

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

OMNI HOTELS MANAGEMENT
CORPORATION

and

Case 13-CA-250528

UNITE HERE LOCAL 1

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF

Respectfully Submitted:

/s/ Emily O'Neill

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Pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations, Series 8, as amended, Counsel for the General Counsel submits this Answering Brief to Respondent's Brief to the Board, dated September 1, 2020.

I. The Calculation of the Withheld Wage Increase is a Matter for Compliance, not a Defense

In its brief, Respondent asks the Board, "exactly what would [wage increases] have looked like, in concrete detail?" Respondent's question implies that because neither Counsel for the General Counsel nor the Charging Party are, at this stage in the proceedings, in a position to ascertain the exact amount of the withheld wage increase, there can be no violation. This argument is preposterous. There is no dispute that Respondent's annual wage increases are discretionary and have been variable in amount from year to year. The exercise of discretion would indeed make it difficult for the General Counsel, at this pre-compliance stage, to determine with any precision what the withheld wage increase for Unit employees would have been but for Respondent's unilateral elimination of the practice. Of course, under well-established Board precedent, that wage increases are subject to employer discretion and vary in amount does not negate the existence of an established practice that has become a term and condition of employment. See *Daily News of Los Angeles*, 315 NLRB 1236 (1994), *enfd.* 73 F.3d 406 (D.C. Cir. 1996), *cert. denied* 519 U.S. 1090 (1997). Indeed, the Board routinely fashions appropriate remedies in cases such as this. See, e.g., *id.*

Counsel for the General Counsel certainly does not deny that information regarding Respondent's methodology for calculating wage increases was not made available during the

investigation, notwithstanding attempts to obtain such information,¹ just as it was unavailable to the Union when it sought to bargain over the issue. Without access to such information, it is entirely unrealistic for the General Counsel to dictate a specific wage increase, just as it would be impossible to do so for raises based primarily on individual employee performance.² Nonetheless, the Board routinely remedies unilateral withholdings of both types of raises. This is because the inability to calculate the withheld wage increase is not evidence that no violation occurred. Rather, it is simply a matter properly deferred to the Board's compliance procedure.

The Board addressed this very issue in *Daily News of Los Angeles*, supra, on remand in response to the D.C. Circuit's concern that determining the amounts of the withheld discretionary increases in that case would be "unascertainable." The Board assured that the compliance proceeding was the proper channel and would enable the General Counsel to construct a formula to approximate the amount of the withheld wage increase and devise an appropriate remedy. See *id.* at 1241. The Board pointed out that in addition to other factors, the General Counsel would have the benefit of examining wage increases granted to unrepresented employees, just as in this case. *Id.* As for Respondent's query as to what "exactly" the increase would be, the Board addressed that concern as well, stating that a "backpay award is only an approximation, necessitated by the employer's wrongful conduct. Therefore, the Board is

¹ See Jt. Stipulation of Facts at par. 50; Jt. Exh. I. Although Respondent shared information concerning its primary criterion, to "attract and retain talent" by examining local market wages, such information is insufficient to enable Counsel for the General Counsel to devise a methodology for calculating the withheld wage increase.

² The investigating Board Agent's attempt to approximate the appropriate wage increase amounts during the course of and in furtherance of settlement are neither admissible under Rule 408 of the Federal Rules of Evidence, nor relevant to the Board's analysis of whether a violation occurred. Respondent's confounding contention to the contrary would render Rule 408 meaningless. The statement was clearly made in the context of the Agent's attempt to devise a settlement amount and is now relied upon by Respondent to disprove its commission of an unfair labor practice. There can be no other interpretation and no plainer, textbook application of Rule 408.

required only to adopt a formula which will give a close approximation of the amount due ...; it need not find the exact amount due.” *Id.* (internal citations omitted).

Respondent next speculates that whatever wage increase it granted to the Unit employees would have inevitably drawn objection from the Union. Such futile conjecture as to what might have happened had Respondent not unilaterally withheld the increase altogether is entirely irrelevant and provides no defense. Notably, Respondent’s protestation ignores another—lawful—option at its disposal: consult with the Union as to how to approach to the scheduled wage increase in the wake of certification. The parties were already engaged in bargaining a first contract at the time Respondent made and implemented its decision, and yet Respondent failed to raise this topic. Moreover, even when provided with the opportunity to correct course and engage with the Union on the subject, Respondent doubled down on its unlawful unilateral decision to withhold the increase for Unit employees.

