

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED PULSE TRADING D/B/A AGT FOODS

and

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

Case 18-CA-242003

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EXCEPTIONS TO THE DECISION  
OF THE ADMINISTRATIVE LAW JUDGE  
AND BRIEF IN SUPPORT OF EXCEPTIONS

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Submitted by:

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## **Exceptions**

Counsel for the General Counsel excepts to the following findings and/or conclusions of the Administrative Law Judge:

1. To the ALJ's finding that the timing of wage increases was erratic (ALJD 2, ll.18-19; ALJD 6, ll.17-18).

2. To the ALJ's limited finding that at a mandatory meeting in March 2019, a consultant making an anti-union campaign speech said Respondent was looking to get performance reviews back on track, thereby ignoring the additional statement by the consultant that Respondent could not authorize wage increases as long as a vote on the Union was pending (ALJD 3, ll.23-25).

3. To the ALJ's findings regarding the timing of annual reviews in 2018 (ALJD 4, 1.6-ALJD 5, 1.18).

4. To the ALJ's finding that Respondent abandoned its annual merit wage increase program in early 2018, when the record evidence demonstrates that the merit wage increase program was only briefly suspended for 2018 (ALJD 6, ll.13-14).

5. To the ALJ's finding that the record does not establish the criteria by which Respondent determined merit wage increases in 2018 (ALJD 6, ll.14-17).

6. To the ALJ's conclusion that Respondent did not violate the Act by ceasing annual merit increases (ALJD 1, unnumbered lines; ALJD 6, ll.12-18).

7. To the ALJ's remedial order that does not make the remedy for both conducting reviews and granting wage increases retroactive to the date of the violations (ALJD 7, 1.15).

## **Brief in Support of Exceptions**

### **I. Introduction**

On March 31, 2020, the Administrative Law Judge issued a decision finding that Respondent violated Section 8(a)(3) and (1) of the Act by ceasing an established practice of conducting annual performance reviews after the Union filed its representation petition (ALJD 6-7).<sup>1</sup> This conclusion is compelled by the record. Les Knudson, Division Head and highest ranking official at the Minot facility since it opened in 2013, admitted that Respondent had a “practice” of “historically conduct[ing] annual performance evaluations of the employees” (Tr 114). With a few exceptions (detailed in full in ALJ BR 7-8), these reviews were issued in April or May every year. They were “automatic” (Tr 33, 36).

On the other hand, the ALJ rejected the complaint allegation that Respondent also violated the Act by ceasing its practice of granting wage increases based on the reviews (ALJD 6-7). Counsel for the General Counsel respectfully submits that the ALJ’s rejection of the raise allegation is based on a misreading of the testimony in crucial respects, and it ignores express

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<sup>1</sup> Citations to the record are abbreviated as follows:

ALJD: Administrative Law Judge’s Decision dated March 31, 2020.

Tr: Transcript of Hearing in Minot, ND, January 29, 2020.

GCX \_\_: Exhibits introduced at the Hearing by Counsel for the General Counsel.

RX \_\_: Exhibits introduced at the Hearing by Counsel for the Respondent.

ALJ BR: General Counsel’s Brief to the Administrative Law Judge, dated March 16, 2020.

evidence that Respondent refused to grant raises because of the Union's organizing efforts.

Finally, the ALJ ordered Respondent to conduct reviews again in the future, 2020. The remedy must be made retroactive to the time of the violations, 2019.

**II. The Employer's Consistent Practice was to Give Raises Every Year If Performance Reviews Merited Them (Exceptions 1-6)**

The ALJ concluded as follows with respect to raises:

With regard to the annual wage increases, I find that Respondent did not violate the Act by failing to continue them in 2019. AGT publicly abandoned its annual merit wage increase program in early 2018. While it gave a lot of employees merit increases later in the year, the record does not indicate the criteria by which AGT determined which employees received such a raise and how much. For example, there is no indication in this record as to why witnesses Wigness and Betterley did not receive a raise in 2018, when other employees did. Moreover, the timing of these increases is too erratic for them to be a condition of employment.

The ALJ thus relied on three factors: 1) public abandonment; 2) no evidence establishing the criteria; and 3) erratic timing. Each of these findings is contrary to the record evidence.

a) Reviewing Employees' Performance And Giving Raises Was Respondent's Consistent Practice Through 2018.

The ALJ's findings ignore the evidence that, at least until 2018, reviews and raises went hand-in-hand. The supervisors who delivered the evaluations explained to employees that the purpose of the evaluations was to give employees directions for improvement and determine whether to grant raises and in what amount (Tr 25-26). Thus, a good review meant a bigger raise (Tr

79, 91, 99). The testimony in this regard is undisputed. The documentary evidence supports this conclusion: the last page of the reviews was a wage increase recommendation, and sometimes it was for no increase if the employee's performance was deemed undeserving (e.g., GCX 4, 6, 7, 10, 11). The evidence of Respondent's past practice is undisputed and the ALJ found as much, at least until 2018. As discussed in the next section, in 2018 the practice was merely suspended, not abandoned. Indeed, the record evidence establishes that Respondent meant to resume the practice the following year (GCX 19).

b) 2018 Was An Anomaly As Far As Timing And Procedure Was Concerned, But Respondent Still Conducted Reviews and Ultimately Gave Raises.

