Airgas USA, LLC *and* International Brotherhood of Teamsters Wholesale Delivery Drivers, General Truck Drivers, Chauffeurs, Sales, Industrial and Allied Workers Local 848. Cases 31–CA–226568 and 31–CA–260895

September 18, 2024

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND PROUTY

On February 25, 2022, Administrative Law Judge Ariel L. Sotolongo issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the International Brotherhood of Teamsters Wholesale Delivery Drivers, General Truck Drivers, Chauffeurs, Sales, Industrial and Allied Workers Local 848 (the Union) each filed answering briefs, and the Respondent filed a reply brief. In addition, the General Counsel filed cross-exceptions with supporting argument, and the Union filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

[1] The parties have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order to conform to the Board's standard remedial language and in accordance with our decisions in *Paragon Systems, Inc.*, 371 NLRB No. 104 (2022); *Cascades Containerboard Packaging—Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021); *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016); *Excel Container, Inc.*, 325 NLRB 17 (1997); and *Bottom Line Enterprises*, 302 NLRB 373 (1991), enfd. mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994). In accordance with our decision in *Thryv, Inc*., 372 NLRB No. 22 (2022), enf. denied on other grounds 102 F.4th 727 (5th Cir. 2024), we have also amended the make-whole remedy and modified the judge's recommended Order to provide that the Respondent shall compensate employees for any other direct or foreseeable pecuniary harms incurred as a result of its unlawful withholding of the October 2018 wage increase; the unlawful unilateral changes to schedules, hours, and overtime; and the unlawful layoff of Cameron Desborough, including, as to Desborough's layoff, reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). We shall substitute a new notice to conform to the Order as modified.

Our dissenting colleague would not order the Respondent to compensate employees for any other direct or foreseeable pecuniary harms in accordance with *Thryv* because he disagreed with that remedy in that case and because in *Thryv, Inc. v. NLRB*, 102 F.4th 727, 748 (5th Cir. 2024), the United States Court of Appeals for the Fifth Circuit vacated certain paragraphs of the Board's order, including the provision containing the Board's clarified make-whole remedy. However, the court did so because it disagreed with portions of the Board's underlying unfair labor practice findings on the merits. See id. at 737–746, 748. Importantly, the court did not hold that the Board lacked authority under the National Labor Relations Act to grant the clarified make-whole remedy as set forth in the Board's decision in *Thryv*. As such, the court's decision in *Thryv* did not have the effect that our colleague believes it had. See *J.G. Kern Enterprises, Inc. v. NLRB*, 94 F.4th 18, 31 (D.C. Cir. 2024) (finding that the Board's analysis in *Whisper Soft Mills, Inc.*, 267 NLRB 813 (1983), retained "precedential value" even though a Federal circuit court subsequently reversed the Board's decision and vacated its order in that case—see *Whisper Soft Mills, Inc. v. NLRB*, 754 F.2d 1381 (9th Cir. 1984)—because the reviewing court in *Whisper Soft Mills* did not reject the underlying principle applied by the Board there). Our dissenting colleague attempts to distinguish *J.G. Kern* from the present case because in *J.G. Kern*, the United States Court of Appeals for the District of Columbia Circuit characterized the relevant legal principle for which the Board cited *Whisper Soft Mills* as "longstanding," while our dissenting colleague characterizes the clarified make-whole remedy set forth in the Board's decision in *Thryv* as "novel." But see *Thryv*, 372 NLRB No. 22, slip op. at 7–8 (summarizing prior Board precedent that "implicitly recogni[zed] that making employees whole should include, at least, compensating them for direct or foreseeable pecuniary harms resulting from the respondent's unfair labor practice"). Regardless of this purported distinction, the salient point is that the D.C. Circuit did not hold that the Board erred by citing and relying on *Whisper Soft Mills* merely because a reviewing court subsequently reversed the Board's decision and vacated its order in that case.

Even if the Fifth Circuit had specifically rejected the Board's rationale for ordering the clarified make-whole remedy in *Thryv*, contrary to the dissent, the Board's decision there would remain valid Board precedent under the Board's long-established policy of nonacquiescence in adverse appellate court decisions. See, e.g., *Sunbelt Rentals, Inc*., 372 NLRB No. 24, slip op. at 17 fn. 40 (2022); *D. L. Baker*, *Inc*., 351 NLRB 515, 529 fn. 42 (2007). Pursuant to the Board's nonacquiescence policy, the Board respectfully regards an adverse court decision as only "the law of that particular case." *D. L. Baker*, 351 NLRB at 529 fn. 42. Thus, as a result of the Fifth Circuit's adverse decision in *Thryv*, the respondent in *that* case no longer has a legal obligation to take the remedial actions identified in the paragraphs of the Board's order that the Fifth Circuit vacated. However, the Board's published decision in *Thryv* has not ceased to exist. Rather, in the absence of the Board specifically acquiescing to the Fifth Circuit's adverse decision in *Thryv* or overruling its own decision in *Thryv* on other grounds, the Board's decision in *Thryv* remains controlling precedent, and the Board can and will rely on it as such in future Board decisions, including in our decision today. Accordingly, consistent with *Thryv*, 372 NLRB No. 22, slip op. at 6–13, in all cases in which the Board's standard remedy includes an order for make-whole relief, the Board will continue to expressly order that "the respondent compensate affected employees for all direct or foreseeable pecuniary harms suffered as a result of the respondent's unfair labor practice." Id., slip op. at 13.

For the reasons discussed by the judge and the reasons discussed below, we affirm the judge's findings that the Respondent violated Section 8(a)(5) and (1) by unilaterally adjusting unit employees' schedules, reducing unit employees' hours, changing the procedure for overtime for unit employees, and laying off unit employee Cameron Desborough, and violated Section 8(a)(3) and (1) by withholding the October 1, 2018 wage increase from unit employees.[3]

I. UNILATERAL CHANGES

For the reasons discussed by the judge, we affirm his findings that the Respondent violated Section 8(a)(5) and (1) by adjusting unit employees' schedules, reducing unit employees' hours, changing the procedure for overtime for unit employees, and laying off unit employee Desborough without giving prior notice or affording the Union an opportunity to bargain about these changes.

With regard to the layoff of Desborough, and contrary to our dissenting colleague, we agree with the judge that the Respondent's April 24, 2020 letter notifying the Union of Desborough's impending layoff was presented as a fait accompli, leaving the Union with no opportunity to bargain over the layoff decision itself. The April 24 letter stated that the Respondent used "inverse order of seniority" criteria to select which employees at its Alameda and Burbank, California facilities to lay off and that those employees "will be separated effective end of the day Wednesday, April 29, 2020." After listing the employees who would be laid off at each facility, the April 24 letter indicated that those employees would be paid through the end of the week if they worked until April 29, 2020, and that they would have recall rights for 12 months from the date of the layoff. At that point, the April 24 letter stated that the Respondent "remain[ed] willing to bargain over any aspect of this layoff *procedure* if the Union requests" (emphasis added). It then explained that the Respondent was willing to offer the employees selected for layoff a severance agreement if they were willing to forgo their recall rights and asked the Union to reach out if it wanted the Respondent to offer the severance agreement to those employees. The April 24 letter closed by stating the following:

> Finally, although unexpected economic exigencies continue to compel rapid implementation of these mitigation measures, please take notice that Airgas remains willing to bargain over this matter, should the Union request it, regardless of the implementation date. Please contact me immediately if you wish to discuss.

Thus, the Respondent, through its April 24 letter, which announced the layoffs only 5 days before they were to be implemented, offered to bargain over the "layoff procedure" (i.e., the effects of its decision to lay off an employee at the Burbank facility) but did not offer to bargain over the layoff decision itself. We acknowledge that in the closing paragraph of the letter, the Respondent stated more generally that it was "willing to bargain over this matter," but based on the Respondent's earlier offer to bargain over only the layoff procedure, the Union would have understood that the "matter" over which the Respondent was willing to bargain was the layoff procedure, not the layoff decision itself.[4] The April 24 letter's reference to the Respondent's willingness to bargain "regardless of the implementation date" further indicated that the Respondent was offering to bargain over only the effects of the layoff decision. The parties would not have been able to bargain over the layoff decision after it was implemented, but they could have still bargained to address certain effects of that decision, such as whether Desborough would be offered a severance agreement. Moreover, the April 24 letter itself discusses only the layoff procedure and its possible effects, and does not at any point indicate that the Respondent was willing to reconsider, or even specifically discuss, its decision to lay off an employee at the Burbank facility. Accordingly, the Respondent's April 24 letter communicated to the Union a fixed intent to follow through on its layoff decision in just 5 days, and the Respondent therefore failed to provide the Union with an opportunity to bargain over the layoff decision in violation of Section 8(a)(5) and (1).

In its cross-exceptions, the Union argues that the judge erred by failing to order additional remedies, including an extended notice posting period, a notice reading with the Union present and allowed to record the meeting, distribution of an Explanation of Rights document, and a broad cease-and-desist order. In the circumstances of this case, Chairman McFerran and Member Kaplan find that the standard remedies ordered by the judge are sufficient to address the Respondent's unfair labor practices.

[3] We find it unnecessary to pass on the Union's cross-exceptions asking the Board to find that the Respondent's withholding of the October 2018 wage increase also violated Sec. 8(a)(5) and (1). This additional violation would not materially affect the remedy in light of our finding that the same conduct violated Sec. 8(a)(3) and (1).

The Union also cross-excepts to the judge's failure to find that the Respondent violated Sec. 8(a)(3), (5), and (1) by withholding from the unit employees a "Market Wage Adjustment" raise that it gave to nonunit production employees on September 3, 2018. We deny these cross-exceptions, as that issue was not included in the complaint, is not closely connected to the subject matter of the complaint, and has not been fully litigated.

[4] This understanding was reinforced by the Respondent's use of the definitive term "will" when describing the layoff. See *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1024 (2001) (notice stating that changes "will" be implemented was further evidence of a fait accompli because it showed the employer's "intent to effect the change without bargaining").

Our dissenting colleague claims that we have failed to view the April 24 letter holistically and asserts that the statement at the end of that letter that the Respondent "'remains willing to bargain over this matter' . . . could just as easily imply a willingness to bargain over the layoff itself as it could imply a willingness to only bargain over the effects of the layoff." However, it is our colleague who has failed to view the April 24 letter holistically because, as we have demonstrated above, when the statement cited by our colleague is read in the context of the rest of the letter, it is reasonably understood to indicate that the "matter" over which the Respondent was willing to bargain was the effects of the layoff decision, not the layoff decision itself. That statement must be read in isolation in order to find ambiguity in the April 24 letter, and that is exactly what our dissenting colleague has done. We decline to do the same.[5]

With regard to all of the Respondent's alleged unilateral changes—i.e., adjusting unit employees' schedules, reducing unit employees' hours, changing the procedure for overtime for unit employees, and laying off unit employee Cameron Desborough—we find, in addition to the reasons cited by the judge, that those changes violated Section 8(a)(5) and (1) because they were made at a time when the Respondent was under a duty to refrain from implementing any unilateral changes during the pendency of bargaining for an initial collective-bargaining agreement. As the Board held in *Bottom Line Enterprises*, "when . . . the parties are engaged in negotiations, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it 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." 302 NLRB at 374; see also *Wendt Corp.*, 369 NLRB No. 135, slip op. at 5 (2020) (applying *Bottom Line* to analyze whether an employer unlawfully laid off employees in the absence of an overall impasse during negotiations for an initial contract), enf. denied and remanded in relevant part on other grounds 26 F.4th 1002 (D.C. Cir. 2022). As the judge noted, the Union and the Respondent were still in the process of negotiating for an initial collective-bargaining agreement for the unit at the Respondent's Burbank, California facility when the Respondent made the unilateral changes described above in March and April of 2020. The Respondent does not dispute this fact.

We further find that the Respondent has not established either of the two exceptions to the *Bottom Line* rule. See *Pleasantview Nursing Home, Inc.*, 335 NLRB 961, 962 (2001) ("In *Bottom Line*, the Board recognized only two exceptions to that general rule: when a union engages in bargaining delay tactics and 'when economic exigencies compel prompt action.'" (quoting *Bottom Line*, 302 NLRB at 374)), enfd. in relevant part 351 F.3d 747 (6th Cir. 2003). The Respondent does not claim that the Union engaged in bargaining delay tactics, but it does assert that its failure to bargain over its decision to reduce employees' hours was justified by the economic exigency exception. "The Board has limited the economic considerations which would trigger the *Bottom Line* exception to 'extraordinary events which are an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.'" Id. (quoting *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995)) (alteration in original). The Respondent maintains that in March and April of 2020, the COVID-19 pandemic caused a decline in orders, production, and deliveries at its Burbank facility. However, "business necessity is not the equivalent of compelling considerations which excuse bargaining" because "[w]ere that the case, a respondent faced with a gloomy economic outlook could take any unilateral action it wished . . . simply because it was being squeezed financially." *Farina Corp.*, 310 NLRB 318, 321 (1993). The Respondent has not met the heavy burden of establishing that the decline in its business in March and April of 2020 had a major economic effect requiring it to take immediate action. Accordingly, we additionally find that the Respondent violated Section 8(a)(5) and (1) by making the unilateral changes above in the absence of an overall impasse in bargaining.[6]

[5] Our dissenting colleague also claims that certain of the Respondent's actions after it sent the April 24 letter suggested that the Respondent was willing to bargain in good faith. However, the actions cited by our dissenting colleague were consistent with the Respondent's expressed willingness to bargain over the effects of the layoff decision but did not suggest that it was willing to bargain over the decision itself.

[6] Our dissenting colleague, though conceding that the effects of the COVID-19 pandemic on the Respondent's business did not excuse the Respondent's obligation to bargain over its decision to lay off unit employee Desborough altogether, contends that pursuant to *RBE Electronics of S.D.*, 320 NLRB 80, 81–82 (1995), the Respondent was not required to refrain from implementing Desborough's layoff absent an overall impasse in bargaining but instead was required only to provide the Union with notice and an opportunity to bargain, and that the Respondent met this obligation. This argument fails for multiple independent reasons.

First, although the Respondent excepted generally to the portion of the judge's decision finding that the Respondent failed to establish any exigent circumstances that justify and excuse its failure to provide the Union an opportunity to bargain over its decision to lay off Desborough, the Respondent did not provide any argument in support of that general exception. Therefore, in accordance with Sec. 102.46(a)(1)(ii) of the Board's Rules and Regulations, we shall disregard that bare and unsupported exception. See *Community Counseling & Mentoring Services, Inc.*, 371 NLRB No. 39, slip op. at 1 fn. 1 (2021). The Respondent has not otherwise asserted that the limited exception to the *Bottom Line* rule established in *RBE Electronics* applies here.

