not a financial one. Such a finding does not require Madelaine to pay the shift-differential, retroactively. Such a finding can only compel Madelaine to negotiate regarding its impact, but not to pay such differential, unless negotiations achieves a financial result.

Thus, it is clear that: (i) the General Counsel failed to meet his its burden of proof to prove a past practice as a shift differential; and (ii) the Employer's witnesses, testifying non-hearsay direct and candidly, persuasively show there is no shift differential in effect at Madelaine.

are New Hires. And, of course, actual new hires at Madelaine are contractual new hires who receive only the minimum wage.

As New Hires, Madelaine contends that Madelaine had the right, in its sole discretion, to pay them minimum wage; both upon hire, and also as the New York City minimum wage surged upward.

In order to undermine Madelaine's position that there was no binding "past practice" requiring a shift differential, the ALJ incorrectly found that there was shift differential language in the CBA. The opposite is correct. There is no shift differential language in the wage provisions of the 2010-2013 CBA, nor was there a past practice of such shift differential for second shift (Afternoon) and third shift (Night) employees.

To support his finding that there was a binding shift differential, the ALJ relied on two references to "shift differential" in non-wage provisions of the 2010-2013 CBA (GC-7, P-20). Both provisions simply state employees get time and a half or vacation pay, and such pay includes a shift differential, but only if there is one, not that the shift differential is required. This means, if they get this pay, they are getting a differential, i.e., are paid more than minimum wage due to the Employer's contractual right to award higher wages in its discretion, that extra pay would be included in calculation vacation benefits. It did not create a situation where the shift

differential was a plant practice or that such was a condition of the Madelaine work force. Madelaine's witness who testified of the shift differential conceded that it was paid but insisted credibly it was voluntary. (TR 173).

Indeed, the shift differential was so discretionary and not required that Madelaine CFO, David Reifer, credibly testified that he never even heard of it until the onset of this case<sup>9</sup>. (TR 244-245). Thus, the obscure references to wage differential (as to benefits, if any) do not alter the fundamental fact that the 2010-2013 CBA and all its predecessors, did not have that provision as part of the wage paragraphs.

There is more support for Madelaine's position in the language of the 2010-2013 CBA. As we have described above, in contrast to the failure of the CBA to require (or even mention) a shift incentive for Afternoon or Night-shift employees, another CBA provision, Article 42, Line-Leaders (pp. 42-42), specifically in Sub-paragraph B, provides an additional wage increase called "differential", for such Line-Leaders of fifteen cents per hour. This specificity of wage differential demonstrates that the Union and the Employer had the opportunity to preserve a specific shift incentive differential in the wage section of the CBA, as the parties

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<sup>9</sup> The ALJ's discussion of Mr. Reifer's Testimony is absurd on its face.

expressly did for Line-Leaders, but did not do so. The failure to do so, together with the Employer's discretionary rights under the CBA, means that at all relevant times any differential in pay between a Night-shift employee and other employees on other shifts was entirely voluntary, and not obligatory, on the Employer. The ALJ found that the alleged past practice, as to those two shifts, superseded Madelaine's panoply of rights under Article 8, Paragraph B. That interpretation is wrong.

The General Counsel, adopting the Union's position, and ultimately endorsed by the ALJ, ignored the explicit contractual right to pay minimum wage both to new employees and ongoing employees and made a flawed value-judgment decision that the prior practice of voluntarily making such shift-differential payments overwhelmed the explicit contract right to pay minimum wage.

As a practical matter, the claim for a wage differential obligation over an ever-advancing New York state minimum wage requirement of \$2 per hour in one year for bargaining-unit members is financially debilitating to Madelaine as it struggles to rebuild its business. The expense to newly reconstituted Madelaine to pay the wage differential would be enormous. Madelaine thereupon applied its long standing contractual right to pay minimum wage and no more. No clause in the CBA requires such payments.

It is crucial to observe that on this record the General Counsel offered no proof from any witness that there was an expectation of ongoing shift differential by the employees. This is a major failure of proof by the General Counsel as to the binding nature of the shift differential.<sup>10</sup>

In summary, Article 8, Paragraph B, is clear and the applicable principles may be broken down into these component steps:

- 1. Step One:** Article 8, Paragraph B applies to Employees “hired after the effective date of the CBA.”

