

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 2

NBCUniversal Media, LLC

and

Case No.: 2-CA-262640

NewsGuild of New York, Local 31003,
TNG/CWA

ACTING GENERAL COUNSEL'S POST HEARING BRIEF
TO THE ADMINISTRATIVE LAW JUDGE

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Case Summary

In December 2019, the NewsGuild of New York, Local 31003, TNG/CWA, herein the Union, was certified to represent a Unit of editorial employees.¹ In January 2020, NBCUniversal Media, LLC, herein Respondent, notified the Union of its intent to grant merit wage increases to certain Unit employees pursuant to a longstanding practice over which Respondent maintains sole discretion. The Union had no objection, recognizing Respondent's past practice of giving annual merit wage increases. In March 2020, 42 of 166 Unit employees received merit wage increases. However, in May 2020, after Respondent announced its decision to "roll back" the March wage increases to all employees, Respondent informed the Union of this decision. The parties discussed the wage reduction during three May conference calls, during which the Union objected since there was no past practice of Respondent rescinding merit wage increases that had been granted to employees. Respondent claimed that its discretion to give the merit wage increases encompassed its right to rescind them. In June 2020, Respondent reduced the 42 Unit employees' wages to what they were before the March merit wage increase.

It is axiomatic that an employer cannot unilaterally reduce employees' wages without first bargaining with the union. Here, Respondent did not provide the Union with an opportunity to bargain over the wage reduction. Rather, Respondent presented the wage reduction as a *fait accompli*. Accordingly, it is evident that the rescission of employees' merit wage increases without any bargaining to impasse was an unlawful unilateral change in violation of Sections 8(a)(1) and (5) of the National Labor Relations Act (herein, "Act").

¹ The Certification of Representative (G.C. Exh. 2) clearly shows that on December 27, 2019, the Union became certified as the representative of certain employees employed in Respondent's digital platforms, herein the "Unit."

Case Procedural History

On July 1, 2020, the Union filed the instant charge alleging that Respondent violated Sections 8(a)(1) and (5) of the Act by unilaterally reducing the wages of Unit employees without first bargaining with the Union (G.C. Exh. 1(a)).² On October 7, 2020, the Regional Director, Region 2, issued a Complaint and Notice of Hearing alleging that Respondent implemented an annual discretionary merit wage increase to employees represented by the Union on March 2, 2020 pursuant to a longstanding past practice and rescinded that merit wage increase on June 8, 2020 (G.C. Exh. 1(c)). The Complaint further alleges that Respondent's rescission or "rollback" of the March merit wage increase was a violation of Sections 8(a)(1) and (5) of the Act since Respondent failed to provide the Union with an opportunity to engage in meaningful bargaining to impasse before rescinding the merit wage increase (G.C. Exh. 1 (c)).³

On December 21 and 22, 2020, a hearing via Zoom Videoconference was held before Administrative Law Judge (ALJ) Kenneth Chu.

² Throughout this brief, abbreviated references are employed as follows: "T" followed by page numbers to designate Transcript pages; "G.C.Exh." followed by exhibit number to designate General Counsel's Exhibits; Jt. Exh. Followed by an Exhibit number designates Joint Exhibits.

³ In its Answer, Respondent claimed that it lacked information and knowledge sufficient to form a belief as to what Paragraphs 2(a) and 2(b) of the Complaint regarding Jurisdiction allege, but admitted that the allegations were true during a 12 month period ending July 7, 2020 and continuing to date. Respondent further admitted that Respondent was an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act during the 12 month period ending July 7, 2020 and continuing to date. Based on its Answer, Respondent admits that it satisfies the discretionary standard by more specifically defining "at all material times" to mean "from July 2019 to the present, which is a period of at least the past 12 months." Respondent further admits to the legal conclusion that it is an "employer" within the meaning of Section 2(2). While no serious dispute regarding jurisdiction has been interposed, the ALJ should take administrative notice of the most recent Board case finding jurisdiction against this entity in *NBC Universal Media, LLC*, 369 NLRB No. 134 (July 29, 2020).

Issue

Did Respondent have an obligation to notify and bargain with the Union to impasse before implementing its decision to reduce Unit employees' wages by its rollback of the March 2020 merit wage increases?

Statement of Facts

A. Respondent granted annual merit wage increases

On January 13, 2020, Respondent Sr. Vice President, Labor Relations, Jason Laks (herein Laks) and Respondent Vice President, Labor Relations, Neil Mukhopadhyay (herein Mukho) informed Union Counsel Ben Dictor (herein Dictor) about the Company's plan to implement its "standard annual review and merit increase process" to Unit employees (G.C. Exhs. 4; 27, p. 1 and 2), which had been a "longstanding and consistent practice." (G.C. Exh. 27). In an email dated January 17, 2020, Dictor, on behalf of the Union, agreed to have Respondent proceed with its annual evaluation and compensation changes in the "usual course of business" (G. C. Exhs. 5, 27, p.2). In this email, Dictor also informed Respondent that the Union's agreement to the implementation of the annual merit wage increases was "without prejudice to any proposal the [Union] might make concerning wages or evaluations in the course of [their] negotiations for a first [collective-bargaining agreement (CBA)]" (G.C. Exhs. 5, 27, p.2).

Consistent with Respondent's annual merit wage increase process, on March 2, 2020, Respondent gave an annual merit increase, up to three percent, to 42 Unit employees earning \$100,000 or more, including Tate James (herein James) (Tr. 44, 94; G. C. Exh. 17). Laks confirmed the implementation of the Respondent's "standard annual review and merit increase process" in an email to Sloan dated March 3, 2020 (Tr. 37, G.C. Exh. 4).

James, a Unit employee and member of the Union's Bargaining Committee, received annual merit wage increases in March 2019 and March 2020 (Tr. 94-98; G. C. Exh. 17, 18).⁴ The Total Compensation Summary Statements that Respondent gave to James show that he received a three percent increase in early March 2020 and another salary increase in early March 2019. In 2018, James was informed by his Supervisor, Tom Parrinello, that supervisors were given a budget and could decide which employees were eligible for an annual merit wage increase based on job performance. The standard merit wage increase was three percent (Tr. 99; Jt. Exh. 1)).

