

**In the United States of America
Before the National Labor Relations Board**

Omni Hotels Management Corporation

Respondent

- and -

UNITE HERE Local 1

Charging Party

Case No. 13-CA-250528

**Respondent's Brief Pursuant to
Section 102.35(a)(9) of the
Board's Rules and Regulations**

Brian Stolzenbach
Matthew A. Sloan
SEYFARTH SHAW LLP
233 S. Wacker Drive, Suite 8000
Chicago, Illinois 60606
(312) 460-5000
bstolzenbach@seyfarth.com
masloan@seyfarth.com

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**RESPONDENT'S BRIEF PURSUANT TO SECTION 102.35(a)(9)
OF THE BOARD'S RULES AND REGULATIONS**

Respondent Omni Hotels Management Corporation submits this brief in accordance with Section 102.35(a)(9) of the National Labor Relations Board's Rules and Regulations, Series 8, as amended. Pursuant to Section 102.24 and 102.35(a)(9) of the Board's Rules and Regulations, Series 8, as amended, the parties have chosen to waive a hearing and decision by an Administrative Law Judge and have submitted this case to the Board on a stipulated record for issuance of a decision.

INTRODUCTION

In collective bargaining under the National Labor Relations Act, the union and the employer are supposed to be free to negotiate their own agreement, establishing terms and conditions of employment for bargaining unit employees through a combination of compromise, cooperation, and economic leverage. In this case, the Union asks for something different: it wants the federal government to place its thumb on the scale and tilt the negotiations decisively in the Union's favor. Specifically, the Union asks for a Board order requiring the Omni Chicago Hotel to grant bargaining unit employees a wage increase without the Union ever having to bargain for it. The Board should decline that invitation and dismiss the Complaint in its entirety.

Almost immediately after UNITE HERE Local 1 prevailed in a representation election among Food and Beverage (F&B) Department employees at the Omni Chicago Hotel, having barely commenced negotiations for a first contract, the Union demanded that Omni provide wage increases to bargaining unit

employees. According to the Union, Omni was required by the pre-election status quo to provide a wage increase to bargaining unit employees on September 1, 2019. This, even though the Union has never told Omni how much the wage increase should be and even though it has never asked to bargain over the issue.

In fact, the pre-election status quo for each bargaining unit employee is the employee's current (pre-election) wage rate. The law requires Omni to maintain **that** status quo while the parties bargain; it did not require Omni to provide employees with an unspecified wage increase on September 1, 2019. Before the Union was elected to represent the F&B employees, previous decisions by Omni to grant wage increases to those employees have never been predicated on any fixed criteria, formula, or longstanding practice. Instead, since at least 2002, the Company's decisions to increase wages for F&B employees — sometimes once a year, sometimes twice a year, **sometimes not at all** — have been made based on various and varying considerations, including the budgeted, forecasted, and actual economic performance of the hotel, employees' individual job performance reviews, statutory minimum wage requirements, and wage rates offered by comparable hotels in the Chicago area, with each of these considerations being more or less important (or, at times, not even considered at all), depending on the circumstances.

Counsel for the General Counsel disagrees, arguing that a loose trend of historical wage increases, based on no fixed criteria, is enough to establish a bona fide pattern of wage increases, such that failing to provide wage increases during

bargaining over a first contact would disrupt the status quo and violate Section 8(a)(5) of the Act.

Not a single case cited by the General Counsel stands for this proposition. Instead, when the Board has considered the basic premise of the Supreme Court's decision in *Katz* and the kind of situation presented by the stipulated record in this case — i.e., a history of inconsistent increase amounts at different times **based on no fixed criteria** — the Board consistently has found no requirement based on the status quo to grant wage increases during negotiations for a first contract and no requirement to provide advance notice and an opportunity to bargain over not providing wage increases. *See, e.g., News Journal Co.*, 331 NLRB 1331 (2000); *St. George Warehouse, Inc.*, 349 NLRB 870 (2007); *American Mirror Co.*, 269 NLRB 1091 (1984). The Board should do the same here.