II. WITHHOLDING OF ANNUAL WAGE INCREASE

We also agree with the judge that the Respondent violated Section 8(a)(3) and (1) by withholding the October 1, 2018 wage increase (the October 2018 wage increase) from the unit of drivers and coordinators at its Burbank facility that the Union was seeking to represent. Specifically, we agree with the judge's analysis under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), that the Respondent was motivated by the unit employees' union activity.[7] In finding animus, we rely first, as the judge did, on the Respondent's statements to unit employees, including repeatedly taunting unit drivers that "October is coming"; telling drivers that management could not "help [drivers] with raises" if they voted for the Union; warning a driver, "[I]f you guys vote the Union in tomorrow, it's going to get ugly"; and telling a driver that he and the other drivers had been "this close" to getting a raise but would now get nothing because of their support for the Union. We find that these statements are the most direct evidence of animus and go directly to the Respondent's motive for failing to grant the October 2018 wage increase to the unit employees. See *Aluminum Casting & Engineering Co.*, 328 NLRB 8, 8 (1999) ("Withholding a wage increase during a union organizing campaign has been found to be an unfair labor practice if the employer attempts to blame the union for the withholding." (internal quotations omitted)), enfd. in relevant part 230 F.3d 286 (7th Cir. 2000).

Additionally, we agree with the judge that the Respondent's failure to adhere to its established past practice of providing wage increases to unit employees in October each year is further evidence of animus. See, e.g., *Medic One, Inc.*, 331 NLRB 464, 475 (2000) (explaining that evidence of a departure from a past practice supports inferences of animus and discriminatory motive). For the reasons that follow, we affirm the judge's finding that the annual October wage increase was an established past practice that was part of the status quo of the unit employees' terms and conditions of employment in October 2018.

"A wage increase program constitutes a term or condition of employment when it is an 'established practice . . . regularly expected by the employees.'" *Mission Foods*, 350 NLRB 336, 337 (2007) (quoting *Daily News of Los Angeles*, 315 NLRB 1236, 1239 (1994), enfd. 73 F.3d 406 (D.C. Cir 1996), cert. denied 519 U.S. 1090 (1997)) (alteration in original). Factors relevant to the determination of whether a wage increase is such an established practice include "'the number of years the program has been in place, the regularity with which raises are granted, and whether the employer used fixed criteria to determine whether an employee will receive a raise, and the amount thereof.'" *Omni Hotels Management Corp.*, 371 NLRB No. 53, slip op. at 3 (2022) (quoting *Rural/Metro Medical Services*, 327 NLRB 49, 51 (1998)).

Documentary evidence—which the General Counsel, the Respondent, and the Union entered into the record as joint exhibits—firmly establishes that prior to October 2018, the Respondent had, since at least 2014, provided an annual wage increase to unit employees (and nonunit production employees) at its Burbank facility that was effective in October each year.[8] This evidence clearly supports

Second, even if this issue were properly before the Board, we would not find that the Respondent has established that "time [was] of the essence" and that prompt action was demanded in laying off Desborough, as required under *RBE Electronics*. 320 NLRB at 82. While our dissenting colleague contends that the onset of the COVID-19 pandemic, and its impact on the Respondent's business, necessitated prompt action by the Respondent on Desborough's layoff, the Board has found, in response to similar arguments, that "'business necessity is not the equivalent of compelling considerations which excuse bargaining.'" *PPG Industries Ohio, Inc.*, 372 NLRB No. 78, slip op at 3–4 (2023) (quoting *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995)) (rejecting *RBE Electronics* claim regarding employer's unilateral scheduling change that it asserted was necessary when orders were higher than expected after customers came back from COVID-19-related shutdowns in 2020). As discussed above, the Respondent maintains that in March and April of 2020, the COVID-19 pandemic caused a decline in orders, production, and deliveries at its Burbank facility, but it has not shown that those declines demanded prompt action with regard to Desborough's layoff. Moreover, the Respondent has not even argued, let alone demonstrated, that those declines "put its operations in peril," as our dissenting colleague claims. To the contrary, the testimony of Cory Garner, the Respondent's President of Operations for the West Region, undercuts the argument that prompt action on Desborough's layoff was necessary. In this regard, his testimony demonstrates that the Respondent first tried to address the pandemic-related issues through furlough scheduling that spread hours and available work among the employees. Only later did it move to layoffs, when it determined that the work could not be spread out sufficiently among the employees. This sequence of events does not suggest that "time [was] of the essence" with regard to Desborough's layoff as required under *RBE Electronics*. 320 NLRB at 82. In these circumstances, the Respondent's situation does not rise to the level contemplated under *RBE Electronics*. We decline to speculate on whether the *RBE Electronics* exception would have applied here if the Respondent had decided to lay off Desborough as an initial response to the effects of the COVID-19 pandemic on its business because that factual situation is not before us.

Third, even if the Respondent had made the required showing under *RBE Electronics*, as discussed above, the Respondent did not provide the Union with an opportunity to bargain over its decision to lay off Desborough because it presented its layoff decision as a fait accompli.

[7] Because we adopt the judge's alternative *Wright Line* analysis, we find it unnecessary to pass on his analysis pursuant to *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), that the Respondent's withholding of the October 2018 wage increase was inherently destructive of Sec. 7 rights regardless of its motivation. It is therefore unnecessary to address the judge's characterization of the relevant precedent related to *Great Dane* or our colleague's critique of the "inherently destructive" analysis.

[8] Every unit employee who was employed at the time that these four annual October wage increases went into effect and was not on a leave of absence received those wage increases, with two possible exceptions.

a finding that the annual October wage increase was an established practice regularly expected by the unit employees in October 2018 and was thus a term or condition of their employment. See, e.g., *Omni Hotels*, 371 NLRB No. 53, slip op. at 3 (finding an established past practice where an employer had provided a wage increase to employees, "effective September 1, in each of [] the 5 years immediately preceding 2019"); *Mission Foods*, 350 NLRB at 337 (finding an established past practice where an employer had provided a wage increase to employees during the first quarter of each year for at least the previous 4 years); *Lee's Summit Hospital & Health Midwest*, 338 NLRB 841, 841 fn. 3 (2003) (finding an established past practice where an employer had provided a general wage increase to unit employees each of the previous 4 years); *Harrison Ready Mix Concrete Co.*, 316 NLRB 242, 242 (1995) (finding an established past practice where an employer had provided a wage increases to unit employees each July for the previous 3 years). Further, as discussed by the judge, witness testimony and other evidence in the record suggest that the Respondent may have provided an annual wage increase to unit employees each year since at least 2004, with the possible exception of 2009.[9]

Additionally, the record establishes that the Respondent's vice president of operations for the West Region, Scott McFarland, who was entirely responsible for adjusting the unit employees' wages from 2014 to 2017, used fixed criteria to determine the specific amounts of the wage increases that unit employees received in October 2014, 2015, 2016, and 2017. Specifically, documentary evidence—which, as discussed above, the parties entered into the record as joint exhibits—establishes that, with few exceptions, McFarland applied the following criteria:

- Drivers who had worked for at least a year but were hired in 2011 or later received a $1.00-per-hour wage increase;
- Drivers who had worked less than a year or who were hired prior to 2011 received a smaller wage increase in a defined monetary amount (i.e., $0.50 per hour in 2014 and 2015, $0.60 per hour in 2016, and $0.55 per hour in 2017);
- Coordinators received the smaller wage increase regardless of their date of hire.[10]

Driver Anthony Diaz is not listed on the spreadsheet for the October 2015 wage increase, even though his date of hire was March 17, 2015. Driver Elio Carrillo was hired on September 26, 2016, but he is not listed on the spreadsheet for the October 2016 wage increase—although we would not find it surprising that Carrillo did not receive a wage increase less than a week after he was hired. In any event, the record firmly establishes that at least 97 percent of the unit employees who were actively working at the time that the October 2014, 2015, 2016, and 2017 wage increases went into effect received those wage increases. See *Mission Foods*, 350 NLRB at 337 (finding an established past practice where "the majority of the [employer's] employees—at least 80 percent—received th[e] annual first-quarter [structural] wage increase").

[9] Our dissenting colleague claims that the General Counsel has failed to establish that the Respondent provided wage increases to the unit employees "at the same time every year for a sufficient number of years leading up to 2018." For the reasons discussed below, we disagree. The parties stipulated that the effective dates for the wage increases documented in the spreadsheets entered as Jt. Exhs. 4, 5, and 6 were on or about October 4, 2015, October 2, 2016, and October 1, 2017, respectively. Additionally, the parties entered into evidence as joint exhibits the emails that the Respondent sent to employees in 2014, 2015, 2016, and 2017 to announce that they would be receiving wage increases in October of each of those years. (The Parties' stipulation of facts states that Jt. Exh. 3 includes a column with the effective date of the wage increase received by the employees who were employed by the Respondent at its Burbank facility in October 2014, but Jt. Exh. 3 includes no such column; as a result, we rely on the announcement email described above in finding that the Respondent provided the unit employees' with their annual wage increase in October in 2014.) Accordingly, we find that the record evidence establishes that the Respondent has provided wage increases to the unit employees each October since at least 2014.

Our dissenting colleague asserts that prior to 2014, unit employees received their annual wage increases at various times of the year. The email announcing the October 2014 wage increase stated, however, that in 2013, "in response to the economic softness that we continue to experience today, the company-wide wage and salary increase took place on October 1 instead of our historic July 1 date" and that because of continuing economic challenges, it had decided to "permanently reset the annual wage and salary increase cycle to October 1 starting this year." Thus, it appears that the unit employees also received their annual wage increase in October in 2013 but may have received annual wage increases in July prior to 2013. Even assuming that prior to 2013, the Respondent provided annual wage increases to unit employees in July, rather than October, the Respondent had an established practice of providing annual wage increases to unit employees in October for 5 years prior to October 2018, which, as discussed above, the Board has previously found to be a sufficient period to establish a practice as a term or condition of employment. Moreover, we do not find that such a change in the date that unit employees received the annual wage increase would have affected their expectation that they would continue to receive annual wage increases in the future since the Respondent announced the date change and explained its reasons for making the change. Given those circumstances, such a date change certainly would not have made the wage increases appear random to unit employees. Cf. *Postal Service*, 261 NLRB 505, 505–507 (1982) (finding no established past practice where wage increases were "randomly given," as employees received them at "irregular intervals").

On March 12, 2019, the Respondent announced to employees that starting in 2019, the "annual salary increases" would "now take effect in April of each year instead of October." However, an action taken by the Respondent in 2019 is irrelevant to whether the annual October wage increase was an established practice regularly expected by the unit employees in October 2018.

Finally, we note that the Respondent, in its brief in support of exceptions, describes the employees' annual wage increases as having been implemented in July from 2010 to 2012 and in October from 2013 to 2017, which is consistent with our findings above.

[10] The nonunit production employees typically received wage increases consistent with the criteria applied to the drivers.

We note that the spreadsheet for the October 2015 wage increase (Jt. Exh. 4), as opposed to the spreadsheets for the October 2014, 2016, and 2017 wage increases, does not list the specific wage increase amount that

McFarland's testimony is consistent with those criteria. His testimony establishes that he first gave wage increases to shorter-tenured employees while still reserving funds to provide increases to more senior employees based on the money available in a given year, as he testified that his general philosophy for determining the amount of the specific wage increase given to each employee "[w]as to try and move the younger guys up that were strong performers that we wouldn't want to lose as quickly as I could, while still being able to provide an increase to others."[11]

McFarland's testimony also explains how he determined the amount of the smaller wage increases given to coordinators and drivers who had worked less than a year or who were hired prior to 2011. President of Operations for the West Region Garner would inform McFarland of the percentage of total payroll that wages could increase overall, and then McFarland would add up the total wages of all employees in the West Region for whom he was responsible and increase that amount by the designated percentage to determine the total dollar amount that could go toward wages for those employees. McFarland treated that amount as a "cap" for the annual October wage increases even though it was merely guidance issued by the Respondent's senior executive leadership. McFarland then determined the amount of the smaller wage increases based on how much money was still available under the "cap" after allocating the $1-per-hour wage increases.[12] McFarland specifically testified, "I would plug in, in the step banding columns again, you know, those $1 increases I would put them into all—all facilities in the Region first, and then work out as best as I could what everyone else would make with—with the remaining money in the pot."[13]

Our dissenting colleague incorrectly claims that we have pulled together discrete portions of McFarland's testimony to create the bullet-point list of criteria above. As

each employee received. Specifically, unlike in the spreadsheet for the October 2016 wage increase (Jt. Exh. 5), the "Step Pay Banding" column in Jt. Exh. 4 does not list the wage increase amount that each employee received but instead lists each employee's new wage rate after receiving the October 2015 wage increase, as the wage rates listed for the employees in the "Step Pay Banding" column in Jt. Exh. 4 are the same as the wage rates listed for the employees in the "Current Rate" column in Jt. Exh. 5. Thus, we have calculated the wage increase amount that each employee received in October 2015 by subtracting the wage rate in the "Current Rate" column in Jt. Exh. 4 from the wage rate in the "Step Pay Banding" column in that same exhibit. The wage rates listed in the "Total Pay" column in Joint Exhibit 4 are incorrect because they are inconsistent with the wages rates in the "Current Rate" column in Jt. Exh. 5.

Our dissenting colleague faults the General Counsel for failing to clearly explain the errors and omissions in Jt. Exh. 4 and the columns on which the Board should rely to calculate the amounts of the October 2015 wage increases that employees received. While it may have been preferable for the General Counsel to have spelled out such an explanation, she did include in her answering brief a chart that displayed the specific wage increase amounts that each unit employee received from 2014 to 2018, and she clearly calculated the wage increase amounts that the unit employees received in 2015 by subtracting the wage rate in the "Current Rate" column in Jt. Exh. 4 from the wage rate in the "Step Pay Banding" column in that same exhibit. Thus, we have not, as our dissenting colleague contends, "decided to take it upon [our]selves to reconcile the inaccuracies and contradictions within" Jt. Exh. 4. Instead, we have simply read that exhibit in the most logical manner with the assistance of the General Counsel's chart.

[11] Our dissenting colleague claims that we have failed to acknowledge McFarland's testimony that the employees on whom McFarland focused changed from year to year. However, the testimony that our colleague has cited to support that claim did not address McFarland's process for determining the amounts of the annual October wage increases but instead was given in response to a question regarding what information the Respondent's president of operations for the West Region, Garner, would provide to McFarland prior to McFarland beginning that process. McFarland testified that from 2014 to 2017, he used the same process each year to determine the amounts of the annual October wage increases that employees received, and he described that process as adhering to the general philosophy described above.