Since 2015, Respondent had a recurring annual review process that includes granting an annual merit wage increase (Jt. Exh. 1). The granting of the annual merit wage increase to Unit employees is determined by and at the discretion of Respondent managers and supervisors. Some employees receive an annual merit increase in wages while some do not. Annual merit wage increases are granted based on an assessment of factors including an employee's work performance over the past year, market and economic information and the health of the overall business of the Company (G.C. Exh. 27). Pursuant to this process, Unit employees who receive an annual merit increase receive an increase in wages up to three percent (Jt. Exh. 1). However, the amount of the wage increase is also discretionary and determined by Respondent (Jt. Exh. 1).

On February 28, 2020, after the Union became certified, Union Local Representative Beverly Sloan (herein Sloan) informed Laks that Respondent should not make any unilateral changes to

⁴ Although James believed he received a merit wage increase in 2018, he did not have the financial documents to show receipt of that annual increase (Tr. 98).

the terms and conditions of employment of Unit employees and that he should continue to give any wage increases or benefit increases that normally occurred prior to the Union's certification during the "normal course of business" (G.C. Exh. 3).

B. Respondent rescinded the 2020 merit wage increase without notice and bargaining

On May 5, 2020, Respondent, by CEO Jeff Shell, issued a company-wide email to employees, including Unit employees, announcing the "rollback" of the annual merit wage increase they received in March 2020. Respondent was rolling back the annual merit increase, up to three percent, without reducing an employee's salary below \$100,000. The rollback was effective as of June 8, 2020 (Tr. 99; G.C. Exhs. 19, 21). In addition to announcing the rollback plan, Shell also took the opportunity to inform employees that Respondent had strong earnings during the first quarter of 2020 and to describe his "optimism for the long-term strength of [the] company" (G.C. Exh. 19). In the Q&A section of Shell's email, he also informed employees that Respondent would be reaching out to unions to discuss these changes (G. C. Exh. 21, p.2).

Prior to May 5, 2020, no one ever explained to James that a rollback of the merit wage increase was part of the annual merit review process (Tr. 113-19). In fact, prior to June 8, 2020, Respondent never rolled back any annual merit wage increase (Jt. Exh. 1).

C. Respondent's communication with the Union about its decision to rescind the 2020 merit wage increases.

1. May 5th conference call

After Respondent issued its announcement of the rollback on May 5, 2020, Laks and Mukho held a conference call later that evening with Sloan and Dictor to discuss the rollback

(Tr. 45, 47; G.C. Exhs. 6, 19).⁵ During this call, Laks and Mukho informed Sloan and Dictor that Respondent was rolling back the annual merit increase that was just given to employees earning more than \$100,000, that the rollback would go into effect in early June and that the wage increase would not be restored (Tr. 48). Laks denied that Respondent was trying to meet any financial targets by rolling back the increase (Tr. 48) and Mukho agreed to send a list of Unit employees impacted by the rollback to the Union (Tr. 49).

On May 7, 2020, pursuant to the Union's request, Mukho sent the Union a list of Unit employees impacted by Respondent's rollback plan (Tr. 49, G.C. Exhs. 7, 8). According to the list, 42 Unit employees were scheduled to have their wages reduced by up to three percent on June 8, 2020 (G.C.Exh. 8).

2. May 13th conference call

On May 13, 2020, during a conference call with Laks, Mukho, Dictor, Sloan and James, Laks and Mukho told the Union that the rollback was part of the merit process, that the Unit employees were also part of that process (Tr. 52), and that the Union had already agreed to that process (Tr. 102). Dictor, however, denied that he had any prior conversations with Respondent about a rollback and insisted that the parties only discussed a merit wage increase (Tr. 103). Dictor further told Laks and Mukho that since they were negotiating an initial collective-bargaining agreement, the parties were bound to the status quo and that Respondent could not unilaterally roll back the merit wage increase (Tr. 52). In addition, Dictor warned Respondent that the rollback was a significant change without exigent circumstances

⁵ CEO Jeff Shell's announcement of the rollback issued at 12:59PM on May 5, 2020. The Union and Respondent did not meet to discuss the rollback until later that day, in the evening (Tr. 45,47; G.C. Exhs. 6, 19).

(Tr. 52) and that such conduct could be a violation of Section 8(a)(5) of the Act if Respondent made changes without bargaining with the Union (Tr. 53). Notwithstanding Dictor's contentions, Laks insisted that the merit review process was a matter of "perception" and that the rollback was part of that process (Tr. 52). Laks also claimed that Respondent had the right to roll back the merit wage increase and that the change to wages was not a violation of the status quo (Tr. 53). According to Mukho and Laks, employees earning below \$100,000 would not have wages rolled back (Tr. 53) and the rollback was going into effect on June 8, 2020 (Tr.52).

3. May 22nd conference call

On May 22, 2020, another conference call was held with Laks, Mukho, Dictor, Sloan and James (Tr. 56, 103). On this call, Dictor informed Respondent that the rollback change would have a significant impact on a majority of the Unit (Tr. 57). Nonetheless, Muhko asserted that the merit increase in March was part of the merit process and that the rollback was also part of that process (Tr. 57). Laks told the Union that the rollback was a corporate initiative designed to have a broad impact in the smallest way possible, (Tr. 57), that the whole process was discretionary (Tr. 57, 104), and that Respondent did not have to bargain over the rollback (Tr. 57, 105). In response to Respondent's claims, Dictor insisted that the rollback was not part of the merit review process and that he never experienced an employer rolling back wages without first bargaining with the Union (Tr. 57, 104). At this point, Laks apologized for the timing of the rollback since it was unfortunate that the rollback was occurring at the same time the parties were about to bargain (Tr. 58). He further claimed that the rollback was part of the merit process and that it was going into effect on June 8 (Tr. 58). Dictor then asked if