THE FACTS

I. Certification of the Union and Commencement of Negotiations

Respondent operates the Omni Chicago Hotel in Chicago, Illinois. (Stipulation of Facts ¶ 2(a).) On July 10, 2019, the Union won a representation election conducted among the employees in the Hotel's F&B Department. (*Id.* ¶ 4(b).) On July 18, 2019, the Board certified the Union as the exclusive collective-bargaining representative of the bargaining unit employees. (*Id.*) The parties commenced negotiations for an initial collective bargaining agreement on August 6, 2019, and the Union presented its first proposal to Omni at the parties' second bargaining session on August 30, 2019, although that proposal did not include a wage proposal. (*Id.* ¶ 5.) A little more than a month later, on October 4, 2019, the

Union e-mailed its first wage proposal to Omni, requesting a new wage scale for bargaining unit employees, effective retroactively to September 1, 2019. (*Id.*) The Union's proposed wage scale would not have provided a uniform amount or percentage of wage increase to the employees. (*Id.*)

II. The September 2019 Wage Increases for Other Employees

In the meantime, on September 19, 2019, while the Union and Omni were engaged in contract negotiations, Omni implemented wage increases for hourly employees who were not represented by the Union. (*Id.* ¶ 6.) Some of those employees are represented by Operating Engineers Local 399, and the wage increases implemented on September 19 were made retroactive to July 1, pursuant to negotiations with Local 399 for a new collective bargaining agreement. (*Id.*) The other affected employees were not represented by any labor organization, and their wage increases were made retroactive to September 1. (*Id.*)

For all the employees other than those represented by Local 399, the September 19 wage increases followed annual performance reviews. (*Id.* ¶ 7.) For most of the employees, however, the increases had no connection to the outcomes of those evaluations. (*Id.* ¶¶ 6-7.) Instead, all hourly employees in the Housekeeping Department received a wage increase of 80 cents per hour, and all hourly employees in the Front Office and Guest Services Departments received a wage increase of 70 cents per hour. (*Id.* at ¶ 6.) Only those hourly employees in the Sales, Human Resources, Finance, and Security Departments, as well as an hourly employee in the Engineering Department who is not represented by Local 399, received wage increases based on their performance reviews. (*Id.*) Generally, employees in those

categories who “met” expectations received a 2.5% wage increase, employees who “exceeded” expectations received a 3.5% wage increase, and employees who did not at least “meet” expectations received no wage increase at all. (*Id.*) One employee in the Sales Department, however, who had already received an 8.64% wage increase in June 2019, received another 0.74% wage increase on September 19. (*Id.*)

III. Previous Wage Increases for F&B Employees

History evidences no discernible pattern or practice of wage increases for F&B employees, which makes sense, given the lack of criteria or formula underlying the Company’s decision-making. (*Id.* ¶¶ 14-49.) Indeed, the stipulated record reveals that:

[b]etween January 2002 and June 2019, the decision of whether and when to grant Unit employees a wage increase and, if so, how much to grant them has been determined by Respondent based on various considerations, including the budgeted, forecasted, and actual economic performance of the hotel, employees’ individual job performance reviews, statutory minimum wage requirements, and the wage rates offered by comparable hotels in the Chicago area, with each of these considerations being more or less important (or, at times, not even considered at all), depending on the circumstances.

(*Id.* ¶ 49.) This approach has led to a wide variety of outcomes, in both the timing and the amounts of wage increases. (*Id.* ¶¶ 14-49.)