Our dissenting colleague also contends that the General Counsel failed to elicit details on how McFarland factored "accident avoidance" into wage increase determinations. However, McFarland explained that if a driver had a preventable accident, they generally would not receive a wage increase. He did not suggest that accidents factored into wage increase determinations in any other manner. Thus, "accident avoidance" did not factor into McFarland's determinations of the *amounts* of the wage increases that drivers received.

[12] McFarland clarified that in making this determination, he did not use defined percentages to determine the amounts of the wage increases that employees received, even though a wage increase percentage is listed for each employee in the spreadsheets for the October 2014–2017 wage increases. As an example, McFarland pointed to a nonunit production employee who received a $0.60-per-hour wage increase in October 2016. He explained that the $0.60-per-hour wage increase was the equivalent of a 2.82 percent wage increase for that employee but that he "didn't go in and plug in 2.82 percent" to determine the amount of that employee's wage increase. All eight of the unit drivers who had worked less than a year or who were hired prior to 2011 and one unit coordinator received that same $0.60-per-hour wage increase in October 2016. The wage increase percentage listed for each of those employees varies, however, depending on what the employee's hourly wage rate was prior to receiving the $0.60-per-hour wage increase.

[13] As our dissenting colleague notes, McFarland also testified that he "would always try to hold some money back" so that he could give additional wage increases primarily to individual nonunit production employees throughout the year, but that testimony does not change the fact that McFarland determined the amount of the smaller wage increases based on how much money was left under the "cap" after allocating the $1-per-hour wage increases. Even assuming that McFarland did not hold back the same amount of money each year, his limited exercise of discretion in determining how much money to hold back for other wage increases throughout the year does not negate the substantial evidence that the annual October wage increase was an established practice regularly expected by the unit employees in October 2018. See *Central Maine Morning Sentinel*, 295 NLRB 376, 379 (1989) ("[T]he exercise of some discretion is not fatal to the conclusion that the raise was a condition of employment."). In such circumstances, an employer has "an obligation to maintain the fixed elements of its practice . . . and bargain with the [u]nion over the discretionary aspects." *Omni Hotels*, 371 NLRB No. 53, slip op. at 4.

indicated above, that list is based exclusively on documentary evidence that the parties entered into the record as joint exhibits. While we acknowledge that, when read in isolation, McFarland's testimony is not a model of clarity, when his testimony is read in light of that documentary evidence, it becomes much clearer and proves to be consistent with that evidence, as demonstrated above.[14]

In addition, our dissenting colleague argues that the Respondent did not have an established past practice of granting wage increases to the unit employees each October because there was "significant variability [] in the amounts employees received as compared to each other in the same year." He more specifically claims that the unit employees received "individualized wage increases for the four years prior to 2018." However, as discussed above, the record evidence establishes that in each year during that period, the vast majority of unit employees received a wage increase in either the amount of $1 per hour or a smaller defined monetary amount, and which of those two amounts the employees received was specifically based on the criteria described above.[15] We simply cannot see how the specific wage increase amounts that each unit employee received during a given year can be described as "significantly variab[le]" or "individualized" in those circumstances. Moreover, the Board has never required that employees all receive the same amount as one another in any given year in order for an annual wage increase to become an established past practice. See *Omni Hotels*, 371 NLRB No. 53, slip op. at 2 (finding an established past practice where in one year, the employer provided a $0.46-per-hour wage increase to tipped employees and a $0.96-per-hour wage increase to non-tipped employees); *Mission Foods*, 350 NLRB at 337 fn. 6 (finding an established past practice where "[i]n 2000, employees received structural wage increases ranging from 1.56 to 7.10 percent; in 2001, the structural wage increases ranged from 3.17 to 7.69 percent").

Our dissenting colleague also contends that the annual October wage increase was not an established past practice because "there were extreme variations in the increases from year to year." The Board has never required that employees receive the same amount each year in order for an annual wage increase to be an established practice regularly expected by employees. See *Rural/Metro Medical Services*, 327 NLRB at 50 ("When an employer has an established practice of granting wage increases according to fixed criteria at predictable intervals, a discontinuance of that practice constitutes a change in terms and conditions of employment even if the amounts of increases have varied in the past."); see also *Eastern Maine Medical Center*, 253 NLRB 224, 242 (1980) ("That the specific amount of the increase was not fixed is not significant."), enfd. 658 F.2d 1 (1st Cir. 1981). To the contrary, the Board has often found annual wage increases to be established past practices where the amounts that the employees received varied from year to year. See, e.g., *Omni Hotels*, 371 NLRB No. 53, slip op. at 2 (finding an established past practice where from 2015 to 2018, employees received wage increases of 3 percent, 4 percent, $0.46 per hour for tipped employees/$0.93 per hour for non-tipped employees, and 3.5 percent, respectively); *Lee's Summit Hospital*, 338 NLRB at 841 fn. 3 (finding an established past practice where "[b]etween 1996 and 1999, the [employer] granted a general wage increase to the employees . . . in the amount of 2 percent, 2.5 percent, 3 percent, and 3 percent, respectively"). Moreover, there were not "extreme variations" in the amounts of the annual October wage increases from year to year. In fact, drivers who had worked for at least a year and were hired in 2011 or later received the same $1-per-hour wage increase each year from 2014 to 2017. The amounts of the wage increases

[14] McFarland may not have considered the methodology that he used to determine the amounts of employees' wage increases to be a "formal formula," but the unmistakable patterns that emerge upon review of the spreadsheets for the October 2014–2017 wage increases reveal the criteria that he used in making those determinations, and when McFarland's testimony is read in light of that documentary evidence, it is consistent with the criteria described above.

[15] Specifically, in 2014, three drivers who had worked for at least a year and were hired in 2011 or later received $1-per-hour wage increases, ten drivers who had worked less than a year or who were hired prior to 2011 received $0.50-per-hour wage increases, one coordinator received a $0.50-per-hour wage increase, and one driver who was hired prior to 2011 received a $1.03-per-hour wage increase. In 2015, five drivers who had worked for at least a year and were hired in 2011 or later received $1-per-hour wage increases, nine drivers who had worked less than a year or who were hired prior to 2011 received $0.50-per-hour wage increases, one coordinator received a $0.50-per-hour wage increase, and one coordinator received a $0.55-per-hour wage increase (as discussed above, driver Diaz is, without explanation, not listed on the spreadsheet for the October 2015 wage increase). In 2016, five drivers who had worked for at least a year and were hired in 2011 or later received $1-per-hour wage increases, eight drivers who had worked less than a year or who were hired prior to 2011 received $0.60-per-hour wage increases, one coordinator received a $0.60-per-hour wage increase, and one coordinator received a $0.66-per-hour wage increase (as discussed above, driver Carrillo is, without explanation, not listed on the spreadsheet for the October 2016 wage increase). In 2017, five drivers who had worked for at least a year and were hired in 2011 or later received $1-per-hour wage increases, nine drivers who had worked less than a year or who were hired prior to 2011 received $0.55-per-hour wage increases, two coordinators received $0.55-per-hour wage increases, one driver who had worked for at least a year and was hired in 2011 or later received a $0.95-per-hour wage increase, and one driver did not receive a wage increase because he was on a leave of absence. In sum, at least 91% of the unit employees who were actively working at the time that the October 2014, 2015, 2016, and 2017 wage increases went into effect received wage increases in amounts consistent with the criteria described above.

received by coordinators and drivers who had worked less than a year or who were hired prior to 2011 did vary somewhat from year to year, but they fell within a narrow range of $0.50 to $0.60 per hour.

Our dissenting colleague further claims that our assessment of the documentary evidence above, and in particular the spreadsheets for the October 2014–2017 wage increases, is "extremely misleading" and, in support, cites instances of employees receiving wage increases that he argues are inconsistent with our finding that the Respondent applied fixed criteria to determine the amounts of the unit employees' wage increases. However, he does not, and cannot, dispute our finding that at least 91 percent of the unit employees who were actively working at the time that the October 2014, 2015, 2016, and 2017 wage increases went into effect received wage increases in amounts consistent with the criteria we have described above.[16] Several of the examples that our dissenting colleague cites involve unit employees who had worked for the Respondent for less than a year at the time of the relevant wage increase and, consistent with the criteria described above, received the smaller wage increase amount given that year. Moreover, we have acknowledged the few occasions where unit employees received wage increases that were not consistent with the criteria described above, but we do not find that this very small number of outliers disproves that the annual October wage increase was an established practice regularly expected by the unit employees in October 2018.[17]

Our dissenting colleague more generally accuses us of having "essentially paint[ed] the bullseye around the arrow" (internal quotations omitted; alteration in original) in determining that the annual October wage increase was an established past practice by October 2018. We believe that our detailed analysis above speaks for itself and accurately characterizes the documentary evidence and testimony in the record before us. The source of the difference in perspective may be that our colleague characterizes the amounts of the annual October wage increases that employees received as defined percentages rather than defined monetary amounts. As discussed above, see fn. 12, McFarland testified that he did not use defined percentages to determine the amounts of the wage increases that unit employees received. Instead, with limited exceptions, he assigned each employee one of two defined monetary amounts for their wage increase each year (and which specific amount they received corresponded to the criteria discussed above). Thus, the wage increase percentages listed in the spreadsheets for the October 2014–2017 wage increases are after-the-fact calculations that did not influence or factor into McFarland's wage increase determinations. As a result, it is unsurprising that the wage increase percentages varied from employee to employee. By relying so heavily on those after-the-fact calculations, our dissenting colleague has essentially attempted to move the bullseye after the arrow has found its mark.[18]

The Respondent argues, and our dissenting colleague agrees, that this case is similar to *Arc Bridges, Inc. v.*

[16] Instead of disputing this calculation, our dissenting colleague simply reiterates his erroneous claim that the annual October wage increases were not "given in amounts consistent with any fixed criteria whatsoever."

[17] In challenging our assessment of the evidence, our colleague also cites several wage increases received by certain nonunit production employees. For example, he cites a nonunit production employee who was hired in 2008 and received a $2.34-per-hour wage increase in 2015 and two nonunit production employees who were hired less than a year before the October 2016 wage increase went into effect and received $0.60-per-hour wage increases that year. We have focused our analysis on the annual October wage increases received by *unit* employees because we are tasked with determining whether the General Counsel established that the annual October wage increase was an established practice regularly expected by those employees. We do not find the wage increases that nonunit production employees received to be particularly relevant to that determination. In any event, as mentioned above, the documentary evidence shows that the nonunit production employees typically received wage increases consistent with the criteria that the Respondent applied to the unit drivers. To be more specific, our colleague's examples notwithstanding, 88% of the nonunit production employees who were actively working at the time that the October 2014, 2015, 2016, and 2017 wage increases went into effect received wage increases consistent with the criteria that the Respondent applied to the unit drivers (and in fact the two $0.60-per-hour increases cited by our colleague are consistent with those criteria). We do not find that the few instances of nonunit production employees receiving wage increases that were inconsistent with those criteria undercut our finding that the annual October wage increase was an established practice regularly expected by the unit employees by October 2018.

[18] Our dissenting colleague claims that our analysis goes beyond the arguments made and the evidence cited by the General Counsel on exceptions, and, while conceding that this is appropriate under the Board's Rules, he questions "the extent to which the Board should act as a prosecutor." His remark is off base. First, he does not suggest—nor could he—that any due process concerns are implicated here, as we have primarily relied on exhibits jointly entered into evidence by the Respondent and the other parties and testimony elicited by the Respondent from McFarland, the management official whom the Respondent bestowed with the responsibility to adjust the unit employees' wages. Second, it is well established that the Board may find violations for different reasons or on different theories from those of the administrative law judge or the General Counsel where, as here, the unlawful conduct is alleged in the complaint, and the evidence establishes a violation under Board law. See *American Federation for Children, Inc.*, 372 NLRB No. 137, slip op. at 12 (2023); *Morgan Corp.*, 371 NLRB No. 142, slip op. at 2 & fn. 6 (2022); *Electrical Workers Local 58 (IBEW), (Paramount Industries, Inc.)*, 365 NLRB No. 30, slip op. at 4 fn. 17 (2017), enfd. 888 F.3d 1313 (D.C. Cir. 2018); *W. E. Carlson Corp.*, 346 NLRB 431, 434 (2006). But even that, while undisputedly proper, is more than we have done here. Rather, we have relied on the same evidence cited by the General Counsel in her answering brief and a rationale quite similar to the one she has put forward. Specifically, in arguing that the annual October wage increase was an established past practice, the General Counsel primarily relied on the spreadsheets for the 2014–2017 October wage increases—which, as discussed above, she has used to construct a chart displaying

NLRB, 861 F.3d 193 (D.C. Cir. 2017), and *Advanced Life Systems, Inc. v. NLRB*, 898 F.3d 38 (D.C. Cir. 2018), wherein the United States Court of Appeals for the District of Columbia Circuit held that the employers' statements about withholding raises or freezing wages if employees unionized did not establish 8(a)(3) violations given the specific facts of those cases. We disagree. Unlike in those cases, the Respondent here went beyond simply expressing its understanding of its obligations under the Act and instead repeatedly taunted the drivers with the potential loss of the October 2018 wage increase and linked that risk to the drivers' union support as a way to convince them to vote against the Union.[19] Thus, the Respondent's statements to unit employees regarding the October 2018 wage increase were not merely a consequence of "confusing questions of legality surrounding [the Respondent's] ability (or not) to continue such payments," *Advanced Life Systems*, 898 F.3d at 49, but instead were calculated to erode the unit employees' support for the Union. Moreover, both *Arc Bridges* and *Advanced Life Systems* expressly dealt with situations in which the wage increases at issue were not found to be an established past practice, whereas we have found the Respondent here had an established past practice of granting wage increases in October.

Finally, given that the annual October wage increase was an established past practice by October 2018 and thus a term or condition of the unit employees' employment, the Respondent has failed to establish that, as it claims, Section 8(a)(5) prohibited it from providing the October 2018 wage increase to the unit employees.[20] The Respondent has not raised on exceptions any other purportedly nondiscriminatory reason for why it withheld that wage increase from the unit employees. Thus, it has failed to establish that it would have withheld the October 2018 wage increase from the unit employees even in the absence of their union activities.

For these reasons and those discussed by the judge, we agree with the judge that the Respondent violated Section 8(a)(3) and (1) by withholding the October 1, 2018 wage increase from its unit employees.[21]

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the specific amounts of the October wage increases that each unit employee received from 2014 to 2017—and McFarland's testimony, just as we have done in our decision today. Further, the General Counsel describes the Respondent's methodology for determining the amounts of the annual October wage increases as follows:

> [McFarland] issued junior employees $1.00, and senior employees about $0.50, adjusting the senior employees' increase up or down to meet the "cap." The wage increases to the senior employees ranged from $0.50 to $0.60 and were consistent among all senior employees each year.

(Internal citations omitted.) Although we have described the criteria that McFarland applied to determine the amounts of the annual October wage increases that unit employees received with more precision and specificity than the General Counsel, we both have identified essentially the same methodology used by McFarland.

