

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

NBCUniversal Media, LLC
Respondent

and

Case No.: 2-CA-262640

NewsGuild of New York, Local 31003,
TNG/CWA
Charging Party

**ACTING GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS TO
THE DECISION OF 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, the ALJ properly decided 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."

Respondent excepts to many substantive portions of the ALJ's Decision. Nearly all of Respondent's exceptions are premised upon mischaracterized assertions that Respondent's rollback was part of an established past practice and that the Union unmistakably waived its right to bargain over this rescission of wages. This Answering Brief will describe how well-established Board law does not support Respondent's exceptions and assertions and why the ALJ's legal conclusions should be upheld and modified by the Board, as set forth herein and in Acting General Counsel's cross exceptions.

Respondent's Exceptions

In its exceptions, Respondent argues that the ALJ erroneously found that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally rescinding the merit wage increase given to Unit employees without affording the Union an opportunity to bargain to impasse. Respondent also argues that the ALJ erred by finding Respondent had a bargaining obligation under *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017); by failing to find that the rescission of the merit wage increase was not a past practice and by failing to find that the Union waived its bargaining obligation. Respondent further takes exception to the ALJ's proposed Order and Remedies, including the Notice, attached as an Appendix to the ALJ's Decision (R. Excep. 1-25; R. Br.).²

² Throughout this brief, abbreviated references are employed as follows: "ALJD" followed by page and line numbers to designate the ALJ's Decision; "R. Excep." followed by a number to designate Respondent's exceptions; "R. Br." followed by a page number to designate Respondent's brief in support of exceptions; "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.

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 (ALJD p. 3, Lines 12-14; ALJD p. 3, lines 16-22; 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" (ALJD p. 3, lines 17-20; 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) (ALJD p. 3, lines 24-25; 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).³ 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 (ALJD p. 5, 6, 7; lines 39-46; 1-45; 1-9; 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 (ALJD p. 5, 6, 7; lines 39-46; 1-45; 1-9; Jt. Exh. 1). However, the amount of the wage increase is also discretionary and determined by Respondent (ALJD p. 5, 6, 7; lines 39-46; 1-45; 1-9; 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 the terms and conditions of employment of Unit employees and that he should continue to give

³ 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).

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 (ALJD p. 3, lines 37-44; 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" (ALJD p. 3, lines 37-39; 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 (ALJD p. 5, 6, 7; lines 39-46; 1-45; 1-9; 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).⁴ 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 (ALJD, p. 4, lines 1-7; Tr. 102). Dictor, however, denied that he had any prior conversations with Respondent about a rollback and insisted that the parties only discussed a

⁴ 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).

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 (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 (ALJD p. 4, lines 14-22; 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).

During the above conference calls. Sloan and James testified that Laks and Muhko never told the Union that the rollback was due to the Covid-19 pandemic (Tr. 75, 118). In addition, James testified that Laks and Muhko raised Covid-19 when discussing whether the merit wage increase, not the rollback, should have been given in the first place (Tr. 117-118).

On June 2, 2020, Sloan sent an email to Laks and Muhko objecting to Respondent's rollback plan (ALJD p. 4; lines 24-26; Tr. 66, 67; 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 (ALJD p. 4, lines 28-44; 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 (ALJD p. 5, lines 19-25; Tr. 105, G. C. Exh. 22, 23).

D. Implementation of Respondent's rollback decision

On June 8, 2020, Respondent implemented its rollback plan (ALJD p. 5; line 27; Tr. 69, G.C. Exhs. 24, 25; Jt. Exh. 1, paragraph 10). Out of 166 Unit employees, 42 were impacted by this rollback (ALJD p. 5, line 29; 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 (ALJD p. 5, line 30; 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 (ALJD p. 5, lines 33-34; Tr. 71). Although the parties have met numerous times, a collective-bargaining agreement has not yet been reached (Tr. 71).