**FACT:** The CBA was effective April 1, 2010.

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<sup>10</sup> In light of the silence of the 2010-2013 CBA about requiring a shift differential, the General Counsel relied on oral testimony to prove a “past practice” establishing a binding shift differential. But, the General Counsel failed to so prove. The only testimony offered by the General Counsel to support this claim was hearsay testimony of Union representative James Gangale. That testimony totally fails to meet the requirement of proving a binding past practice by proving Employee expectations, the standard of showing a past practice.

In contrast was the testimony of two Madelaine representatives with knowledge.

Scott Wright, the Chief Administrative Office of Madelaine, explicitly testified that the shift differential was discretionary with the Employer. (See TR 173).

David Reifer, the Chief Financial Officer of Madelaine, testified he never even heard of the shift differential until litigation began. (See TR 244-245).

The burden of proof to prove a past practice which modifies (or defines) the Contract is on the General Counsel.

This required direct, non-hearsay proof of employee expectations of a binding past practice. No Madelaine unit employee testified to that effect. There was no evidence to that effect on this record. The available witness, Alma Cruz, did not testify.

**FACT:** Every employee hired after April 1, 2010 is covered by Article 8, Paragraph B--not after the CBA expires, but after it starts.

**FACT:** Superstorm Sandy shut down Madelaine's operations at least nine months.

**FACT:** As detailed above here are two categories of Employees hired by Madelaine after Superstorm Sandy, those Madelaine calls "terminated and rehired after six months" and totally "New Hires". Therefore, every single Employee hired by Madelaine when the plant reopened, nine (9) months after Superstorm Sandy, was a New Hire, hired after the effective date of the CBA.

- 2. Step Two:** Employees hired after the effective date of the CBA may, in the sole discretion of the Employer, be paid the minimum wage prevailing under New York State or federal law.

**FACT:** The Employer had sole discretion to apply the minimum wage.

**FACT:** No mention of any differential.

**FACT:** No time limitation when to apply minimum wage as pay scale. In other words, at any time a minimum became applicable.

- 3. Step Three:** The EMPLOYER had sole and discretion 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.

**FACT:** The Employer had sole discretion elective rights, to pay minimum wage for some or all Employees.

**FACT:** No mention of applicable shifts.

**FACT:** No mention of shift differential.

**FACT:** Employer election rights are even when the CBA is applicable. “At any time.”

**4. Step Four:** The overwhelming conclusion is that Article 8, Paragraph B, was designed to deal with increases in the New York minimum wage and gave the Employer sole discretion to decide how to apply such minimum wage to literally New Employees, and to ongoing Employees.

**FACT:** The General Counsel offered no evidence to disagree or contest Madelaine’s legitimate interpretation of its discretionary rights regarding application of the New York minimum wage.

Madelaine emphasizes that it was the obligation of the General Counsel to prove the General Counsel's Case by a preponderance of the evidence. Madelaine submits that the General Counsel did not prove any of the essential allegations of the Complaint by a preponderance of the evidence and the ALJ erred in concluding otherwise.<sup>11</sup>

The failure of proof by the General Counsel is profound:

- The General Counsel has failed to prove that Madelaine had a required shift differential for the Afternoon or evening shifts.

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<sup>11</sup> The Decision does not discuss burden of proof issues. In this case, failure to do so is further evidence of the failure of the ALJ to properly consider the evidence, the CBA and the respective obligations of the parties.

- The General Counsel failed to prove that the previously employed employees were not new employees, and therefore not subject to minimum wage limitations on pay.
- The General Counsel failed to prove the new hires (with no prior Madelaine employment experience) were not new employees, and therefore subject to minimum wage limitations on pay.
- The General Counsel failed to prove that as to those employees previously earning more than the new minimum wage, and who therefore were not impacted by the minimum wage increase(s), even if there was a shift differential, there was no change in their terms and conditions of employment by the minimum wage increase(s) and those have no claim even if a binding shift differential requirement is found.
- The General Counsel failed to prove Madelaine did not discuss these shift differential issues with the Union in good faith and indeed to impasse.
- The General Counsel failed to prove that for prior employees and for new employees, the shift differential was not subsumed into the minimum wage increases.

- The General Counsel ignores that Madelaine was in constant communication and negotiation with the Union over the shift differential (and all CBA issues). There was no surprise, or unilateral action by Madelaine at all.
- Plainly, the law and the facts, it is clear that the Employer acted appropriately, consistent with its contractual rights, negotiated in good faith and did not violate Section 8(a)(5) of the Act.