Respondent was claiming financial exigency, because if it were, then the Union could have a conversation with Respondent about exigencies (Tr. 58). Laks informed Dictor that while there was a financial need, Respondent was not claiming financial exigency (Tr. 58, 104). Dictor also proposed that Respondent rescind the implementation of the rollback to Unit employees since Respondent did not apply the rollback to all employees. (Tr. 58). Finally, Dictor claimed that the Union was going to file an objection to Respondent's action if they went forward with the rollback, including the possibility of filing an unfair labor practice charge (Tr. 58, 105).⁶

On June 2, 2020, Sloan sent an email to Laks and Muhko objecting to Respondent's rollback plan (Tr. 66; G. C. Exh. 12). In this email, she also informed Respondent that they could not make the rollback changes without bargaining with the Union. On June 4, 2020, by email, Laks reminded Sloan that Respondent's merit process was part of the status quo and that Respondent's decision to roll back the merit wage increase was also part of and consistent with that status quo (Tr. 67; G. C. Exh. 13).

On June 3, 2020, Unit employees on the Bargaining Committee, including James, sent a letter to Chris Berend, who plays a leadership role within Respondent's news group unit (Tr. 69, 105) regarding their objections to the rollback (Tr. 105, G. C. Exh. 22, 23).

⁶ While Respondent in its position paper (G. C. Exh. 27) claimed that the rollback was discretionary and part of a Covid-19 response, Sloan and James testified that Laks and Muhko never told the Union that due to the pandemic emergency, Respondent had to roll back the merit wage increases (Tr. 75, 118). According to James, Laks and Muhko only raised Covid-19 when discussing whether the merit wage increases should have been given in the first place. Laks and Muhko never raised Covid-19 as a reason for the rescission (Tr. 117, 118).

D. Implementation of Respondent's rollback decision

On June 8, 2020, Respondent implemented its rollback plan (Tr. 69, G.C. Exhs. 24, 25; Jt. Exh. 1, paragraph 10). Out of 166 Unit employees, 42 were impacted by this rollback (Tr. 69; G.C.Exh. 8). The reduction in wages, which is ongoing, did not exceed three percent (Tr. 69, G.C. Exh. 8) and has not been restored (Tr. 70, 113). On June 12, 2020, Respondent Human Resource Representative Randi Pittman issued an email to employees explaining the reversal of their "recent annual salary increases" (G.C. Exh. 24).

On July 29, 2020, the Union and Respondent began negotiations for an initial collective-bargaining agreement (Tr. 71). Although the parties have met seven times, a collective-bargaining agreement has not yet been reached (Tr. 71).

ARGUMENT

A. Respondent's 2020 merit wage increase is part of an annual longstanding past practice

Although Respondent denied in its Answer that it had a longstanding past practice of implementing an annual discretionary merit wage increase to Unit employees, the undisputed evidence clearly shows that Respondent has implemented such a practice for years. (G.C. Exh. 1(e); Jt. Exh. 1).

It is well established that an employer's practices, even if not required by a collective-bargaining agreement, which are regular and longstanding, rather than random or intermittent, become terms and conditions of unit employees' employment, which cannot be altered

without offering the collective bargaining representative notice and an opportunity to bargain over a proposed change to the practice. *E.I. Du Pont Nemours*, 364 NRB 1356 (2016). “A past practice must occur with such regularity and frequency that employees could reasonably expect the ‘practice to continue to reoccur on a regular and consistent bases.’” *Id.*, citing *Sunoco, Inc.*, 349 NLRB 240, 244 (2007).

Here, there is no dispute that Respondent’s granting of a merit wage increase is a recurring annual event for Unit employees, which was part of the merit review process. While the process in which Respondent gives the annual merit wage increase is discretionary, the undisputed evidence shows that for years, Respondent has given certain Unit employees an annual merit wage increase (Jt. Exh. 1). Not only did Respondent admit to the existence of such a past practice at trial (Jt. Exh. 1), but the Total Compensation Summary Statements show that Respondent gives employees merit wage increases in early March of each year (G.C. Exhs. 17, 18).

Respondent also informed the Union of this recurring past practice. On January 13, 2020, shortly after the Union became certified as the Representative of the Unit, Laks informed Dictor of Respondent’s longstanding annual merit review process and its intension to continue to include Unit employees within the process in 2020 (G.C. Exh. 27). Laks also emailed Sloan on March 3, 2020, to inform her of his earlier conversations with Dictor about Respondent’s standard practice of giving merit wage increases to Unit employees (G.C. Exh. 4). Consistent with that annual practice, Respondent gave merit wage increases to 42 Unit employees in March 2020 (Tr. 69, G. C. Exh. 8). Since the practice of granting merit wage increases was a standard practice that existed before the Union became the bargaining representative, Dictor

had no objection to Respondent granting merit wage increases to Unit employees in March 2020 (G.C. Exh. 5).

Based on the undisputed evidence and relevant case law, the ALJ should conclude that years before the Union became the collective-bargaining representative of the Unit, Respondent maintained and implemented a longstanding past practice of granting annual merit wage increases to Unit employees (Jt. Exh. 1). This practice was an annual, recurring and regular practice that Unit employees expected to occur in March of each year. And consistent with this longstanding past practice, Respondent granted merit wage increases, up to three percent, to 42 Unit employees in March 2020 (Tr. 44, 94; G. C. Exhs. 8, 17). Therefore, Acting General Counsel submits that the ALJ should conclude that Respondent's granting of a merit wage increase in March 2020 was part of a longstanding annual past practice.

B. Respondent was obligated to maintain the status quo after the Union became the newly certified bargaining representative of Unit employees

It is well-settled that once a union has been certified, an employer must maintain the status quo with respect to terms and conditions of employment and that an employer must bargain with its employees' exclusive bargaining representative before implementing changes to employees' terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736, 743-44 (1962). However, when an employer's actions are consistent with its established policies or past practice, no "change" has occurred under established Board law. See *id.* at 746.