ARGUMENT

1. **The ALJ correctly found that the rescission of the March 2020 merit wage increase was not part of the merit review process and was not a past practice**

In its exceptions, Respondent argues 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 (R. Excep. 7,10,13-25). Respondent claims, as it did during the May conference calls with the Union, 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.⁵ “Such unilateral actions are not subject to the statutory bargaining obligation

⁵ Respondent's exceptions 11 and 12 relate to the ALJ's recitation of Respondent's contention regarding the rollback being part of an existing past practice. Since Respondent failed to provide an alternative recitation in its

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 (R. Br. p. 6-13; G. C. Exh. 27). According to Respondent, such action was “similar in kind and degree” to prior decisions to grant none or partial increases to Unit employees and therefore, Respondent’s conduct did not violate the Act under a unilateral change theory (R. Br. p. 6-13 ;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

brief, Acting General Counsel submits, based on the credible evidence, that it is Respondent’s contention that it had the right to make a unilateral change by rescinding the 2020 merit wage increases since the rescission is encompassed in the long standing past practice of a merit review process, which also includes the discretionary granting of merit wage increases.

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.

Here, unlike *Raytheon, supra*, the undisputed evidence shows and the ALJ correctly found 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 (ALJD, p.10, lines 27-31; 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 (ALJD p. 10, lines 2727-28; R. Excep. 14; Jt. Exh 1.). Moreover, Respondent failed to show that the rescission of the merit wage increase was encompassed in the merit review process (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, as the ALJ found, there is absolutely no evidence of historical changes to Respondent's practice of granting annual merit wage increases (ALJD p. 10; lines, 28-30). 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, which were credited by the ALJ, (ALJD, p.8, fn. 4; Tr. 73,74,113,116,117,119) and the joint stipulation introduced at trial (Jt. Exh. 1, para. 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, the ALJ correctly found that Respondent failed to establish a past practice of rolling back annual merit wage increases and, therefore, did not meet its burden under *Raytheon*(ALJD, p. 10, lines27-30, R. Excep. 14,15). Accordingly, the Board should dismiss this argument and affirm the ALJ's conclusion that Respondent failed to sufficiently show that the rollback of merit increases was an established recurring past practice and not a change.

Contrary to Respondent's exceptions, the ALJ also correctly found that the rollback of the merit wage increase in June 2020 is not similar in kind or degree to the established past practice of granting annual merit wage increases to employees (ALJD, p. 11, lines 6-8; R. Excep. 17, 18). Although Respondent argues 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 the ALJ correctly dismissed it. The granting of annual merit wage increases and the rescission of those wage increases are two separate and distinct acts and as the ALJ properly found, employees had no reasonable expectation that their merit wage increase would be rescinded (ALJD p.11, lines 16-17; R. Excep. 1). 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 properly concluded 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 (ALJD p. 11, lines 20-23; R. Excep. 20).⁶

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

Although Respondent argues 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 (R. Excep. 2-6, 8, 9, 23-25; Tr. 102; G. C. Exh. 27), the ALJ properly found that the undisputed evidence shows that the Union did not waive any right to bargain over the rescission of the merit wage increase (ALJD, p.7, lines 23-25). 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)

⁶ Respondent's reliance on a recent Board case in *800 River Road Operating Co.*, 369 NLRB No. 109 (2020) is also misplaced (Resp Br. 7, 12). In that case, the Board addressed discretionary prediscipline bargaining obligations under *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016) and held that an employer did not have an obligation to bargain prior to disciplining unit employees in accordance with an established disciplinary policy or practice even when discretionary aspects of the established policy or practice were part of the status quo as the nondiscretionary aspects. As argued above and as the ALJ, herein, found, the roll back of the 2020 merit wage increase did not involve any past practice.

(citing *Rockwell International Corp.*, 260 NLRB 1346, 1347 (1982)).⁷ 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).

As the ALJ properly found, the evidence, herein, 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, as the ALJ correctly found, 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 (ALJD, p. 8, 30-31; R. Excep. 6; 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 employees in March 2020 (ALJD p. 8;

⁷ 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.

lines 30-31). 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 properly concluded that the January email exchange between Dictor and Laks did not constitute a clear and unmistakable waiver to bargain about the rollback (ALJD p. 8, lines 6-31).

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 Board should find 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 announcing and implementing its rollback decision. Therefore, the ALJ did not err in finding that 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 (ALJD p. 12, lines 21-23).