[19] Unlike in *Arc Bridges*, where the D.C. Circuit emphasized that the employer did not suggest that "the represented employees could capture the wage increase if they abandoned the [u]nion," 861 F.3d at 198, the Respondent's repeated preelection taunts that "October is coming" and its preelection statement that it could not "help [drivers] with raises" if they voted for the Union clearly implied that the unit employees would receive the October 2018 wage increase if they did not select the Union as their representative. The Respondent's statement that the drivers had been "this close" to getting a raise but would now get nothing because of their support for the Union confirmed that implication.

[20] Because we find that the October 2018 wage increase was a term or condition of the unit employees' employment, we find it unnecessary to address what the Respondent's obligation would have been with regard to the October wage increase if that wage increase had not been an established past practice.

[21] In addition to the Board's standard remedies for the unfair labor practices committed by the Respondent in this case, Member Prouty would also order the following remedies: (1) an extended 1-year notice-posting period; (2) a notice reading (with a copy of the notice provided to each employee immediately prior to the reading so that the employees can follow along if they choose as the notice is read aloud); (3) an explanation of rights (which would be read along with the notice, provided to each employee immediately prior to the reading, and posted for 1 year); and (4) the presence of supervisors and managers during the reading of the notice and explanation of rights. As discussed above and in the judge's decision, the Respondent violated Sec. 8(a)(3) and (1) by withholding the October 2018 wage increase from the unit employees at the Burbank facility and violated Sec. 8(a)(5) and (1) by making several changes to the unit employees' terms and conditions of employment without providing the Union notice and an opportunity to bargain and at a time when the Respondent had a duty to refrain from implementing any unilateral changes during the pendency of bargaining for an initial collective-bargaining agreement. Additionally, the Board has previously found that the Respondent committed unfair labor practices at a different facility. See *Airgas USA, LLC*, 366 NLRB No. 104, slip op. at 1–4 (2018) (finding that the Respondent violated Sec. 8(a)(4) and (1) by issuing a written warning to an employee in retaliation for filing unfair labor practice charges with the Board), enfd. 916 F.3d 555 (6th Cir. 2019); *Airgas USA, LLC*, 366 NLRB No. 92, slip op. at 1 fn. 2 (2018) (finding that the Respondent violated Sec. 8(a)(4) and (1) by withholding holiday pay from the same employee "because of his activity in the filing and litigation of unfair labor practice charges"), enfd. mem. 760 F. App'x 413 (6th Cir. 2019). Member Prouty views the Respondent's unlawful withholding of the October 2018 wage increase as particularly egregious because the Respondent repeatedly taunted the unit drivers prior to the election with the prospect of withholding the October 2018 wage increase in order to dissuade them from selecting the Union as their representative and announced on the day of the election that union-represented employees would not receive the October wage increase. This unlawful conduct involved an important bread-and-butter issue, which employees often seek union representation to improve, and it affected all of the employees in the unit. The Respondent's unlawful withholding of the October 2018 wage increase is likely to have a particularly long-lasting effect, as each time over the last 6 years that the unit employees have received a paycheck without this customary wage increase, "they were reminded of the Union's ineffectiveness in preserving such raises, let alone in obtaining additional wage increases." *Denton County Electric Cooperative, Inc. d/b/a CoServ Electric*, 366 NLRB No. 103, slip op. at 3 (2018), enf. denied in part 962 F.3d 161 (5th Cir. 2020). The Respondent's unlawful unilateral changes during negotiations for an initial collective-bargaining agreement would have further undermined the unit employees' confidence in the Union's ability to preserve, let alone

ORDER

The National Labor Relations Board orders that the Respondent, Airgas USA, LLC, Burbank, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withholding wage increases from the unit employees because they engage in union activities.

(b) Making unilateral changes to the unit employees' terms and conditions of employment at a time when the Respondent and International Brotherhood of Teamsters Wholesale Delivery Drivers, General Truck Drivers, Chauffeurs, Sales, Industrial and Allied Workers Local 848 (the Union) are not at a valid impasse in bargaining.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment for unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> Included: All full-time and regular part-time route drivers, distribution drivers, inventory specialists and dispatchers with commercial driver licenses employed by Airgas USA, LLC working out of its facility currently located at 10675 W. Vanowen St., Burbank, CA 91505; Excluded: All other employees, office clericals, professional employees, confidential employees, managerial employees, guards, and supervisors as defined by the Act, as amended.

(b) To the extent that it has not already done so, rescind the unilaterally implemented reduction in the unit employees' working hours, changes of the unit employees' work schedules, and reduction in the amount of overtime work offered to the unit employees, and continue these terms and conditions of employment in effect until the parties reach an agreement or a good-faith impasse in bargaining.

(c) Make unit employees whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms, suffered as a result of the unlawful withholding of the October 1, 2018 wage increase and the unlawful unilateral changes to schedules, hours, and overtime, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d) Within 14 days from the date of this Order, offer Cameron Desborough full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(e) Make Cameron Desborough whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms, suffered as a result of his unlawful layoff, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoff of Cameron Desborough, and within 3 days thereafter, notify him in writing that this has been done and that his unlawful layoff will not be used against him in any way.

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improve, their terms and conditions of employment. In these circumstances, Member Prouty believes that the reading and posting for an extended 1-year period of the notice and an explanation of rights—which would set forth the employees' core rights under the Act, coupled with clear general examples that are specifically relevant to the unfair labor practices found in this case—is necessary to dissipate fully the lingering coercive effects of the Respondent's unlawful actions and to reassure the unit employees that they can exercise their Sec. 7 rights free of coercion going forward. Specifically, the reading of the notice and explanation of rights would be an "'effective but moderate way to let in a warming wind of information and, more important, reassurance.'" *United States Service Industries*, 319 NLRB 231, 232 (1995) (quoting *J. P. Stevens & Co. v. NLRB*, 417 F.2d 533, 540 (5th Cir. 1969)), enfd. mem. 107 F.3d 923 (D.C. Cir. 1997). The extended posting period would "better help mitigate . . . the chilling 'lore of the shop'" that has likely developed over the many years that these unfair labor practices have remained unremedied. *Pacific Beach Hotel*, 361 NLRB 709, 714 (2014) (quoting *Bandag, Inc. v. NLRB*, 583 F.2d 765, 772 (5th Cir. 1978)), enfd. in relevant part sub nom. *HTH Corp. v. NLRB*, 823 F.3d 668 (D.C. Cir. 2016). Finally, given that numerous managers and supervisors taunted drivers with the prospect of withholding the October 2018 wage increase to dissuade them from voting for the Union, Member Prouty believes that requiring the presence of supervisors and managers during the reading of the notice and explanation of rights would also help to dispel the coercive effects of the Respondent's unfair labor practices. Their presence would not only convey to employees that their supervisors and managers are responsible for adhering to the Act but would also instruct those supervisors and managers regarding their own substantive obligations under the Act, thereby deterring future unfair labor practices. See id. at 716.

While, for the reasons discussed above, Member Prouty believes that a notice reading is particularly warranted in the present case, he urges the Board to adopt a reading of the notice to employees aloud at a group meeting, in the employees' own language or languages, accompanied by the distribution of the notice at the start of the meeting, as a standard remedy for unfair labor practices found by the Board. See *CP Anchorage Hotel 2 d/b/a Hilton Anchorage*, 371 NLRB No. 151, slip op. at 9–15 (2022) (Member Prouty, concurring), enfd. 98 F.4th 314 (D.C. Cir. 2024). Member Prouty believes that the mere posting of the notice on a bulletin board is always an inadequate, inferior, and outdated method for the Board to fulfill its responsibility to fully remedy unfair labor practices because "notice posting leaves too many ways for the notice to go unobserved, unread, and not understood by employees." Id., slip op. at 11. "If the Board is determined to ensure that, notwithstanding the employer's past unfair labor practices, employees feel free going forward to exercise their rights under the Act, employees must be fully informed that unlawful conduct occurred in their workplace and that it will be remedied." Ibid.

(g) Compensate all affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 31, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each affected employee.

(h) File with the Regional Director for Region 31, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 forms reflecting the backpay award.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Post at its Burbank, California facility copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 20, 2018.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 18, 2024

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Lauren McFerran, Chairman

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David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, dissenting in part.

My colleagues find that the Respondent violated Section 8(a)(3) and (1) by discriminatorily withholding a wage increase from a unit of employees that the Union was seeking to represent. This finding not only relies on a flawed analysis of the facts, but also ignores that had the Respondent given this wage increase, it would have risked violating other provisions of the Act, thus placing it in an impossible situation. Additionally, the majority finds that the Respondent violated Section 8(a)(5) and (1) when it laid off driver Cameron Desborough without providing the Union with notice or an opportunity to bargain. Unlike my colleagues, however, I find that the Respondent provided the Union with sufficient notice rather than a mere fait accompli. Therefore, I must respectfully dissent in part.[1]

[22] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] I agree with the majority that the Respondent violated Sec. 8(a)(5) and (1) when it unilaterally adjusted drivers' schedules, reduced their hours, and changed overtime policies without affording the Union notice or an opportunity to bargain. In finding these 8(a)(5) violations, my colleagues, in addition to the judge's rationale, reason that these unilateral changes were impermissibly made, as described in *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), during bargaining for a collective-bargaining agreement absent an overall impasse over the whole agreement. For the reasons described in fn. 13, infra, I do not join this additional rationale as to the reduced hours or changed overtime policies. Additionally, I join Chairman McFerran in finding that the Union's request for extraordinary remedies—including an extended notice posting period, a notice reading with the Union present and allowed to record the

I. BECAUSE THE OCTOBER 2018 WAGE RAISES WERE NOT BASED UPON AN ESTABLISHED PAST PRACTICE, THE RESPONDENT DID NOT VIOLATE SECTION 8(A)(3) AND (1) BY WITHHOLDING THEM

From 2013 to 2017, the Respondent generally gave annual wage increases to both production employees and drivers, but the specifics were not consistent. The timing of this raise varied from year to year, sometimes occurring as early as April or, as became more common, as late as October. Raises averaged anywhere from 2 to 4 percent, but some employees' raises fell above or below that range. The amount varied from employee to employee.

On September 20, 2018, the Respondent's national leadership announced that it would be granting a nationwide wage increase, and it gave full discretion to regional management to determine the exact raise each individual employee would receive. From 1997 through 2017, Vice President of Operations for the West Region Scott McFarland had made these determinations for the Burbank facility at issue, but in 2018, President of Operations for the West Region Cory Garner took over this role. Garner testified that he implemented a new formula for calculating raises in 2018, though, as the judge observed, his "unpersuasive testimony failed to establish how his new formulation varied in any significant way from the manner in which McFarland had decided to parcel out the raises in the past—a process which Garner admitted he did not review, let alone understand." The wage increases decided on by Garner went into effect on October 1 and ranged from 42 to 77 cents per hour. Unlike in previous years, however, the Respondent gave this raise only to production employees, not drivers.[2]

The timing of the 2018 wage increases overlapped with the drivers' unionization efforts. In the month leading up to the election, management made numerous statements to employees suggesting that they could not "help [drivers] with raises" if they voted for the Union and cautioned them, "October is coming." Management also stated that because of the Union, there was a "freeze" preventing drivers from receiving raises. One manager told an employee, "[I]f you guys vote the Union in tomorrow, it's going to get ugly."[3]

The majority applies *Wright Line* and finds that the Respondent violated Section 8(a)(3) and (1) by failing to give the October wage increases to drivers.[4] In doing so, they use the Respondent's numerous statements to drivers about not receiving their October wage increases as evidence of animus. As explained in greater detail below, however, these statements are not proper evidence of animus unless the October wage raises were an established past practice. See *Advanced Life Systems, Inc. v. NLRB*, 898 F.3d 38 (D.C. Cir. 2018); *Arc Bridges, Inc. v. NLRB*, 861 F.3d 193 (D.C. Cir. 2017). My colleagues find that it was a past practice. I respectfully disagree.

Factors to consider in analyzing an established practice include the timing of the pay increases as well as "'the number of years the program has been in place, the regularity with which raises are granted, and whether the employer used fixed criteria to determine whether an employee will receive a raise, and the amount thereof.'" *Omni Hotels Management Corp.*, 371 NLRB No. 53, slip op. at 3 (2022) (quoting *Rural/Metro Medical Services*, 327 NLRB 49, 51 (1998)). In *Omni Hotels*, the Board found an 8(a)(5) violation because of the Respondent's established practice of issuing across-the-board wage increases for 5 consecutive years on September 1, with that increase being either a defined percentage (3 percent for all hourly employees in 2015, 4 percent for all hourly employees in 2016, and 3.5 percent for all hourly employees in 2018) or a defined monetary amount ($0.46 for all hourly tipped employees and $0.93 for all hourly nontipped employees in 2017). Id., slip op. at 2–3, 6. These raises were based on clear "fixed criteria" such as "economic conditions in the hotel industry, specifically its own economic performance and the wages offered by its competitors, as well as any statutory minimum wage requirements." Id., slip op. at 4.

Although drivers had received wage increases every year for the years 2013 to 2017, I disagree with my colleagues' conclusion that the General Counsel met her burden to establish that the Respondent used sufficiently fixed criteria to determine the amounts of these raises.[5] In

meeting, distribution of an Explanation of Rights document, and a broad cease-and-desist order—is unnecessary, as the standard remedies that the judge ordered are sufficient.

[2] I join the majority in not finding that the Respondent's withholding of the October wage increase also violated Sec. 8(a)(5) and (1) or that its failure to provide a market adjustment in September violated Sec. 8(a)(3), (5), and (1), which were not alleged in the complaint.

[3] In an agreement containing a non-admission clause, the parties informally settled the General Counsel's allegation that the Respondent's statements regarding the wage increase were 8(a)(1) threats.

[4] The judge primarily reasoned that the Respondent violated Sec. 8(a)(3) and (1) by withholding the wage increase because its failure to continue the established past practice was "inherently destructive" of employees' Sec. 7 rights under *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). My colleagues wisely do not rely on that rationale. There is simply no relevant case law applying this standard to a similar scenario, and the judge acknowledged that he could only cite cases that do not "directly rely[] on the 'inherently destructive' doctrine."