Knudson testified that due to the financial challenges that Respondent's corporate-wide operations were facing in 2018, a corporate-wide hiring and wage freeze was implemented (Tr 116-117). Les Knudson announced to employees on several occasions in 2018 that there were not going to be raises given with the reviews that year:

- Employee Madison Wigness said Knudson came to a toolbox meeting with 20-30 employees in attendance and "stated the reasons as to why – why we weren't getting pay raises that year. . . .he said AGT didn't make enough money that year, . . . there just wasn't quite enough money to really give anyone pay raises at all." (Tr 31-32 (emphasis added).)
- Employee Brady Betterly said Knudson came to a meeting in his department in February 2018 and said, "nobody would be receiving raises that year. . . . I don't believe he gave a reason as to why." (Tr 62-63 (emphasis added).)

Nevertheless, despite the announcement and corporate-wide hiring and wage increase freeze, Knudson realized that for employee retention, he needed

to continue the program: he went to headquarters to beg for money for the Minot plant to give employees raises, received permission, and decided to continue the review and raise program (Tr 117, 130-131).

Judge Amchan: Just to make sure I got this. So around February 2018 you tell people, you know, we've been told no raises at all, but then a couple months later, you actually do give performance reviews and raises to some employees?

Mr. Knudson: That's correct. (Tr 139.)

This evidence does not support a finding that Respondent “publicly abandoned” its practice of giving raises based upon employees’ review results. What the evidence does show is that Respondent initially intended to suspend its past practice for 2018 because of economic conditions, but ultimately decided to continue its past practice or possibly face employee retention problems. Knudson’s testimony cited below is key to establishing that Respondent had a practice of giving reviews and raises around April or May, and that in 2018, it still endeavored, at least on paper, to maintain that practice, even if in practicality, the raises for that year were not given until June or July.

Mr. Knudson: I went to Regina and asked for money to do so. We -- I was given some money -- I was given the latitude to do what's necessary. Most of those, I believe -- and I'd have to pull a lot of files to be sure -- occurred in June and July, and we backdated the pay raises to prior to that because we were more than 365 days from their last review, so we were late with it. We were making an attempt to do what we could to salvage the plant morale. (Tr 139.) (emphasis added)

This testimony established that Respondent continued its past practice in 2018. Indeed, the ALJ stated, “Most employees eligible for an annual

performance review in 2018 received one and most received a wage increase as a result” (ALJD 4). It is impossible to square this statement with the ALJ’s conclusion that Respondent abandoned its practice of giving reviews and raises, if merited, in 2018. The documentary evidence shows that most employees who were eligible for a review and possible raise in 2018 got their annual reviews that same year (GCX 4 – Aamot, Asmamow, Anderson, Arant, Bagwell, Beyer, Duchaine, Eisner, Glsore, Horner, Mogaka, Oritz, Smith, Waltz, Wigness), and some received raises.

c) The ALJ Erred Critically By Failing To Consider That Respondent’s Established Practice of Giving Raises After Reviews Were Conducted Was Suspended Only Due to 2018’s Uncertain Economic Conditions.

The ALJ stated that “the timing of these [wage] increases [in 2018] is too erratic to for them to be a condition of employment.” (ALJD 6). The ALJ’s conclusion that raises in 2018 were erratically timed appears to be based on Exhibit RX 1.

Mr. Sutton: What does [RX 1] reflect?

Mr. Knudson: It started out as a payroll report, and what it started out in is the time in which employees got a wage change. It didn't - - it started out and we didn't know why they got a wage change, and it started out if they were active or not active. And then we had to go through and do a whole lot of research to get the rest of the columns in here.

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[T]his is based from an accounting standpoint, so these dates are for the dates that the wage took effect, not necessarily when the review was done or anything like that. It's -- it's payroll driven, not driven by reviews and those things. For instance, there can be people on here that received their review that did not receive a wage increase so there will -- so there won't -- it won't record that they received a review.

The ALJ's reliance on this document is misplaced for two reasons: first, this document only establishes the timing of raises in 2018, not in the several years prior; second, the document must be considered in light of the testimony explaining its compilation and providing important background context for this evidence.

After reviewing RX1, the ALJ summarized the information for 43 employees included in the document. The ALJ counted one raise and review in March, two in April, nine in May, ten in June, two in July, three in August, one in September and one in November (14 employees didn't show a raise or a review or both). Based on that summary, the ALJ concluded that the raises were erratic in 2018. RX 1 provided no information (though the record evidence clearly establishes) about Respondent's consistent past practice dating back to at least 2013 of granting merit wage increases consistent with the results of the annual reviews. Moreover, the erratic timing for 2018 is explained by Knudson's uncontroverted testimony cited above on page 5, a portion of which is reproduced here:

Knudson: Most of those, I believe -- and I'd have to pull a lot of files to be sure -- occurred in June and July, and we backdated the pay raises to prior to that because we were more than 365 days from their last review, so we were late with it. (Tr 139.)

