

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SUBREGION 24**

ASOCIACION DE EMPLEADOS DEL  
ESTADO LIBRE ASOCIADO DE  
PUERTO RICO

and

UNION INTERNACIONAL DE  
TRABAJADORES DE LA INDUSTRIA  
DE AUTOMOVILES, AERESPACIO E  
IMPLEMENTOS AGRICOLAS, U.A.W.,  
LOCAL 1850

Cases 12-CA-218502  
12-CA-232704

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## **I. STATEMENT OF THE CASE**

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Counsel for the General Counsel files this Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision.

On November 6, 2019, based on a stipulated record, Administrative Law Judge Sharon Levinson Steckler (hereinafter "the ALJ") issued her decision in Asociacion de Empleados del Estado Libre Asociado de Puerto Rico, Cases 12-CA-218502 and 12-CA-232704, reported at JD 88-19.

The ALJ properly found that Asociacion de Empleados del Estado Libre Asociado de Puerto Rico (Respondent), violated Section 8(a)(1) and (5) of the Act by unilaterally drastically reducing the 2017 and 2018 Christmas bonuses payable to each bargaining unit employee represented by Union Internacional de Trabajadores de la Industria de Automoviles, Aeroespacio e Implementos Agrícolas, U.A.W., Local 1850 (the Union) from a maximum of \$3,460.00 annually [8.65% of wages up to maximum wages of \$40,000), which unit employees received in 2016 pursuant to the parties' collective-bargaining agreement that expired on June 30, 2017], to a maximum of \$600.00 annually (6% of wages up to maximum wages of \$10,000, which is the Christmas bonus formula required by Puerto Rico law). As alleged in the Consolidated Complaint (the Complaint),<sup>1</sup> Respondent took this action in 2017 after the collective-bargaining agreement expired and when no extension agreement was in effect, without giving the Union notice or an opportunity to bargain, in violation of Section 8(a)(1) and (5) of the Act. [JD 11: 38-40].<sup>2</sup>

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<sup>1</sup> The Regional Director issued a Complaint and Notice of Hearing in this matter on August 31, 2018. On February 27, 2019, an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing was issued. [GC Ex. 1(f) and 1(p)].

<sup>2</sup> As used herein, "JD" refers to the ALJ's decision in this case, followed by the page and line numbers; "JS" refers to the parties' Joint Stipulation; "Tr." refers to the transcript followed by the page and line numbers; "GC Ex." refers to

Respondent's reduction of the bonus in 2017 also contradicted the annual past practice since at least 2002, and also contradicted a successor contract proposal Respondent had made to the Union to maintain the 2016 Christmas bonus formula.

As the ALJ further properly found, in 2018, while an extension of the parties' collective-bargaining agreement that had expired on June 30, 2017 was in effect, Respondent again paid unit employees only the reduced Christmas bonus formula required by Puerto Rico law, rather than the amount paid in 2016. Respondent took this unilateral action during mid-term of the extension agreement and without the Union's consent. Thus, Respondent's unilateral reduction of the Christmas bonus in 2018 constituted a mid-term contract modification and violated Section 8(a)(1) and (5) and Section 8(d) of the Act, by failing to continue in effect all the terms and conditions of the parties' extended collective-bargaining agreement. [JD 12:5-6].

On December 4, 2019, Respondent filed Exceptions to the ALJ's decision along with a supporting brief. In sum, Respondent excepted to the ALJ's findings that Respondent's reduction of the Christmas bonus payments to unit employees in 2017 and 2018 was unlawful. Respondent relies on the first sentence of Article 41 of the collective-bargaining agreement concerning the Christmas bonus benefit, that reads "The Association Will Grant the Christmas Bonus as Provided in Law No. 148 of June 30, 1969, as Amended, with the Following Modification:" Respondent asserts that the ALJ erroneously applied "a variation of the theory of 'Dynamic Status Quo' that has been expressly rejected" and the "clear and unmistakable waiver" standard, instead of the contract coverage waiver standard established in *MV*

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General Counsel's exhibits; "J. Ex." refers to joint exhibits; "R. Ex." refers to Respondent's exhibits; and "R.brief" refers to Respondent's brief in support of its exceptions.

*Transportation, Inc.*, 368 NLRB No. 66 (2019). For the reasons discussed below, the Board should reject each of Respondent's exceptions and affirm the ALJ's decision in its entirety.

## **II. STATEMENT OF FACTS**

As noted above, the record was stipulated and the facts are undisputed. [JD 1].

### **A. Introduction**

Respondent maintains an office and place of business in San Juan, Puerto Rico, where it is engaged in providing savings and loan services, insurance, and related financial services to its members.<sup>3</sup> The Union is a labor organization within the meaning of Section 2(5) of the Act. [JD 2: 23-24].

As stipulated by the parties, the ALJ found that, since at least 1992, the Union has been the collective-bargaining representative of an appropriate unit of office and maintenance employees employed by Respondent in Puerto Rico. [JD 2: 28-46; JS 8 and 9, setting forth the full unit description].

Respondent and the Union have a longstanding bargaining relationship and have entered into a series of successive collective-bargaining agreements, the most recent was effective by its terms from July 1, 2013 through June 30, 2017. [JD 3: 1-4; J. J. Ex. 1-4]. Since May 24, 2017, the parties have been bargaining for a successor collective-bargaining agreement. [JS 15]. After the agreement expired on June 30, 2017, the parties extended that agreement through October 31, 2017, and then, in a series of agreements, the parties extended that from December 21, 2017 through January 31, 2019. There was no extension agreement in effect during the period from November 1, 2017, through December 20, 2017. [JD 3: 5-6; JD 4:26-27; JS 14-16; J. Ex. 5]. As the ALJ also found, throughout negotiations for a successor agreement Respondent never claimed

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<sup>3</sup> Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act based on the facts in the record and as found by the ALJ. [JD 2: 12-21; JS 3].

that financial difficulties precluded it from paying economic benefits to its employees. [JD 3: 6-7; JS 5].

### **B. Christmas Bonus Provisions in the Collective-Bargaining Agreements**

As the ALJ found, from 2002 through the agreement that expired by its terms on June 30, 2017 — a period of 15 years— the parties’ successive collective-bargaining agreements provided for annual Christmas bonus payments to unit employees, and Respondent annually paid said bonuses according to the agreements. [JD 3:12-13]. As the ALJ also found, the collective-bargaining agreements covering the period from 2002 through 2013, providing for Christmas bonus payments from 2002 through 2012, were paid at the rate of 8.5 percent of a unit employee’s annual earnings, up to a maximum specified in the collective-bargaining agreement.<sup>4</sup> [JD 3:13-15; J. Ex. 1, 2 and 3]. As set forth below, the maximum annual earning amounts for payment of the Christmas bonus increased from \$30,000 in 2002 to \$37,000 in 2012. The agreement that expired on June 30, 2017, provided for annually increasing Christmas bonus payments during the years 2013 through 2016, ranging from 8.6 percent of a unit employee’s annual earnings up to maximum earnings of \$37,000 in 2013, to 8.65 percent of annual earnings up to maximum earnings of \$40,000 in 2016. [J. Ex. 4]. These contract provisions are quoted in full below. As the ALJ found, the Christmas bonus language in each of these four agreements (CBAs) is similar. [JD 3:16-17]. The period for determining the maximum wages for the Christmas bonus formula in all of these agreements is October 1 through September 30.