For example, Omni granted wage increases to bargaining unit employees in January and September of 2002 but only in September of 2003. (*Id.* ¶¶ 14-16.) Then, between 2004 and 2008, Omni provided wage increases to most F&B employees on a bi-annual basis, with only one of those ten increases having occurred in September. (*Id.* ¶¶ 17-29.) In 2009, however, those F&B employees who received a wage increase received only one, and it occurred in March. (*Id.* ¶¶ 30-31.) The next wage

increase for any F&B employee occurred in April 2010. (*Id.* ¶ 31.) Between 2010 and 2013, raises were once again given to most F&B employees on a bi-annual basis, and none of them occurred in September. (*Id.* ¶¶ 32-39.) To be sure, between 2014 and 2018, those F&B employees who received wage increases did receive them on September 1, (*Id.* ¶¶ 40-41, 43, 45, 47), but those few years do not erase the entire history preceding that time period.

At the same time, some F&B employees have not received a raise at all, even though others have: banquet servers received no wage increases at any time between October 2006 and September 2017, and banquet supervisors (who are in the bargaining unit, notwithstanding their “supervisor” job title) received no wage increase between October 2007 and September 2017. (*Id.* ¶¶ 23-24.)

Even those who did receive wage increases sometimes received different amounts at the same time. In January 2002, F&B employees received increases of varying percentages, based on performance reviews. (*Id.* ¶ 14.) In some years, many F&B employees received increases according to a discernible rule — for example, a straight percentage increase unrelated to performance reviews — while some others did not. (*Id.* ¶¶ 15-18, 20.) In some years, increases generally differed as between tipped and non-tipped F&B employees while in other years they did not. (*Compare id.* ¶¶ 19, 21-22, 25-30, 32-40, 45 *with id.* ¶¶ 41, 43, 47.) Sometimes, Omni awarded wage increases as a percentage of the employee’s current wage rate whereas other times it provided wage increases in specific “dollars and cents” amounts, regardless

of how that amount equated to a percentage of the employee's rate at the time of the increase. (*Id.* ¶¶ 45, 47.)

IV. The Union Demands Wage Increases, and Omni Responds

Omni did not provide wage increases to bargaining unit employees in September 2019. (*Id.* ¶ 8.) On October 10, Union Representative Sheila Gainer e-mailed Omni's chief negotiator to assert that this was a "change[] in the working conditions at the Omni." (*Id.* ¶ 9; Jt. Ex. G.) Omni's chief negotiator responded:

[A]s you know the Hotel is required by the National Labor Relations Act to maintain the status quo while negotiating with the Union for a first contract. Based on all the facts and circumstances as I understand them, I believe the Hotel is correct that the status quo with respect to wages is the employees' current wage rate. Accordingly, the Hotel does not believe it has made a unilateral change in wages for the bargaining unit employees and, in fact, believes that providing them with an increase (or decrease) would have been a unilateral change.

(*Id.* ¶ 10, Jt. Ex. G.)

On October 18, 2019, Omni and the Union met for their first bargaining session following the foregoing e-mail exchange. (*Id.* ¶ 11). During the meeting, Union Representative Angel Castillo stated that the Union believed Respondent's failure to give a wage increase to bargaining unit employees was unlawful and that the Union would file an unfair labor practice charge if Omni refused to grant them an increase. (*Id.*) In response, Omni's chief negotiator reiterated that Omni did not

believe the law required it to grant wage increases to bargaining unit employees and that it would not grant wage increases at that time.¹ (*Id.*)

The Union has never informed Omni how much it believes the wage increase in September 2019 should have been. (*Id.* ¶ 12.) Nor has the Union ever asked to bargain over the issue of a September 2019 wage increase, separate and apart from its wage proposal presented in the context of an overall collective bargaining agreement. (*Id.* ¶¶ 5, 12.)

ANALYSIS

I. Omni Did Not Violate Section 8(a)(5) of the Act

Without a historical past practice of consistent, predictable, or automatic wage increases based on established criteria, formula, or methodologies, Omni made the lawful determination that, following the F&B employees' decision to negotiate their wages through a labor organization, the Company no longer possessed the right to unilaterally implement wage increases for those employees. (Jt. Ex. G.) Granting the employees a wage increase would have changed the status quo in the midst of the parties' negotiations and would have violated the Act. *See NLRB v. Katz*, 369 U.S. 736 (1992).