It is also well-settled that an employer is required to continue the status quo post-certification with respect to its general business operations. See, e.g., *Lafayette Grinding Corp.*, 337 NLRB 832, 833 (2002) (employer's obligation while bargaining for first contract is to

maintain status quo consistent with past practice). Part of the status quo is continuing its business operations, including its pre-certification disciplinary procedures. See, e.g., *Southern Mail, Inc.*, 345 NLRB 644, 646 (2005) (employer unlawfully changed disciplinary policy from virtual nonenforcement to strict enforcement following union's certification and while bargaining for initial contract).

Under established Board law, it is evident that Respondent was required to maintain the status quo once the Union became the certified bargaining representative of Unit employees (G. C. Exh. 2). Sloan even reminded Laks of this requirement (G.C. Exh. 3). Therefore, since December 27, 2019, Respondent was required to continue the business operations that existed prior to the Union becoming certified, including the implementation of its annual merit review wage increase process, while bargaining for an initial contract.

C. Respondent's practice of granting merit wage increases is a mandatory condition of employment for the purposes of collective bargaining

The Supreme Court has decided that during contract negotiations, an employer must not make unilateral changes to represented employees' terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736, 742-747 (1962). In addition, the Court has determined that wages are a mandatory subject of collective bargaining. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 348 (1958). The Board has held that a respondent's unilateral grant and rescission of wage increases during parties' collective bargaining negotiations in the absence of good-faith impasse undermines the bargaining process and is a violation of the Act. *Koenig Iron Works*, 276 NLRB 811, 814 (1985); *JPH Management d/b/a Mid-Wilshire Health Care Center*, 337 NLRB 72, 73 (2001); *Faro Screen Process, Inc.*, 362 NLRB 718 (2015). In the instant matter, it is undisputed

that the annual merit wage increase that was given to Unit employees in March 2020 is a mandatory subject and that any unilateral change to that wage increase without affording the Union an opportunity to bargain to impasse is a violation of the Act.

D. Respondent's rescission of the annual merit wage increase was a material and significant change to Unit employees' wages

There is no dispute that Respondent rolled back the March 2020 merit wage increase on June 8, 2020 (G.C. Exh. 25; Jt. Exh. 1). Under *Katz, supra*, Respondent's June 2020 rescission of the merit wage increases was a significant and material change especially since approximately 39 percent of the Unit experienced the rescission of wages during negotiations for an initial agreement. Although the amount of the reduction varied from employee to employee and did not exceed three percent (Tr.69, G. C. Exh. 8), the impact on Unit wages was significant and substantial. In addition, the change in wages had a significant impact on the Union's bargaining position regarding wages during negotiations for an initial contract. Therefore, under *Katz, supra*, the rollback was a substantial change to unit wages and bargaining and Respondent was obligated to provide the Union notice and an opportunity to bargain to impasse before implementing a substantial unilateral change to the merit wage increases.

E. Respondent did not engage in meaningful bargaining with the Union over the rollback because Respondent presented the Union with a *fait accompli*

The undisputed evidence shows that on May 5, 2020, Respondent announced its decision to roll back the annual merit wage increase that was given to employees, including Unit employees, on June 8, 2020 (G.C. Exh. 19, 21). Respondent CEO Jeff Shell issued

Respondent's rollback announcement in an email to all employees (G. C. Exh. 19). This announcement also contained a Q&A link that provided additional information regarding the rollback procedure, including the amount of the rollback, who would be affected and the effective date of June 8, 2020 (G. C. Exh. 21). According to Shell's email and supplemental Q&A, the rollback would reduce an employee's salary up to three percent without reducing an employee's threshold salary below \$100,000 (G. C. Exh. 21).

The evidence further shows that Respondent did not inform the Union of this rollback until after its decision was made and announced to employees. The undisputed record evidence shows that Shell's announcement was issued at 12:59PM on May 5 (G.C. Exh. 19), but Respondent's conference call with the Union to discuss the rollback did not occur until later that evening (Tr. 45,47; G.C. Exh. 6). Therefore, the timing of Respondent's announcement of its decision to roll back merit wage increases clearly shows that Respondent's decision was made before it afforded the Union any opportunity to bargain about the rollback.

In addition, the undisputed evidence regarding the three conference calls clearly shows that Respondent had no intent on engaging in meaningful bargaining over the rollback and that its decision to rescind the 2020 merit wage increases was a *fait accompli*.

In order to determine whether an employer has presented a union with a *fait accompli*, the Board considers objective evidence regarding the presentation of the proposed change and the employer's decision-making process. *KGTV*, 355 NLRB 1283 (2010) (union's "subjective impression of its bargaining partner's intention is insufficient" to establish *fait accompli*); *Bell Atlantic Corp.*, 336 NLRB 1076, 1087 (2001); *Haddon Craftsmen*, 300 NLRB 789 (1990). While

presenting a proposed change as a fully formulated plan or the use of positive language does not definitively establish a *fait accompli*, statements conveying an irrevocable decision constitute significant evidence that bargaining would be futile. See *Aggregate Industries*, 359 NLRB 1419 (2013)(employer representative presented *fait accompli* by telling union representative that the employer was “going to” transfer bargaining unit employees); *UAW-DaimlerChrysler National Training Center*, 341 NLRB 431, 433 (2004) (employer presented *fait accompli* by telling union that layoff was a “done deal”); *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023-1024 (notice stating that changes “will be implemented” and other “unequivocal language” evidence of *fait accompli*). The Board also evaluates the timing of the employer's statements vis a vis the actual implementation of the change, the manner in which the change is presented, and other evidence pertinent to the existence of a “fixed intent” to make the change at issue which obviates the possibility of meaningful bargaining. *Aggregate Industries, supra*; *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982), enf'd. 722 F.2d 1120 (3rd Cir. 1983) (“if the notice is too short a time before implementation, or because the employer has no intention of changing its mind, then the notice is nothing more than informing the union of a *fait accompli*”); *Patrish, LLC, D/B/A Northwest Airport Inn*, 359 NLRB 690 (2013) (*fait accompli* established given owner's testimony that a decision to subcontract bargaining unit work had already been made and implemented, and union bargaining proposals regarding employee compensation “made no difference”).

