

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 18**

UNITED PULSE TRADING D/B/A AGT FOODS

and

**BAKERY, CONFECTIONERY, TOBACCO
WORKERS AND GRAIN MILLERS,
INTERNATIONAL UNION, AFL-CIO, LOCAL NO.
167G**

Case 18-CA-242003

BRIEF TO THE ADMINISTRATIVE LAW JUDGE
ON BEHALF OF COUNSEL FOR THE GENERAL COUNSEL

Submitted by:

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**Brief to the Administrative Law Judge on Behalf of Counsel for the the
General Counsel**

The complaint alleges that “In about the spring of 2019, Respondent withheld its practice of giving employees annual reviews and associated wage increases.” There are three elements to this allegation: 1) that there was an established practice; 2) that the Employer stopped following it; 3) and that the Union’s appearance and organizing effort was the reason it stopped.

Despite the Employer’s attempted obfuscation in defense, the “practice” in issue is not just giving raises – it is doing annual evaluations and assessing employees for raises based on a variety of factors including the evaluation and the Employer’s overall financial performance.

The first section of the Brief reviews the facts. Second, the Brief will examine the general legal principles involved. Third, the Brief explains why the Employer’s cessation of the annual review process violates Section 8(a)(3) of the Act. Finally, the Brief will review and respond to some of the arguments the Employer raised in its Answer to the Complaint.

I. FACTS

A. Annual Evaluations

Since the Minot facility opened in 2013, employees have been given an evaluation approximately 90 days after starting work, and annually in April or May (GCX 4, Tr 22, 114). According to Les Knudson, the Division Head and

highest ranking official at the Minot facility (Tr 102-105), the Employer had a “practice” of “historically conduct[ing] . . . annual performance evaluations of the employees” (Tr 114). The evaluation consists of several pages filled out by the supervisor or lead person commenting on performance factors and grading on a numerical scale, and a couple pages filled out by the employee that contained a space for replies to the supervisors’ comments as well as suggestions for company improvements (GCX 21-31).

The supervisors who delivered the evaluations explained to employees that the purpose of the evaluations was to base raises on and to give employees directions for improvement (Tr 25-26). A good review meant a bigger raise (Tr 79, 91, 99). The reviews are important to employees independent of the raises because “employees want to know where they stand” (Tr 77-78 (employee Betterley)).

In every year but 2018, some raise followed most evaluations (GCX 4). In 2018, on the other hand, the company’s overall financial performance led to a nationwide freeze order (Tr 62, 116). Les Knudson explained to every employee that the Employer didn’t make enough money that year to give anyone a pay raise (Tr 32, 62). However, even in 2018, Knudson prevailed on his superiors for some leeway to give raises in the interest of staff retention (Tr 117, GCX 4: Anderson, Duchaine, Smith). And, importantly, the evidence clearly shows that the evaluation part was “automatic” before the Union started campaigning (Tr 33, 36). However, following the “freeze” of 2018 and the entry of the Union on

the scene later that year, the Employer never resumed its well-established evaluation process.

B. Other Raise Programs

The Employer granted raises for other reasons not related to the annual evaluations. For example, an employee could earn a 50 cent per hour raise for earning a “Qual card,” based on certification of job knowledge (Tr 117-119). These depended on employees taking the initiative to learn new job skills and could happen any time of year (Tr 60, 121). Employees also got raises for certain departmental moves to a higher rated classification or due to promotions (Tr 29). These, too, could happen any time of year (GCX 4: Dahl, Eisner C., Gates, Okwoyo, Wigness).

C. Union Organizing

The Union started organizing late in 2018 or early in 2019 and filed its Petition for election on February 15, 2019 (Tr 64, GCX 3).¹ No one has gotten an evaluation or consideration for a raise based on an evaluation since then (GCX 4, Tr 115). However, the Employer never abandoned the review process – supervisors were working on them even in 2019 (Tr 92), and Les Knudson promised his superiors in February 2019 to “keep our promises on reviews” and “hold [the management team] accountable” for doing them in the future (GCX 19). Employee Brady Betterly was given his part of the evaluation on which to write comments or suggestions even in 2019, but that process was not completed (Tr 56-57), i.e., it did not result in an in-person review or a corresponding

¹ The election was blocked by this and other charges and was never held (Tr 152-153).

assessment and wage increase. The Employer merely stopped giving the completed evaluations or raises as a result to employees.

