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

MADELAINE CHOCOLATE NOVELTIES, INC.
(RESPONDENT) **Case 29-CA-222257**

and

LOCAL 1222, UNITED PROFESSIONAL SERVICE EMPLOYEES UNION

(CHARGING PARTY UNION)

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ALJ'S DECISION AND ORDER

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this 10th day of January, 2020

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I. Preliminary Statement

Respondent, Madelaine Chocolate Novelties, eliminated its well-established ten-percent shift differential for its afternoon and evening shift employees without providing the Union with notice and an opportunity to bargain and without reaching an overall valid impasse. Respondent contends that it was permitted to change the shift differential based on contractual language or impasse. Respondent further advanced an inconsistent defense that it did not eliminate the shift differential. Respondent also raised a procedural defense that the Complaint is not reasonably consistent with the language of the underlying charge and should be dismissed as to the second shift (afternoon shift) employees. After a review of the testimony and documentary evidence, Administrative Law Judge Jeffrey P. Gardner determined that the shift differential was an established past practice and that Respondent's actions violated sections 8(a)(1) and (5) of the National Labor Relations Act.

Respondent's exceptions to the Administrative Law Judge do not raise any novel issues not raised at hearing. Respondent simply continues its attempt to defend its behavior by manufacturing a contract interpretation that has no basis in the parties' bargaining history.

The Administrative Law Judge correctly made his decision based on the testimony of the witnesses, a review of years of payroll documents, and a fair application of the law to the facts of this case. Respondent failed to raise or substantiate any valid claim that the ALJ erred in finding that Respondent violated the Act. For these reasons, Counsel for the General Counsel urges the Board to reject Respondent's Exceptions and to adopt the ALJ's Decision and Recommended Order requiring Respondent to rescind its unilateral change and to make employees whole for their losses resulting from Respondent's unlawful action.

II. Procedural History

On June 18, 2018, Local 1222, United Professional Service Employees Union ("the Union") filed Case No. 29-CA-222257 against Madelaine Chocolate Novelties, Inc. ("Respondent"), which was served on Respondent on July 13, 2018[1] (GC 1(A-C))[2].

On October 30, 2018, the Regional Director of Region 29 issued a Complaint and Notice of Hearing in the instant matter, alleging, inter alia, that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act ("the Act") by eliminating the shift differential for employees working the afternoon and evening shifts, without giving the Union prior notice and an opportunity to bargain, and without reaching overall impasse (GC-1(F)).

On November 6, 2018, Respondent filed an Answer to the allegations in which it denied the substantive allegations set forth in the Complaint (GC-1(H)). Respondent raised no affirmative defenses in its Answer. *Id*.

A hearing before Administrative Law Judge Jeffrey Gardner was conducted in Brooklyn, New York, on February 26, and March 25, 2019. At hearing, Respondent made an oral Motion to Dismiss the Complaint as to the afternoon shift employees on the grounds that the Charge (GC-1(A)) listed "night shift" employees as losing the shift differential, while the Complaint (GC-1(F)) included "afternoon" and "evening" shift employees as the affected classes of employees. Judge Gardner deferred his ruling on the matter and instructed Respondent to raise the issue in its post-hearing brief (Tr. at 24).

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[1] On June 19, 2018, a copy of the Letter accompanying the Charge to Employer and the front page of the Charge were served on Respondent (GC-1(B)). The second page of the Charge that includes the narrative of Respondent's conduct was inadvertently not sent. The Charge was otherwise timely filed and served on June 19, 2018. Respondent waived any claim that the Charge was not timely served as it did not raise that affirmative defense in its Answer or at trial. *Approved Elec. Corp*, 356 NLRB 238, n.1 (2010).

[2] As used herein, "ALJD." Refers to the ALJ's Decision issued November 1, 2019, "Tr." refers to the page in the transcript, "GC-" refers to General Counsel's exhibits, and "R-" refers to Respondent's exhibits.

On November 4, 2019, Judge Gardner issued a Decision and Recommended Order ("the Decision") in the above captioned case, finding that "Respondent unlawfully ceased paying a shift differential to unit employees working its afternoon and evening shifts without first notifying and bargaining with the Union…" (ALJD 4) and that the parties did not reach lawful impasse permitting such a change. (ALJD at 6). Judge Gardner also made the determination that "[t]he Complaint allegations adequately matched the Charge language" and denied the Respondent's Motion to Dismiss the Complaint. (ALJD at 6).

The ALJ's Recommended Order provides that Respondent shall "cease and desist from altering the shift differential payable to afternoon and evening shift employees and make whole employees who were not paid the shift differential which Respondent was obliged to make," and post a Notice to employees notifying them that it will not alter the shift differential.

III. Respondent's Exceptions

On December 12, 2019, Respondent filed Exceptions to the Decision and a Brief in Support of the Respondent's Exceptions. Pursuant to 102.46 of the Board's Rules and Regulations, Counsel for the General Counsel hereby submits it's Answering Brief in Reply to the Respondent's Exceptions and supporting Brief.

Respondent filed 22 exceptions to the Administrative Law Judge's ten-page decision. Each of Respondent's exceptions is without merit and Counsel for the General Counsel urges the Board to affirm the ALJ's decision. Respondent's exceptions will be dealt with by category including, 1) objections to the ALJ's credibility determination; 2) objections to the ALJ's factual findings, and 3) objections to the ALJ's application of the law to those factual findings.

Respondent's exceptions and supporting brief continue a trend that carried throughout litigation, namely, Respondent counsel making assertions regarding a purported interpretation of a provision in

the parties' CBA - without providing any evidence that the parties ever interpreted or applied the CBA in that way. The witness testimony and the documentary evidence overwhelmingly reject the legal arguments advanced in Respondent's briefs. As outlined below and in the ALJ's Decision, Respondent's own witnesses' testimony does not support any contract construction advanced in their briefs, nor does that testimony show a historical interpretation of the CBA by the parties. Instead, the record evidence conclusively demonstrates that the Respondent had a past practice of providing employees of the afternoon and night shifts with a 10% wage differential, that differential was referenced in multiple provisions throughout the CBA, and that Respondent eliminated this established practice without notice to the Union or bargaining to impasse.

In considering the Respondent's exceptions, Counsel for the General Counsel urges the Board to reject any argument advanced in the briefs not supported by documentary evidence or witness testimony, subjected to cross examination.