Furthermore, the Board has consistently found that “where the manner of the respondent's presentation of a change in terms and conditions of employment to the union precludes a meaningful opportunity for the union to bargain,” the change constitutes a *fait*

accompli, such that the union's failure to demand bargaining does not constitute a waiver. *Aggregate Industries*, 361 NLRB 879 (2014), 359 NLRB 1419 (2013); see also *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001). The obligation to bargain requires that the employer “at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counter arguments or proposals.” *Intersystems Design & Technology Corp.*, 278 NLRB 759 (1986), quoting *Gulf States Mfg. v. NLRB*, 704 F.2d 1390, 1397 (1983) (citations omitted). Informing the union of a change in a manner which precludes meaningful bargaining divests the union of its obligation to demand bargaining or have inaction construed as a waiver. *Id.*

Here, the undisputed evidence shows that after announcing its decision to roll back the 2020 merit wage increases, Respondent and the Union discussed the rollback during three conference calls held on May 5, May 13 and May 22, 2020. During these calls, the unrefuted evidence shows that Respondent never planned to bargain with the Union about its rollback decision. Instead, Respondent scheduled the calls in order to inform the Union of its “fixed intent” on implementing the rollback of the merit wage increases. In this regard, the unrefuted and corroborated testimonies of Sloan and James clearly show that Laks and Mukho repeatedly informed the Union that Respondent was rolling back the merit wage increases, that the rollback was part of the merit review process, that it was discretionary, that they did not have to bargain about the rollback and that it was effective as of June 8 (Tr. 48,52,57,102,104; G. C. Exhs. 14, 15, 16, 26). Although Dictor informed Laks and Mukho that Respondent could not unilaterally change the merit wage increases without bargaining with the Union, that such a change was a violation of the Act, and that the rollback was never part of the merit review

process (Tr. 53, 57, 103, 104), Laks and Mukho ignored Dictor's attempt to engage in bargaining and continued to offer their "perception" of Respondent's rollback decision (Tr. 48, 52, 57, 58,104,105; G. C. Exhs. 14, 15, 16, 26). Even when Dictor proposed an alternative option to exempt Unit employees from the rollback decision (Tr. 58, G. C. Exh. 16), Laks and Mukho refused to entertain alternative counter arguments and proposals. Instead, Laks and Mukho repeatedly confirmed Respondent's fully formulated plan and decision to roll back the Unit's merit wage increases as of June 8 (Tr. 52-58; 102-104; G. C. Exhs. 14, 15, 16, 26). Without doubt, Laks and Mukho were not interested in the Union's concerns or any modifications to Respondent's rollback decision and were not interested in bargaining about the rollback decision. Based on this unrefuted evidence, the ALJ should conclude that Respondent presented a *fait accompli*, an "irrevocable decision," when it announced the rollback on May 5 without giving the Union an opportunity to engage in meaningful bargaining before implementing the rollback. Such conduct is clearly a violation of the Act.⁷

F. Respondent had an obligation to bargain to impasse with the Union before rescinding the 2020 merit wage increase that was given to Unit employees

In *Bottom Line Enterprises*, 302 NLRB 373 (1991), the Board held that an employer has a heightened obligation to refrain from making unilateral changes where no collective-bargaining agreement is in place and the parties are currently engaged in bargaining for an overall agreement. In these circumstances, "an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it

⁷ Although not alleged in the Complaint, Respondent's May 5th announcement of the rollback, alone, is a violation of Section 8(a)(5) of the Act. See *ABC Automotive Products Corp.*, 307 NLRB 248, 250 (1992) (the Board held that the employer violated Section 8(a)(5) of the Act where it announced a unilateral change, even without ever implementing it because a reasonable employee would believe the change was effectively implemented when announced, which thereby damaged the bargaining relationship).

encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole.” *Id.*

However, the Board in *Bottom Line Enterprises, supra.*, recognized two exceptions to that general rule: when a union engages in bargaining delay tactics and “when economic exigencies compel prompt action.” *Id.* at 374. The Board has limited the economic considerations which would trigger the *Bottom Line* exceptions to “extraordinary events which are an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.” See *Hartford Head Start Agency*, 354 NLRB 164 (2009) citing *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995). In *RBE Electronics*, 320 NLRB 80 (1995), the Board made clear that “[a]bsent a dire financial emergency, economic events such as ... operation at a competitive disadvantage ... do not justify unilateral action.” *Id.* at 81, citing *Triple A Fire Protection*, 315 NLRB 409, 414 (1994).

In *RBE Electronics, supra*, the Board also found that there may be other economic exigencies that although not sufficiently compelling to excuse bargaining altogether, should be encompassed within the exigency exception. In those cases, the employer will “satisfy its statutory obligation by providing [the union] with adequate notice and an opportunity to bargain over the changes it proposes to respond to the exigency and by bargaining to impasse over the particular matter. In such time sensitive circumstances, however, bargaining, to be in good faith, need not be protracted.” *Id.* at 82. See generally *Naperville Ready Mix, Inc.*, 329 NLRB 174, 182-184 (1999). In defining the less compelling type of economic exigency, the Board in *RBE Electronics* made clear that the exception will be limited only to those exigencies in which time is of the essence and which demand prompt action. The Board will require an

employer to show a need that the particular action proposed be implemented promptly. Consistent with the requirement that an employer prove that its proposed changes were “compelled,” the employer must also show the exigency was caused by external events, was beyond its control, or was not reasonably foreseeable. *Id.*