A few months into 2019, consultants hired by the Employer to campaign against the Union told employees that it would like to get the annual review process back on track, but it could not authorize wage increases as long as the Union vote was pending (Tr 67-68). In the spring of 2019, Knudson sent an email to the supervisors telling them to get ready to write up reviews as soon as the Union vote takes place (Tr 124). In about June 2019, the Employer announced in an email that it couldn't do annual reviews as long as the "union situation" was going on (Tr 70). In August or September 2019, Les Knudson told employees, during a discussion of the company's position with respect to the Union, that if the company gave raises it would be construed as a bribe, so it would only recognize qual cards to justify raises (Tr 93, 96-97). Employees have asked Les Knudson in 2019 when they are getting another review and he told them only "we can't" (Tr 125).

II. LEGAL PRINCIPLES

"The general rule is that, in deciding whether to grant benefits while a representation election is pending, an employer should act as if no union were in the picture." Orland Park Motor Cars, Inc., 333 NLRB 1017, 1036-1037 (2001) (quoting Kauai Coconut Beach Resort, 317 NLRB 996, 997 (1995)). "Withholding a wage increase during a union organizing campaign has been held to violate section 8(a)(1) of the Act under any of three conditions: if the increase was promised by the employer prior to the union's appearance; if it normally would

be granted as part of a schedule of increases established by the employer's past practice; or if the employer attempts to blame the union for the withholding.” Noah's Bay Area Bagels, LLC, 331 NLRB 188, 193 (2000). The second and third situations are in issue in this case.

The fact that wage increases that result from the evaluations are discretionary does not remove this from being a “pattern and practice.” Daily News of Los Angeles, 315 NLRB 1236, 1240 (1994) (amount of raises based on merit reviews need not be constrained to any narrow range of discretion to create a past practice), *enfd.*, 73 F.3d 406 (D.C.Cir. 1996), cert. denied, 519 U.S. 1090 (1997).

However, the Employer in this case is not without a safe harbor. An employer may temporarily postpone implementation of a past practice with a proper explanation to employees by making it clear that the future adjustment will occur regardless of their choice in the election, that the sole purpose of the postponement is to avoid any appearance of influencing the election, and that the postponement is temporary and would be made up retroactively after the election. Care One at Madison Ave., 361 NLRB 1462, 1474-1475 (2014); Noah's Bay Area Bagels, LLC, 331 NLRB 188, 193 (2000).

III. ARGUMENT

A. Past Practice

The “practice” in issue is not just giving raises – it is doing annual evaluations and assessing employees for raises based on a variety of factors including the evaluation and the Employer’s overall financial performance. The

evaluation itself is an important, independent component of the program, and also incidentally a mandatory subject of bargaining. Santa Barbara News-Press, 358 NLRB 1415, 1473 (2012), reaffirmed by a lawful majority, 362 NLRB 252 (2015). That practice is clear, and importantly, admitted by Les Knudson. There is a plethora of other evidence that establishes that annual evaluations were indeed a well-established past practice.

First, the Employer's documentary evidence establishes that the evaluations are to occur annually as indicated by the box checked on each of the exhibits offered (GCX 6, 7, 8, 11, 17, 21-31).

Second, Les Knudson admitted that the Employer "historically" conducted annual performance evaluations on employees and that "this practice has been in place" since the Minot facility opened in about 2013 (Tr 114). Knudson also self-servingly and conclusionarily said evaluations have been "inconsistent" and have not occurred at set times of year, but the evidence shows otherwise.

There are 24 employees on GCX 4 with any history of annual evaluations.² They have a total of 46 evaluations in their personnel files. All but eight of them are dated in April or May in the years prior to 2019.

The eight exceptions to the practice of doing them in April or May:

- Thompson got two "annual" evaluations in one year, Jan. 8 and Apr. 9, 2015.

² There are 66 employees on GCX 4 who show no annual evaluations. They were all hired since July 2017, so they didn't qualify for an annual evaluation before the Employer stopped doing them.

- Mauti completed the employee part of his 2018 evaluation on Mar. 30, and the rest of the evaluation is missing from his file.
- Irmen, “Les Knudson’s assistant,” was hired on Jan. 22, 2018 and got a “90-day and annual” evaluation on July 27, 2018.
- Wigness got annual evaluations on Mar. 22, 2016 and June 17, 2017.
- Monroy got annual evaluations on Mar. 20, 2014, Mar. 19, 2015, and Sep. 22, 2017.

Three of the “exceptions” to the practice of doing them in April or May are within two weeks of April 1, and one more is within 17 days of May. Mauti completed his part of an incomplete evaluation within one day of April 1. Those are not far off the standard. One more is for an employee who got more than one annual evaluation within a year. Considering Knudson’s testimony about his desperation to award increases in the interest of staff retention, that hardly rebuts the general practice, either. One was for “Les Knudson’s assistant,” arguably a non-unit employee. That leaves only Monroy’s Sep. 22, 2017 evaluation as truly aberrational as to its timing. That his supervisor was late that year (Tr 37) does not rebut the usual “practice.”