IV. Statement of Facts

A. Respondent Admitted Jurisdiction in its Answer but Respondent Filed Exception to ALJ's Finding of Jurisdiction (Exception 1)

The ALJ correctly found that Respondent falls under the NLRB's jurisdiction. Counsel for the General Counsel alleged in the Complaint, and Respondent admitted in its Answer that at all material times, it has been a domestic corporation with an office and place of business located at 96-03 Beach Channel Drive, Rockaway Beach, New York, and has been engaged in the manufacture and retail sale of chocolate products; that in conducting its operations during the past twelve month period, Respondent derived gross revenues in excess of $500,000 and purchased and received goods and materials at its Rockway Beach, New York, facility valued in excess of $5,000 directly from suppliers located outside the State of New York; and that it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. (GC. Ex. 1(G) and ALJD at 1-2).

Because Respondent admitted the above allegations, no additional evidence regarding the interstate nature of Respondents business was introduced by either party at hearing. Respondent now excepts to the ALJ's finding that Respondent falls within the jurisdiction of the NLRB.[3] Respondent sole grounds for the objection is that "Retail is a de minimus aspect of Madelaine's business." Respondent provides no support for the objection beyond this statement. Respondent's exception is without merit and should be rejected.

There are two problems with this assertion. First, whether retail of chocolate is de minimis or not, the Respondent does in fact have a retail operation. Respondent admitted as such. The ALJ could therefore not have erred in describing the Respondent's business as being made up of chocolate manufacturing and retail.

Second, Respondent's argument that its retail business is "de minimus," or a smaller part of its overall business operation, is utterly irrelevant. The only relevant facts are whether the Respondent meets the requisite statutory and discretional jurisdictional standards – to which Respondent admitted.

Respondent's specious exception should be denied.

B. Background: The Parties' Bargaining History

Respondent and Union have had a collective bargaining relationship for over 15 years (ALJD 2; Tr. 44). The Union represents the following unit of Respondent's employees:

> All full-time and regular part time production, maintenance, shipping, receiving and office and clerical employees, employed by the Respondent at its Rockaway Beach, New York, facility and excluding, all salesmen, guards and supervisors as defined in the Act (ALJD 2, GC 7).

Respondent and the Union were parties to a Collective Bargaining Agreement ("CBA") that was

[3] The sole support for this exception is contained in a "comment" in the Exceptions filed by Respondent. As outlined further below, such arguments in the Exceptions document are impermissible when a Brief in Support of Exceptions is filed, as one is here. The Brief in support of exceptions contains no support for this exception and so it should be deemed an exception without support and denied. See NLRB Rules and Regulation 102.46.

effective by its terms from April 1, 2010, through March 31, 2013 (ALJD 2, GC. 7). Union and Respondent witnesses testified that prior to and since the expiration of the CBA on March 31, 2013, representatives of Respondent and the Union have met on several occasions to negotiate a successor agreement (ALJD 2, Tr. 48, Tr. 168-69). Proposals have been exchanged, but to date no final collective bargaining agreement has been reached (ALJD 2, Tr 49).[4] At no time during any of the bargaining sessions, at or away from the bargaining table, did either party declare, announce or suggest the parties had reached impasse (ALJD 6 and Tr. 73). No best final offer was ever distributed, nor did anyone ever refer to any proposal as a final offer (Tr. 73). There was also no notice of any intent to implement any final offer *Id*. Other than a change to the shift differential described below, no other proposed terms of a successor CBA were implemented. *Id*.

C. The Shift Differential

The shift differential is a ten-percent wage enhancement paid to employees who work the afternoon and evening shifts (ALJD at 3, Tr. 53).[5] The shift differential has been a term and condition of employment for employees for at least 18 years prior its 2017 elimination. (ALJD 3, Tr. 53). Respondent's Chief Administrative Officer Scott Wright testified that the shift differential for the afternoon and evening shifts has been in effect since at least 2001, when he began working for Respondent (ALJD 3 and Tr. 208). The shift differential is explicitly referenced throughout the CBA (ALJD 3; GC 7; Tr. 53, 57-58). Section 9(c) of the CBA states that employees' regular hourly wage rate includes the shift differential (ALJD 3; GC 7). In addition to being expressly included in the definition of "regular hourly wage rate," the CBA also requires that each of the following benefit

[4] Respondent's facility was closed for a period of eight or nine months due to Hurricane Sandy, which occurred in October 2012. Respondent resumed operations in around July 2013. Hurricane Sandy contributed to the delay in bargaining for a successor contract. (Tr. 48-49, 175).

[5] The afternoon and evening shifts are defined in the CBA as second shift and third shift (GC-7, art. 7; Tr. 50). The Employer's payroll records refer to employees shifts as "day," (first shift) "afternoon," (second) and "night" (third) for production employees (See GC 3, 4, 5, 12 and 13). Employees refer to their shifts as "afternoon" and "evening", when describing their shifts to Union representatives (Tr. 53).

payments include the shift differential: holiday pay (Article 12(B)), sick time (Art. 14 (A)(1) & (B)(1)), bereavement leave (Art. 15), jury duty (Art. 16), call-in-pay (Art. 17) and vacation pay (Article 13(B)) (ALJD 3). However, the amount of the shift differential is not specified in the contract. (*Id.*)

Wright testified that from the time he started working for Respondent in 2001 until Respondent's January 2018 unilateral change to the shift differential, *all* employees working the afternoon and evening shifts received the shift differential *on top of their base rate of pay* (ALJD 3; Tr. 54 and 209). A review of Respondent's payroll records confirms this testimony (ALJD 3; GC 3, 4, 5, 6, 12, 13).

Even when the New York State minimum wage[6] has increased periodically over the past five years, Respondent continued its long-established practice of paying afternoon and evening shift employees the ten-percent shift differential *on top of* their regular hourly wage rate (ALJD 5; GC 2, 3, 4, 5, 6, 12, 13).

Prior to December 31, 2016, the minimum wage was $9.00 per hour (GC 2). Respondent's payroll records show that it paid employees working the day shift no less than $9.00 per hour as mandated by the minimum wage.[7] Respondent paid employees working the afternoon and evening shifts a minimum of $9.90 per hour. ($9.00 per hour base pay plus the additional ten-percent shift differential) (ALJD 3; GC 12).