Article 41 of the CBA that is effective by its terms from May 24, 2002 to July 31, 2005, specified that Respondent would pay a Christmas bonus consisting of 8.5% of each employee’s

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<sup>4</sup> Although the bonus was due on December 15 of each calendar year, it was customary for Respondent to pay it on the day before Thanksgiving holiday. (JS 18)

earned wages, up to maximum wages of \$30,000. [J. Ex. 1]. The full Christmas bonus provision reads as follows:

ARTICLE 41  
CHRISTMAS  
BONUS

The Association will grant the Christmas Bonus as provided in Law No. 148 of June 30, 1969, as amended, with the modification of eight and a half percent (8½%) of the earned wages up to a maximum of \$30,000.00 dollars during the term of this Agreement. The wages to be considered shall be those earned between October 1<sup>st</sup> of the previous year and September 30 of the year corresponding to the bonus.

Article 41 of the CBA that was effective from February 1, 2006 to July 31, 2009, maintained the Christmas bonus at 8.5% of an employee's total wages, but increased the wage limit upon which the bonus would be calculated to \$32,000 for the years 2005 and 2006, to \$33,000 for 2007, and to \$34,000 for 2008. [J. Ex. 2] The full Christmas bonus provision reads as follows:

ARTICLE 41 CHRISTMAS BONUS

The Association will grant a Christmas Bonus as provided in Law 148 of June 30, 1969, as amended, with a modification of eight and a half percent (8½ %) of the wages earned up to a maximum of \$32,000 during the years 2005 and 2006, \$33,000 during the year 2007 and \$34,000 during the year 2008. The wages to be considered shall be the ones earned between October 1<sup>st</sup> of the previous year and September 30th of the year corresponding to the bonus.

The CBA in effect from December 1, 2009 to July 1, 2013, in Article 41, also maintained the bonus amount at 8.5% of an employee's total wages, but further increased the wage limit upon which the bonus percentage would be calculated for each year covered by the agreement, to \$34,000 for 2009, \$35,000 for 2010, \$36,000 for 2011, and \$37,000 for year 2012. [J. Ex. 3]. The full Christmas bonus provision reads as follows:

ARTICLE 41 CHRISTMAS BONUS

The Association will grant a Christmas Bonus as provided in Law 148 of June 30, 1969, as amended, with the modification of eight and a half percent (8 ½ %) of the wages earned up to a maximum of \$34,000 during the year 2009, \$35,000 during the year 2010, \$36,000 during the

year 2011 and \$37,000 during the year 2012. The wages to be considered shall be the ones earned between October 1<sup>st</sup> of the previous year and September 30<sup>th</sup> of the year corresponding to the bonus.

Finally, the CBA in effect from July 1, 2013 to June 30, 2017, which is the most recent CBA between the parties, increased the bonus percentage to 8.60% during the first two years of the contract (2013 and 2014) and further increased the percentage to 8.65% for the following two years (2015 and 2016). [J. Ex. 4]. This CBA also increased the maximum wage (salary) limit upon which the bonus would be calculated, providing for a higher wage limit for each year covered by the agreement (2013, 2014, 2015, and 2016). The full provision in Article 41 of this CBA reads as follows:

#### ARTICLE 41 CHRISTMAS BONUS

The Association will grant the Christmas Bonus as provided in Law 148 of June 30, 1969, as amended, with the following modification:

Eight point sixty percent (8.60%) of the salaries earned up to a maximum of \$37,000 in 2013.

Eight point sixty percent (8.60%) of the salaries earned up to a maximum of \$38,000 in 2014.

Eight point sixty-five percent (8.65%) of the salaries earned up to a maximum of \$39,000 in 2015.

Eight point sixty-five percent (8.65%) of the salaries earned up to a maximum of \$40,000 in 2016.

Salaries to be considered shall be the ones earned between October 1<sup>st</sup> of the previous year and September 30<sup>th</sup> of the year corresponding to the bonus.

The ALJ summarized this information in a table which reflects the Christmas bonus formula for each year from 2002 through 2016. [JD 3 to 4]. That information is contained in the below chart on a year-by-year basis. For each year, the bonus is based on wages earned during the year ending on September 30 of the year during which the bonus is to be paid.

<b>Year</b>	<b>Percentage</b>	<b>Maximum wage up to which bonus is calculated</b>	<b>Maximum bonus to be paid</b>
2002	8.5%	\$30,000	\$2,550
2003	8.5%	\$30,000	\$2,550
2004	8.5%	\$30,000	\$2,550
2005	8.5%	\$32,000	\$2,720
2006	8.5%	\$32,000	\$2,720
2007	8.5%	\$33,000	\$2,805
2008	8.5%	\$34,000	\$2,890
2009	8.5%	\$34,000	\$2,890
2010	8.5%	\$35,000	\$2,975
2011	8.5%	\$36,000	\$3,060
2012	8.5%	\$37,000	\$3,145
2013	8.6%	\$37,000	\$3,182
2014	8.6%	\$38,000	\$3,268
2015	8.65%	\$39,000	\$3,373.50
2016	8.65%	\$40,000	\$3,460

As shown in the table, from 2002 through 2016, the Christmas bonus payment was never reduced from the prior year, and increased annually starting in 2005. In November 2016, Respondent paid Christmas bonuses to unit employees based on a formula providing for the highest bonuses used to date. [JS 19 and J. Ex. 6]. As properly found by the ALJ, the highest bonus amount received by unit employees in 2016 was \$3,460, while the lowest was \$437.06. In total,

the unit received \$651,843.47 in Christmas bonuses for 2016. [JD 4: 2-4]. In 2016, all but two unit employees received a Christmas bonus of at least \$1,000. [J. Ex. 6].<sup>5</sup>

As found by the ALJ, the parties' most recent collective-bargaining agreement also includes a "zipper" clause in Article 53, entitled "Validity":

This Collective Bargaining Agreement shall be in effect from July 1, 2013 until June 30, 2017 and subsequently from year to year, unless one party notifies the other (party) in writing, by certified mail with acknowledgement of receipt, within sixty (60) days prior to June 30, 2017, or any other subsequent anniversary date, whichever the case, of its intention to end it or modify it through the negotiation of a new Collective Bargaining Agreement. If any clause of this Collective Bargaining Agreement provides any specific term, that shall prevail over the term that is provided herein.