[5] As noted above, the General Counsel failed to establish that the raises took place every year at the same time. Prior to 2014, the raises had been awarded at various times of the year. For the years 2014 to

fact, the record establishes that the Respondent had a great deal of discretion over the employee wage increases. Unlike in cases such as *Omni Hotels*, where the employers' calculations resulted in a fixed, across-the-board increase each year, the Respondent's employees received individualized wage increases for the 4 years prior to 2018,[6] and the General Counsel did not establish by a preponderance of the record evidence how the Respondent made these calculations. Garner's testimony regarding calculations both before and after he started handling raises was not meaningfully clear, and the General Counsel did not provide sufficient testimonial or documentary evidence to clarify the Respondent's methodology. McFarland, who handled the calculations prior to 2018, even *admitted* under oath that there was "no formal formula" or methodology in place, and it is clear that there were extreme variations in the increases from year to year. For example, employees at the facility received anywhere from a 1.92 percent increase to a 9.76 percent increase in 2015, yet in 2016 they received anywhere from a 2.25 percent increase to a 4.5 percent increase. Because of the variability between increases and the lack of a set formula in making the calculations, the General Counsel failed to prove that the Respondent had been using sufficiently fixed criteria to constitute an established practice.

In coming to the opposite conclusion, my colleagues provide a detailed explanation about the amounts of the annual raises in an effort to demonstrate that they were fixed. In reality, however, the amounts were anything but fixed, with the record showing significant variations from year to year. Because the judge largely discredited Garland's incoherent attempts to explain his methodology,[7] the majority is forced to make the raises seem fixed by piecing together McFarland's testimony with various exhibits. Although they paint a seemingly clean picture of the Respondent's calculations, this picture is inconsistent with a full reading of the record. For example, my colleagues pull together discrete portions of McFarland's testimony into a bullet-point list of the supposed "formula" that he applied; however, they completely ignore McFarland's direct admission that he used "no formal formula" in calculating increases. Although McFarland did testify that he would "try and move the younger guys up that were strong performers," the majority does not acknowledge his later testimony explaining that his goals for which types of employees to focus on changed from year to year: "[T]here were years where it was a percent and a half, or we're going to take care of hourly employees right now, depending on the business year, and hold off on salaried employees to go on a later date."

Additionally, in an attempt to downplay how the Respondent's national senior executive leadership merely provided guidance to the regions about the amounts of annual increases each year, the majority focuses on how McFarland chose to treat those national guidelines as a true "cap" when calculating raises for employees at the Burbank facility. But other key pieces of McFarland's testimony—such as how in some years he didn't use the full "cap" and held back money so that he could give additional raises later in the year—contradict the idea that he treated it as a true "cap." The record does not establish why he held back money in some years or how much he held back. The majority categorizes this as "limited discretion," but the General Counsel failed to prove that there was anything "limited" about his discretion. This highlights how messy, and seemingly arbitrary, the Respondent's supposed "methodology" really was.

My colleagues rely extensively on documentary evidence that supposedly establishes a past practice. Respectfully, I have examined that documentary evidence closely and find the majority's assessment of it extremely misleading. They focus heavily on four charts, admitted as joint exhibits, showing the wage increases for each employee from 2014 through 2017. But I am at a loss for how those charts clearly establish any sort of fixed criteria for determining which employees would receive which raise amounts. My colleagues criticize my reliance on the wide differences in the percentages of the increases listed in these charts, but even setting aside the vast percentage ranges, the individual dollar amounts that the majority relies on are not any clearer. Looking first at the 2014 chart, the raises ranged from $0.50 to $1.03. Job title clearly did not dictate how much each employee received.[8] For example, some employees listed as "Driver—Class A Local" received $0.50, some received $1, and some received $1.03. Additionally, contrary to the testimony from

2018, the raises were awarded in October, and then in 2019, the raises reverted back to being paid earlier in the year. Although the record evidence regarding the timing of the raises isn't entirely clear, what is clear is that the General Counsel did not meet her burden to establish by a preponderance of the evidence that the Respondent paid employee wage increases at the same time every year for a sufficient number of years leading up to 2018.

[6] The judge found that "testimonial evidence strongly suggests that prior to 2013 [the] Respondent had . . . given across-the-board wage increases to its production employees and drivers on a regular basis."

[7] The judge observed, "Garner's contradictory testimony . . . did not help his credibility, as he left the impression that he was seeking to avoid admitting facts that he believed might be detrimental to Respondent's case."

[8] Although the majority does not suggest that different job titles accounted for the differences in wage increases among various employees, I looked at that factor anyway to see if perhaps it could explain these otherwise unexplainable differences. It did not.

McFarland that the majority relies on, there is also no discernible correlation between the amounts given and the date an employee was hired. As I explained above, McFarland testified that he would "try and move the younger guys up that were strong performers that we wouldn't want to lose as quickly as [he] could, while still being able to provide an increase to others." This testimony suggests that the exhibits the majority relies upon should show that newer hires received the larger raises and employees who had been with the company longer received smaller raises. But the chart does not show any such recognizable pattern; the two most recent hires received $0.50, several 2013 hires received $1, a 2012 hire received $0.50, a 2011 hire received $1, and an employee hired all the way back in 2003 received $1.03. After reviewing the 2014 chart, it is clear that there is no discernible pattern based on job title, date of hire, or any other listed factor.

The 2015 chart indicates the same lack of any fixed criteria. As the majority acknowledges, the 2015 chart does not note the specific dollar amount of the raise for each employee. Instead, it lists each employee's "current rate," their "step pay banding" rate, their increase percentage, and a "total pay" column. The majority has decided that, because the "step pay banding" column in the 2015 chart matches the amounts listed in the "current pay" column of the subsequent 2016 chart, the "total pay" column in the 2015 chart must be inaccurate, and the dollar amount of the 2015 increase should be calculated by subtracting the 2015 "current rate" from the "step pay banding" column instead of from the "total pay" column. First, such blatant inaccuracies and contradictions within the charts the majority holds up as key evidence of a past practice are troubling and further demonstrate that the General Counsel did not meet her burden. Second, my colleagues have seemingly decided to take it upon themselves to reconcile the inaccuracies and contradictions within these key pieces of evidence, when it should have been the General Counsel's job to cleanly explain these errors and note which columns to rely upon, which to disregard, and why.[9] But instead, she left it to the Board to try and cobble together the correct information. Third, even assuming the majority's decision about which columns in the 2015 chart to rely upon and which to disregard is correct, it does not paint the clear picture the majority claims. Like with the 2014 chart, there are no obvious correlations between job title and the dollar amount of the raise. For example, one employee with the business title "Operator—Production III" received $2.34, while another employee with the exact same title received only $0.50. Nor does there appear to be a consistent correlation between the amounts received and dates hired. For example, although the majority says that this documentary evidence supports McFarland's testimony that he tried to pay newer hires a greater increase, the employee who received $2.34—the largest raise—was hired in 2008, yet another employee hired in 2008 received only $0.50, as did the most recently hired employee (aside from the one who was hired after the 2015 raise was given and therefore understandably did not receive any raise).[10] In light of these discrepancies, the majority's reliance on this chart to establish a past practice is baffling.

The 2016 chart also fails to clearly establish fixed criteria. Like with the previous charts, there is no discernible correlation between the amounts given to employees with the same title. Of the four charts, this one does align the most plausibly with McFarland's testimony about giving newer employees the larger increases, but there are still unexplained discrepancies. For example, of the five employees hired in 2015, three received the highest increase of $1 increase, and two received the lowest increase of $0.60. And when viewing the 2016 chart in light of the blatant lack of any fixed criteria in the 2014 and 2015 charts, it is simply insufficient to establish a past practice.

The 2017 chart is equally unhelpful. This is the first chart to include a column regarding each employee's performance rating, though that column is blank for several employees, and it does not seem to explain the variations in the increases. The raises for employees who scored "excellent" spanned the full available range of $0.55 to $1, just like employees who scored "good—solid." Those appear to be the only two scores given. Like in previous years, job title did not seem to factor into the amount an employee received. And, like with the 2014–2016 charts, it is not evident that McFarland consistently gave newer hires larger increases; many of the 2016 and 2017 hires received $0.55, while drivers hired as far back as 2014 received the highest raise of $1, and one of the 2011 hires received $0.95.

Essentially, it is not clear from the record that the General Counsel proved there was any fixed, consistently applied criteria for determining the raise amount that each employee received in the 4 years prior to the year at issue.

[9] Although the General Counsel's answering brief contained a chart that she made compiling the supposedly correct numbers, she never acknowledged or explained the errors in the underlying exhibit that she used to create this chart.

[10] My colleagues criticize my inclusion of nonunit employees as examples of wage increases that did not follow any readily identifiable fixed criteria. But the Respondent did not assert that it treated unit and nonunit employees differently when calculating raises, nor could it have, as there was no such thing as a "unit" or "nonunit" employee before the organizing campaign began in 2018. Therefore, these extreme outliers still undermine the General Counsel's contention that a past practice existed.

McFarland did testify that, in addition to trying to give newer hires larger raises, he also considered "accident avoidance," but these charts do not readily reflect that consideration, nor did the General Counsel elicit any details about how he supposedly factored in "accident avoidance" or whether this additional consideration explains the extreme discrepancies on display in these charts.[11]

By patching together individual pieces of an unclear record, the majority has essentially "paint[ed] the bullseye around the arrow." *Advanced Life Systems*, 898 F.3d at 48 ("The question under *Katz* is not whether numbers could be averaged in hindsight, but whether a 'long-standing' practice of predetermined payments to individual employees was so ingrained in the workplace as to lead to 'automatic wage increases' for individual employees." (internal citations omitted)). Although their picture seems clear, it is unsupported by the record, which shows significant variability both in the amounts employees received as compared to each other in the same year, and in the amounts employees received from year to year. My colleagues, in turn, accuse me of "essentially attempt[ing] to move the arrow after the bullseye has found its mark," but they ignore that the General Counsel had the burden to hit the bullseye in the first place, and she did not. After reading McFarland's testimony—which did not establish a clear process by which he calculated wage increases—and reviewing the related record evidence, the General Counsel did not establish by a preponderance of the evidence that there was anything akin to a fixed formula or methodology in place.[12] Therefore, I would not find that the General Counsel met her burden to establish that the October wage raises were awarded based on an established past practice.[13]

Because I find no past practice, I would not find that the Respondent's statements to drivers—such as their inability to "help [drivers] with raises," "October is coming," and that there was a wage "freeze"—showed animus. The judge, and the General Counsel, relied heavily on previous Board cases such as *Advanced Life Systems, Inc.*, 364 NLRB 1711 (2016), and *Arc Bridges, Inc.*, 362 NLRB 455 (2015), both of which found violations of Section 8(a)(3) for withholding wage increases based on similar management statements, even if the wage increases there were not established past practices. The D.C. Circuit, however, reversed the Board in both of those cases, pointing out an issue that the Board had not addressed: if the wage increase was not a past practice, then giving the wage increase would put the employer at risk of violating Section 8(a)(5) by changing employees' compensation without affording the union notice and an opportunity to bargain. *Advanced Life Systems*, 898 F.3d 38; *Arc Bridges,* 861 F.3d 193. The Board's holding in those cases had put employers in an impossible position: give the wage increase and violate Section 8(a)(5), or withhold it and violate Section 8(a)(3). Therefore, the D.C. Circuit held in *Advanced Life Systems* that statements the employers made to employees about having to freeze wages and being unable to give raises if employees unionized were "too thin a reed on which to hang a finding of anti-union animus," and the General Counsel was not permitted to "bootstrap[]" these statements "into evidence of actual discriminatory intent on [the employer's] part given the confusing questions of

[11] I note that my colleagues' analysis goes beyond the arguments made, and evidence cited, by the General Counsel in her brief. Which, under the Board's Rules, is appropriate, although one could question the extent to which the Board should act as a prosecutor when the General Counsel fails to sufficiently make her case. Conversely, my colleagues criticize my reasoning with regard to the layoff of driver Cameron Desborough, discussed infra, because the Respondent submitted "bare exceptions." As I have previously explained, the Board's Rules do not prohibit the Board from analyzing issues, so long as an appropriate exception has been filed. See *Hilton Hotel d/b/a Hilton Hawaii Village*, 372 NLRB No. 61, slip op. at 15 fn. 12 (Member Kaplan, dissenting) (concluding that "even when parties make exceptions that do not contain *any* supporting argument, the Board still has the option to consider those exceptions"); accord *Troy Grove, Inc.*, 372 NLRB No. 94, slip op. at 11 fn. 34 (2023) (Member Kaplan, dissenting in part) ("Sec. 102.46(a)(1)(ii) of the Board's Rules and Regulations indicates that *exceptions* not raised by a party '*will* be deemed to have been waived.' (Emphasis added.) The second sentence of Sec. 102.46(a)(1)(ii), in turn, states that exceptions that are raised but fail to conform with the requirements of Sec. 102.46(a)(1)(i)—including Sec. 102.46(a)(1)(i)(D), pertaining to bare exceptions containing no supporting argument—'*may* be disregarded.' Sec. 102.46(a)(1)(ii) (emphasis added). In other words, even when parties make exceptions that do not include *any* supporting argument, the Board still has the option to consider those exceptions. And if the Board has the option to consider exceptions that lack supporting argument, the Board must have the authority to decide those exceptions based on its own legal analysis.").

Furthermore, I note that a judge on the Third Circuit has recently explained why my colleagues' view of the Board's Rules may not be supported by the Act or consistent with the Administrative Procedure Act. *New Concepts for Living, Inc. v. NLRB*, 2024 WL 904486 (3d Cir. Mar. 4, 2024) (J. Krause, concurring) (warning that courts should view the Board's rules with regard to acceptable exceptions, 29 CFR § 102.46, "with skepticism" and noting that those rules may be inconsistent with the Act itself).

[12] The majority boldly and incorrectly asserts that I "do[] not, and cannot, dispute [their] finding that at least 91% of the unit employees who were actively working at the time that the October 2014, 2015, 2016, and 2017 wage increases went into effect received wage increases in amounts consistent with the criteria we have described above." For the reasons already explained above in great detail, I absolutely dispute that these wage increases were given in amounts consistent with any fixed criteria whatsoever.

[13] I note that my colleagues today are inarguably establishing the precedent that, as found by the judge, wage increases over a 4-year period that "rang[ed], approximately, from between 2 to 4 %, with a few limited exceptions that were either below or above those thresholds" were sufficient to establish a past practice under *NLRB v. Katz*, 369 U.S. 736 (1962).

legality surrounding [the employer's] ability (or not) to continue such payments." 898 F.3d at 48–49. Similarly, the D.C. Circuit held in *Arc Bridges* that management's statements that the company would not be providing a planned 3 percent wage increase because employees unionized were improper evidence of antiunion animus. See 861 F.3d at 205.

Because the October wage increase was not an established past practice, I believe that the same tension between Section 8(a)(3) and (5) present in those cases also exists here. Therefore, I would not consider any of the Respondent's statements about the wage raises to be evidence of antiunion animus. It is undisputed that the drivers engaged in union activity and that the Respondent knew of that activity. But because management's specific statements about its inability to provide a wage increase if employees unionized, "without more[,] . . . cannot be bootstrapped into evidence of actual discriminatory intent on [the Respondent's] part," *Advanced Life Systems*, 898 F.3d at 48–49, the General Counsel failed to show animus. I would thus find that she did not meet her initial *Wright Line* burden and dismiss the 8(a)(3) and (1) allegation.