On December 31, 2016, the minimum wage rose to $11.00 per hour (GC 2 & 12). When the minimum wage rose, employees working the day shift saw their pay rate rise to no less than $11.00 per hour. The afternoon and evening shift employees saw their pay rate rise to no less than $12.10 per hour

[6] All references to the minimum wage hereafter refer to the minimum wage in the State of New York, the only State where the conduct in this case occurred.

[7] It is undisputed that the CBA permits the Employer to set a new employee's *initial* wage rate at minimum wage or any higher wage rate at the Employer's discretion.(GC-7, Art. 8) Some employees working for the Respondent make more than minimum wage either by function of their longevity and negotiated wage rates in successive CBAs or because the Employer chose to set their starting wage rate higher. Despite this discretion, the payroll records show that in 2016 no afternoon or evening shift worker made less than $9.90, and that in 2017, no afternoon or evening shift employee made less than $12.10 - both rates being ten percent higher than the minimum wages in those years in which the minimum wage was $9.00 and $11.00.

($11.00 per hour base pay plus the additional ten-percent shift differential) (ALJD 3; GC 12). Wright confirmed that the additional $1.10 cents in those employees' paychecks was the shift differential (Tr. at 187).

D. The Unilateral Change: Respondent Eliminates the Shift Differential

On December 31, 2017, the minimum wage increased from $11.00 to $13.00 per hour (GC 2). Effective on that date, Respondent unilaterally eliminated the shift differential for afternoon and evening shift employees (ALJD 3). Payroll records show that in paychecks dated January 11, 2018, employees working the day shift who had been earning a minimum of $11.00 saw their hourly pay rise to $13.00 (GC 2). Employees working the afternoon and evening shifts who were earning a minimum of $12.10 also saw their hourly pay raise to the new minimum wage of $13.00 per hour- *but* they did not receive the additional ten-percent shift differential (*Id).* This represented a departure from all past minimum wage increases and reflected Respondent's elimination of the shift differential. If Respondent had provided the shift differential, it would have paid employees on the afternoon and evening shifts $14.30 per hour: $13.00 per hour base pay plus the ten-percent shift differential, in this case$1.30.

Respondent's elimination of the shift differential is self-evident and conclusively established by Respondent's payroll documents (ALJD 3, 5; GC 4,5,12,13). After the implementation of the $13.00 per hour minimum wage, Respondent increased the hourly wage rate of all employees making less than $13.00 per hour to $13.00 per hour *regardless of shift* - something that Respondent had never done before (ALJD 5; Tr. 209, GC 3, 12). The evidence establishes that the vast majority of employees working the afternoon and evening shift went from an hourly wage of $12.10 to $13.00 per hour.[8]

[8] The payroll records show that Respondent selectively continued to pay very few afternoon and evening shift employees a ten percent added increase over and above minimum wage which reflects the amount those employees would have received if they had continued to pay the shift differential (see payrate for employee Katherine Razak below). The Respondent has not explained why those employees retained the shift differential while others did not - and has represented that it does not maintain any documents related to those increases (Tr. 154). Accordingly, it is impossible to determine if the Respondent

An illustrative sampling of payroll records follows:

Last Name, First Name (Shift)	December 2016 (GC Ex. 12)	January 2017-December 2017 (GC Ex. 4 & 12)	January 2018 (GC Ex. 4)	January 2019 (GC. Ex. 13)
Astudillo, Maria (Factory-Afternoon)	$9.90	$12.10	$13.00	$15.00
Cruz-Leon, Cecilia (Factory-Day)	$10.95	$11.00	$13.00	$15.00
Jean, Elise (Factory-Afternoon)	$13.06	$13.06	$13.06	$15.00
Razak, Katherine (Factory-Afternoon)	$11.22	$12.10	$14.30	$15.00
Rodriguez, Maria (Factory-Day)	$10.40	$11.00	$13.00	$15.00
Veras, Antonia (Factory-Afternoon)	$11.44	$12.10	$13.00	$15.00
Mero, Katherina[9]	$9.90	$12.10	$13.00	$15.00

E. Union Learns of Change and Confronts Respondent about Elimination of Shift Differential.

Upon noticing the discrepancy in their pay checks, Respondent's employees contacted Alma Cruz ("Cruz"), a Union representative responsible for servicing Respondent's bargaining unit, and reported to her that they suspected Respondent failed to pay them the shift differential (Tr. 58-59). Cruz passed the employees' complaints along to the Union's Director of Field Services James Gangale (Id). During the week of January 13, 2018, Gangale called Respondent's Chief Administrative Officer Scott Wright to inquire about the employees' wage complaints (Tr. 60-62). During that phone call, Wright told Gangale that Respondent had spoken to their attorney and that it was their understanding that they could include the shift differential in the minimum wage increase - something Respondent had never done before. (Tr. 60-61). Gangale protested, stating that Respondent had not given the Union any advanced notice of Respondent's elimination of the shift differential (Tr. 61). Wright was present in the hearing room for the duration of Gangale's testimony and testified extensively at the hearing. Wright did not testify concerning the January 2018 telephone conversation with Gangale and therefore Gangale's testimony

retained the shift differential for those employees or gave those employees a suspiciously timed ten-percent raise. This connotes a new level of discretion in the application of the shift differential that never existed before.

[9] Mero worked on the afternoon shift during the relevant time periods from 2016 until February 2018, at which time she switched to the day shift. She experienced no change in pay when she switched from the afternoon to the day shift.

that the Union received no notice from Respondent about the implementation stands uncontested by Respondent.

F. Respondent's Proposed Elimination of the Shift Differential

Respondent offers its bargaining history as evidence that it provided sufficient notice to the Union of its intention to change the shift differential. Specifically, Wright testified that because the minimum wage was increasing, Respondent looked for items to negotiate and identified the shift differential as something Respondent could negotiate with the Union (ALJD 6; Tr. 174). Wright testified that Respondent made bargaining proposals in 2012 and 2013 that struck all references to the shift differential from the CBA.[10] When asked if Madelaine proposed "elimination" of all references to the shift differential, Wright responded, "I have never used the word elimination…I would not testify that it was eliminated. No money was ever taken off the table from any employee. The shift differential eventually became part of their -- it was always part of their compensation (Tr. 193-194)."