Based on the above established Board law, the ALJ should find that Respondent, herein, had an obligation to bargain to impasse with the Union before deciding to rescind the 2020 merit wage increase. Regrettably, as the evidence clearly shows, Respondent failed to meet this bargaining obligation. Instead, Respondent unilaterally announced its decision to rescind the merit wage increases on May 5th and then failed to engage in any meaningful bargaining during the three conference calls held in May ((Tr. 48,52,57,102,104; G. C. Exhs. 14, 15, 16, 19, 26). During these calls, Respondent did not exchange any counter proposals, especially in response to the Union’s request to exempt Unit employees from the rollback decision, was not interested in the Union’s concerns about Respondent’s rollback decision and clearly failed to bargain to a good faith impasse, as required by *Bottom Line Enterprises, supra*. Therefore, the rescission of the wage increase on June 8, 2020, without good faith meaningful bargaining to impasse, is an unlawful unilateral change in violation of Section 8(a)(5) of the Act. See *Bottom Line Enterprises, supra; Faro Screen Process, supra*, (the unilateral granting and rescission of wages constituted unlawful unilateral changes); *Mid-Wilshire Health Care Center*, 337 NLRB 72, 73 (2001); *Eugene Iovine, Inc.*, 328 NLRB 294 (1999)(the unilateral reduction in hours was an unlawful change since the evidence failed to establish a past practice that the reduction in hours was consistent with conduct in prior years). And even if the decision to rescind the merit

wage increase was made at the corporate level (Jt. Exh. 1, paragraph 10), Respondent still had an obligation to bargain to impasse with the Union under *Bottom Line Enterprises, supra*.

Respondent's rescission of the merit wage increases was not motivated by economic exigencies.

The evidence also fails to show that Respondent's rollback decision was motivated by economic exigencies, such as Covid-19, justifying an exception to the normal rule set out in *Bottom Line Enterprises* and *RB Electronics, supra*. Although the undisputed evidence shows that Laks and Mukho brought up the Covid-19 Pandemic when discussing the granting of the merit wage increase (Tr. 117-118, G. C Exh. 26), the evidence clearly shows that Respondent never offered documentation or evidence to substantiate its evidentiary burden of establishing any economic exigencies when it decided to roll back the merit wages (Tr. 52-58; 102-104; G.C. Exhs. 14, 15, 16, 26). Indeed, the unrefuted evidence clearly shows that during the May 22 conference call, Laks specifically stated that Respondent's rollback decision was not based on any economic exigencies, just some vague, unexplained financial concerns (Tr. 58, 104). In addition, in Lak's June 4th email to Sloan, he informed her that Respondent's rollback decision was not motivated by or premised on any economic exigencies (G. C. 13). "Absent a dire financial emergency, the Board has held that economic events such as loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages do not justify unilateral action." *RBE Electronics, supra*. at 81-82. Here, Respondent never claimed any exception to its bargaining obligation, only that it didn't have any bargaining obligation (Tr. 53, 57, 105).

G. Respondent's Defenses Fail

1. Respondent's decision to rescind the March 2020 merit wage increase was not part of the merit review process.

Respondent may argue that under the Board's decisions in *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017) and *Mike Sells Potato Chip*, 368 NLRB No. 145 (2019), it did not have an obligation to bargain with the Union about its rollback decision. Respondent may claim, as it did during the May conference calls, that its decision to roll back the merit increase was based on an established discretionary past practice and therefore Respondent was not required to bargain with the Union over this decision. "Such unilateral actions are not subject to the statutory bargaining obligation because they do not represent changes in the status quo within the meaning of *NLRB v. Katz*, 369 U.S. 736 (1962). *Id.*; *Mike-Sells Potato Chip Co.*, 368 NLRB No. 145, slip op at 4 (Dec. 16, 2019)." In *Raytheon, supra*, the majority ruled that "actions do not constitute a change if they are similar in kind and degree with an established past practice consisting of comparable unilateral action. The majority stated that this principle applies regardless of whether (i) a collective-bargaining agreement was in effect when the past practice was created, and (ii) no collective-bargaining existed when the disputed actions were taken. The majority also ruled such actions consistent with an established practice do not constitute a change requiring bargaining merely because they involve some degree of discretion."

Respondent contends that the decision to roll back merit wage increases was an exercise of discretion that fell within the scope of its past practice of retaining discretion to decline to grant annual increases based on its sole judgment (G. C. Exh. 27). According to

Respondent, such action was “similar in kind and degree” to prior decisions to grant no or partial increases to Unit employees and therefore, Respondent’s conduct did not violate the Act under a unilateral change theory (G.C. Exh. 27).

In *Raytheon, supra*, the Board recognized that when interpreting *Katz*, it has often evaluated whether particular actions constitute a “change.” As to this issue, numerous cases have focused on whether there has been “a substantial departure from past practice,” with no scrutiny into whether collective-bargaining agreements existed when the employer’s prior actions created the past practice, and regardless of whether any collective-bargaining agreements contained language expressly permitting the actions in question. By returning to the rule reflected in the *Shell Oil*, 149 NLRB 283 (1964), and embodied more recently in the *Courier-Journal cases*, 342 NLRB 1093 (2004) and 342 NLRB 1148 (2004); *Capitol Ford*, 343 NLRB 1058 (2004), and *Beverly Health & Rehabilitation Services*, 346 NLRB 1319 (2006) (*Beverly II*), the Board in *Raytheon, supra*, analyzed whether an employer’s conduct was consistent with what the employer had done previously.

Even when dealing with something as central to the Act as wages, the Board has likewise found that when an employer has a past practice of providing certain wage increases, an employer does not violate Section 8(a)(5) when it provides new wage increases in keeping with that practice without affording the union notice and opportunity to bargain. See, e.g., *Daily News of Los Angeles*, 315 NLRB 1236 (1994). See *Arc Bridges, Inc.*, 355 NLRB 1222 (2010), enf. denied 662 F.3d 1235 (D.C. Cir. 2011); *Mission Foods*, 350 NLRB 336, 337 (2007); *Central Maine Morning Sentinel*, 295 NLRB 376 (1989).