My colleagues attempt to neatly avoid the D.C. Circuit's reasoning in *Advanced Life Systems* and *Arc Bridges*, as well as the tension between Section 8(a)(3) and (5), by cobbling together a past practice where none existed. An employer would not be at risk of violating Section 8(a)(5) if it were continuing a past practice. But because there was no past practice here, finding that the Respondent acted unlawfully in withholding the wage increases essentially forces employers to choose between withholding a wage increase and violating Section 8(a)(3), or giving the wage increase and violating Section 8(a)(5). The majority highlights differences between the statements management made here and those made in *Arc Bridges* and *Advanced Life Systems*; in doing so, my colleagues suggest that management in those cases simply expressed their genuine understanding about their obligations under the Act. Although I agree that the statements in this case are different, I do not think they are *sufficiently different* to warrant a disparate outcome. My colleagues overlook that in *Advanced Life Systems*, the D.C. Circuit did not refuse to consider management's statements about wages because those statements were benign or accurate; on the contrary, the D.C. Circuit upheld the Board's finding that management's statements constituted unlawful threats under Section 8(a)(1). Therefore, even if my colleagues were correct that the Respondent "repeatedly taunted" the drivers, I do not believe the specific statements that it made, without more, are proper evidence of animus given the circumstances.

II. DRIVER DESBOROUGH'S LAYOFF WAS NOT A FAIT ACCOMPLI AND DID NOT VIOLATE SECTION 8(A)(5) AND (1)

On April 24, 2020, the Respondent informed the Union via letter that because of rapidly declining business volumes brought on by the COVID-19 pandemic, layoffs would occur at some facilities in inverse order of seniority. The letter stated that driver Cameron Desborough was the last driver hired in Burbank and would thus be laid off on April 29, though he could be recalled according to seniority if the recall occurred within 12 months of his layoff. The letter also explained that nonunion employees subject to a reduction-in-force policy were being separated from the company and thus were receiving a severance package instead of recall rights, and it asked the Union to notify the Respondent immediately if its members would prefer a severance package to recall rights. The letter ended with, "[A]lthough unexpected economic exigencies continue to compel rapid implementation of these mitigation measures, please take notice that Airgas remains willing to bargain over this matter, should the Union request it, regardless of the implementation date. Please contact me immediately if you wish to discuss."

Union Business Agent Tom Tullius responded later that day asking for a copy of the severance agreement being offered under the reduction-in-force policy so he could advise his members accordingly, and he proposed that any laid off drivers be allowed to keep their health benefits for two months. Tullius reiterated his request for a copy of the severance agreement on April 27, and the next day, the Respondent provided Tullius with the requested information and noted that it was considering his proposal regarding health benefits. On April 29, the Respondent called Tullius to inform him that the Respondent would not be extending health benefits to laid-off employees. That same day, the Respondent officially laid off Desborough, who chose recall rights over the severance package. When the Respondent offered to recall Desborough to the Alameda facility several months later, he declined because it was too far away from his home in Burbank, and he was already working for another employer.

Although my colleagues are correct that the Respondent had a duty to engage in decisional bargaining over the layoff, I disagree with their finding that the letter notifying the Union of layoffs was a mere fait accompli which foreclosed decisional bargaining. When assessing 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 decisionmaking process, not the Union's subjective impression. *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993). An employer's decision is not a fait accompli

simply because it "propose[s] [a] change in terms and conditions of employment as a fully developed plan or . . . use[s] positive language to describe it." *Haddon Craftsmen*, 300 NLRB 789, 790 (1990), rev. denied mem. sub nom. *Graphic Communications Workers Local 97B v. NLRB*, 937 F.2d 597 (3d Cir. 1991). In contrast, statements conveying an irrevocable decision constitute significant evidence that bargaining would be futile. See, e.g., *UAW-Daimler Chrysler National Training Center*, 341 NLRB 431, 433 (2004) (finding a fait accompli when the employer told the union that a layoff was a "done deal"). Additionally, the Board must "evaluate[] 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." *Pacific Maritime Assn.*, 367 NLRB No. 121, slip op. at 24–25 (2019) (internal citations omitted), enfd. 967 F.3d 878 (D.C. Cir. 2020).

The judge's analysis, which my colleagues adopt, focuses heavily on the end of the letter, particularly the phrase "regardless of the implementation date." My colleagues agree with the judge's interpretation that this meant the Respondent was only willing to engage in effects bargaining, not decisional bargaining. Although the letter proposed a fully developed plan and used positive language to describe it, I do not believe the language communicated an irrevocable decision such that bargaining would be futile. After all, the Respondent told the Union that "Airgas remains willing to bargain *over this matter* . . . regardless of implementation date" (Emphasis added.) This is hardly the statement of an employer that wants to foreclose bargaining over the decision itself. Rather, the Respondent was clearly communicating to the Union that no matter how soon the layoff was scheduled to occur, the Respondent would still bargain over any aspect of the layoff at the Union's request, including the decision itself. The letter did not say anything implying that this was a "done deal."[14] The majority also ignores that the Respondent provided the documentation Tullius requested and took time to consider his health benefits proposal, suggesting that the Respondent was willing to bargain in good faith and further undermining any accusation of a fait accompli.

Additionally, my colleagues rely on *Pontiac Osteopathic Hospital*, 336 NLRB 1021 (2001), to support finding that the Respondent's use of the word "will"—presumably referring to the phrase, "[T]he following individuals *will* be separated[.]" (emphasis added)—necessitates finding a fait accompli. Not only has the Board been clear that the mere "use[] [of] positive language to describe [a change]" does not make it a fait accompli, *Haddon Craftsmen*, 300 NLRB at 790, but *Pontiac Osteopathic Hospital* is readily distinguishable. In that case, the respondent sent the union a letter stating in part, "It is the intention of [the respondent] to *unilaterally implement* several wage and benefit revisions which would affect classifications both represented and not represented by the [union]," and it attached a memorandum stating that "several revisions and clarifications to the administration of [the respondent's paid-time-off] program *will* be implemented." *Pontiac Osteopathic*, 336 NLRB at 1021 (emphases added). The language in that letter and memo is therefore quite distinct from the language in this letter. Instead of promising to bargain over the change like the Respondent did here, the employer firmly stated that it was making a unilateral change to employees' benefits, and the Board heavily relied on that language about a unilateral change in finding a fait accompli. In a case involving such unequivocal language, it makes much more sense to interpret the word "will" as a fait accompli. But it does not make sense to interpret "will" so strictly here where the Respondent did not blatantly tell the Union that this would be a "unilateral change."

A recent Board case which provides a much more helpful comparison in assessing a fait accompli is *Cascades Containerboard Packaging—Niagara*, 370 NLRB No. 76 (2021). There, the judge found that the notice was devoid of "any language suggesting the slightest willingness to bargain," slip op. at 15, and in affirming the judge's finding of a fait accompli, the Board relied on "the fact that there were two rounds of layoffs . . . and the [r]espondent proceeded with the second round after having received the Union's request to bargain," slip op. at 1 fn. 1. In contrast, the Respondent's letter in this case repeatedly specified its

[14] My colleagues' analysis centers on their decision to emphasize the Respondent's use of the word "procedure" in the letter: "the Respondent 'remain[ed] willing to bargain over any aspect of this layoff *procedure* if the Union requests' (emphasis added)." However, when one reads the letter in its entirety, it would be equally if not more appropriate to place a different emphasis: The Respondent "remain[ed] willing to bargain *over any aspect* of this layoff procedure if the Union requests" (emphasis added).

In any event, my colleagues' focus on one word within the letter fails to view the letter holistically, especially in light of the end, which expressly states that "Airgas remains willing to bargain over this matter," which could just as easily imply a willingness to bargain over the layoff itself as it could imply a willingness to only bargain over the effects of the layoff. This is the fundamental problem with my colleagues' position: the Act is meant to *encourage* bargaining. By asserting that, when presented with an express and, at worst, ambiguous opportunity to bargain from an employer, a union is free to "read between the lines" and infer a fait accompli, my colleagues do real damage to the underlying purpose of the Act.

willingness to bargain over the layoffs. Also, unlike in *Cascades Containerboard* where the notice contained no details about which employees would be laid off or how they had been selected, id., slip op. at 16, the Respondent's letter provided numerous details about who had been selected and why, thus giving the Union a meaningful opportunity to bargain over the specifics of the layoffs.

Furthermore, the Respondent's letter provided the Union with sufficient time to bargain, which weighs against finding a fait accompli. The Respondent sent the letter on April 24, and the layoff went into effect on April 29, giving the Union a 5-day bargaining window. *Cascades Containerboard* is again instructive. There, the Board held that giving the union 6 days' notice was insufficient under Section 8(a)(5); however, the Board clarified that there is no "bright-line rule" regarding timing, and "[u]nder other circumstances," 6 days' notice "might have been sufficient." Id., slip op. at 1 fn. 1. The Board explained that 6 days' notice was insufficient in that case specifically because: (1) the union had only been certified 8 days before the notice of layoff, and its business agent had to determine whether this layoff would continue a past practice of similar layoffs so that it could determine if the employer had a duty to engage in decisional bargaining; and (2) the record failed to explain why the layoff had to be implemented so hastily. Id. Here, however, the Union had been certified for approximately a year and a half before the Respondent sent the letter notifying it of Desborough's layoff, and the Union did not need additional time to determine whether this layoff would continue a past practice of similar layoffs. Additionally, the record does support the Respondent's need to move with some haste in implementing layoffs. Although the Respondent failed to show that the effects of COVID-19 rose to the level of an economic exigency, and thus the pandemic did not entirely excuse its notice and bargaining obligations, it does distinguish this case from *Cascades Containerboard* where the employer simply cited general "market conditions" as the reason for layoffs.

My colleagues also find that Desborough's layoff violated Section 8(a)(5) and (1) because the Respondent was under a duty to refrain from implementing any unilateral changes while negotiations for a collective-bargaining agreement were still ongoing. See *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). It is true that negotiations for a collective-bargaining agreement had not yet concluded when the Respondent laid off Desborough, and I agree that COVID-19 is not an economic exigency sufficient to excuse its bargaining obligations altogether. But even where all bargaining obligations are not excused, if an employer is reacting to a significant economic event "demand[ing] prompt action," it can engage in bargaining limited to the issues needing prompt action and does not need to bargain to impasse over the full collective-bargaining agreement before making a unilateral change. *RBE Electronics of S.D.*, 320 NLRB 80, 81–82 (1995) ("We believe . . . that there are other economic exigencies, although not sufficiently compelling to excuse bargaining altogether, that should be encompassed within the *Bottom Line* exception . . . . [If] an employer is confronted with an economic exigency compelling prompt action short of the type relieving the employer of its obligation to bargain entirely, we will hold under the *Bottom Line* [] exigency exception . . . that the employer will satisfy its statutory obligation by providing the union with adequate notice and an opportunity to bargain."). Although COVID-19 was not sufficient to excuse the Respondent from its bargaining duties entirely, its onset required prompt action on the Respondent's part as to Desborough's layoff. In this regard, the Respondent provided specific evidence of COVID-19's serious impact on its business. In finding that prompt action was not required, my colleagues point to testimony from the Respondent's president of the West Region, Cory Garner, that the Respondent only decided to lay off employees after determining that furloughs would not alleviate the problem. But I fail to see how the fact that the Respondent, when faced with a dire economic situation, initially attempted a less drastic course of action, which was unsuccessful, negates the fact that there was indeed a significant economic event demanding prompt, more serious action.[15]

The majority also cites *PPG Industries Ohio, Inc.*, 372 NLRB No. 78 (2023), as an example of the Board declining to apply the *RBE Electronics* lesser exigency exception when the respondent unilaterally increased the length of employees' shifts due to increased demand brought on by the pandemic. But in that case, I specifically noted that the employer had "failed to present any evidence that the change at issue needed to be made promptly as a result of the COVID-related increases in demand," and I therefore found it "unnecessary to speculate about—let alone comment on the sufficiency of—evidence that the [r]espondent did not introduce." 372 NLRB No. 78, slip op. at 4, fn. 11. Here, by contrast, the Respondent did provide record evidence of the need for prompt action. Also, in *PPG Industries*, the respondent was merely reacting to *increased* demand, whereas here, the Respondent was reacting to *decreased* demand that put its operations in peril.

[15] The logical conclusion to draw from my colleagues' assertion is that employers act at their peril if they attempt intermediary measures rather than immediately discharging employees when faced with a serious economic crisis. I do not support this view.

As explained above, I believe that the Respondent provided the Union with adequate notice and an opportunity to bargain about Desborough's layoff. Therefore, even though collective-bargaining agreement negotiations were ongoing, the Respondent satisfied its modified notice and bargaining obligation pursuant to the lesser exigency exception that the Board set forth in *RBE Electronics*.[16]

After reviewing the letter itself and assessing all of the surrounding circumstances, I find that the Respondent provided the Union with sufficient notice to engage in meaningful decisional and effects bargaining. Accordingly, the Respondent's layoff of Desborough did not violate Section 8(a)(5) and (1).

III. MY COLLEAGUES ERR IN FINDING THAT THE REMEDY ORDERED IN *THRYV* SURVIVED JUDICIAL VACATUR

Unlike my colleagues, I would not order the extraordinary remedy ordered in *Thryv, Inc.*, 372 NLRB No. 22 (2022). Not only did I disagree with that remedy, for the reasons set forth in my partial dissent in *Thryv*, but the provision in the Board's Order containing that remedy, upon which my colleagues rely, has been vacated by the Fifth Circuit. *Thryv, Inc. v. NLRB*, 102 F.4th 727, 748 (5th Cir. 2024). My colleagues are simply incorrect in asserting that the remedy ordered in *Thryv*—which, importantly, was made manifest through a specific provision in the Order itself—remains binding precedent.

My colleagues cite *J.G. Kern Enterprises, Inc. v. NLRB*, 94 F.4th 18 (D.C. Cir. 2024), in support of their position that *Thryv* remains binding precedent. That case, however, is easily distinguishable from *Thryv*. At issue in *J.G. Kern* was whether a party could cite to language set forth in *Whisper Soft Mills*, 267 NLRB 813 (1983), reversed and Order vacated by 754 F.2d 1381, 1388 (9th Cir. 1984). The court found as follows:

> The Company argues that the certification-year principles in *Whisper Soft* hold no precedential value because the Ninth Circuit vacated and reversed the Board's decision. We disagree. The Ninth Circuit simply rejected the Board's holding that the Company had a duty to bargain. The Ninth Circuit did not, however, criticize the underlying principle applied by the Board that an unlawful bargaining delay may warrant extension of the certification year. *See* id. (noting that the Board extended the certification year to remedy unlawful delay, but that "[s]ince . . . [the employer's] method of making a wage proposal did not result in any illegality, the certification year should not have been extended"). Nowhere in its decision did the Ninth Circuit reject the longstanding principle that the Board may extend the certification year if the employer unlawfully impairs bargaining during that year. (Some internal citations omitted).