Later, under questioning from the Administrative Law Judge, Wright admitted that his initial statement that he "never used the word eliminated" was inaccurate, and he acknowledged that Respondent outright proposed elimination of the shift differential in its June and December 2018 bargaining proposals, which post-date Respondent's January 2018 change to the shift differential. (GC 9, 10; Tr. 194).[11]

G. Respondent's Admission of a Change to the Shift Differential

Wright's initial refusal to admit that Respondent ever proposed eliminating the shift differential was in service to one of Respondent's more far-fetched arguments: that the shift differential still exists and is

[10] Other than the two red-lined proposals in 2012 and 2013, neither Wright nor any other Respondent witness testified to any contemporaneous notice, written or otherwise, to the Union that effective January 2018 Respondent would make changes to the shift differential.

[11] It is worth noting that Respondent Counsel had no problem using the term "eliminate" to describe the Respondent's position. Respondent Counsel asked Gangale on cross-examination, "[a]nd would you agree that the Employer's position consistently was to eliminate -- even though it felt it wasn't obligated, to eliminate the shift differential?" (Tr. 109). Crucially, this exchange happened prior to Wright's testimony and while Wright was in the courtroom.

now “baked in” to the wages of employees (Tr. 199-200). When asked by Counsel for the General Counsel to explain it, Wright became tongue tied (Tr. 200). Specifically, Wright was asked to explain how an afternoon/evening shift employee currently earning only the minimum wage[12] is still earning the ten-percent shift differential, Wright responded:

> A: My understand [sic] is that an employee today who is making 15 dollars, inside that wage–
>
> Q: Yeah
>
> A: -- would -- would be a certain amount of money that represented 10 percent that they had been -- they may have been getting the year prior. I'm not saying that very artfully, but –
>
> Q I think you're trying.
>
> A I'm trying.
>
> Q Yeah.
>
> A Inside that 15 would have been an earlier differential tend -- base that would have been combined (Tr. 200).

Wright was given another chance to explain how the shift differential was not eliminated but was rather “baked in.” Wright was questioned about afternoon shift employee Katherina Mero. In 2017, Mero was an afternoon shift employee earning the shift differential and making $12.10 per hour. On December 31, 2017, when the minimum wage increased to $13.00 per hour, Mero’s hourly rate rose to $13.00 per hour. In February 2018, Mero transferred from the afternoon shift to the day shift and continued making $13.00 per hour. Wright’s testimony demonstrating the change as it applies to Mero follows:

> JUDGE GARDNER: Okay. So for those 2017 -- she starts in 2017 making $12.10 in the afternoon. The minimum wage goes up to 13 on January 1st of 2018. And so there are three entries where she's working in 2018 making 13 dollars an hour; is it your testimony that that includes a shift differential baked in?
>
> THE WITNESS: I believe so.
>
> JUDGE GARDNER: Okay. And then, in the -- the following weeks, beginning February 1st [when

[12] On December 31, 2018, the minimum wage rose to $15.00 per hour.

> Mero moved from the afternoon shift to the day shift]-- and for the remainder of 2018 on here -- when she's making the same 13 dollars, do I understand your testimony to be that, well, now, there's no shift differential?
>
> THE WITNESS: She kept making 13 dollars.
>
> JUDGE GARDNER: Okay. And did the day people get shift differentials?
>
> THE WITNESS: No. (Tr. at 203).

Despite Respondent's contention that it did not eliminate the shift differential, payroll and witness testimony conclusively establishes that it did. Respondent's defense is not born out by the evidence. Paradoxically, Wright's testimony actually constitutes an admission that Respondent made a substantial change to the shift differential.

H. Respondent's Defense that Contract Language Privileged its Actions

Respondent's counsel has seized upon a provision in the expired CBA involving Respondent's discretion in assigning starting wage rates to "new employees" to argue that its elimination of the afternoon and evening shift wage differentials was privileged. To argue the applicability of this provision, Respondent resorted to a perversion of the contract and the facts. Namely, it argues, despite all evidence to the contrary, that all employees who were employed by Respondent prior to Hurricane Sandy became "new employees" upon their 2013 recall as a result of an eight to nine-month hiatus in operations due to Hurricane Sandy. Respondent is required to make this argument in order to find a contract provision that permits them to make the unilateral change to the shift differential- in this case Article 8(B) of the CBA. However, the ALJ determined that neither the facts, nor the history of the contract support Respondent's argument (ALJD 3, 4, 5). Because Respondent continued to provide the shift differential for many years after the 2013 recall on an uninterrupted basis, and for numerous other reasons, the ALJ was correct in finding that the facts do not support Respondent's argument.

Article 8 of the CBA deals with wages and contractually agreed upon hourly wage increases (GC 7). Article 8(A) states that employees shall be paid their hourly wage rate and that the Respondent may

change their wages from time to time (GC 7). Article 8(B) states:

> 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. (GC 7).

The next provision, Article 8(C) provides for specific wage increases for existing employees hired at or before the effective date of the CBA. Article 8(C) has historically provided the agreed-upon wage increase amounts and their respective effective dates that have been negotiated to take effective in each successive CBA (GC-7, R-1, R-3). All witnesses agreed that Article 8(B) is a long-standing provision that existed in previous CBAs between Respondent and the Union.

Respondent's counsel made a series of arguments in its opening statement, and through Counsel's often leading questions, asserting that Article 8(B) of the expired CBA permits Respondent to eliminate or change the shift differential (Tr. 39-36). Respondent's argument relied on reading 8(B) in total isolation without regard to 8(C) or any other provision of the CBA. Respondent's Exceptions continue to make arguments about the construction and operation of Article 8(B) without regard to any record testimony and make far fetched arguments about its interpretation, again without the support of any witness testimony about its past operation.

Through leading questions, Respondent's Counsel elicited Wright's testimony that Article 8(B) permits Respondent to set a newly hired employee's wage rate at minimum wage or any other amount (Tr. 171). On cross-examination, Wright conceded that Article 8(B) permits Respondent to set a new employee's *initial* wage rate, but that Article 8(C) precludes Respondent from lowering an existing employee's wage rate to minimum wage (Tr. at 207). This explains why Respondent must now argue, despite direct contradictory payroll documents provided by the Respondent, that all employees were "new employees" after Hurricane Sandy.