[JD 4:11-24; Jt. Ex. 4].

As mentioned above and found by the ALJ, after this collective-bargaining agreement expired, the parties agreed to extensions until October 31, 2017, and then from December 21, 2017, through January 31, 2019. [JD 4: 25-27; JS14].

### **C. Law 148 of June 30, 1969: The Christmas Bonus Law**

As stated by the ALJ in her decision, the law referred to in the parties' contracts (Law 148) is in Puerto Rico statutes. [JD 4: 5]. Puerto Rico Law 148 of June 30, 1969, 29 L.P.R.A. § 501, et. seq. (Law 148), often called "the Christmas Bonus Law," requires an annual Christmas bonus to be paid to each employee between December 1 and December 15 of each year. Law 148 provides that for employees who have worked for a particular employer at least 700 hours between October 1 of a given year and September 30 of the following year, that employer shall

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<sup>5</sup> There have been approximately 200 employees in the Unit at all material times. For example, in 2017 there were 214 employees in the unit. [J. Ex. 16]. Assuming that there were also 214 employees in 2016, the average Christmas bonus amount per unit employee (\$651,843.47 divided by 214) in 2016 was approximately \$3,046.00.

pay a bonus based on the first \$10,000 of each employee's wages or salary, according to the following schedule:

Year	15 or fewer workers	16 or more workers
2006	2.5%	3%
2007	2.75%	4.5%
2008 (or later)	3%	6%

29 L.P.R.A. § 501. In other words, according to Puerto Rico law, since 2008 the minimum required bonus has been \$600 for anyone earning \$10,000 or more working for an employer with at least 16 employees. Thus, pursuant to the successive collective-bargaining agreements between the parties, from at least 2002 through 2016, Respondent paid unit employees Christmas bonuses based on formulas providing for significantly higher Christmas bonuses than the Christmas bonuses provided by Law 148.

Moreover, as the ALJ accurately found, Law 148 does not apply when employees receive an annual bonus by collective agreement, except if the amount of the bonus to which employees are entitled to pursuant to a collective agreement may result lower than the minimum amount required by the Law, in which case the employer is required to make up the difference and pay its employees a bonus based on at least the minimum amount established by the Law.<sup>6</sup> [JD 4:6-10].

**D. Respondent Reduced the Christmas Bonus Paid to Unit Employees in 2017 and 2018**

On May 24, 2017, the parties began bargaining for a successor agreement to the CBA which was to expire on June 30 of that year. [JS 15; J. Ex. 4]. On November 9, 2017, the parties began exchanging proposals that included proposed language for the Christmas bonus article for

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<sup>6</sup> Respondent excepted to this finding of fact without providing any argument or explanation. (Exception 2). A clear reading of Section 6 of Law 148, 29 L.P.R.A. §506, supports that the ALJ's finding is a correct interpretation of the Law. Therefore, Respondent's exception is without merit and the ALJ's finding should be affirmed.

the successor CBA. These proposals are embodied in Joint Exhibits 7-9. Respondent initially proposed a significantly lower Christmas bonus formula than in the previous 15 years; in fact, even lower than the minimum required by Law 148.<sup>7</sup>

On November 30, 2017, the Union rejected Respondent's position and demanded that the 2016 Christmas bonus formula be maintained in a two-year agreement that would also include certain other economic improvements. [J. Ex. 9]. As reflected in Respondent's response to the Union dated December 1, 2017, on November 30, 2017, Respondent made a "Final Bargaining Proposal" to the Union, which included a Christmas bonus based on 8.65% of each employee's total salary up to a maximum salary of \$40,000, i.e. the contractual formula for payment of the Christmas bonus to unit employees in 2016. [J. Ex. 10]. In addition, as the ALJ found, on December 1, 2017, Respondent notified "all unionized personnel" of a proposed increase in the Christmas bonus amount to be paid, among other items, and informed that the negotiations were to continue. [JD 4:30-34; JS 24; J. Ex. 10].

On December 5, 2017, the Union proposed to accept the Christmas bonus formula of 8.65% of salaries up to a maximum salary of \$40,000 (i.e. to maintain the 2016 Christmas bonus formula) for 2017 and 2018, and further proposed that the expired CBA be extended to January 31, 2018, and negotiations continue in an effort to reach a full agreement by that date. [JD 4:34 to 5:2; J. Ex. 11]. In response, also on December 5, 2017, Respondent rejected the Union's proposal to extend the contract to January 31, 2018, and instead conditioned the maintenance of the current Christmas

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<sup>7</sup> On November 29, 2017, Respondent proposed two contract options to the Union: (1) an agreement to expire on June 30, 2018, providing for a Christmas bonus equivalent to that provided for in Puerto Rico's "Labor Transformation and Flexibility Act" enacted on January 26, 2017, referenced by Respondent as the "Labor Reform Act" (that statute provides for a Christmas bonus of up to \$600 for employees of employers that employ 16 or more employees who were hired before the enactment of that statute, and a lesser amount for employees hired since the enactment of the statute on January 26, 2017; or (2) an agreement to expire on June 30, 2019, and to pay the Christmas bonus based on 4.33% of each employee's salary up to a maximum salary of \$40,000, and made no mention of the "Labor Reform Act." Each option also included certain other proposals. [J. Ex. 7].

bonus on a contract effective until June 30, 2019, and the Union's acceptance of Respondent's proposals concerning salaries, medical benefits and Christmas closing. [J. Ex. 12]. Thus, the parties did not agree on the term to extend the contract and did not complete negotiations. [JD 5: 2-5; J. Ex. 15].

The proposals exchanged between the parties thereafter remained in agreement regarding the Christmas bonus formula of 8.65% of each employee's annual salary up to a salary of \$40,000, for years 2017 and 2018. Each party moved toward the other regarding the remaining issues in proposals exchanged on December 12 and 13, 2017, but the parties continued to disagree as to other contract terms. [J. Ex. 13, 14, 15].

The ALJ properly found that, despite traditionally paying the Christmas bonus the day before Thanksgiving, in 2017, Respondent waited until December 15, 2017 to pay employees a reduced Christmas bonus based on Law 148 as if there was no collective-bargaining relationship in effect.<sup>8</sup> [JD 5:7-8]. Notwithstanding the existing Christmas bonus formula as of 2016 and the longstanding practice of paying Christmas bonuses to unit employees based on formulas that substantially exceeded the formula provided in Law 148, and the fact that in negotiations for a successor agreement Respondent proposed to maintain the 2016 Christmas bonus formula of 8.65 percent of wages up to a maximum of \$40,000, on December 15, 2017, Respondent significantly reduced the Christmas bonus amount from previous years and paid almost every unit employee a Christmas bonus for 2017 in the gross amount of \$600.00.<sup>9</sup> Thus, in 2017, Respondent paid a gross total amount of \$127,924.44 for Christmas bonuses to 214 unit employees, an average of

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<sup>8</sup> Respondent excepted to this fact found by the ALJ. (Exception 5). However, Respondent admitted to these facts in the Joint Stipulations signed by the parties. (JS 18 and 30). Therefore, its exception is without merit and the ALJ's findings should be affirmed.