With no fixed criteria or methodology for wage increases in place before the Union's election to represent the bargaining unit employees, this case presents facts not unlike those in *News Journal Co.*, 331 NLRB 1331 (2000). In that case, the

¹ Although the Union's charge alleged that Omni's refusal to grant a wage increase was discriminatory in violation of Section 8(a)(3) of the Act, in addition to being a violation of the duty to bargain, the General Counsel has not pursued any allegation of discrimination. (*Compare* Jt. Ex. C with Jt. Ex. E.)

Board held that the employer did not commit an unfair labor practice by declining to automatically grant wage increases to employees after successful completion of their 90-day probationary periods. The Union argued that employees had consistently received wage increases after the evaluations that followed their 90-day probationary periods and that the practice was unlawfully discontinued without notice to the Union and without affording the Union an opportunity to bargain over it.

The evidence, however, was to the contrary, including years where some employees did not receive wage increases. The evidence showed instead that wage increases at the end of the probationary period were at the complete discretion of the employer “based on a number of factors including budget considerations, the evaluation of the employee’s performance, the amount of money the employee is currently earning, and whether granting a wage increase might be a factor in retaining an individual on the staff.” *Id.* at 1332. Accordingly, there was no “established practice” that “was in effect that employees automatically received wage increases” *Id.*

Similarly, in *St. George Warehouse, Inc.*, 349 NLRB 870, 893-94 (2007), the employer did not grant an annual wage increase during bargaining for a first contract with a newly elected union. Rejecting the allegation that this was unlawful, the Board agreed that there was no pattern concerning the frequency or amount of wage increases for employees in the past. For instance, only eight of ten bargaining unit employees had received a raise in each calendar year examined by the Board.

Meanwhile, several other employees in the bargaining unit received differing numbers of increases over the same period of time, the dates on which the raises became effective did not fit a fixed pattern, and the amounts of the increases varied. *Id.* at 893-94. Hence, the Board concluded: “[T]here is no evidence that Respondent was committed to granting annual merit evaluations and no evidence that an employee who met established criteria was assured of a wage increase . . . It is clear that Respondent exercised its discretion in all aspects of deciding whether to grant a wage increase including timing and amount and application of criteria.” *Id.*

The Board’s decision in *American Mirror Co.*, 269 NLRB 1091 (1984), is also instructive. There, the union claimed the employer violated the Act by declining to grant wage increases “on or about May 18, 1981,” following the union’s election, while the parties negotiated for an initial collective bargaining agreement. The Board disagreed, even though the represented employees had received a discretionary, across-the-board wage increase at least once in each of the 10 years before the election, and even though employees had received wage increases at roughly the same time (June 23, 1977, June 8, 1978, June 7, 1979, and May 22, 1980) in each of the previous four years. *Id.* at 1092 n.7. The Board concluded that the history of wage increases for bargaining unit employees lacked a discernible pattern, having included “across-the-board raises of differing amounts at differing times.” *Id.* at 1095 n.20. In dismissing the union’s allegation that the employer had violated the duty to bargain, the Board articulated fundamental principles that should drive a dismissal of the Complaint in this case, as well:

The Company's refusal to accommodate the Union by granting interim raises, based in some manner on past discretionary and across-the-board raises of differing amounts at differing times was . . . not an unlawful change. To find otherwise would be to subject the Company involuntarily to granting some type of interim raises, while facing the obligation to negotiate yet an additional or different wage program without certainty in its outcome or economic effects.

Id. As the Board explained in *American Mirror*, the Union cannot have “the best of both worlds” by demanding ongoing wage increases (where there is no clear historical pattern to be followed) while also in the midst of negotiating additional increases in a first contract between the parties. *Id.* at 1095. The employees elected the Union to represent them in bargaining over their wage rates, and Omni should not be punished for respecting that decision by maintaining the status quo while conducting those negotiations.