It is the Employer's position that as a matter of law, under explicit contractual provisions, Articles 7 and 8, the Employer retained the authority under the CBA to elect to pay, or not to pay, minimum wage as it rose, with or without incentives for working on shifts other than the day shift. When Madelaine chose not to do so, it was entirely within its rights.<sup>12</sup>

Madelaine contends and proved, and is correct as a matter of law, that there was no binding past practice, but that any wage differential was voluntary.<sup>13</sup> Moreover, the 2010-2013 CBA "in the Employer's discretion" supersedes any

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<sup>12</sup> Madelaine contends that under Articles 7 and 8, it did not have to negotiate its discretionary application of Articles 7 and 8. Still, Madelaine raised these issues with the Union repeatedly, to impasse. (See TR 109-110; 189).

<sup>13</sup> It is true that certain employees on the Afternoon and Night-shifts did receive at one time, a 10% per hour increase in base wages as an Employer discretionary incentive to work on the Night-shift. However, this incentive pay never was and continues not to be a mandatory obligation upon the Employer. Nor was it ever imposed or even referenced in the CBA. Nor was any employee's wage ever reduced. Nor has the Employer refused to discuss the impact of current economics with the Union.

alleged past practice, and as the minimum wage rose, gave express authority to Madelaine to pay the higher minimum wage without further differential. Thus, Madelaine did not unlawfully eliminate any so-called “wage shift differential” pay for employees working the Afternoon and Evening shifts.

## **ARGUMENT**

### **POINT I**

**MADELAINE HAD DISCRETION TO APPLY MINIMUM WAGE WITHOUT REGARD TO SHIFT DIFFERENTIAL UNDER ARTICLE 8.B. AND FURTHER, THE ONLY FAIR READING OF THE CBA IS THAT ALL THE EMPLOYEES WERE NEW HIRES.**

We have detailed above that Article 8, Paragraph B, of the CBA, empowered Madelaine to treat both returning employees and the literal new employees as “new employees.” Thus, the Minimum Wage Application of Article 8.B. applied and superseded any purported claims that past practice required more payment than the new minimum wage.

### **POINT II**

**THE COMPLAINT SHOULD HAVE BEEN DISMISSED BECAUSE IT DOES NOT PROPERLY ALIGN ITSELF WITH THE CHARGE, AND NEITHER THE CHARGE NOR THE COMPLAINT WAS AMENDED.**

The filed charge must align with the Complaint. That is standard law, albeit with some flexibility. The second page of the Charge contains the description of the

8(a)(5) allegation. The Charge states: "within the previous six months, the Employer failed and refused to bargain in good faith with the Union as the collective bargaining representative of its employees by making unilateral changes in terms and conditions of employment."<sup>14</sup> Underneath that language, the Charge states, "List Changes" followed by "Revoke Night Shift Differential."<sup>15</sup> Night shift. Not Afternoon shift. Not Second shift. The Employer responded to the change in the investigation and cooperatively supplied all of the information requested in response to the various requests and subpoenas of the General Counsel.

Following the investigation, the Complaint was issued. In Paragraph 8 of the Complaint, on page two (2) of five (5), "The General Counsel alleges, effective in employee paychecks dated January 11, 2018, Respondent eliminated the wage Shift Differential pay for employees working in the Afternoon shift and Evening shift." All concede those are two separate shifts and the Afternoon shift significantly larger than the Night (third) shift. The "Afternoon shift", however, was not referred to in the charge. They are not the same thing.

The ALJ found essentially 'no harm, no foul', i.e., that it is the same thing, that they do not have to be so specific in the charge. Madelaine vehemently disagrees. We submit that in a specific case like this where there are three defined

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<sup>14</sup> We have disputed this contention as a matter of fact.

<sup>15</sup> This contention is disputed as a matter of fact.

shifts, and where the General Counsel refers to them as three defined shifts, where the issue is comparative wages among the three shifts, the Charge cannot simply state that the Employer violated the act because it did something in the Night shift, and then allege in the Complaint that the Afternoon shift is to be included as well. Those shifts are not the same. That violates due process.

This is a serious, and we believe, fatal flaw in this proceeding as to the Afternoon shift. In Labor Board v. Fant Milling Co., 360 U.S. 301 (1959), the U.S. Supreme Court held that “in finding a refusal to bargain collectively, the Board was not precluded from considering conduct on the part of the employer which was related to that alleged in the charge **and grew out of it while the proceeding was pending** before the Board.” (See National Licorice Co. v. Labor Board, 309 U.S. 350).