<sup>9</sup> Respondent excepted to this fact found by the ALJ. (Exception 6). However, Respondent stipulated to the fact that, on December 15, 2017, Respondent paid a Christmas bonus to eligible bargaining unit employees up to the maximum amount of \$600 per employee. (JS 30; J. Ex. 16). Respondent did not submit any argument or point to any evidence stating otherwise. Therefore, its exception is without merit and the ALJ's finding should be affirmed.

\$597.98 per employee. As compared with the \$651,843.47 Respondent paid to unit employees in Christmas bonuses for 2016, the average paid in 2017 constitutes a reduction of \$523,919.03.<sup>10</sup> [JD 5:8-11].

From 2002 through 2016, Respondent had annually paid Unit employees a Christmas bonus based on the percentages established in the parties' CBA that exceeded \$600 per employee. [JS 51, J. Ex. 1-4]. As the ALJ properly found, there is no evidence that Respondent notified the Union that it intended to reduce the Christmas bonus payment in 2017 to the formula set forth in Law 148 if the parties did not reach a new collective-bargaining agreement. [JD 9:41-43; JS 30]. To the contrary, Respondent's proposal of November 30, 2017 and those thereafter were to maintain the 2016 Christmas bonus formula and were silent regarding the Christmas bonus formula to be used if a contract was not reached.<sup>11</sup>

After Respondent paid unit employees the drastically reduced Christmas bonuses on December 15, 2017, the Union sent a letter to Respondent on December 20, 2017, proposing that Respondent pay a Christmas bonus based on 9% of salary up to a maximum salary of \$50,000 in 2017 and 2018, minus the \$600 already paid for the 2017 Christmas bonus. [J. Ex. 17]. Respondent replied on the following day, restating its earlier proposals to pay a Christmas bonus of 8.65% of each employee's annual salary up to a maximum salary limit of \$40,000 for 2017 and 2018. [J. Ex. 18].

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<sup>10</sup> Thus, for many unit employees, the Christmas bonus received in 2017 constituted only about 17% of the amount they received in 2016, i.e. \$600 as compared to \$3,460).

<sup>11</sup> In its Exception 25, Respondent excepted to the ALJ's finding that Respondent failed to give the Union advance notice of the reduction in the Christmas bonus payment. [JD 9:40-45]. However, the evidence supports the ALJ's finding, and Respondent did not submit any argument or point to any evidence in the record showing otherwise. Exception 25 is without merit and the ALJ's finding should be upheld.

On December 21, 2017, the parties signed an agreement to extend the expired contract until January 31, 2018. [J. Ex. 19]. As noted above, subsequent extension agreements were in effect through January 2019.

On December 22, 2017, Respondent sent a memorandum to unit employees, recounting the recent negotiations between the parties, and informing unit employees that, on December 13, 2017, it had made an offer to the Union to pay the Christmas bonus based on 8.65% of employee salaries up a maximum of \$40,000, as part of its proposal for a contract, and the Union had rejected Respondent's offer on December 20, 2017. [J. Ex. 19]. Respondent's assertion was misleading because, as noted above, as of December 13, 2017, the Union agreed to maintain the 2016 Christmas bonus formula, and the parties' disagreements were limited to other contract terms.

On the same date, December 22, 2017, the Union sent a letter to Respondent proposing solely that Respondent adjust the 2017 Christmas bonus by paying 8.65% of each employee's annual salary up to a maximum salary of \$40,000, as the parties had previously agreed, minus the \$600 that had been paid on December 15, 2017. [J. Ex. 20 and JS 34]. On January 8, 2018, Respondent replied, rejecting the Union's request, contending that the bonus was part of the employer's contract proposal presented on December 21, 2017, and that "advance payment" was not applicable until the parties reach an agreement. [J. Ex. 21].

During 2018, the parties exchanged various contract proposals that continued to focus on the Christmas bonus and other economic issues. [J. Ex. 22 to J. Ex. 29]. Respondent maintained its stance that the Christmas bonus should be paid based on the 2016 formula of 8.65% of employee salaries up to \$ 40,000. [J. Ex. 23, 25, 28, 29]. As the ALJ stated, the parties continued negotiations throughout 2018, while the contract was extended, but did not reach an agreement for a successor contract. [JD 5:13-14].

On October 31, 2018, the parties' signed an extension of the 2013 to 2017 contract stating, in relevant part:

Due to the fact that no agreement has yet been reached between the parties, **the current Collective Agreement is extended in all its parts and conditions, except for the article on the Salary**, until November 26, 2018, or until the signing of an agreement between the parties on the Agreement, whichever comes first.

[J. Ex.4, emphasis supplied].

On November 15, 2018, the Union sent a letter to Respondent requesting payment of the 2018 Christmas bonus on November 21, 2018 (Thanksgiving Eve), as had been historically paid through 2016, at 8.65% of each employee's salary up to a maximum of \$40,000, as established by the extended contract then in effect. [JD 5: 14-18; J. Ex. 31; JS 18]. Notwithstanding that the extension of the contract that expired on June 30, 2017, was in effect, Respondent replied to the Union on November 20, 2018, stating that the payment of the Christmas bonus "beyond the applicable law" was a matter of collective bargaining and it would not proceed with the bonus payment as requested by the Union until the parties reached an agreement on the successor contract. [JD 5: 20-30; J. Ex. 32].

As the ALJ found, the parties met to bargain on November 26 and December 12, 2018. On November 26, 2018, the parties agreed to further extend the 2013 to 2017 contract until January 10, 2019, or until an agreement was signed, as follows:

Due to the fact that no agreement has yet been reached between the parties and **in consideration of the upcoming Christmas holiday season, the parties agree to extend the Collective Agreement in all its parts and conditions, except for the article on the Salary**, until January 10, 2019, or until the signing of an agreement between the parties on the Agreement, whichever comes first.

[J. Ex. 4, emphasis supplied]. Thus, the extension agreements only modified the salary of the article of the 2013 to 2017 contract, and made no change to Article 41 concerning Christmas bonuses. During contract negotiations, on November 26 and December 12, 2018, Respondent

proposed to keep the same Christmas bonus language in the successor contract (8.65% of employees' salaries up to a maximum salary of \$40,000), but only for the years 2018 and 2019. Thus, for the first time, Respondent did not propose to make up the difference between the 2016 Christmas bonus formula and the \$600 Christmas bonus paid in 2017. [JD 5: 31-34; J. Ex. 33 and 34].