II. The Cases Cited by Counsel for the General Counsel Are Distinguishable

The cases cited by Counsel for the General Counsel are inapposite. In *Daily News of Los Angeles* and the several other cited cases from the *Daily News* progeny, *see, e.g., United Rentals, Inc.*, 349 NLRB 853 (2007), *Bryant & Stratton Business Institute*, 321 NLRB 1007 (1996), and *Rural/Metro Medical Services*, 327 NLRB 49 (1998), the Board found that the status quo required wage increases even in the midst of contract negotiations only in limited situations where historical wage increases were based on performance appraisals and were regularly given at fixed times (either calendar dates or anniversary dates), with only the amount of the increases being left to the employer's discretion, ***based on established merit appraisal criteria***. This case does not present such a situation. Annual reviews have served as the basis for wage increase decisions for F&B employees only once in

nearly 20 years, and that was in 2002. That the timing of wage increases sometimes (though not always) occur around the same time annual performance reviews, but with no correlation to those reviews whatsoever, is insufficient for analogizing to the *Daily News* cases or delineating any pre-election status quo. *Daily News of Los Angeles*, 73 F.3d at 412 n.3 (“[W]e do not believe that fixed timing alone would be sufficient to bring the program under *Katz*.”).

The General Counsel also cites *Central Maine Morning Sentinel*, 295 NLRB 376 (1989), for support. While distinguishable from the *Daily News* canon, in that *Central Maine* does not involve merit-based wage increases based on annual performance reviews, it is similarly inapplicable. In *Central Maine*, the Board found that the employer unilaterally withheld a wage increase whereas previously, the employer “did not deviate from year to year in deciding that a raise would be granted; it applied a formula derived from uniform factors across-the-board and granted it to all employees whose wages were not governed by collective bargaining agreements.” *Id.* at 379. The history of wage increases for the F&B employees at the Omni Chicago Hotel, however, reveals no such trademarks: no formula, no uniform factors, and no consistent granting of a wage increase to all employees. In contrast, the stipulated facts show that, over at least the 17 years prior to the Union’s election, Omni has decided whether and when to grant F&B employees a wage increase, and, if so, how much to provide them, by considering various factors, which have varied inconsistently over time, with no clear formula or criteria driving the decision. (Stipulation of Facts ¶ 49.)

This is exactly the type of situation in which an employer is prohibited from granting unilateral wage increases during negotiations for a first contract. *See Katz*, 369 U.S. at 746 (“Whatever might be the case as to so-called ‘merit raises’ which are in fact simply automatic increases to which the employer has already committed himself, the raises here in question were in no sense automatic, but were informed by a large measure of discretion.”). The mere existence of wage increases over time, in different amounts and at different times and based on no fixed criteria or formula, cannot be the basis for finding a pattern sufficient to create a status quo requiring continued wage increases, and none of the cases cited by counsel for the General Counsel suggest otherwise.

III. The Fundamental Flaw in the General Counsel’s Theory Is Revealed by a Detailed Consideration of the Options Facing Omni in September 2019

If the Board were to conclude that Omni should have provided bargaining unit employees with wage increases retroactive to September 1, 2019, on the theory that this is required by a historical “status quo” of wage increases, exactly what would that have looked like, in concrete detail? Was Omni supposed to have granted wage increases identical to those given to non-represented hourly employees at the hotel? If so, then which employees? Housekeeping Department employees received one fixed amount (80 cents) while the Front Office, Guest Services, and Security Department employees received a different fixed amount (70 cents) while a third set of employees in various other departments received varying percentage increases based on their individual performance reviews and recent wage histories.