The employer in *Raytheon* unilaterally changed employee benefits after the parties' collective-bargaining agreement expired, but maintained the status quo created by the employer's past practice of making annual modifications to unit employees' costs and/or benefits under the Raytheon Plan in January of every year from 2001 to 2012. The changes made in 2013 did not materially vary in kind or degree from the changes made in prior years, the changes were made at the same time--January--as in past years, and the changes applied to unit and nonunit employees alike. And because the 2013 changes themselves were lawfully implemented, the employer's announcement of those changes in the fall of 2012 was also lawful.

Nevertheless, here, unlike *Raytheon, supra*, the undisputed evidence shows that Respondent's June 2020 rescission of the March 2020 merit wage increase to Unit employees was wholly inconsistent with Respondent's longstanding annual past practice of granting such merit increases (Jt. Exh. 1). Respondent has quite simply failed to demonstrate that it ever rescinded merit wage increases, let alone, establish a past practice of rescinding merit wage increases (Jt. Exh 1.).

The burden of proving a well-established past practice rests not on the Acting General Counsel, but on the party asserting that practice as an affirmative defense. *Eugene Iovine, Inc.*, 328 NLRB 294 fn. 2 (1999) (no past practice where record evidence failed to establish circumstances of hours reductions in past years, and employer merely asserted hours reduction was due to slow work during holiday season and/or principal temporarily providing less work to contractor); compare *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017) (finding past practice where parties stipulated that employer made annual changes to healthcare benefits

over twelve year period and record evidence showed that changes did not materially vary in kind or degree from year to year). Here, there is absolutely no evidence of historical changes to Respondent's practice of granting annual merit wage increases. Respondent provided no evidence to establish any rollbacks to the granting of annual merit wage increases prior to June 2020. In this regard, Respondent failed to present evidence that shows that its June 2020 rollback procedure was regular, customary and longstanding enough to constitute a past practice. In addition, based on Sloan's and James' unrefuted testimonies (Tr. 73,74,113,116,117,119) and the joint stipulation introduced at trial (Jt. Exh. 1, paragraph 11), it is evident that Respondent never rolled back or rescinded an annual merit wage increase prior to June 2020. Moreover, after working for Respondent for three years and being a recipient of annual merit wage increases, James provided credible testimony that he never heard about any rollback procedure being part of Respondent's merit review process prior to May 5, 2020 (Tr. 93, 99, 113, 116, 117,119). Without evidence that such prior rollbacks occurred and were part of the status quo, Respondent has clearly failed to establish a past practice of rolling back annual merit wage increases and, therefore, cannot meet its burden under *Raytheon*. Accordingly, this argument must be dismissed and the ALJ should conclude that Respondent failed to sufficiently show that the rollback of merit increases was an established recurring past practice and not a change.

The rollback of the merit wage increase in June 2020 is not even similar in kind or degree to the established past practice of granting annual merit wage increases to employees. Although Respondent will argue that the discretionary nature of granting merit wage increases encompasses the discretionary right to remove the merit wage increases, such an argument

lacks merit and should not be considered. The granting of annual merit wage increases and the rescission of those wage increases are two separate and distinct acts. Without evidence to show that Respondent has a past practice of rolling back merit wage increases or that the rollback of merit wage increases was specifically part of the merit review process, Respondent's fictitious expansion of its discretionary authority is misplaced. Accordingly, the ALJ should conclude that Respondent's reliance on *Raytheon, supra*, is inappropriate herein and that the June 2020 rollback plan was not part of an overall past practice of granting merit wage increases.

2. The Union did not waive its right to bargain over Respondent's rescission of the March 2020 merit wage increase

Although Respondent may argue that it did not have an obligation to bargain over its rollback decision since the Union waived its right to bargain by agreeing to the March 2020 merit wage increase (Tr. 102; G. C. Exh. 27), the undisputed evidence shows that the Union did not waive any right to bargain over the rescission of the merit wage increase. In the absence of exigent exceptions, an employer is obligated to refrain from making any unilateral changes until the parties reach overall impasse unless the union has waived its right to bargain to overall impasse. A waiver of a statutorily protected right will not be lightly inferred and must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 n.12 (1983); *Georgia Power Co.*, 325 NLRB 420, 420 (1998), enforced mem. 176 F.3d 494 (11th Cir. 1999). To demonstrate a clear and unmistakable waiver where there is no contract language to be relied upon, it must be shown that the issue was "fully discussed and consciously explored" during bargaining and that the union "consciously yielded or clearly and unmistakably waived its interest in the matter." *Georgia Power Co.*, *supra.*, at 420-21; *Johnson-Bateman Co.*, 295 NLRB

180, 185 (1989) (citing *Rockwell International Corp.*, 260 NLRB 1346, 1347 (1982)).⁸ If the issue was not raised during bargaining, the Board will not find that it was clearly and unmistakably waived. See *Georgia Power Co.*, supra., at 421 (finding that in the absence of relevant contract language and where the issue of giving the employer the right to amend benefit plans at any time was not raised during bargaining, the union did not clearly and unmistakably waive its right to bargain over changes in the benefit plans); *Rockwell International Corp.*, supra., at 1347 (finding no clear and unmistakable waiver of the union's right to bargain over the subject of food prices when the issue was never discussed during contract negotiations).