As found by the ALJ, by November 30, 2018, the parties remained in negotiations, but differences remained with respect to economic issues. [JD 5: 36-37; JS 52-53]. The ALJ properly found that, on December 15, 2018, as it did a year earlier, Respondent paid a Christmas bonus to unit employees consisting of a gross maximum of \$600 per employee, instead of using the formula for 2016 specified in the contract extension.<sup>12</sup> [JD 5:37-40; JS 50-51; J. Ex. 36].

Respondent engaged in this drastic reduction notwithstanding that the Union had not consented to any reduction to the formula provided by the CBA for 2016. Moreover, Respondent had never specified to the Union that it would only pay a \$600 maximum Christmas bonus to Unit employees in 2018. There is no evidence or claim that the parties reached an impasse in bargaining at any point in 2018.

### **III. ARGUMENT**

#### **A. The ALJ Properly Found that Respondent's Reduction of the Employees' Christmas Bonuses was Contrary to its Past Practice. Exceptions 3, 9 to 16, and 22 to 26 are Meritless and Should be Rejected.**

Without reiterating each of Respondent's exceptions addressed in this point, in summary, Respondent takes exceptions claiming that the ALJ: mischaracterized its position; found that

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<sup>12</sup> Respondent excepted to this fact found by the ALJ. (Exception 7). However, Respondent stipulated that, on December 15, 2018, it paid a Christmas bonus to eligible bargaining unit employees up to a maximum amount of \$600 per employee. (JS 50; J. Ex. 36). There is no evidence that supports Exception 7. It is without merit and the ALJ's finding should be affirmed.

Respondent unilaterally reduced the Christmas bonus payments in 2017 and 2018; found that the contract language required maintenance of the status quo; found that there was a past practice that required Respondent to maintain the contractual Christmas bonus formula; and failed to find that the contract provided that the Christmas bonus formula reverts to the formula provided for in Puerto Rico Law 148 in any year not specified in the contract. General Counsel submits that the ALJ's findings of fact and conclusions of law were correct, and that Respondent's exceptions are entirely without merit.

Sections 8(a)(5) and 8(d) of the Act require an employer to bargain with the union representing its employees "with respect to wages, hours, and other terms and conditions of employment," commonly referred to as "mandatory" subjects of bargaining. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). During negotiations for a successor collective-bargaining agreement, an employer violates its duty to bargain collectively by unilaterally implementing terms and conditions of employment without first bargaining to agreement, or to a good faith impasse and implementing terms reasonably comprehended by its pre-impasse bargaining proposals. *NLRB v. Katz*, 369 NLRB 736, 743 (1962); *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), review denied sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). A party claiming impasse bears the burden of demonstrating its existence. *Dish Network Corporation*, 366 NLRB No. 119, slip op. at 2 (2018), citing *Serramonte Oldsmobile*, 318 NLRB 80, 97 (1995), *enfd. in part* 86 F.3d 227 (D.C. Cir. 1996).

Christmas bonuses are a mandatory subject of bargaining. *San Juan Batista Medical Center*, 356 NLRB 736, 738 (2011). The ALJ properly concluded that the Christmas bonus benefit of Respondent's employees is a term and condition of employment and a mandatory subject of bargaining, because bonuses are considered wages, and the Christmas bonuses were regularly paid

by Respondent on an annual basis and tied to employment-related factors. [JD 7:1-21]. Additionally, unilateral changes to wages, hours, and other terms and conditions of employment after a contract expires are typically unlawful because these provisions survive that expiration. *Hen House Market No. 3*, 157 NLRB 596 (1969), *enfd.* 428 F.2d 133 (8th Cir. 1970).

The ALJ correctly stated the principles for determining whether a past practice exists:

A past practice must occur with such regularity and frequency that employees could reasonably expect the “practice” to continue or reoccur on a regular and consistent basis. *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353-354 (2003), *enfd.* 112 Fed. Appx. 65 (D.C. Cir. 2004); *Eugene Iovine, Inc.*, 328 NLRB 294, 297 (1999).

[JD 8: 6-14]. Contrary to Respondent’s assertions, the ALJ properly determined that Respondent’s payment of Christmas bonuses constitutes a well-established past practice. Respondent paid Christmas bonuses annually for at least 15 years, from 2002 through 2016, based on the formula determined by the parties’ collective-bargaining agreement. These bonuses were paid at the same time each year, based on earnings during the same 12-month period ending on September 30 of the year in which the bonus was paid. As the ALJ further correctly found, “Respondent had no discretion in when the bonus was calculated or the formula to be used because the collective-bargaining agreement stated the formula. *Richfield Hospitality, Inc. as Managing Agent for Kahler Hotels, LLC*, 368 NLRB No. 44, slip op. at 20 (2019).”

In view of the well-established past practice of using the contractual Christmas bonus formula, the ALJ correctly found that unit employees could expect the Christmas bonus to be paid according to the formula established in the collective-bargaining agreement, not by the limit set by the Commonwealth’s law. [JD 8: 40-46]. Therefore, as the ALJ correctly found, “Respondent had an obligation to notify the Union and give it an opportunity to bargain over its intended change.

In the meantime, Respondent was obligated to maintain the status quo of the expired collective-bargaining agreement.” [JD 9: 1-3].

The undisputed evidence establishes that Respondent gave no notice to the Union of its intention to reduce the Christmas bonus. In fact, at the time it unilaterally reduced the Christmas bonus benefit in both 2017 and 2018, Respondent’s extant bargaining proposal to the Union included a provision to maintain the formula of 8.65 percent of wages up to maximum wages of \$40,000 – the same formula used to pay the Christmas bonus as of the expiration of the contract that expired by its terms on June 30, 2017. The reduced Christmas bonus paid by Respondent in 2017 was a *fait accompli*, because Respondent gave the Union no notice or opportunity to bargain, and therefore, the Union cannot be held to have waived its right to bargain about this change. *Harley-Davidson Motor Company*, 366 NLRB No. 121, slip op. at 2-3 (2018) and cases cited therein.

As the Board recently stated in *Richfield Hospitality, Inc. as Managing Agent for Kahler Hotels, LLC*, 368 NLRB No. 44, slip op. at 3 (2019):

It is clear that, following the expiration of a collective-bargaining agreement, an employer must maintain the status quo of all mandatory subjects of bargaining until the parties either agree on a new contract or reach a good-faith impasse in negotiations. See, e.g., *Triple A Fire Protection, Inc.*, 315 NLRB 409, 414 (1994), *enfd.* 136 F.3d 727 (11th Cir. 1998), *cert. denied* 525 U.S. 1067 (1999). Often, these cases turn on a determination of what the status quo was at the time that the contract expired.