That the practice was more hit-and-miss in 2018 does not rebut it as a practice. First, most eligible employees got an evaluation even in 2018 (GCX 4,

8, 17).³ Second, the remainder who didn't get a full evaluation got at least part of one, if only a "pay raise authorization" form that showed no pay raise (GCX 4 – Badke, Betterly, Davis, Mogaka, Muhindi, Thompson). The only possible reason for memorializing the lack of a raise was to show that the full evaluation wasn't going to matter that year. Knudson had previously announced that no one was getting a raise in 2018 (Tr 62). Even though that proved untrue (Tr 139), that surely lowered the incentive some supervisors might have had to complete the evaluations. The Employer provided no explanation for this.

That's the record for current employees.⁴ Significantly, the Employer did not produce a single evaluation outlying the April or May period.

Third, employees believed this was the practice. If the supervisors would have been late (despite the lack of evidence that any of them were very late), employees would have complained (Tr 37, 77-78), because that was inconsistent with their expectations.

Fourth, the Employer recognized that the cessation of the spring evaluations and accompanying raises was an aberration. Even in 2019, supervisors were working on them early in the year (Tr 92), and Les Knudson was planning for resumption of the review process (GCX 19 – "we need to keep

³ Taking the company's nationwide performance into consideration in one year does not rebut finding a past practice based on evaluations. As stated in Bryant & Stratton Business Inst. v. NLRB, 140 F.3d 169, 181 (2d Cir. 1998):

The exception [taking financial circumstances into account in one year] is just that—an exception—a practical and narrowly focused exception to the norm, the norm being a fixed and automatic wage increase policy with respect to time and criteria. The exception does not eradicate the norm.

⁴ See also GCX 20 – virtually all of the recorded "last evaluations" were in April or May, except for leads and supervisors and employees with less than a year of service in spring 2018.

our promises on reviews”). The promise (i.e., practice) that Knudson was referring to of course was to do one every year. Knudson sent an email to the supervisors imploring them to get the reviews done right after the election, which was then set for March 8, again consistent with the practice of doing reviews annually in April or May (Tr 148).

The Employer completely ignores the significance of doing evaluations in regard to the practice alleged in the complaint. Instead it focuses exclusively on raises (RX 2⁵). There are reasons for the Employer doing an annual evaluation besides giving raises – they let employees know how they are doing and what areas they could improve on, and they solicited comments from employees (Tr 23, 25, 78). Doing the evaluation, not just the raise, was a key part of the practice.

Respondent’s RX 2, a series of unrelated charts and graphs described page by page below, proves nothing relevant to the practice alleged in the complaint because it focuses solely on raises, ignoring the evaluation process. All of it is skewed by the Employer’s inclusion of non-bargaining unit supervisors and leads (Tr 160). Page 1 displays the number of employees who were eligible who received a raise in any given year. Given that an annual evaluation did not automatically lead to a raise, this is immaterial. Page 2 addresses raises by

⁵ It is not clear that RX 2 is actually part of the record. The Administrative Law Judge ordered at the hearing that it could be admitted after 10 days for the parties to complete review and copying of certain exhibits (Tr 164), but the Judge’s order closing the record does not mention Respondent’s exhibits (Order Receiving Exhibits Into the Record (Feb. 13, 2020). In any event, General Counsel did not object to the accuracy of the exhibits (Motion to Supplement and Then Close the Record (Feb. 12, 2020)).

month. Given that employees could receive raises for reasons not connected to an annual evaluation, as described above, this is also immaterial. Just because Knudson occasionally granted a raise out of season in desperation to retain an employee (Tr 117) doesn't mean there was no practice regarding annual evaluations. See Dynatron/Bondo Corp., 323 NLRB 1263, 1264-65 (1997) (fact that employer granted raises at other times of year does not rebut practice of annual evaluations).

Page 3 of RX 2 addresses raises for reasons other than Qual cards and promotions. It says nothing material about the annual evaluation process because it still includes 90-day evaluations, and given the turnover rate, the number of these would swamp the annual evaluations. Page 4 addresses raises for Qual cards and promotions, which is simply irrelevant to raises connected with annual evaluations. Page 5 addresses days between hire and first raise. The practice alleged in the complaint is doing annual evaluations, not doing 90-day evaluations, so this, too, is irrelevant. Page 6 addresses days in pay rate. Given that an annual evaluation never led automatically to a raise, this is immaterial. In addition, it is skewed now by the Employer's illegal withholding of raises based on evaluations since completing the last round in May 2018. The last page shows the amount of raises connected to qual cards and promotions, which is totally irrelevant.