Wright testified that Respondent's operations were closed for period of eight- or nine-months following Hurricane Sandy which resulted in many of Respondent's employees being "out of a job for at least eight or nine months, some way more than that" (Tr. 176). When asked by Respondent's Counsel how the company regarded those employees when they returned to work, Wright said "We considered them new employees, for our purposes" (Tr. 177). Wright further testified that employees who were hired that had never previously been employed by Respondent were "truly new employees" (Tr. 178). Wright did not explain how some employees could be "new employees" and others could be "truly new employees." Crucially, Wright did not testify that any of those "new employees" were denied the shift differential by virtue of their alleged status under Article 8(B).

When asked whether any of these returning "new employees" had any reduction in benefits as a result of their alleged new status, Wright said no. Wright testified that employees who returned to work following Hurricane Sandy returned to work making the same rate of pay, the same union seniority, and the same vacation benefits (Tr. 198) as they enjoyed before the Hurricane. Gangale also testified that returning employees did not have to sign new Union authorization cards (Tr. 122). At no point, did Respondent provide any evidence showing that there was a material distinction between the treatment of employees prior to or after Hurricane Sandy regarding any element of compensation, including the shift differential.

Crucially, Respondent's own payroll records serve as the most damning evidence to undermine Respondent's "new employee" contention. Those payroll records contain the employees hire dates and a significant portion of them pre-date Hurricane Sandy. (GC 12, 13). Those same payroll records also show that Respondent paid each and every employee working for the employer post-Hurricane Sandy the shift differential if they worked the afternoon and evening shift. The record evidence is clear that the shift differential existed with the same ten-percent formula and was uniformly applied to all

afternoon and evening shift employees both before and after Hurricane Sandy. In fact, the payroll evidence shows that the shift differential survived multiple minimum wage increases between 2012 and 2016, further solidifying that the past practice existed.

V. Argument

The Administrative Law Judge correctly held that the Respondent violated section 8(a)(1) and (5)

of the Act when it ceased payment of the shift differential to employees working the afternoon and evening shift. The ALJ's decision correctly relied on the credible testimony of the witnesses, an analysis of Respondent's payroll records, a review of the collective bargaining agreements, bargaining history, and application of the facts, and a correct application of the law pertaining to unilateral changes to past practices. Respondents exceptions fall into three main categories: exceptions to the ALJ's credibility findings, exceptions to the ALJ's finding of facts, and exceptions to the application of the law in light of the ALJ's finding of facts. Respondent's exceptions are outlined in their Exceptions and, in some cases, supported in their Brief in Support of Exceptions. Often their Brief replies on legal arguments based on facts that do not appear in the record. To the extent they make those arguments, they should be rejected.

A. The Board should reject Respondent's arguments contained solely in its Exceptions document because it is prohibited by §102.46 of the Board's Rules and Regulations when Respondent also files a Brief in Support for Exceptions as it did here. (Exceptions 1, 2, 3, 6, 9 and 12)

Respondent filed Exceptions and a Brief in Support of Exceptions in response to the ALJ Decision. Respondent is permitted to do this pursuant to NLRB Rules and Regulations §102.46 (a). However, Respondent's Exceptions document also contains arguments in support of certain exceptions, which is expressly forbidden by §102.46(a)(1)(i)(D), "If a supporting brief is filed, the exceptions document must not contain any argument or citation of authorities in support of the exceptions; any argument and

citation of authorities must be set forth only in the brief." Per §102.46 (a)(1)(ii) "Any exception which fails to comply with the foregoing requirements may be disregarded."

Respondent's Exceptions and Brief expressly violates the prohibition described above. The Respondent's Exceptions states explicitly that "The exceptions herein are to specific comments, findings, and determinations of the ALJ. A Brief in support of Exceptions is provided under separate cover. *Some Exceptions have explanatory comments as well*." (Respondent's Exceptions page 2, *emphasis added*). Thereafter, Respondent proceeds to list its exceptions and provide "Comments" arguing the validity of the exception. These comments go beyond specifying the "question of procedure, fact, law or policy to which exception is taken;" as set forth in the §102.46(a)(1)(i)(A). Instead, these comments constitute argument in favor of the exception the Rules specifically require be set forth in the Respondent's Exceptions Brief. For example, Respondent provides commentary in support of its first exception to the ALJ's finding of jurisdiction but provides no support for the exception in it's Brief in Support of Exception. Such a construction of Exceptions is expressly prohibited by the Rules. Because Respondent provided "comments" in support of Exceptions 1, 2, 3, 6, 9, and 12, in violation of §102.46 of the Board's Rules and Regulations, Exceptions 1, 2, 3, 6, 9 and 12 should be rejected. All arguments contained in the comments are improper and only arguments addressed in the Brief should be considered by the Board.

B. The Board Should Affirm the ALJ's Credibility Determination that Gangale was a Credible Witness. (Exception 3)

Respondent excepts to the ALJ's finding that Union Representative Gangale was a credible witness.[13] Respondent provided no valid basis – neither in fact or in law – to challenge Judge

[13] Respondent excepted to the ALJ's finding that Gangale was a very credible witness in Exception 3. The Respondent did not file any exception to the ALJ's determination that Scott Wright or James Reifer were not credible witnesses. In the "Comment" listed under the Exception to Gangale's credibility the Respondent defends the credibility of Wright and Reifer, and appears to argue that the ALJ erred in finding them not credible. For the reasons outlined *supra*, those comments are

Gardner's extremely well-supported credibility findings.

Respondent attempts to attack Gangale's testimony by making a general argument that his testimony is hearsay. Respondent's argument is without merit. Gangale's testimony that the shift differential was a long-standing term and condition of employment is based on his extensive 18+ year history of bargaining with Respondent on behalf of the Union's membership and bargaining successive contracts and his direct communication with Representatives of the Employer in the course of that relationship, including Scott Wright.

Judge Gardner based his finding that Gangale was a credible witness, in part, on his observation of Gangale's demeanor. In making his decision, ALJ Gardner "…found Gangale to be a very credible witness, straightforward in his answers on both direct and cross examination. He was familiar with the issues, and seemed at all times to be speaking from his personal knowledge, careful to clarify when he was unsure of a particular answer." (ALJD p3, fn.3).