In *Richfield Hospitality*, the Board further found that the expired collective-bargaining agreement did not address whether the parties intended that employees receive longevity pay increases after the parties’ agreement expired, and the agreement did not indicate that the parties intended that the increases should cease at the end of the contract, so the employer was obligated to maintain the status quo by paying the longevity increases after the contract expired, and the

employer violated Section 8(a)(1) and (5) of the Act when it unilaterally failed to do so. *Id.*, citing *Wilkes-Barre General Hospital*, 362 NLRB 1212, 1212 and fn.1, 1216-1217 (2015) and *Prime Healthcare Services-Encino, LLC d/b/a Encino Hospital Medical Center*, 364 NLRB No. 128, slip op. at 1 (2016).

The Board's holding in *PG Publishing Co., Inc. d/b/a Pittsburgh Post-Gazette*, 368 NLRB No. 41, slip op. at 2-3 (2019), another recent case, is also consistent with the ALJ's determination herein. In *Pittsburgh Post-Gazette*, the Board was presented with the issue of whether the employer unlawfully changed a term or condition of employment when it failed to increase welfare fund contributions after the parties' collective-bargaining agreements expired, as it had done for two years when the agreements were in effect. The parties' contracts established a baseline contribution level for 2015 and required the employer to pay contribution increases limited to 5 percent in 2016 and 2017. The contracts did not establish any contribution increases for subsequent years. The Board distinguished between the employer's contractual and statutory duties, stating that, while contractual obligations generally end once the agreement expires, an employer still has a statutory duty to maintain the status quo on mandatory subjects of bargaining until a new agreement or a valid impasse is reached. *Id.*, citing *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 207 (1991) and *Triple A Fire Protection*, 315 NLRB 409, 414 (1994), *enfd.* 136 F.3d 727 (11th Cir. 1998), *cert. denied* 525 U.S. 1067 (1999). The Board found that "when the agreements expired in March 2017, the status quo was the contribution rate for 2017, to which the employer lawfully adhered." *Id.*; see also, *Hempstead Lincoln Mercury Motors Corp.*, 351 NLRB 1149, 1149, fn. 1 (2007). In the instant case, the ALJ did not require any increase in the Christmas bonus formula. Rather, she correctly determined that Respondent violated the Act by failing to maintain Christmas bonus formula that was in effect at the time the 2013 to 2017 contract expired.

Thus, her finding is completely consistent with the Board's determination in *Pittsburgh Post-Gazette* and she did not adopt a "dynamic status quo" theory as claimed by Respondent.

Although Respondent asserts that the Christmas bonus article of the contract only obligated it to pay a Christmas bonus based on the formulas therein for the specified years listed in the contract and that it was free to reduce the bonus formula after the contract expired, nothing in the language of Article 41 suggests that Respondent had the right to reduce the Christmas bonus formula after the contract expired. The formula in Law 148 only applies to employers whose employees are covered by a collective-bargaining agreement if that agreement provides for a lower Christmas bonus than that provided for in Law 148. The mention of Law 148 in Article 41 of the contract merely refers to Puerto Rico's statutory requirement that employers pay an annual Christmas bonus, and it does not have any bearing on the formula to be used to calculate that bonus, because the contractual formula greatly exceeds the Law 148 formula.

As the ALJ found, Respondent had an established and longstanding past practice consisting of maintaining or gradually increasing the Christmas bonus formula pursuant to the parties' collective-bargaining agreements. Whereas Law 148 provides for payment of a Christmas bonus based on a percentage of up to 6%, during the 15 years from 2002 to 2016, the modified percentage upon which Respondent paid the Christmas bonus pursuant to the parties' contracts was from 8.5 percent to 8.65 percent, and never decreased. The same goes for the wage limits upon which the bonus is calculated. Whereas Law 148 states that the bonus will be calculated based on the first \$10,000 of each employee's wages or salary, during the 15 years from 2002 to 2016, the modified wage limit upon which Respondent paid the Christmas bonus pursuant to successive CBAs was \$30,000 to \$40,000, and never decreased. Thus, Respondent had an established practice of paying its employees an annual Christmas bonus based on specific percentages established in the parties'

contracts; the status quo was the 2016 rate of 8.65 percent of wages to maximum wages of \$40,000; and the drastically reduced payment in 2017 and 2018 based on the formula of 10 percent of wages up to maximum wages of \$10,000 violated Section 8(a)(1) and (5) of the Act. Cf. *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017) (actions constitute a ‘change’ only if they materially differ from what has occurred in the past, regardless of whether a contract was in effect when the past practice was created, or no contract existed when the disputed actions were taken, and actions consistent with an established practice do not constitute a change requiring bargaining simply because they may involve some degree of discretion).

In this case, unlike in *Raytheon*, Respondent deviated from its past practice. Respondent’s unilateral action of reducing the Christmas bonus formula providing for a maximum bonus of \$3,460 to a formula providing for a maximum bonus of \$600 obviously “materially differed from what had occurred in the past” for at least 15 consecutive year and materially differed from the reasonable expectations of the employees and the Union, as found by the ALJ. Neither the past practice nor the plain language of the contract suggests that Respondent was permitted to reduce the Christmas bonus to the amount provided for in Law 148 following the expiration of the contract, or that the formula of the Christmas bonus in effect in 2016 would no longer be in effect after 2016. Rather, the contractual Christmas bonus formula in effect at the time the contract expired remained in effect after the contract expired and was a pre-existing condition that survived the contract expiration. Thus, the employer had to bargain before changing the formula. [JD 8:25-30].

As the Board found in *Richfield Hospitality*, supra, any changes which an employer seeks to make to its employees’ terms and conditions of employment— whether established solely by practice or because they survive from a collective-bargaining representative, must be made only

following good faith bargaining with the employees' chosen representative. Before changing the Christmas bonus formula, Respondent was required to give the Union notice and an adequate opportunity to bargain for a complete successor collective-bargaining agreement, or required to bargain in good faith to an impasse in negotiations for a complete successor collective-bargaining agreement.

After the 2013 to 2017 contract extension expired on October 31, 2017, and continuing during the period when no contract or extension was in effect, until December 20, 2017, the parties did not reach a new contract, and there was no claim of impasse in negotiations for a successor agreement. Even if it had made such a claim, Respondent could not meet the burden of showing that an impasse exists. There is no evidence that the parties were deadlocked when Respondent reduced the Christmas bonus payments to unit employees on December 15, 2017. To the contrary, the parties continued to exchange contract proposals and there was movement in their bargaining positions during November and December 2017. Further, the reduced Christmas bonus formula implemented by Respondent on December 15, 2017, was clearly inconsistent with its "final offer" proposal to the Union to maintain the contractual Christmas bonus formula of 8.65 percent of wages up to maximum wages of \$40,000.