B. The Employer Stopped Doing Evaluations in 2019

Since the round of annual evaluations in April and May 2018, the Employer has not done any more annual evaluations (GCX 4; Tr 33, 115). Of

course that means it has not granted any wage increases based on those annual evaluations (Tr 146).

**C. The Employer Stopped Doing Annual Evaluations in 2019
Because of the Appearance of the Union**

The Employer offered no evidence to show that it stopped doing annual evaluations and associated pay assessments for any reason other than the appearance of the Union. The documentary evidence and the testimony establish that the reason the Employer stopped doing annual evaluations and granting corresponding wage increases is because of the union organizing of its employees. Specifically, as noted above, in about June 2019, the Employer announced in an email that it couldn't do annual reviews as long as the "union situation" was going on (Tr 70). In August or September 2019, Les Knudson told employees, during a discussion of the company's position with respect to the Union, that if the company gave raises it would be construed as a bribe, so it would only recognize qual cards to justify raises (Tr 93, 96-97). Employees have asked Les Knudson in 2019 when they are getting another review and he told them only "we can't" (Tr 125).

The Employer produced no evidence that the economic downturn that depressed the amount of increases granted in 2018 continued thereafter. Compare 3-V, Inc., 350 NLRB 227, 229 (2007) (employer made it clear that suspension of merit wage program would last until supply problems abated). When an employer stops an established practice after a union appears without any explanation, it is an unfair labor practice. Care One at Madison Ave., 361 NLRB 1462, 1474 (2014) (employer said it was not allowed to discuss the issue).

Here, the Employer publicly blamed the Union for stopping the review and wage assessment process. Blaming the Union lays bare its motive for not granting the raises, proving the violation of Section 8(a)(3).

At a meeting led by the Employer's consultants a few months into 2019, it announced that it was trying to get the reviews back on track, but it couldn't authorize any wage increases as long as the Union vote was pending (Tr 67-68). The Employer made an email announcement in about June 2019 that it couldn't do reviews as long as the union "situation" was going on (Tr 70). At a safety meeting in August or September 2019, Les Knudson announced that he wanted to give raises, but in light of what was happening with the Union, giving raises could be construed as a bribe (Tr 96-97). Les Knudson admitted telling employees who asked about their annual evaluations since the Union appeared that "once the Union vote is completed we can do that," but until then "we can't" (Tr 125). He also sent an email to the supervisors saying he wanted evaluations done as soon as the Union vote was over (Tr 124). Not once did the Employer explain that employees' choice in the election would make no difference to the program, or promise to resume the evaluation process after the election, or promise retroactive increases once that happened.

IV. EMPLOYER ARGUMENTS

In its Answer to the Complaint (GCX 1(e)), the Employer cited several U.S. court of appeals cases in an attached "Brief in Support." Two are cited primarily for their criticism of the Board's standard for assessing a past practice – Acme Die Casting v. NLRB, 93 F.3d 854 (DC Cir. 1996) and Advanced Life Sys. v. NLRB,

898 F.3d 38 (DC Cir. 2018). The Administrative Law Judge is bound to the Board's standards described above regardless of the circuit courts' critique. The Board's standard has also evolved in response to the courts' critique. See, e.g., Dynatron/Bondo Corp., 323 NLRB 1263, 1267 fn.15 (1997) (distinguishing and explaining Acme Die Casting).

Another case cited by the Employer, Phelps Dodge Mining Co. v. NLRB, 22 F.3d 1493 (10th Cir. 1994), is factually distinguishable. In that case, the wage increases varied in both timing and amounts, and the amounts were based in each instance on differing criteria. In other words, the amounts were not discretionarily based on merit, they were totally discretionary.

Daily News of Los Angeles v. NLRB, 73 F.3d 406 (DC Cir. 1996), also cited by the Employer, actually supports finding past practice in this case. The court merely opined in a footnote that had wage increases been *totally discretionary* in amounts they would not become terms and conditions of employment. Nevertheless, the court affirmed the Board's order finding the merit increases in question were not *totally discretionary* – on the contrary, they were, as in this case, based primarily on merit evaluations, even though the exact amounts awarded retained discretionary variations. Id. at 412-413.

V. CONCLUSION

Accordingly, Counsel for the General Counsel respectfully submits that the Complaint should be sustained and the Employer should be ordered to perform merit evaluations and grant wage increases on an annual basis, retroactive to about May 1, 2019.

Dated: March 16, 2020

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**CERTIFICATE OF SERVICE OF Brief to the Administrative Law Judge on Behalf
of Counsel for General Counsel**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **March 16, 2020**, I served the above-entitled document by **electronic mail** upon the following persons, addressed to them at the following addresses:

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