In sum, the General Counsel and Charging Party’s inability to dictate the exact amount of the withheld wage increases “in concrete detail” does not disprove the existence of a violation. This plain fact is demonstrated by the legions of nearly identical Board cases remedying the unilateral elimination of discretionary raises. Likewise, the possibility that the Union might object to whatever amount Respondent implemented in adherence to its past practice does not excuse its unilateral decision to withhold the increases. Respondent was obligated to continue its long-standing practice and grant raises just as it would have in the absence of the Union’s certification and, therefore, the unilateral decision to eliminate the wage increases without providing the Union with notice and an opportunity to bargain violated Section 8(a)(5).

II. Respondent Admits the Existence of a Discernable Pattern of Granting Annual Wage Increases

Despite its efforts, Respondent cannot credibly deny that its historical practice of annual wage increases followed a predictable pattern spanning many years. Respondent goes to great lengths to highlight the minor variances over the years, including that amounts differed according to classification, that certain classifications did not receive increases some years, and that the timing and amounts of the increases sometimes varied from year to year. However, Board law does not require uniformity in order for wage increases to become an established pattern and practice, but rather it is the regularity with which wage increases occur over a period of time, such that employees would reasonably come to expect them, which determines whether the practice has become a term or condition of employment. See, e.g., *Daily News of Los Angeles*, 315 NLRB at 1236 (only about 80 percent of employees received raises, which varied from 3 to 5 percent from year to year), and *Mission Foods*, 350 NLRB 336 (2007) (same but where raises varied from 1.5 to 7.1); *Central Maine Morning Sentinel*, 295 NLRB 376, 376 fn. 2 (1989) (raises not given on specific dates, but rather in January or February each year); *Arc Bridges*, 355 NLRB 1222, 1224 (2010) (finding established practice notwithstanding that employer did not implement raises in three of the eight years examined) enf. denied 662 F.3d 1235 (D.C. Cir. 2011); *Lee's Summit Hospital*, 338 NLRB 841, 843-44 (2003) (same where practice was in place for six years with only a single exception); *Bryant & Stratton Business Institute*, 321 NLRB 1007 (1996), enf. 140 F.3d 169 (2nd Cir. 1998) (same where practice in place for 10 years with only a single exception).

Counsel for the General Counsel previously detailed Respondent's wage adjustment practice in its Brief to the Board dated September 1, 2020 (hereinafter "Brief to the Board"), and maintains the position that an established practice has been in effect since at least 2002, as

evidenced by the consistency and regularity with respect to timing, amount, and criteria. As such, Counsel for the General Counsel will not burden the record by restating the evidence herein.

Instead, Counsel for the General Counsel directs the Board's attention to Respondent's brief. In Respondent's own words, "To be sure, between 2014 and 2018, those F&B employees who received wage increases did receive them on September 1, but those few years do not erase the entire history preceding that time period." R. Brief to the Board at p. 6. Thus, even accepting Respondent's invitation to narrow the examination to the five-year history preceding the 2019 withholding of annual raises, Respondent's practice was not only regular, it was scheduled down to a specific date for a longer period of time than the practices in *Daily News of Los Angeles*, supra, *Mission Foods*, supra, and *United Rentals*, 349 NLRB 853 (2007). Board law does not require that a pattern must be consistent for all an employer's operating history. Rather, once an employer begins to consistently grant raises for a period long enough to establish a pattern, those increases become an established term or condition of employment. In both *United Rentals* and *Mission Foods*, that period was four years, and in *Daily News of Los Angeles*, the Board found a period of just three years sufficient to establish a term and condition of employment.

Respondent's delusive attempt to qualify its own concession that a pattern had emerged across the past five years by referring to the preceding years lacks any basis in law or logic. Respondent points out that for many years prior to 2014, in addition to their regular fall raises, employees also received raises in March or April. The Board has held, however, that the conferral of additional raises at other times has no bearing on a regularly scheduled increase occurring at the same time each year. See *Arc Bridges*, 355 NLRB at 1224. Respondent also

highlights that before 2014 the annual fall raise did not occur on September 1. Respondent omits, however, that during the preceding eight years, from 2005 to 2013, the fall raises had been regularly scheduled on October 1.³ Thus, whether the Board examines only the past 5 years or the past 14 years, raises have consistently occurred on a fixed date: either September 1 or October 1. As such, Respondent cannot plausibly deny the regularity of its annual raises. Accord *Central Maine Morning Sentinel*, 295 NLRB 376 (1989) (raises that occurred in either January or February deemed sufficiently regular to constitute a term or condition of employment).

In sum, the undisputed evidence, as discussed in full in Counsel for the General Counsel's Brief to the Board, readily establishes that Respondent's annual wage increases had become an established pattern and practice over many years, and one that employees had come to expect, down to a specific date and, therefore, there can be no dispute that the practice had become a term and condition of employment within the meaning of Section 8(d).