In Fant Milling Co., the Court held that, just as in National Licorice, the unilateral wage increase was “of the same class of violations as those set up in the charge...”. The Court held that the wage increase was “related to” the conduct alleged in the charge and developed as one aspect of that conduct “**while the proceeding was pending before the Board.**” Fant Milling Co. at 307 (emphasis added). We emphasize, in those cases, the new conduct occurred while the NLRB case was ongoing and is not the case here.

The Court made it clear that this decision to give the Board a more expansive interpretation of the charge, is not simply that the Board is, in the words of the Court of Appeals, to be left “carte blanche to expand the charge as they might please, or to ignore it altogether.” Id. at 309 (quoting Labor Board v. Fant Milling Co., 258 F.2d 851, 856 (5<sup>th</sup> Cir. 1958)). There, the Court held that the Board is not precluded from “dealing adequately with unfair labor practices which are related to those alleged in the charge and **which grow out of them** while the proceeding is pending before the Board.” Id. at 309.

The applicable law therefore shows that it is required that the Charge be reasonably consistent with the Complaint. That requirement was not met in this case: the Complaint’s allegations substantially differ from those in the Charge. The concept on which the General Counsel relies, i.e., “inclusion”, applies only to alleged-related acts occurring while a case is pending. That contention does not apply to actions occurring before the original Charge was filed. Those prior actions must be changed before they may be the subject of a Complaint. That is basic due process.

In this case, there are two distinct shifts and facts relating to allegations that there had to be some type of incremental pay for the Afternoon shift. Therefore, the

Employer moved at trial, and contends now, the Board should dismiss the Complaint in its entirety as to the Afternoon shift.

### **POINT III**

#### **THERE WAS NO BINDING PAST PRACTICE REGARDING SHIFT DIFFERENTIAL, AND THE GENERAL COUNSEL FAILED TO MEET ITS BURDEN OF PROOF.**

The General Counsel has the burden of proving every element of its case. Here the General Counsel must prove the existence of a past practice of wage differentials for the Afternoon and Night shifts. National Steel and Shipbuilding Co., 348 NLRB 320, 326(2006),\_enfd. Mem. 256 Fed Appx. 360 (D.C. Cir. 2007); Regency Heritage Nursing and Rehabilitation Center, 353 NLRB 1027(2009). Further, the Party being asked to honor it (i.e., Madelaine), must be aware of it as binding. BASF Wyandotte Corp., 278 NLRB 173, 180(1980). We have detailed above the failure of the General Counsel to meet its burden of proof on showing a binding “past practice.” The CBA 2010-2013 does not grant such shift differential. Thus, it can only be proved by a persuasive showing of past practice. Madelaine has always treated it as voluntary, not binding. Such testimony was undisputed. No employees appeared to testify that they had an expectation of past practice. The General Counsel has, thus, utterly failed to meet its burden of proof.

The only evidence offered by the General Counsel to prove existence of a binding past practice was the hearsay testimony of the president of the Union, James Gangale (“Mr. Gangale”). In his testimony, Mr. Gangale claimed that he became aware of this so-called unilateral change by receiving a few phone calls from employees of the Employer. (TR 58-59) But, Mr. Gangale never received those calls. More specifically, Mr. Gangale stated, “we had some, as you can imagine, some employees called us.” (TR 58-59). But, Mr. Gangale stated that he was not called directly. Rather, it was pure hearsay: Alma (Cruz), the Union representative who had responsibility with regard to the Employer, was the person called, and then she supposedly told him. That testimony is hearsay, and incredible. To this day, we do not know who allegedly complained. We do not know how many Employees complained. We do not know what they complained about. Alma was identified as in the hearing room. (TR 169). But, she did not testify. No excuse or reason was proffered why Alma, or the employees, could not testify. In opposition to this hearsay, is the clear testimony of Scott Wright, who testified the wage differential was voluntary. (TR 173). The integrity of the NLRB process requires that the ALJ’s cavalier reliance on hearsay be rejected.

David Reifer, who had reason and responsibility to know about all wage issues, including wage differentials, never even heard of the wage differential until this case started. (TR 244-245).