In contrast to Gangale, Judge Gardner found Respondent's witness Wright to be a "…less credible in much of his testimony. He sounded rehearsed when pressed on the apparent contradictions of his testimony, and appeared not to sincerely believe his own testimony regarding the voluntariness of the payments of the shift differential." (ALJD p3, fn.4). Gardner also found that Respondent's witness James Reifer, CFO of Respondent, "As a witness, I found Reifer's brief [sic] testimony not at all credible. Despite his CFO position, he had never even heard of the shift differential, which Respondent does not dispute it used to pay, until the issue came up in this matter" (ALJD p3, fn 5).

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improperly filed pursuant to rule §102.46(a)(1)(i)(D). Similarly, Respondent makes comments in defense of Reifer and Wright in its brief, but as no exception to the ALJ's finding that they were not credible has been filed, those comments should be similarly disregarded. see §120.46(a)(1)(ii) "Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived." Should the Board choose to address these improperly filed exceptions, Counsel for the General Counsel urges that the ALJ's determination about the credibility of Reifer and Wright is amply supported by their demonstrated lack of knowledge of the case and their frequent contradictions, which the Judge relied upon in making his decision.

Judge Gardner provides ample support for his determinations, including pointing to specific examples of instances where Reifer and Wright contradict themselves, whereas Gangale was honest about not knowing something or correcting himself without prompting. The record is in fact, replete with examples of Wright's testimony either contradicting itself, or the facts directly contradicting Wright's testimony as outlined above.

Gardner's credibility determinations of the witness formed the basis for his own finding of fact to which he subsequently applied the law. Those determinations are entitled to deference by the Board and Respondent's exceptions to Judge Gardner's findings should be denied. It is axiomatic that the Board gives broad deference to and will not overturn an administrative law judge's credibility findings unless it is convinced by a clear preponderance of the evidence that those credibility resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951), *Upper Great Lakes Pilots, Inc*., 311 NLRB 131 (1993), *Storer Communications, Inc*., 297 NLRB 269, fn.2 (1982). Respondent failed to meet this burden of proof. A review of Judge Gardner's decision reveals that his credibility findings are well supported by the record and Respondent has not met its burden of proving by a clear preponderance of the evidence that the ALJ erred in crediting Gangale's testimony and finding Wright and Reifer not credible.

C. The ALJ made sound factual conclusions based on review of the witness demeanor and testimony and ample documentary evidence. (Ex 2, 4, 5, 6, 9, 10, 11, 13)

Respondent filed multiple exceptions to the factual determinations of the ALJ. Respondent's exceptions to the Judge's factual findings often ignore that the most obvious evidence of Respondent's behavior is documentary evidence produced by Respondent itself: payroll documents.

In Exception 2, Respondent excepted to the ALJ's finding that different parties used different

verbiage to describe the three distinct shifts at the facility.[14] The ALJ's determination that different documents use different verbiage to describe the same shifts is based on his review of the CBA (First, Second, Third), the Employer's payroll (Day, Afternoon, Night), James Gangale's testimony (night and overnight) and even Respondent counsel's own mixture of terms (afternoon, evening, and night) shift to refer to different shifts. Clearly the ALJ did not err in finding that there are in fact three distinct shifts of work at the Employer's plant with a variety of language used to describe them. There is no error in the ALJ's findings contained in the paragraph "Respondent's Work Shifts."

In Exception 4, Respondent also excepted to the ALJ's recitation of references to the "shift differential" in the Collective Bargaining Agreement. The ALJ wrote:

> 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 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).

Respondent's exception to such a finding is incredible and can be dismissed upon a quick review of the CBA at the referenced Articles where the word "shift differential" appears. The ALJ did not err in stating that the CBA lacks a specific definition of shift differential but contains specific references to the shift differential.

In Exceptions 5 and 6[15], Respondents except to the ALJ's finding of fact related to their treatment of employees post-Hurricane Sandy. The ALJ rejected Respondent's contention that after recalling its employees post-Hurricane Sandy, it considered these employees to be "newly hired," thereby permitting Respondent to pay those employees minimum wage. The ALJ found that the Respondent did not treat its returning employees as new hires and instead continued their employment,

[14] The Comment provided in support for Exception 2 is improper under rule §102.46 and should be disregarded.
[15] The Comment provided in support of Exception 6 is improper under rule §102.46 and should be disregarded.

pay rates, and contract benefits based on "pre-storm hire dates" (ALJD 4).

The ALJ's determination that Respondent did not treat its returning employees as new hires and continued their benefits is based on Respondent's own documents and testimony. Respondent's payroll documents conclusively show employees hire dates and those hire dates vary from before and after Hurricane Sandy. As ALJ Gardner pointed out, "'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" (ALJD 6).

The ALJ's decision was further supported by Respondent's own witness Scott Wright's testimony that no employees were paid severance upon their supposed termination, and no employees were required to perform any of the tasks new employees would have been required to perform, such as signing new authorization cards. Similarly, the employer provided those returning employees with the same Union seniority and attendant benefits they had prior to Hurricane Sandy. The ALJ relied on Respondent's payroll documents showing the employees' hire dates pre-date Hurricane Sandy coupled with Wright's testimony that "we chose to bring people back and not have them sacrifice anything" (ALJD 4; Tr. 198).

Respondent's exceptions to the ALJ's finding and argument in support of its exception has no factual support. There is not a shred of contemporaneous evidence that Respondent treated employees as new hires when they returned to work in 2013. Respondent's argument instead, amounts to, "trust us, they were new employees." When Respondent's assertion was tested on cross-examination, it promptly fell apart. Wright admitted that returning employees had the *exact* same benefits upon return from hiatus they had before, from vacation and sick leave, to payrate and shift differential. Wright even went so far as to reveal the hoax of this "new employee" theory when on cross examination he conceded that

the actual purpose of CBA provision 8(b) was to allow Respondent to competitively set the *initial* wage rate for hired employees as necessary- and not to allow Respondent to downgrade existing employees' pay rates ,as Respondent now argues.

By making his factual finding rejecting this "new employee" theory, the ALJ eviscerated the remainder of Respondent's arguments that its elimination of the shift differential was permitted by contract. Because the ALJ correctly determined that the Employer did not treat all of its employees as "new employees" there was no need for the ALJ to conduct a thorough examination of whether Article 8(b) of the CBA operated the way Respondent alleges it did-notwithstanding that Wright testified that it did not operate the way they contend. Thus, all the subsequent exceptions that the ALJ erred by not analyzing their rights under Article 8(b) of the CBA are moot as well. The ALJ did not need to conduct any analysis of Article 8(b) because he determined that the employees were not new employees and thus not subject to that contract provision.