3. The ALJ's make whole order and remedy should be amended and not found to be defective⁸

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

⁸ Relates to R. Excep. 24 and 25).

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, the ALJ properly concluded that 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 and that the undisputed evidence clearly shows that Respondent failed to meet this bargaining obligation. Accordingly, the ALJ properly concluded 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 (ALJD, 12, lines 21-23).

As a make whole remedy, the ALJ properly ordered Respondent to cease and desist from making unlawful unilateral changes including the unilateral decision to rescind the merit wage increases (ALD, p. 13, line 25). The ALJ also properly ordered that Respondent, upon request, rescind the rollback and make all affected Unit employees whole, with interest, for any wages they lost due to the rollback and post an appropriate Notice (ALJD, p. 13; lines 29-35). Such an Order is appropriate and consistent with well-established Board law. Therefore, the Board should affirm this make whole remedy. See *Cascades Containerboard Packaging-Niagra*, 370 NLRB No 76 (2021) where the Board recently ordered a make whole remedy that included cease and desist language from unilaterally changing how profit sharing payments are calculated or reduced and an order that required making affected employees whole for any loss of earnings.

The ALJ also properly ordered Respondent to compensate Unit employees for adverse tax consequences, if any, of receiving lump-sum backpay awards, in accordance with *Don*

Chavas, LLC d/b/a Tortillas Don Chavas, 361 NLRB 101 (2014) and to file with the Regional Director for Region 2, within 21 days of that date the amount of backpay fixed, either by agreement or Board Order, a report allocating the backpay award to the appropriate calendar year for each affected employee in accordance with *AdvoServ of New Jersey Inc.*, 363 NLRB No. 143 (2016) (ALJD p. 13, lines 1-6). Such an order is proper and consistent with current Board law. See *Cascades, supra*.

The ALJ further recommended that Respondent file with the Regional Director of Region 2 the W-2 forms of the affected employees within 21 days (ALJD p. 13, line 7). Respondent takes exception to the timeline to submit these W-2 forms since it claims current Board law does not support such an order (R. Excep. 24).

In *Cascades, supra*, the Board addressed the submission of W-2 forms and concluded that such a requirement was warranted. However, the Board did not specifically require or recommend that the W-2 forms be submitted within 21 days. Rather, the Board required that an employer provide W-2 forms when they are generated early in the calendar year. See *Cascades, supra*, fn3. Acting General Counsel will be filing cross exceptions to seek further clarification and modification of the Board's Order in *Cascades, supra*, as it relates to the timeline to submit W-2 forms. In this regard, Acting General Counsel will be proposing in its cross exceptions that the Board adopt the following language to the ALJ's Remedy and Order:

Within 21 days of the date the amount of backpay is fixed either by agreement or Board order, or such additional time as the Regional Director may allow for good cause shown, file with the Regional Director for Region 2 a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

In addition, the Acting General Counsel will be requesting in its cross exceptions that the ALJ's Remedy, Order and Notice conform with the above proposed amendment.

Notwithstanding Respondent's exception to the 21 day timeline and Acting General Counsel's proposed above language, any amended remedy does not render the ALJ's remaining make whole remedy defective (R. Excep. 24,25). As the Board amended the remedy in *Cascades* to address the submission of W-2 forms, the Board did not set aside the remaining make whole remedy. The respondent in that case was still ordered to cease and desist from engaging in unfair labor practices and ordered to make affected employees whole for loss of earnings and benefits. Likewise, the Board, herein, should affirm the ALJ's remaining make whole remedy that requires Respondent to cease and desist from unlawful unilateral changes and to restore the merit wages to affected Unit employees with interest.

CONCLUSION

For the reasons set forth above, Acting General Counsel respectfully submits that the Board should deny Respondent's Exceptions to the Decision of the Administrative Law Judge in its entirety and affirm the ALJ's Conclusions of Law. The Board should also amend in part the ALJ's Remedy, Order, and Notice to Employees as set forth above and requested in Acting General Counsel's Cross Exceptions.

Dated: 24th of March 2021.

Respectfully submitted,



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