Accordingly, Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally reducing the Christmas bonus formula in 2017.

**B. Respondent's Exceptions to the ALJ's Waiver Analysis are Meritless and Should be Rejected. (Exceptions 16 to 22).**

Respondent claims that the ALJ failed to properly analyze whether the Union waived its right to bargain with Respondent regarding a change in the Christmas bonus formula by improperly applying a "clear and unmistakable waiver" standard and failing to properly apply a contract coverage waiver analysis. (Exceptions 16 to 22).

In *MV Transportation*, 368 NLRB No. 66 (2019), the Board held that to determine whether an employer's unilateral action is permitted by language in a collective-bargaining agreement it:

.... will assess the merits of this defense by undertaking the more limited review necessary to determine whether the parties' collective-bargaining agreement covers the disputed unilateral change (or covered it, if the disputed change was made during the term of an agreement that has since expired). In doing so, the Board will give effect to the plain meaning of the relevant contractual language, applying ordinary principles of contract interpretation; and the Board will find that the agreement covers the challenged unilateral act if the act falls within the compass or scope of contract language that grants the employer the right to act unilaterally. In applying this standard, the Board will be cognizant of the fact that "a collective bargaining agreement establishes principles to govern a myriad of fact patterns," and that "bargaining parties [cannot] anticipate every hypothetical grievance and . . . address it in their contract." .... Accordingly, we will not require that the agreement specifically mention, refer to or address the employer decision at issue. .... Where contract language covers the act in question, the agreement will have authorized the employer to make the disputed change unilaterally, and the employer will not have violated Section 8(a)(5).

If an agreement does not cover a disputed unilateral change, the Board will next consider whether the union waived its right to bargain over the change. In such cases, the Board will ascertain whether the union "surrender[ed] the opportunity to create a set of contractual rules that bind the employer, and instead cede[d] full discretion to the employer on that matter." .... Under those circumstances, the waiver must be "clear and unmistakable." .... Accordingly, **if the contract coverage standard is not met, the Board will continue to apply its traditional waiver analysis** to determine whether some combination of contractual language, bargaining history, and past practice establishes that the union waived its right to bargain regarding a challenged unilateral change. .... (Emphasis ours.)

368 NLRB No. 66, slip op. at 11-12, citations omitted.

When Respondent unilaterally reduced the 2017 Christmas bonus, the contract was expired and there was no extension agreement in effect. Therefore, the *MV Transportation* contract coverage standard is inapplicable to Respondent's unilateral reduction of the Christmas bonus in 2017, and the clear and unmistakable waiver standard was correctly applied to that unilateral change by the ALJ. The 2017 bonus reduction was significant and unilateral. It was also unprecedented and contrary to the preceding 15 years of past practice. Although Respondent

argues that it had the right to reduce the bonus to the amount provided for in Law 148 by virtue of the fact that the expired contract did not specify a bonus formula for 2017 or 2018, to be paid in the years after the contract expired by its terms on June 30, 2017, the Board's recent decisions clearly support the ALJ's finding that Respondent acted unilaterally and violated Section 8(a)(1) and (5) of the Act. *Richfield Hospitality, Inc.*, 368 NLRB No. 44 (2019) (finding that the contract did not indicate that the parties intended longevity pay increases to cease at its expiration, nor did it address whether employees would continue receiving the longevity pay increases after the contract expired; the employer had a duty to maintain the status quo by continuing the longevity increases after the contract extension expired, and that the employer's unilateral discontinuance of the longevity pay increases violated Section 8(a)(5) of the Act.); *PG Publishing Co., Inc. d/b/a Pittsburgh Post-Gazette*, 368 NLRB No. 41, (2019) (distinguishing between the employer's contractual and statutory duties; although contractual obligations generally end once the agreement expires, an employer still has a statutory duty to maintain the status quo on mandatory subjects of bargaining until a new agreement or a valid impasse is reached). *Id.*, slip op. at 2-3.

In the present case, as the ALJ found, there was no waiver of the Union's right to bargain about changes in the Christmas bonus formula, and Respondent violated the Act because in 2017 it did not maintain the status quo level of Christmas bonus payments made in 2016. As in *Richfield Hospitality* and *PG Publishing Co., Inc. d/b/a Pittsburgh Post-Gazette*, nothing in the parties' expired contract or the extensions of that contract addresses the amount of the Christmas bonus to be paid after 2016 or suggests that Respondent had the right to reduce the bonus formula from the 2016 status quo. As discussed above, the formula to which Respondent reduced the Christmas bonus that is set forth in Puerto Rico Law 148 only applies to situations where there is no agreement or bargaining relationship in effect that does not provide for a greater bonus. The

parties' intention in referencing Law 148 in Article 41 was not to dictate the Christmas bonus amount that would be paid to employees, since the parties' series of agreements since 2002 have always specified that the formula for the Christmas bonus to be paid to unit employees is significantly greater than the formula in Law 148, and since there has never been a reduction in the parties' formula. Rather, Article 41 mentions Law 148 merely to refer to Puerto Rico's statutory requirement that employers pay an annual Christmas bonus, and as argued above, it is unreasonable to construe the reference to Law 148 in Article 41 as having any bearing on the formula to be used to calculate the Christmas bonus payment to be made to unit employees.

Following Respondent's illogical analysis would permit employers to unilaterally reduce wages, after a contract expires, to rates in effect when that contract was entered into, and thereby eliminate all wage increases that had been granted on specified dates during the contract term.

**C. Respondent's Exceptions to the ALJ's Conclusion that Respondent did not have a Sound Arguable Basis for Modifying the Extended Contract in 2018 in Violation of Section 8(a)(1) and (5) and 8(d) of the Act are Without Merit and Should be Rejected. (Exceptions 26 and 27).**

Respondent contends that the parties expressly agreed, in the first sentence of Article 41 of the expired contract, that Respondent would pay the Christmas bonus amount as provided by Law 148, with modifications only assigned for particular years (2013-2016), and that therefore, it had a sound arguable basis for reducing the Christmas bonus provision to the Law 148 formula. This is not a reasonable interpretation of Article 41 of the contract, because the contract, read in its entirety and throughout its term, required the payment of much more generous Christmas bonus formulas than Law 148, as had the three previous contracts, and nothing in the contract suggests that the Christmas bonus would revert to the Law 148 formula after 2016.