To begin, the question in *J.G. Kern* was whether certain longstanding principles set forth in the text of a vacated decision may still be cited. The issue here, by contrast, is whether a novel remedy *made manifest in a Board Order* survives when a court vacates that portion of the Order. Further, the question in *J.G. Kern* was not whether the decision and analysis in *Whisper Soft Mills* remained binding precedent. Rather, the question was whether an "underlying principle" concerning extensions of the certification year could still be cited even though the court had denied enforcement and vacated the Board's Order because it did not agree with the application of the underlying principle. By contrast, here my colleagues are not seeking to cite a longstanding principle that was applied in *Thryv* but rather are taking the position that the specific novel remedy authorized in that case and contained in the Order vacated by the court remains binding precedent. Similarly, the longstanding principles cited in *Whisper Soft Mills* were not in any way affected by the court's action vacating the Board's Order in that case. That is, of course, not the case with the novel remedy ordered in *Thryv*.

My colleagues dispute that *J.G. Kern* is distinguishable, suggesting that the remedy ordered in *Thryv* was not "novel" because prior Board cases had, in their view, "implicitly recogni[zed] that making employees whole should include, at least, compensating them for direct or foreseeable pecuniary harms resulting from the respondent's unfair labor practice." But, of course, even assuming that general language in previous cases supported the Board's rationale for ordering the specific remedy ordered in *Thryv*, the fact remains that the Board had *never before* ordered that remedy. If my colleagues think a remedy that is being ordered for the very first time is not "novel," then I'm not sure what else there is to say.[17]

[16] The Respondent also argued that COVID-19 necessitated its unilateral reduction in hours and changes to its overtime policies, but, unlike Desborough's layoff, the Respondent did not provide any notice or an opportunity to bargain. Therefore, the exigency may have excused bargaining over these matters separate from the overall collective-bargaining agreement, as described in *RBE Electronics*, but the Respondent did not even meet that reduced bargaining obligation. Because it is not clear that the Respondent had to bargain to an overall impasse over the whole agreement before making these unilateral changes, however, I do not join my colleagues in relying on the Respondent's failure to do so. Because the Respondent admits that its adjustment to drivers' schedules was not motivated by COVID-19, *RBE Electronics* has no relevance to that unilateral change, and there is no basis to conclude the Respondent would not have to bargain to an overall impasse over the whole agreement before making that change.

[17] Certainly, my colleagues' suggestion that the remedy ordered in *Thryv* was not novel is hard to reconcile with their processing of that case, which issued as a full-Board decision—the only vehicle for

As for my colleagues' assertion that the remedies issued in *Thryv* remain binding precedent due to the Board's nonacquiescence policy, I believe their position begs the question. Under the Board's nonacquiescence policy, the Board, and its administrative law judges, apply Board precedent rather than adhere to adverse court precedent. But because the relevant portion of the Order in *Thryv* has been vacated—and the aspect of *Thryv* that my colleagues claim remains binding precedent is the remedy set forth in that Order—I do not believe that it can be considered Board precedent in the first place. My colleagues, unsurprisingly, insist that the nonacquiescence policy applies and proclaim that they "can and will" continue to apply the remedy set forth in the vacated order in *Thryv* as binding precedent. I, of course, cannot stop them from doing so, but, as I have explained, I do not believe that there is a reasonable legal justification for doing so.

Accordingly, I would not order the *Thryv* remedy but, instead, require the Respondent to compensate the affected employees for their other pecuniary harms only insofar as the losses were directly caused by these unilateral changes, or indirectly caused by these unilateral changes where the causal link between the loss and the unilateral changes is sufficiently clear.

Conclusion

Based on the foregoing, I would dismiss the allegations that the Respondent violated Section 8(a)(3) and (1) by withholding the October 2018 wage increase and that the Respondent violated Section 8(a)(5) and (1) when it laid off Desborough.

Dated, Washington, D.C. September 18, 2024

Marvin E. Kaplan Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT withhold wage increases from you because you engage in union activities.

WE WILL NOT make unilateral changes to our unit employees' terms and conditions of employment at a time when we are not at a valid impasse in bargaining with International Brotherhood of Teamsters Wholesale Delivery Drivers, General Truck Drivers, Chauffeurs, Sales, Industrial and Allied Workers Local 848 (the Union).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment for our unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

> Included: All full-time and regular part-time route drivers, distribution drivers, inventory specialists and dispatchers with commercial driver licenses employed by Airgas USA, LLC working out of its facility currently located at 10675 W. Vanowen St., Burbank, CA 91505;
> Excluded: All other employees, office clericals, professional employees, confidential employees, managerial employees, guards, and supervisors as defined by the Act, as amended.

WE WILL, to the extent that we have not already done so, rescind the unilaterally implemented reduction in our unit employees' working hours, changes of our unit employees' work schedules, and reduction in the amount of overtime work offered to our unit employees, and WE WILL continue these terms and conditions of employment in effect until we reach an agreement or a good-faith impasse in bargaining with the Union.

WE WILL make the affected employees whole for any loss of earnings and other benefits resulting from the unlawful withholding of the October 1, 2018 wage increase and the unlawful unilateral changes to schedules, hours, and overtime, less any net interim earnings, plus interest, and WE WILL also make such employees whole for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful changes, plus interest.

changing Board law other than rule-making, based on longstanding Board practice—and included *more than five full pages* explaining why the Board had the authority to order that specific remedy for the first time. 372 NLRB No. 22, slip op. at 6–11.

WE WILL, within 14 days from the date of the Board's Order, offer Cameron Desborough full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Cameron Desborough whole for any loss of earnings and other benefits resulting from his unlawful layoff, less any net interim earnings, plus interest, and WE WILL also make him whole for any other direct or foreseeable pecuniary harms suffered as a result of his unlawful layoff, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoff of Cameron Desborough, and WE WILL, within 3 days thereafter, notify him in writing that we have done so and that we will not use his unlawful layoff against him in any way.

WE WILL compensate all affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 31, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each affected employee.

WE WILL file with the Regional Director for Region 31, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 forms reflecting the backpay award.

AIRGAS USA, LLC

The Board's decision can be found at https://www.nlrb.gov/case/31-CA-226568 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Nayla Wren, Esq. and *Jake Yocham, Esq.,* for the General Counsel.

Michael C. Murphy, Esq. (Airgas, Inc.) and *Mark M. Stubley, Esq. (Ogletree, Deakins, Nash, Smoak & Stewart P.C.),* for the Respondent.

Hector De Haro, Esq. (Bush Gottlieb), for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARIEL L. SOTOLONGO**,** Administrative Law Judge. At issue in this case is whether Respondent Airgas USA, Inc. (Respondent or the Employer) violated Section 8(a)(3) and (1) of the Act by withholding a wage increase to a unit of employees whom the Union, Teamsters Local 848 (the Union or Charging Party) was seeking to represent and was later selected to represent; and whether Respondent violated Section 8(a)(5) and (1) of the Act by changing employee schedules, reducing hours, reducing overtime pay, and laying off an employee without giving prior notice or affording the Union an opportunity to bargain about such changes.

I. PROCEDURAL BACKGROUND

Based on charges in Cases 31–CA–226568 and 31–CA–260895 filed by the Union on August 29, 2018, and October 1, 2020, respectively, the Regional Director for Region 31 of the Board issued a fourth consolidated complaint on April 5, 2021, alleging that Respondent had violated the Act in the manner briefly described above.[1] A hearing was conducted on this matter via the ZoomGov video platform on May 3 through 6, 2021.

II. JURISDICTION

The complaint alleges, and Respondent admits, that at all material times, Respondent has been a limited liability company with an office and place of business in Burbank, California, where it is engaged in the business of distributing industrial, medical, and specialty gases. The complaint further alleges, and Respondent admits, that during the 12-month period ending June30, 2020, Respondent, in the course of its business operations, purchased and received at its Burbank facility goods valued in excess of $50,000 directly from points outside the State of California. Accordingly, I find that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] Previous complaints had issued on these and other related charges, containing numerous other allegations. These other charges and allegations, however, were the subject of settlement agreement(s) between the General Counsel and Respondent and were accordingly withdrawn and rescinded in accordance with the terms of said settlement(s). I see no need to provide a detailed account of the other charges, complaints and settled allegations, nor the motions or orders related to those charges and complaints but note that these documents are part of the formal papers admitted herein as General Counsel's Exhibit 1(a) through 1(kkkk), with GC Exh. 1(kkkk) being an index and description of the formal papers.

The complaint also alleges, Respondent admits, and I find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. FINDINGS OF FACT

A. Background Facts

Many of the facts surrounding the events at issue herein are not in dispute, and indeed the parties entered into numerous joint stipulations and to admit numerous related documents with regard to those facts, as I will briefly summarize below.[2] As briefly described above, Respondent is a national company engaged in the business of distributing industrial, medical, and specialty gases throughout the United States. The company is divided into five geographical divisions, each in turn divided into regions and separate areas within those regions. Its Burbank facility (the facility), which is at the center of the dispute in this case, is part of the West Region within the west division, and is located in the "North of Los Angeles" (NOLA) area of the West Region. Besides management and salespersons, the employees at the facility primarily consist of the truckdrivers who deliver the product to the customers (primarily gas cylinders), and the production employees who load the gas into the cylinders and the cylinders unto the trucks. The parties agreed that the following individuals were supervisors and/or agents of Respondent within the meaning of Section 2(11) and 2(13) of the Act:

- Sulma Garcia, Operations Manager (7/22/2018-5/26/2019)
- Ron Rydzewski, District Manager
- Elvis Herrera, Distribution Manager
- Shant Zakarian, Director-Attorney (7/17/17-5/17/2019)
- J.R. Brees, Area Vice President, West Region
- Gerardo Ruiz, Area Branch Operations Manager
- Daniel Rodriguez, Operations Manager (10/13/2019-present)
- Gonzalo Guzman, Assistant Plant Manager
- Michelle Hernandez, Human Resources Manager
- Adrienne Johnson, Human Resources Director
- Ruben Perez, Area Operations Manager
- Michael Murphy, Vice President and Counsel
- David Gonzalez, Director-Attorney (12/12/2016-06/05/2020)
- Laureano Castillo, Operations Manager (2015-7/21/2018)

During July and August 2018,3[3] the Union began organizing a unit of employees primarily composed of the drivers at the facility, and on August 27 the Union filed a petition with the Board seeking to represent the employees.[4] Pursuant to the petition, the Board held an election on September 20 in which the Union received a majority of the votes. On October 11, the Regional Director certified the Union as the collective-bargaining representative of the employees in the above-described unit. The events that occurred following the filing of the petition and the subsequent certification of the Union is at the heart of the instant dispute, as discussed below.

B. The Wage Raises

The complaint alleges, inter alia, that Respondent failed to give the drivers in the bargaining unit a wage raise in *October* 2018 for discriminatory reasons, an allegation disputed by Respondent.[5] The record shows as follows regarding the history of wage raises prior to 2018 and the events surrounding the wage raise given to production (nonbargaining unit) employees in 2018, but not to the bargaining unit drivers.

First, the uncontroverted. The parties jointly introduced documents that show that for the 4-year period from 2013 through 2017, Respondent gave across-the-board wage increases to both production employees and drivers ranging, approximately, from between 2 to 4 percent, with a few limited exceptions that were either below or above those thresholds (Jt. Exhs. 1 through 6). Additionally, documents show that in October 2018 *only* production employees received a wage increase, ranging from approximately 2 to 3 percent (Jt. Exh. 7(a) & (b)). It is also uncontroverted that the (bargaining unit) drivers did not receive a wage raise in 2018, but the reasons therefor are disputed, as discussed below. Additionally, although there is no documentary evidence on the record regarding the years prior to 2013,[6] testimonial evidence strongly suggests that prior to 2013 Respondent had likewise given across-the-board wage increases to its production employees and drivers on a regular basis. Thus, driver Victor Mendoza, employed by Respondent since 2004, testified that employees received wage increases every year, toward the end of the year, typically in October (Tr. 297). Driver Gilbert Huerta, also employed since 2004, supported Mendoza's testimony regarding the yearly increases, although he remembered that these increases occurred at different times of the year, such as April, October, and sometimes June (Tr. 332–333). Driver Manuel Hernandez testified that during his hiring interview in 2017, Plant Manager Laureano Castillo informed him that he would receive a $1-increase (per hour) on his first year anniversary, another $1-increase on his second anniversary, and smaller "cost

[2] Joint Exhibit 1 (Jt. Exh.1) contains a summary of the stipulated facts and corresponding joint exhibits, through [Note: NLRB Style Manual's abbreviation for Joint Exhibit is Jt. Exh.] Joint Exhibit 34 (Jt. Exh. 34) agreed to between the parties.

[3] All dates here after shall be on calendar year 2018, unless otherwise specified.

[4] The petition by the Union sought to represent the following employees: All full-time and regular part-time route drivers, distribution drivers, inventory specialists and dispatchers with commercial driver licenses employed by [Respondent] working out of its facility currently located at 10675 W. Vanowen St., Burbank, California 91505;

Excluded: All other employees, office clericals, professional employees, confidential employees, managerial employees, guards, and supervisors as defined by the Act, as amended.

[5] Complaint par. 7(a). The word *October* is emphasized above because Respondent had previously granted another, larger, wage increase to production employees on September 3, 2018, and the failure to grant drivers that September wage increase is not alleged as a violation, as discussed below.

[6] This limitation is likely the result of the time period covered by the General Counsel's subpoena.

of living" increases each October thereafter.[7] Neither Mendoza's, Huerta's, nor Hernandez' testimony was contradicted nor negated in any way. In this regard, I would note that Scott McFarland, Respondent's vice president of operations for the West Region, and the person responsible for determining individual wage adjustments from 1997 through 2017, testified that there were no wage increases every year—but could only point to 2009 as the lone example of a year when there was no wage increase (Tr. 584).[8] Accordingly, I conclude that in addition to the established wage raises from 2013 through 2018, a strong inference exists that Respondent granted its employees yearly wage increases since 2004, with the possible exception of 2009.