Respondent's exceptions to the ALJ's factual findings are so obviously without merit that they reveal the extent of Respondent's attempts to pull the wool over the eyes of the Board and create ambiguity where there is none. The facts of this case are simple and straight forward and readily ascertainable by reviewing the documentary evidence and Respondent's own witness testimony. A practice of paying employees who worked the afternoon and evening shift a ten percent night differential existed without change for 18+ years, before *and after* Hurricane Sandy. That practice was incorporated in the parties' CBA, it is conclusively established by Respondent's payroll documents, and it was apparent from the record testimony of witnesses of both parties. The undisputed fact is that when the minimum wage rose to $13 per hour, effective December 31, 2017, Respondent eliminated the shift differential without notice or or bargaining with the Union, in violation of the Act.

D. The ALJ applied the correct legal framework to the facts of this case in determining that

the Respondent violated the Act by making a unilateral change to the long-established shift differential without giving notice to the Union. (Exception 7, 8, 13-22)

The ALJ reviewed the record evidence and correctly found that Respondent had an 18+ year past practice of paying afternoon and evening shift employees a ten-percent shift differential, regardless of intermittent minimum wage increases. Based on the conclusion that a past practice existed the ALJ then correctly held that Respondent unilaterally changed the past practice without providing the Union notice and an opportunity to bargain over that change, in violation of Section 8(a)(5) of the Act.

The remainder of Respondent's exceptions fall into the category of exceptions to the ALJ's application of the law. Respondent's exceptions, however, are without merit and should be rejected.

1. The ALJ correctly determined that the shift differential was a past practice that Respondent could not change unilaterally without providing notice and an opportunity to bargain.

Based on the overwhelming probative record evidence, the ALJ correctly found that the afternoon and evening shift differential was an established past practice that Respondent was not permitted to unilaterally eliminate. Respondent excepted to this finding arguing that the shift differential does not meet the definition of past practice because Respondent's employees were "new employees" and so the application of the shift differential to them was entirely discretionary and subject to change at the whim of Respondent. Therefore, Respondent argues, Respondent was permitted to change the shift differential without providing the Union notice and an opportunity to bargain over that change. (See Exception 7,9,15,18, 22)

The ALJ rejected Respondent's argument that the shift differential was discretionary. The ALJ first correctly set forth the standard for considering whether an Employer's practice constitutes a past practice and therefore a mandatory subject of bargaining. The ALJ correctly stated the background case law on past practices, specifically that:

> An employer's past practice becomes a term and condition of employment for unit employees when it is long-standing and regularly applied, as opposed to randomly or intermittently applied, and thus may not be altered without offering the union an opportunity to bargain over the proposed change. *Sunoco, Inc.*, 349 NLRB 240 (2007); *Lasalle Ambulance, Inc.*, 327 NLRB 49 (1998); *Intermountain Rural Electric Association*, 305 NLRB 783 (1991). Moreover, during negotiations, not only must an employer give the union notice and an opportunity to bargain over the proposed change, it must refrain from making the proposed change unless and until an agreement is reached or an overall impasse has been reached on bargaining for an agreement as a whole. *Bottom Line Enterprises*, 302 NLRB 373 (1991), enf'd. 15 F. 3d 1087 (9th Cir. 1991) (ALJD 4.)

In applying that standard, the facts, the ALJ rejected any contention that the shift differential was discretionary, finding that "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" (ALJ p. 5).

In reaching the determination that the shift differential constituted a past practice and thus a mandatory subject of bargaining, the ALJ relied on Respondent's own payroll records which conclusively demonstrate that Respondent paid the shift differential to each and every afternoon and night shift employee (*Id.*) The ALJ also relied on the memorialization of the shift differential throughout the CBA and on Respondent's own witnesses, who admitted that Respondent had historically paid the shift differential to employees even when the minimum wage rose prior to December 31, 2017 (ALJD 5).

Respondent's exceptions to the ALJ's determination that the shift differential is a past practice amount to nothing more than "no, it's not." Throughout the trial and in their exceptions, Respondent utterly fails to point to a single piece of evidence that the shift differential was anything other than a uniformly applied, consistent practice, applied to all employees based solely on the time of their scheduled shift. Instead, Respondent has manufactured a bogus contract interpretation that defies logic and, more critically, all evidentiary support.

As the ALJ pointed out, the shift differential was applied to *all* afternoon and evening shift employees regardless or hire date, the shift differential survived *two* minimum wage increases that occurred after -Hurricane Sandy, and the shift differential existed both before and after Hurricane Sandy. Respondent has failed to show it ever denied the shift differential to *anyone*, whether they were a new hire or not. Instead, Counsel for the General Counsel showed that the Shift Differential applied to *everyone* working the afternoon and evening shift, regardless tenure.

Based on the probative record evidence, the ALJ correctly determined that the shift differential was a past practice that applied to all employees and had been repeatedly memorialized in the parties CBA and was unchanging for 18 years.

2. The ALJ correctly determined that there was no evidence the shift differential was "subsumed" by the minimum wage increase.

In its exceptions brief, Respondent continues its nonsensical, contradictory argument that even though it was privileged to change the shift differential, it did not do so. Respondent argues that the ALJ erred in rejecting Respondent's argument that the shift differential was "subsumed" by the New York State minimum wage. The ONLY explanation in the record for how this could be was from Scott Wright's testimony included above, which Wright admitted himself did not make much sense (Tr. 200). Recall that Wright testified that an employee making $15 working the night shift was still receiving the shift differential while an employee $15 and hour working the day shift, was not receiving the shift differential yet, making both had the same rate of pay (Tr. 203).

Respondent's exceptions brief contains another attempt to explain how the shift differential was "subsumed" into the minimum wage hike. Any attempt by Respondent Counsel to newly explain how this could be true, and go beyond Wright's record testimony, is entirely an improper attempt by Respondent's counsel to introduce new evidence into the record through their Exceptions Brief and to

ask the Board to ignore the clear evidence in the record. The ALJ was swift in dispensing with this argument pointing out that "employees wage rates were historically adjusted to reflect minimum wage increases and the ten percent shift differential had always been added above the new rate" (ALJD 5). The ALJ relied on Respondent's own witnesses' testimony and payroll records when pointing out that the shift differential had never been "subsumed" into the wages of employees working the afternoon and night shift. Respondent's exception is specious and should be rejected. The ALJ's dismissal of Respondent's fallacious argument should be affirmed by the Board.