The 2018 reduced Christmas bonus, like the unlawful unilateral reduction of the 2017 Christmas bonus, was based on the Law 148 formula of a maximum Christmas bonus of \$600,

rather than a maximum of \$3,460 as set forth in the 2013 to 2017 collective-bargaining agreement. The ALJ correctly concluded that Respondent's conduct constituted a mid-term contract modification because, at this time, an extension of the 2013 to 2017 agreement was in effect, except with respect to the salary article of the contract. Thus, the Christmas bonus article was in effect as a contractual right, and the Union never consented to its alteration. In these circumstances, the ALJ properly found, contrary to Respondent's position in its exceptions, that Respondent's conduct in 2018 violated Section 8(a)(5) and (1) and Section 8(d) of the Act. [JD 10:1-5].

The ALJ found that Respondent did not have a sound arguable basis for the modification. In this regard, the management rights provision of the 2013 to 2017 collective-bargaining agreement makes no mention of Christmas bonus benefits. [J. Ex. 4, Article 7 – Managerial Prerogative]. The Christmas bonus is only specifically discussed in Article 41. Moreover, as noted above, the parties' extension agreements provided that all terms of the 2013 to 2016 contract, except for the salary provision, remained in effect during the extension periods. Thus, the Christmas bonus article remained in effect.

As the ALJ also properly found, even if the Christmas bonus formula of 8.65 percent of wages up to maximum wages of \$40,000 was not a contractual condition, it was a past practice, and therefore Respondent violated the Act when it reduced the 2018 Christmas bonus from the contractual amount to a maximum of \$600. [JD 10:31-41].

In determining that the 2018 Christmas bonus reduction was an unlawful mid-term modification, the ALJ properly found that Respondent could not articulate a sound and arguable basis for modifying the contract and that Respondent could not modify the Christmas bonus provision in the extended CBA without the Union's consent, which it never obtained. In contract modification cases, "the General Counsel must show a contractual provision, and that the employer

has modified the provision” without the union’s consent. *Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005). Where the issue involves two conflicting interpretations of a provision in the contract, the Board will not find a violation if the employer has a “sound arguable basis” for its interpretation and is not motivated by union animus or acting in bad faith. *Id.*, at 502; see also *American Electric Power*, 362 NLRB No. 92, slip op. at 1, 3 (2015) (noting that in the absence of evidence of bad faith, animus or an intent to undermine the union, the Board does not seek to determine, in a contract interpretation dispute, which of two equally plausible contract interpretations is correct). When interpreting a collective-bargaining agreement to evaluate the basis of an employer’s contractual defense, the Board has given controlling weight to the parties’ actual intent underlying the contractual language in dispute. To make this determination of intent, the Board examines both the contract language and relevant extrinsic evidence, such as a past practice of the parties regarding the effectuation or implementation of the contract provision in question, or the bargaining history of the provision itself. *Knollwood Country Club*, 365 NLRB No. 22, slip op. at 3; *Mining Specialists, Inc.*, 314 NLRB 268, 268–269 (1994).

As discussed above, the language of the contract does not specify the Christmas bonus formula to be used to pay Christmas bonuses to the Unit employees in years after 2016, but the Christmas bonus formula for 2016 is the most recent applicable formula mentioned in the contract. As explained in the above discussion regarding the 2017 Christmas bonus, the contract contains no language that permits Respondent to modify the 2016 Christmas bonus formula. Respondent’s assertion that it was entitled to severely reduce the bonus formula to the formula provided in Law 148 is neither sound nor reasonably arguable. The extrinsic evidence of the parties’ past practice and Respondent’s bargaining positions regarding the Christmas bonus formula is further support for the General Counsel’s position that Respondent did not have a sound arguable basis to contend

that the contract permitted it to reduce the Christmas bonus from the 2016 formula to the formula provided for in Law 148. Moreover, obviously, the fact that Respondent unlawfully reduced the Christmas bonus formula in 2017 cannot provide a sound arguable basis for Respondent to interpret that the contract, as extended in 2018, permitted its repeated use of the unlawfully reduced formula. Accordingly, Respondent reduced unit employees' 2018 Christmas bonus without the Union's consent, in violation of Section 8(a)1) and (5) and Section 8(d) of the Act.

**D. Respondent's Exception to Other Case Authority Analyzed by the ALJ is also Meritless and Should be Rejected. (Exception 17).**

Respondent's exception to the ALJ's analysis of other cases is misplaced. In *Wilkes-Barre General Hospital*, 362 NLRB 1212 (2015), *enfd.* 857 F.3d 364 (D.C. Cir. 2017), the Board stated that because the parties' agreement did not address whether the employees would receive longevity raises after expiration of the contract, the employer had a continuing statutory obligation to maintain the status quo by paying those wage increases after the contract expired. Respondent attempts to distinguish that case by stating that the longevity-based increases were not tied to the term of the agreement, but to the employees' anniversary dates. However, in the case at hand, the Christmas bonus is also not tied to the term of the contract. Each contract since 2002 contained a Christmas bonus formula to be applied annually. The fact that the Christmas bonus article contains formulas applicable to specific years does not mean that the Christmas bonus formula is tied to the term of the agreement, especially in view of the fact that Christmas bonus article 41 is silent on that question.

In *San Juan Bautista Medical Center*, 356 NLRB 736 (2011); and *Hospital San Carlos Borromeo*, 355 NLRB 153 (2010) the Board found mid-term contract modifications in violation of the Act because the employers failed to pay Christmas bonuses based on contractual provisions that required payment pursuant to the formula provided in Law 148, whereas the instant case

requires Respondent to pay Christmas bonuses based on a much higher negotiated formula. The ALJ simply cited *San Juan Bautista* and *San Carlos Borromeo* because of their analysis of Law 148 and because these cases illustrate the law's impact upon contractual provisions, specifically noting that Law 148 excludes employees covered by a collective-bargaining agreement.

**E. Respondent's Exceptions to the ALJ's Recommended Remedy, Order, and Notice to Employees are Meritless. (Exceptions 28 to 32).**

For the reasons stated in Points a through D of the Argument, Respondent's exceptions to the ALJ's recommended remedy, Order and Notice are also without merit and should be rejected.

**IV. CONCLUSION**

For the reasons set forth above, and based on the entire record, it is respectfully submitted that Respondent violated the Act in all respects alleged in the Complaint, and that Respondent's exceptions are entirely without merit, and the ALJ's findings of fact, conclusions of law, and recommended remedy, Order and Notice should be affirmed.

Dated at San Juan, Puerto Rico, this 14<sup>st</sup> day of January 2020.

Respectfully submitted,

/s/ Manijée Ashrafi-Negroni

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of **COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS** in ASOCIACION DE EMPLEADOS DEL ESTADO LIBRE ASOCIADO DE PUERTO RICO, Cases 12-CA-218502 and 12-CA-232704, has been served electronically on this 14<sup>st</sup> day of January, 2020, as follows:

**By electronic filing:**

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Executive Secretary  
National Labor Relations Board  
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