(Stipulation of Facts ¶ 6.) Prior to issuance of a complaint, Region 13 informed

Omni that it should have granted increases consistent with the latter approach—percentage increases based on individual performance reviews—but Omni has not taken that approach with respect to bargaining unit employees for nearly 20 years, so that surely would not have been consistent with the “status quo.”² (*Id.* ¶¶ 13-14; Jt. Ex. H.) At the same time, the other approach Omni took in 2019 with respect to non-represented employees at the hotel (an increase in a fixed amount of cents per hour, with the amount varying by department) would have been inconsistent with the approach Omni took in September 2018—the last time it gave wage increases to F&B employees. (*Id.* ¶¶ 47-48.) In fact, anything Omni could possibly have done would have been inconsistent with its approach in 2018, when every non-represented hourly employee in the hotel received a 3.5% wage increase, because Omni adopted three different approaches to three different sets of employees outside the bargaining unit. (*Id.*) Even focusing just on F&B employees, if Omni had given them all a 3.5% increase, just as it did in 2018, then that would have been inconsistent with its approach just one year earlier, in 2017, when it provided wage increases in differing amounts of cents per hour to different job classifications within the F&B Department (no matter what percentage increase that constituted). (*Id.* ¶ 45.) It also would have differed from Omni’s approach for several years before

² Counsel for the General Counsel takes the position that the Region’s position in this regard is inadmissible under Rule 408 of the Federal Rules of Evidence, (Stipulation of Facts ¶ 13, n.1), but this is incorrect. Rule 408 is not so broad that it prohibits consideration of any and every statement made in the course of settlement discussions. Instead, Rule 408 excludes evidence of settlement offers only if such evidence is offered to prove liability for or invalidity of the claim under negotiation. *See Vulcan Hart Corp. v. NLRB*, 718 F.2d 269, 277 (8th Cir. 1983). Here, the statement by Region 13 presumes Omni’s liability and was designed not to express weaknesses in the Region’s position, but rather, only to help Omni understand the legal theory underlying the Region’s position.

2017, when some F&B Department employees received no wage increase at all. (*Id.* ¶¶ 23-24.)

Had Omni given a wage increase to bargaining unit employees in September 2019, only to see the Union take the opposite position from the one it is taking now (as the union did in *Katz*), how could Omni have defended itself in light of the foregoing inconsistencies? One year of 3.5% wage increases does not a “status quo” make. Just as important, if the Board orders Omni to provide a retroactive wage increase to bargaining unit employees, it will be impossible for that order to require a specific approach to such an increase, so Omni will be left in an untenable position once again. Any approach it could take would be subject to criticism by the Union for its failure to match some other increase to which it could be compared, precisely because there is no fixed pattern or set criteria by which wage increases have been given, historically. This is the fundamental problem with the Union’s and the General Counsel’s position, and it is precisely why the Complaint in this matter should be dismissed.

CONCLUSION

Omni knows how to satisfy its duty to bargain and how to reach a collective bargaining agreement with a labor organization, as reflected by the fact that it entered into a new five-year agreement with the Operating Engineers in 2019 at the same hotel involved in this case. Omni should be left to do the same with UNITE HERE, without any interference by the Board. On the stipulated facts presented in this case, there is no legal basis for requiring Omni to grant a wage increase to bargaining unit employees while the parties negotiate over the terms to be

contained in their first contract. Accordingly, the Board should dismiss the Complaint in its entirety.

Respectfully submitted this 1st day of September, 2020.

OMNI HOTELS MANAGEMENT
CORPORATION

By: *s/Brian Stolzenbach*

Certificate of Service

I hereby certify that I caused a true and correct copy of Respondent's Brief Pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations to be e-filed with the National Labor Relations Board and served on the following individuals via e-mail on this 1st day of September, 2020.

Emily O'Neill
Counsel for the General Counsel
National Labor Relations Board, Region 13
219 South Dearborn Street, Suite 808
Chicago, Illinois 60604-1443
Tel: (312) 353-7610
Email: emily.o'neill@nlrb.gov

Sheila Gainer
Representative for Charging Party
218 South Wabash Avenue 7th Floor
Chicago, IL 60604-2449
Tel: (312) 663-4373
Email: sgainer@unitehere.org

By: *s/Brian Stolzenbach*