In the instant case, the evidence fails to show that the Union waived its right to bargain about the rollback. Contrary to Respondent's assertion, Dictor's January 17, 2020 email to Laks does not present a clear and unmistakable waiver, as required by Board law. Rather, the January 17th email shows that Dictor was only agreeing to Respondent's intention of including the Unit in its recurring annual merit wage increase process in 2020 (G. C. Exh. 5). The evidence fails to show that the parties in January were discussing a rollback as part of that process. Indeed, up until May 5, 2020, the parties never discussed a rollback because prior to May 5, Respondent never rolled back any annual merit wage increase (Jt. Exh. 1). Up until May 5th, Respondent's merit review process only involved the granting of merit wage increases, not the rollback of merit wage increases (Jt. Exh. 1). Therefore, consistent with the merit review process that existed prior to May 5th, the January 17 email communication between Dictor and Laks was only about the merit wage increases Respondent was planning to give to Unit

⁸ This case should not be analyzed under the "contract coverage" standard set forth in *MV Transportation*, 368 NLRB No. 66 (2019) since there is no collective-bargaining agreement or management rights clause and the parties are negotiating an initial agreement.

employees in March 2020. Laks' March 3rd email to Sloan also corroborates that prior to May 5th, the parties were only discussing an annual merit wage increase. In that email, Laks informed Sloan that he and Dictor had an earlier conversation where they discussed Respondent's "implementation of the company's standard annual review and merit *increase* process" (G.C. Exh. 4; emphasis added). Based on the above unrefuted evidence, the ALJ should conclude that the January email exchange between Dictor and Laks does not constitute a clear and unmistakable waiver to bargain about the rollback.

Undisputed evidence of the conference calls between Respondent and the Union further show that the Union never waived its bargaining right (Tr. 52-58; 102-104)(G. C. Exhs. 14, 15, 16, 26). In fact, as described in detail *infra*, the Union made several attempts to engage in meaningful bargaining about the rollback, but it was Respondent who was not interested in discussing alternative proposals (Tr. 58).

Acting General Counsel submits that the Union never waived any bargaining right and that the unrefuted evidence and case law clearly show that Respondent had an obligation to bargain about the rollback of the merit wage increases before reaching its rollback decision. Therefore, Respondent's failure to engage in meaningful bargaining to impasse with the Union is a violation of Section 8(a)(1) and (5) of the Act. *Bottom Line Enterprises, supra*.

CONCLUSION AND REMEDY

For years, Respondent has had a longstanding past practice of giving an annual merit wage increase to Unit employees. While this past practice may be discretionary, it has been a recurring event that Unit employees expected each year. The undisputed evidence also shows

that on May 5, 2020, for the first time, Respondent decided to roll back the 2020 merit wage increases that were just given to Unit employees in March 2020. The rescission of the merit wage increase is not part of any review process and is not similar in kind to the granting of the merit wage increase. Therefore, Respondent should not be allowed to roll back the merit wage increase without first affording the Union notice and an opportunity to bargain to impasse. The undisputed evidence, however, clearly shows that Respondent failed to meet this bargaining obligation. Accordingly, Acting General Counsel respectfully asks the ALJ to find that Respondent violated Section 8(a)(1) and (5) of the Act by unlawfully unilaterally reducing the wages of Unit employees without affording the Union an opportunity to bargain to impasse before implementing its rollback decision.

As a make whole remedy, Acting General Counsel is seeking a cease and desist order requiring Respondent to cease making unlawful unilateral changes including the unilateral decision to rescind the merit wage increases. Such a remedy should also include the restoration of the merit wage increases to Unit employees that were rescinded since June 8, 2020, plus interest. Respondent should also be required to post at its facility an appropriate Notice to Employees.

Respondent Should Provide W-2 Forms to the Regional Director

Counsel for the Acting General Counsel also respectfully requests that the final Board order in this matter specifically require Respondent to produce appropriate W-2 forms to the Regional Director. In *Tortillas Don Chavas*, 361 NLRB 101 (2014), the Board announced it would routinely require respondents to compensate employees for the adverse tax consequences of

receiving lump-sum backpay awards covering periods longer than one year and to file a report with the Social Security Administration (“SSA”) allocating backpay awards to the appropriate calendar quarters. In that decision, the Board (i) explained that allocating backpay to the appropriate earnings periods for tax purposes is consistent with the Board’s make-whole remedial power and (ii) established SSA allocation as a standard remedy. In *AdvoServ of New Jersey*, the Board noted the SSA had not accepted such backpay reports respondents had submitted prematurely. 363 NLRB No. 143, slip op. at 1 (2016). The Board also observed that SSA would not accept backpay reports prior to its receipt of the affected employees’ W-2 forms. *Id.* To address these issues, the Board ordered that respondents send completed reports directly to the Region, which would transmit them to SSA at the appropriate time. *Id.*

The Acting General Counsel therefore requests that, in support of effective administration of the SSA allocation remedy specified in *Tortillas Don Chavas*, the Board require Respondent to submit appropriate W-2 forms to the Regional Director (in addition to the SSA reports). Doing so will allow the Region to compare the information on the W-2 forms and the SSA reports to ensure accuracy and consistency between the two. Experience has demonstrated the SSA will not credit earnings to the correct calendar year where the SSA reports are inconsistent with the corresponding W-2s or the SSA has not received the proper W-2s, leading to lower SSA benefits than those to which some discriminatees would be otherwise entitled. See General Counsel Memorandum 20-02, “Submission of W-2s to the Regional Director,” (Nov. 12, 2019). Requiring Respondent to produce the appropriate W-2 forms to the Regional Director will enable Regional personnel to ensure the reports are correct prior to submission to SSA.

The Board ordinarily orders respondents to preserve and, where good cause is shown, provide information to the Regional Director, including payroll records, SSA payment records, timecards, and other personnel records necessary to analyze backpay due under the terms of its orders. See *Ferguson Electric Co.*, 335 NLRB 142 (2001). Ordering respondents to provide W-2 forms in cases involving backpay requires a minimal effort on their part, especially given that they are providing them to SSA already yet doing so will significantly aid the Regions' administrative effectuation of the Board's remedy in the compliance stage.

In sum, ordering Respondent to provide the Regional Director with appropriate W-2 forms serves the goal of ensuring accuracy in the reports and allows Regional personnel to identify any inaccuracies or inconsistencies before problems arise in this connection at SSA.

Dated: 29th day of January 2021.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ruth Weinreb". The signature is fluid and cursive, with the first name "Ruth" written in a larger, more prominent script than the last name "Weinreb".

Ruth Weinreb, Counsel for the Acting General Counsel
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