3. The ALJ correctly determined that Respondent unilaterally changed the shift differential past practice without providing notice and an opportunity to bargain to the Union.

Once the ALJ determined that the Shift differential constituted a past practice and term and condition of employment, the ALJ correctly determined that Respondent did not provide notice or an opportunity to bargain to the Union over changes to the past practice. Gangale's testimony that he learned about the elimination of the shift differential after the fact remained unchallenged by Respondent. In fact, as the ALJ pointed out, Respondent provided no evidence that the Union was advised or consented to the change in the Shift differential. (ALJD at 5).

Respondent excepts to this finding but fails to provide any evidence or legal argument suggesting that the ALJ made this determination improperly. Respondent in its exceptions and at hearing rely solely the fact that in 2012 and 2013, it proposed elimination of the shift differential in bargaining. These proposals alone are simply insufficient to demonstrate that the Union had any notice or chance to bargain about the proposed implementation that took place in 2018.

4. The ALJ correctly determined that the parties were not at any lawful impasse permitting implementation of the change to the shift differential.

The ALJ correctly determined that there was no evidence that Respondent and the Union reached

lawful impasse, permitting Respondent to unilaterally change the shift differential. As the ALJ pointed out, "…no evidence was presented that the parties had reached the end of overall bargaining" (ALJD 6).

Respondent excepts to this finding. In their exceptions, as at trial, Respondent relies solely on the fact that the parties did not reach an agreement on a successor agreement to establish impasse. As the ALJ correctly points out, there is no evidence that the parties were at lawful impasse, noting that none of the Respondent's evidence supports such a finding nor did Respondent even attempt to provide any evidence of impasse. Respondent failed to introduce evidence of the parties reaching the end of their rope in bargaining into the record. As the ALJ correctly points out, the parties "did not reach a lawful impasse in overall bargaining which would privilege the Respondent to have made the unilateral change to its practice of paying a shift differential to its afternoon and evening employees." (ALJD 6).

5. The ALJ correctly denied Respondent's Motion to Dismiss the Complaint based on the language in the Charge.

ALJ Gardner correctly denied Respondent's oral Motion to Dismiss the Complaint on the grounds that the underlying charge filed by the Union alleged that Respondent violated section 8(a)(5) by failing and refusing to bargain by making unilateral changes to employees' terms and conditions of employment, listing as the changes "revoking the night shift differential" (GC 1(A)). The ALJ made a factual finding that despite the "varied verbiage" to describe the afternoon and evening shifts, "there was no confusion among the parties as to the existence of three shifts, no confusion as to which shifts were historically paid the shift differential at issue in the case…and no confusion as to which shifts the Respondent ceased paying a shift differential to on January 11, 2018." Gardner then correctly applied the legal standard for allegations that underlying unfair labor practice charge did not meet the obligation to be "reasonably consistent with the complaint." (Tr. 23). Respondent excepts to this

finding in Exception 17 and 18.

ALJ Gardner correctly applied the three-part test first advanced in *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988) for making this determination: "(1), the otherwise untimely allegations must involve the same legal theory as the allegations in timely charge; (2), the otherwise untimely allegations must arise from the same factual situation or sequence of events as the allegations in timely charge; and (3) the defenses raised to both the untimely and timely charged allegations may, but need not be, the same or similar." Applying these factors to the instant case, Gardner found that factors "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…" (ALJD 7-8).

The ALJ's decision comports entirely with the standard set forth in *Redd-I* and Respondent provided no evidence in support of its motion other than conjecture. The ALJ correctly held that 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" (ALJD 7).

6. Respondent's remaining exceptions are similarly without merit.

Respondent filed exceptions to the ALJ's Conclusion, Remedy, Order and Appendix (ALJD 8-10). These exceptions appear to be summary exemptions necessitated by the previous exceptions, i.e., because Respondent excepted to the finding that the Respondent violated section 8(a)(5), the remedy is objectionable. No specific legal argument is made with regard to the ALJ's Conclusion, Remedy, Order or Appendix.

The ALJ's Conclusions of Law are a summarization of the findings made above and are proper. The ALJ's recommended Remedy similarly comports with extent Board law requiring Respondent to

make employees whole by paying them the shift differential and reinstating the shift differential and to post a notice to employees notifying them that they will refrain from further violations of the Act. (ALJD 8). The ALJ's Order is similarly not objectionable and is a reasonable Order in light of the ALJ's findings of law and fact and consistent with Board Orders. (ALJD 9).

VI. Conclusion

At the outset of the trial, Counsel for the General Counsel said that this case is straight forward and simple. That remains true. The ALJ has issued a straightforward decision, rejecting Respondent's arguments, which lack factual support and basing his decision on the obvious irrefutable evidence in this case. The ALJ, supported by the probative record evidence, determined that Respondent had a past practice of providing employees a shift differential. In January 2018, Respondent eliminated that shift differential, without providing the Union notice and an opportunity to bargain over that change. The parties were not at impasse, and the collective bargaining agreement did not permit Respondent's actions. By making the change it did, Respondent violated section 8(a)(5) of the Act. The ALJ's decision is clear, concise, and should be affirmed by the Board.

Based on the above, Counsel for the General Counsel urges the Board to affirm the ALJ's decision that the Respondent violated Section 8(a)(5) and issue an Order that Respondent make its employees whole for the loss they suffered as a result of that unilateral change.

Submitted this 10th day of January, 2020
at Brooklyn, New York

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

MADELAINE CHOCOLATE NOVELTIES, INC.

and

LOCAL 1222, UNITED PROFESSIONAL SERVICE EMPLOYEES UNION

Case Nos. 29-CA-222257

Affidavit of Service of: COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ALJ'S DECISION AND ORDER

I, the undersigned employee of the National Labor Relations Board, hereby state, under penalty of perjury that, in according with NLRB Rules & Regulations § 102.114(i), a copy of the foregoing was sent to each party at the addresses listed below and on the date indicated below:

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