In Consolidated Communications Holdings, Inc., 366 NLRB 1, 154, 3-4 (2018), the Board set forth the established framework for proving a binding past practice that requires employee Proof, not presented here. There, the Board stated:

The Board has held that, “[u]nder the unilateral change doctrine, an employer’s duty to bargain under the Act includes the obligation to refrain from changing its employees’ terms and conditions of employment without first bargaining to impasse with the employees’ collective-bargaining representative concerning the contemplated changes.” Lawrence Livermore National Security, LLC, 357 NLRB 203, 205 (2011). The Act bars employers from taking unilateral action on mandatory bargaining topics such as rates of pay, wages, hours of employment and other conditions of employment. Garden Grove Hospital & Medical Center, 357 NLRB 653, 653 fn. 4, 5 (2011). It is well established that health benefits are mandatory bargaining topics. See, e.g., Mid-Continent Concrete, 336 NLRB 258, 259 (2001), enfd. 308 F.3d 859 (8th Cir. 2002). An employer’s regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment, even where such practices are not expressly set forth within a collective-bargaining agreement. Garden Grove Hospital, supra. **The party asserting the existence of a past practice bears the burden of proof on the issue; specifically, the evidence must show that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to reoccur on a consistent basis.** Palm Beach Metro Transportation, LLC, 357 NLRB 180, 183–184 (2011), enfd. 459 Fed. Appx. 874 (11th Cir. 2012) (emphasis added).

In DMI Distribution of Delaware, 334 NLRB 409, 411 (2001), the Board did not find a past practice when the policy of the employer giving bonuses was in effect for 11 years, but bonuses were only actually given to employees “a couple of times.” See B & D Plastics, Inc., *supra*. (Board found it a random event rather than a past practice when, only three times in the past 5 years, an employer held cookouts for employees and gave the employees paid time off to attend these cookouts). See also, Exxon Shipping Co., 291 NLRB 489, 493 (1988). (Board found that when the union participated twice in government investigations regarding the possible death of one of its members, 3 years apart, too remote in time and too intermittent in their occurrence to be a past practice especially when there was no union participation in three similar investigations).

The above case law provides some insight as to what constitutes a binding past practice. In DMI Distribution of Delaware, 334 NLRB at 411, the Board did not find a past practice when, over the course of an 11-year period, a certain practice on the part of the Employer was intermittent at best. In B & D Plastics, Inc., the Board found a random event as opposed to a past practice.

These cases all have a common theme pertaining to “consistency and frequency” for a long period of time when it comes to establishing a past practice. The criteria for determining the binding nature of a past practice is the reasonable

expectation of the employees, (Sunoco Inc., 349 NLRB 240, 244 (2007)) together with the Employer's awareness of the alleged past practice as binding. In legal terms, the General Counsel must prove by competent evidence what the reasonable expectations of the employees are and the Employer's awareness. In contrast to that requirement here, is the vague hearsay testimony of a Union representative that some employees were disappointed. Disappointed in what? Did those employees remember Article 8.B.? What were the actual employee expectations and not guessed statements about such expectations? This requirement that the General Counsel provide competent proofs of employee expectations is extremely important because, in the present case, the testimony of Union president James Gangale, was limited to a bland statement that "some of the employees called us." (TR 58-59). But, as we have shown, that "us" turned out to be inadequate and hearsay. Mr. Gangale personally could not provide any other testimony as to a basis for establishing the expectations of the employees. The General Counsel has provided no evidence of any grievances relating to a wage shift pay differential other than the current charge and Complaint. And, of course, the Employer's witnesses credibly testified of no awareness. Therefore, the General Counsel has not established and met its burden of proof as to employee reliance on a "consistent and frequent" past practice on the part of the Employer.

#### POINT IV

**ASSUMING *ARGUENDO* THERE WAS AN ENCFORCEABLE WAGE DIFFERENTIAL, THE MINIMUM WAGE INCREASE SUBSUMED ALL DIFFERENTIALS PREVIOUSLY INSTITUTED BY THE EMPLOYER.**

When New York State decided to implement an aggressive minimum wage policy effective December 31, 2016, which really meant January 1, 2017, the minimum wage in New York City was increased to \$11.00, Madelaine has every right to assert its contractual, discretionary rights. Madelaine decided to enforce its rights. It did not have to renegotiate this right. Conclusively, it was largely in CBA 2010-2013, Article 8, Paragraph B. Madelaine did discuss and did try to deal with the Union, even though it did not have to. And Madelaine got nowhere. The parties were at an impasse.