While the timing of the raises was not consistent with past practice, the reason for this was Knudson's uncontroverted testimony about how the corporate-wide hiring and wage freeze affected 2018's review and raise procedure. Respondent back-dated raises that were late because of the

financial difficulties in order try to get back in line with its otherwise-consistent past practice of granting raises with the reviews in April and May. Otherwise, what was the point of backdating to try to be within 365 days from the last review? There is only one inescapable conclusion: Respondent was endeavoring to maintain its established practice of giving yearly reviews and raises, if merited, so that employees would not quit.

d) The ALJ Misapplied Precedent In Concluding That 2018's Aberration Established The End Of Respondent's Past Practice.

A single year's aberration with timing of raises is not evidence upon which to conclude that Respondent's practices were "erratic." The criteria used in 2018, as noted above, was the same as prior years: evaluations and assessment for raises went hand-in-hand, and a better review meant a bigger raise. There is no evidence that changed in 2018, only that Respondent's practices varied because of corporate-wide financial difficulties.

Taking the company's nationwide performance into consideration in one year does not rebut finding a past practice of raises based on reviews. 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.

In the underlying case, Bryant & Stratton Business Inst., 321 NLRB 1007, 1017-1019 (1996), the Board did not even mention the single year in which the employer dispensed with wage increases because of adverse financial considerations as a relevant factor in finding an established past practice.

Board law is clear that the fact that the wage increase amounts were discretionary does not defeat the past practice finding. Here, the evidence established that it was Respondent's past practice to exercise its discretion in determining, based upon an employee's review, whether and by what amount to grant a raise. Discretion does not lend itself to easy description or characterization, but the fact that the amounts were discretionary does not mean they weren't based on past practice. The Board has firmly held to this principle. 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). As

The ALJ was dismayed by the lack of evidence to explain why Wigness and Betterly did not get raises in 2018 while some other employees did. But this is explained by the fact that Respondent continued its established practice of basing raises on reviews. Thus, Wigness's evaluation in 2018 was significantly worse than 2017 – he scored 70 out of 100 on performance and 45 out of 50 on safety (GCX 8), whereas in 2017 he scored 92 out of 100 on performance and 100% on safety (GCX 7). Betterly did not get an evaluation in 2018. There is no evidence in the record as to why. But a single aberration is not enough to rebut the other evidence of consistent practice.

Respondent gave raises for other reasons (such as the Qual Card program) and used that fact to try to hide what it was doing with annual evaluations and the raises that accompanied them (RX 2). The fact that there

were other reasons for raises makes no difference to the demonstrated practice that Respondent annually and routinely evaluated employees and gave raises when merited. Respondent should have continued its past practice in 2019. The Board should reverse the ALJ's contrary conclusions.

### **III. The ALJ Ignored Motive Evidence (Exceptions 2, 6)**

“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). Accord: Gupta Permold Corp., 289 NLRB 1234, 1235 (1988); Times Wire Co., 280 NLRB 19, 27-31 (1986). As noted in the original brief to the ALJ (ALJ BR 4-5), the second and third situations are present in this case.

Specifically, the ALJ found as fact that Respondent's agents repeatedly told employees it could not grant raises while the Union's representation petition was pending (ALJD 3, ll. 16-27). Respondent explicitly blamed the Union for the lack of reviews and raises.

At a meeting led by Respondent'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). Respondent made an email announcement around 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).

Respondent could have lawfully described its dilemma if it had added that reviews and raises would be resumed after the union election and the result of the election would not matter, e.g., Care One at Madison Ave., 361 NLRB 1462, 1474-1475 (2014); Noah's Bay Area Bagels, LLC, 331 NLRB 188, 193 (2000). Not once did Respondent 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.

Not only is this is a second and independent reason why withholding reviews and raises in this case violated Section 8(a)(3) of the Act, a reason not considered by the ALJ, but it further underscores the fact that Respondent was deviating from its past practice and blamed the Union for that unlawful change.

#### **IV. The Remedy Must be Timely with the Violation (Exception 7)**

With no explanation, and contrary to standard Board remedial practices, the ALJ ordered Respondent to “[r]enew its practice of giving annual

performance reviews in 2020” (ALJD 7, l.15), not retroactive to the time of the violation, 2019. The ALJ found as fact that Respondent stopped giving annual performance reviews when the Union filed its representation petition on February 15, 2019 (ALJD 3, ll. 7-13). It is clear reviews were due in April and May 2019. There is also evidence that Respondent had its supervisors do their evaluations at that time to be able to write a review as soon as the Union election was held (Tr 56-57, 92). Also as urged above, the remedy should include wage increases based on reviews, Respondent’s established practice. Thus, the remedy should require Respondent to re-create conditions as they stood in April and May 2019 and do a retroactive review and assessment for wage increases as part of the remedy.

### **Conclusion**

For the foregoing reasons, the Administrative Law Judge’s decision should be corrected to require Respondent to give raises in line with its performance reviews, and to make the remedy retroactive to the time of the violations.

Dated: April 27, 2020

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