III. The Cases Cited by Respondent are Readily Distinguished

Finally, Counsel for the General Counsel briefly addresses Respondent's misplaced reliance on caselaw that has no bearing on the facts at hand. For the reasons discussed in the General Counsel's Brief to the Board, Respondent's reliance on *News Journal Co.*, 331 NLRB 1331 (2000), and *American Mirror Co.*, 269 NLRB 1091 (1984) is improper because those cases are readily distinguished insofar as they did not involve wage increases that were regularly

³ The single exception occurred in 2009, when no raise was given due to economic reasons. This outlier year does not undercut the regularity of the annual wage increases. See, e.g., *Arc Bridges*, supra at 1224 (finding established practice notwithstanding that employer did not implement raises in three of the eight years examined); *Lee's Summit Hospital*, 338 NLRB 841, 843-44 (2003) (same where practice was in place for six years with only a single exception); *Bryant & Stratton Business Institute*, 321 NLRB 1007 (1996), enfd. 140 F.3d 169 (2nd Cir. 1998) (same where practice in place for 10 years).

scheduled as part of an established, predictable practice. Likewise, *St. George Warehouse, Inc.*, 349 NLRB 870 (2007), is not instructive. Unlike here, where the raises have been regularly given at a fixed time of year, the merit increases in that case were given at random, irregular intervals that bore no pattern whatsoever. *Id.* at 893. Likewise, whereas here the amounts of the wage increases varied only slightly from year to year, falling within a narrow range that evinced a consistent methodology, in *St. George Warehouse* the criteria upon which the increases were based was far from standardized. *Id.* For these reasons, the Administrative Law Judge properly distinguished that case from *Daily News of Los Angeles*, 315 NLRB 1236 (1994), *enfd.* 73 F.3d 406 (D.C. Cir. 1996), *cert. denied* 519 U.S. 1090 (1997), and cases cited therein, to dismiss the allegation that the employer's wage increases were a term and condition of employment. *Id.*

Respondent's attempt to distinguish *Daily News of Los Angeles*, *supra*, and its progeny is an exercise in futility. Respondent narrows its focus on the fact that such cases involved raises based on employee performance. This is a red herring. The Board was not concerned with the type of criteria relied upon to calculate wage increases, but rather whether such criteria, whatever it was, remained consistent from year to year. The narrow range of the wage increases across the 17-year history here reveals that there was little, if any, deviation in Respondent's methodology for calculating raises from year to year. Indeed, as discussed in Counsel for the General Counsel's Brief to the Board, Respondent acknowledges that local area wages were the chief consideration. See *Jt. Stipulation of Facts* at para. 50 and *Jt. Exh. I*. In this regard, *Central Maine Morning Sentinel*, 295 NLRB 376 (1989), *Lee's Summit Hospital*, 338 NLRB 841 (2003), *Mission Foods*, 350 NLRB 336 (2007), and *Tampa Electric Co.*, 364 NLRB No. 124 (1016), which all involved raises based on local wage surveys, are directly on point.

Quite simply, Respondent is unable to cite caselaw that supports its untenable position because none exists. To the contrary, Board law, as most recently reaffirmed in *Care One at New Milford*, 369 NLRB No. 109, slip op. at 7 (2020), and *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 13 (2017), makes clear that where, as here, an employer maintains a practice of granting discretionary wage increases that are fixed as to timing but variable in amount, a unilateral discontinuance of that practice is unlawful. See, e.g., *Teco Peoples Gas*, 364 NLRB No. 124 (2016); *Arc Bridges, Inc.*, 355 NLRB 1222 (2010), enf. denied 662 F.3d 1235 (D.C. Cir. 2011); *United Rentals, Inc.*, 349 NLRB 853 (2007); *Rural/Metro Medical Services*, 327 NLRB 49 (1998); *Bryant & Stratton Business Institute*, 321 NLRB 1007 (1996), enf. 140 F.3d 169 (2nd Cir. 1998); *Daily News of Los Angeles*, supra; *Central Maine Morning Sentinel*, 295 NLRB 376 (1989).

IV. Conclusion

Based on the foregoing, it is submitted that Respondent's arguments in support of its position be rejected and, for the reasons stated herein and in Counsel for the General Counsel's Brief to the Board, that the Board find that Respondent's annual wage increases was an established practice and term and condition of employment regularly expected by employees under Section 8(d) such that Respondent violated Section 8(a)(5) and (1) when it unilaterally withheld wage increases for the Unit employees without first providing the Union with notice and an opportunity to bargain.

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AFFIDAVIT OF SERVICE OF: Counsel for the General Counsel's Answering Brief

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that a copy of the Counsel for the General Counsel's Answering Brief has been electronically filed with the Office of the Executive Secretary and served upon the following individuals via electronic or regular mail, as noted below, this 29th day of September, 2020.

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