Further, even in 2018, and later in 2019, There were already many employees as of January 1, 2017, earning more than the new minimum wage. Some were earning \$13.06 or \$14.00, some \$15.00, some \$18.00, some \$30.00 and so on. Those employees were not impacted by the increase and personally had differentials built in before 2017. They should not even be in this case at all. In contrast, the claim from the General Counsel seems to be that everybody, even if they were earning greater than the minimum wage increase, should have gotten some type of increment increase, even though they already got it. Even though they were already making

\$1.00, \$2.00, \$3.00, or \$5.00 more, as the minimum wage increased. That contention of the General Counsel is absurd on its face.

In short, the so-called unilateral change, to the extent that there even was one, could only apply to employees making less than \$13.00 as of January 1, 2018. Employees making \$13.06, for example, or \$13.01 or more, are not in this case.

Additionally, Madelaine contends that for all those employees who were making \$12.10 prior to the bump to \$13.00 already had differentials built into their wage. Those employees already received a 10% bump. When the employees went from \$12.10 to \$13.00, they had incorporated, into their wages, a prior 10% bump. So the best case scenario, for the General Counsel, in the Employer's view, is not that these employees now are obligated to be increased to \$14.30, but that these employees are to be increased to the difference between \$12.10 and \$13.00, \$0.90, with 10% of \$0.90 being \$0.09 increase as their "missing shift differential."

Therefore, even under the General Counsel's best-case scenario, the maximum that any person who was increased to \$13.00 as a result of the January 1, 2018 minimum wage increase, could receive as the "missing shift differential" is \$0.09, not \$1.30, because these same employees already received a \$1.10 increase the year before, and the employee is not entitled to a duplicative, and/or compounding 10% increase.

In relation to the actual Night shift, there are no employees who were affected by the Employer's decision. At the relevant time in the Night shift, there were approximately eleven employees in the Night shift. There were employees making \$16.25, \$16.83, \$17.00, \$19.12, \$17.00, and \$13.06. In fact, five of the six Night-shift workers, Garcia (\$16.25 per hour), Pean (\$16.25 per hour), Ticona (\$16.83 per hour), Philogene (\$17.00 per hour), and Bolton (\$19.12 per hour), are above the new minimum wage by a factor of more than 10% per hour over \$13.00 per hour, i.e. \$1.30 per hour. (Ex GC 12; GC 13). Those five employees therefore, in any case, cannot have a claim, as they continue to be paid more than the minimum wage by a 10%-plus factor. Further, given that all other employees in the Night shift were already making more than \$13.00, there was and could be no unilateral change. There was no change at all. Further, the payroll records will reflect the aforementioned numbers, one way or the other.

### CONCLUSION<sup>16</sup>

We have emphasized that the burden of proof is on the General Counsel to prove all phases of its case. Any failure in the house of cards topples the entire claim. Madelaine submits that the General Counsel has failed to meet its burden of proof

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<sup>16</sup> Madelaine incorporates all arguments made in the Exceptions and at Trial on the record as if stated herein at length.

for each and every alleged illegal claim asserted against Madelaine. The house of cards is lying flat on the floor.

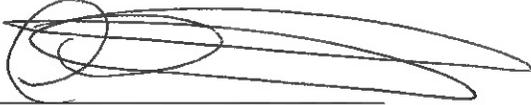
In contrast to that failure, Madelaine has proved:

- The shift differential was a non-binding voluntary extension of benefits.
- There is no credible, non-hearsay evidence on the record that the employees on the Afternoon or Night shifts relied on the alleged shift differential as a binding, past practice.
- Madelaine had the right, in its sole discretion, to apply the minimum wage to newly hired employees, or existing employees, even mid-contract.
- All Madelaine employees on all three shifts were, as a matter of contract and/or fact, new hires subject to the employer's minimum wage rights.
- Madelaine properly paid the \$13.00 minimum wage and \$15.00 minimum wage without obligation of a shift differential to Afternoon or evening employees.
- The \$13.00 minimum wage "subsumed" a previously given \$1.10 differential, and therefore, the most Madelaine owes any employees for 2017 is \$0.09.

- Madelaine, in any event, without obligation, discussed and negotiated all these issues, with the Union, to impasse.
- The Complaint cannot be allowed to apply to Afternoon employees, when no charge was filed covering Afternoon, Second shift employees.

We respectfully submit the Complaint should be dismissed.

Respectfully,

By:   
/s/ ABRAHAM BORENSTEIN, ESQ.  
BORENSTEIN MCCONNELL & CALPIN, PC

Dated: December 12, 2019

Oral Argument is requested.

Served by electronic means and UPS overnight mail on the General Counsel and Union.

/s/ Abraham Borenstein, Esq.