The wage raises granted to the production employees in 2018 came on two separate occasions within a month of each other. The first of such raises, deemed a "Market Adjustment" raise, was granted on September 3, and was by far the larger of the two, ranging anywhere from $1.54 to $2.60 per hour, representing about a 6 percent to slightly above 11-percent increase. There is no evidence on the record that Respondent had granted such large "Market Adjustment" increases in years past, and certainly not on any regular basis. This raise, according to the testimony of Cory Garner, President of Respondent's West Region, was the result of Respondent wanting to maintain a competitive edge by offering its employees within the region wages that were similar to those offered in the area. It was a discretionary decision on his part to grant this "market adjustment" raise to the employees in the region.[9] The second raise, deemed a "Periodic Salary Adjustment" came on October 1, and ranged from 42 to 77 cents per hour (Jt. Exh. 7(b)) or about a 2- to 3-percent increase, which was entirely consistent with the yearly raises that Respondent had granted its employees across the board since at least 2013.

The evidence shows the following regarding how these wage raises came about, and why the drivers were excluded from getting these raises in 2018. Regarding the manner by which Respondent decides to give the yearly wage raises, and the amount of such raises, the evidence is fairly uncontroverted, for the most part. Thus, Cory Garner, president of Respondent's west region, testified that Respondent's senior (national) corporate leadership makes an annual decision as to whether merit wage increases are forthcoming, and provides guidance as to the "target" amount, in essence setting a cap or range for said increases.[10] It is then left to the assistant vice presidents within the regions to determine the precise amount the employees within each region would receive, within the guidelines set by the corporate leadership. As mentioned above, from 1997 through 2017 McFarland was responsible for determining the exact raise each employee within the region would receive, within the parameters established by Garner, who in turn had to stay within the targets established by the corporate leadership. McFarland testified that he used a formula that sought to bridge the wage differentials between less senior and more senior employees, by typically granting less senior employees a higher raise, but that also took individual performance into account, including avoidable accidents. As shown by the statistical data provided by the Joint Exhibits discussed above, the amount of these raises was consistent throughout the 5-year period from 2013 to 2018, typically between 2 to 4 percent. As for the reason for excluding the drivers from this raise in 2018, this issue will be discussed below.

The "Market Adjustment" raise granted on September 3, as discussed briefly above, appears to be a different animal, a one-time raise designed to keep wages in par with those in the area, and one that was decided upon by Garner on a Regional basis, without apparent national corporate input. Garner testified that he based his decision regarding 2018 "Market Adjustment" raise based on analysis produced by Chris Kaul from Respondent's HR department, and presented to Garner the day *before* the Union filed its August 27 petition seeking to represent the drivers in Burbank. Garner initially admitted that Kaul's analysis of the recommended wage increases included both the drivers as well as the production employees. On August 28, the day after the petition was filed, however, Respondent announced that only the production employees—not the drivers—would be receiving a wage raise. Garner testified that it was his decision to grant only the production employees a wage raise, because the Union had filed a petition to represent the drivers and that "laboratory conditions" in the wake of such petition had to be maintained.[11]

Sometime in September, the national corporate leadership decided to grant a nation-wide wage increase, as it had done since at least 2013, and decided to cap such increase at 3 percent, which was also generally consistent with previous caps.

[7] Indeed, Hernandez' testimony in this regard is consistent with his later testimony, as discussed below, that in July 2018 he asked then Operation Manager Garcia when he could expect his promised wage raise. Hernandez' testimony also dovetails with Vice President Scott McFarland's testimony that he would typically give larger raises to newer employees in order to reduce the wage gap between newer employees and more senior ones, as discussed below.

[8] I take judicial notice of the fact that 2009 was at the height of the so-called "Great Recession," when the economy had tanked, to put it mildly. McFarland also testified that prior to 2016, the year that Respondent was acquired by Air Liquide, Respondent gave its raises during April, at the beginning of its fiscal year, but since then has given its raises in October, which dovetails with Air Liquide's fiscal year. This would appear to explain Huerta's recollection of raises given at different times of the year. I would further note that in 2019 Respondent again changed its "*Annual* Salary Increases" to April (see, Jt. Exh. 10. Emphasis added).

[9] There is no evidence that this "market adjustment" raise, unlike the yearly pay raises decided by the corporate leadership, was offered to employees outside the west region. As noted above, this raise is not the subject of the allegations in the complaint.

[10] These caps or guideless generally called for average increases of approximately 2.5 to 3%.

[11] It is undisputed that the Union filed its petition on August 27 (J Exh. 2(a)). Initially, Garner testified that he had received the wage analysis from Kaul the day before the petition was filed, and that the drivers were included in that analysis (Tr. 547), only to contradict himself at a later point, claiming that the drivers had not been included (Tr. 640–641). A discussion on the record by counsel regarding a subpoena that arguably encompassed Kaul's analysis, and prompted additional testimony from Garner, however, established that Kaul sent his wage analysis to Garner on August 20, a week before the petition was filed, and included an analysis covering both production workers as well as drivers, and which encompassed the entire Region, not just Burbank (Tr. 625–650). Although this raise is not at issue pursuant to the complaint, Garner's contradictory testimony in this regard did not help his credibility, as he left the impression that he was seeking to avoid admitting facts that he believed might be detrimental to Respondent's case.

Respondent announced this wage increase via memo to all its employees on September 20, 2018 (Jt. Exh. 8).[12] As was its practice in years past, Respondent left it to its regional management to determine the exact raise each individual employee would receive, within the limits of the cap set by the corporate leadership. As described earlier, from 1997 through 2017 the job of determining these individual raises had been performed by assistant VP McFarland. In 2018, however, Garner decided that he, not McFarland or another vice president (such as J R Brees, North LA area vice president) would determine the amounts of the raises that were given to individual employees in the Region, including the facility in Burbank, although he did not provide an adequate explanation as to why there was such a departure from past practice.[13]

On October 1, 2018, Respondent granted its annual wage increase to its employees, but in the case of the Burbank facility, only to its production employees—not to its drivers, as in years past. Garner testified that the October raise, which occurred after the Union had won the election (but before it the Union was certified), was granted only to production employees because there had been a "change in the methodology" of calculating this raise, which represented a "change in the status quo" that had to be "collectively bargained" about (Tr. 536). It is notable that Respondent admitted that it never notified the Union about its decision to grant these wage raises, or its decision to withhold these wage increases from the drivers, let alone about its rationale for doing so.[14]

Based on the above, the facts strongly support the conclusion that *but for* the filing of the petition or their support for the Union, the drivers would have received the same raises granted to the production employees, as they had regularly received in years past. Contemporaneous statements made by supervisors of Respondent to the drivers lend further support for this conclusion. Thus, driver Manuel Hernandez testified that sometime in July (2018) he asked (operations manager) Sulma Garcia when he could expect his raise.[15] Garcia told him she would check with management, and a few days later informed him that the raise would come in October. In August, shortly after the petition was filed, Garcia told Hernandez that he had been "this close," to getting a raise, but would get nothing now because he, or his fellow drivers, supported the Union.[16] Similar statements were made during a series of mandatory meetings Respondent started holding with drivers soon after the petition was filed, to discuss the Union. These meetings occurred at least 2 to 3 times per week during the pre-election period, and were conducted by District Manager Ron Rydzewski, Area Vice President JR Brees, and Area Branch Operations Manager Gerardo Ruiz. According to the testimony of driver Elio Carrillo, both Rydzewski and Brees stated during one of the meetings that if the Union was voted in, they couldn't "help you with raises." They also reminded the drivers that "October is coming," a reference to the time when Respondent traditionally gave wage raises. According to driver Hernandez, these managers stated during the meetings that because of the Union "everything was frozen." Driver Victor Mendoza similarly testified that during these meetings, these managers said that because of the Union, there was a "freeze" and that there would be no raises coming.[17]

Additionally, the evidence shows that for several weeks during the period immediately following the filing of the petition, managers accompanied drivers during their daily routes (commonly referred to as "ride-alongs"), during which they spoke about the Union and made comments similar to the ones described above. Thus, Carrillo testified that he was accompanied by Ruiz during one of these "ride-alongs," during which Ruiz would ask him how he felt about the Union—something Carrillo tried to avoid answering. Ruiz also told Carrillo that the Company was listening to the drivers and was willing to "work with them," provided they did not support the Union, and then repeated the refrain "October is coming." Hernandez testified that Rydzewski accompanied him on his route during one of these ride-alongs, and that Rydzewski asked him about his motivation for supporting the Union—something Hernandez tried to avoid answering, saying he was undecided. Rydzewski told Hernandez that the production employees (loaders and fillers) had just received a raise which they were happy about, but that the drivers' wages were frozen—something that could change if they

[12] September 20, 2018, was also the date the Board held an election at the facility, in which the drivers chose to be represented by the Union. The decision to grant that raise, however, had already been made. The Union was certified on October 11, 2018.

[13] Garner testified that McFarland's "methodology" of determining wage raises "did not make sense" to him, so he decided to use his own methodology in 2018. Garner's explanation as to what "methodology" he used to determine wage adjustments in 2018 was at best muddled, however, offering only that it was based on a "market adjustment (analysis)," as well as performance reviews, although he did not adequately explain how such performance reviews differed from McFarland's. Indeed, he admitted that undertook a "quick" review of McFarland's analysis, and never reviewed its "details" nor the individual adjustments, and only made sure it remained within the guidelines or caps (Tr. 566–567; 569). It is thus inexplicable how Garner's methodology significantly differed from McFarland's, inasmuch he admitted not being familiar with the latter's method.

[14] According to the testimony of Respondent's vice president and counsel Michael Murphy, Respondent did not notify the Union after September 20 because it not yet been certified (Tr. 405.)

[15] Hernandez testified that when he was hired in 2017 then Operations Manager Laureano Castillo told him he would get a $1-raise after 1 year, another $1 after the second year, as well as cost of living raises (Tr. 186–187).

[16] I credit Hernandez' testimony, noting that he is a current employee, which enhances his credibility, and the fact that neither Castillo nor Garcia testified.

[17] I credit the testimony of Carrillo, Hernandez and Mendoza, not only because their status as current employees enhance their credibility, but also because Respondent did not proffer any testimony that contradicted or refuted their testimony. In that regard I note that while Brees testified that he was not a "presenter" during these meetings and that *he* did not even speak or said anything about the Union (Tr. 472; 484; 496–497), he never denied that Rydzewski, who did not testify, did so. Accordingly, I find that the statements were made as described by these employees. I would further note, as will be discussed further below, that although Garner testified that he decided that the raises in question could not be granted because "laboratory conditions" needed to be preserved, no such nuanced or legally elegant terminology was used when drivers were told by managers why they weren't getting raises.

voted against the Union.[18]

Finally, additional comments were made by managers in other contexts that alluded to what might occur depending on whether the Union was voted in or not. Carrillo thus testified that in the week prior to the election, Ruiz spoke to him near the dock, and said that he had just checked in his office and said, "you are looking at about a four-buck raise." Shortly afterwards, Rydzewski came by the dock, shook Carrillo's hand and said that he wanted to apologize in advance. When Carrillo asked why, Rydzewski said, "if you guys vote the Union in tomorrow, it's going to get ugly."

C. The Changes in Working Conditions

The complaint alleges that in early 2020 Respondent changed the working conditions of the drivers, more specifically the starting and ending times of their shifts, the number of working days per week (from 5 days a week to 4), their total amount of working hours, and the elimination of overtime work. Additionally, the complaint alleges that Respondent laid off driver Cameron Desborough in April 2020, and that Respondent made all these changes without bargaining with the Union.[18] At the outset, I note that there is no factual dispute that these changes took place. Indeed, as more thoroughly discussed below, there is really no dispute that little or no bargaining took place between Respondent and the Union regarding these changes, and Respondent instead takes the position that exigent circumstances related to the COVID-19 pandemic justified its conduct.[19]

Thus, drivers Joe Ledesma, Victor Mendoza, and Victor Rodriguez testified that prior to March 2020 their shifts started at 5:30 a.m. and ended at 2 p.m., and driver Elio Carrillo testified that his shift started at 6:30 a.m. and ended at 3 p.m. All of these drivers also testified, without contradiction, that starting on or about March 23, 2020, their schedules were changed to start, and end, 1 hour earlier.[20] Ledesma, Mendoza, and Rodriguez testified that they were notified of these changes during a preshift morning meeting by Operations Manager (OM) Daniel Rodriguez, who did not mention the COVID-19 pandemic as the reason for the change. There is no evidence that Respondent ever notified or bargained with the Union about these shift changes prior to their implementation.

With regard to the alleged reduction in the number of work hours per week, drivers Ledesma and Hernandez testified that for a number of years (or at least since 2017), drivers had regularly worked 8 hours a day, 5 days per week, excluding overtime. In mid-March 2020, OM Rodriguez announced during a safety meeting that drivers' schedules would be reduced to working 4 days per week, to 32 hours. This reduction in the amount of work hours was later confirmed in a letter sent to the drivers on April 6, 2020 (Jt. Exh. 25(a)-(l) and is reflected in the payroll records (J. Exh. 27(a)-(m)). In order to mitigate for the reduction in hours (and resulting reduction in pay), Respondent allowed the drivers to use earned vacation or floating days off to cover for the missing day each week. Curiously, although Respondent notified the Union by letter on April 2, 2020, that these measures were being implemented in its Alameda facility (also known as the "Lynwood" facility), no such notice was given to the Union regarding the Burbank facility, the site of the instant dispute (Jt. Exh. 13).[21]

Regarding overtime, drivers Ledesma, Desborough, Mendoza and (Gilbert) Huerta testified that prior to 2020 they generally averaged several hours of overtime per week. The procedure, in general, was that if they had not made all their deliveries by the end of their normal shift, they would keep going until all such deliveries were completed, before returning to the yard. In mid-March 2020, they testified, OM Rodriguez informed drivers that a new overtime (OT) procedure was being implemented. This new procedure required drivers to call the dispatcher 6 hours into their shift to report how many deliveries remained to be made on that day. The dispatcher would then inform the drivers how many more deliveries they could make, and whether the driver was permitted to work OT to complete their deliveries. The end result, beginning in mid-March 2020, was that drivers were routinely denied OT and were instructed instead to return to the yard at the end of their shifts, even if all deliveries had not been completed. Records admitted as Joint Exhibits 27 (a)-(m) show that from 2017 through early 2020, drivers typically worked several hours of OT per week, and hundreds of hours per year. Beginning in mid-March, the number of OT hours worked by drivers sharply declined, almost stopping altogether, at least until the very end of the year.[22] Union Business Agent Tom Tullius testified that Respondent did not notify the Union about these changes in its OT policy until sometime in mid-April 2020, by which time the changes had already been implemented.[23]

Regarding the topic of communications or negotiations between Respondent and the Union regarding the changes in drivers' schedules and OT pay, the record shows scant evidence of any significant such communications, let alone negotiations.

[18] Again, I credit the testimony of Carrillo and Hernandez, noting that neither Ruiz nor Rydzewski testified. I would additionally note that Respondent proffered the testimony of Brees to explain that there were legitimate business reasons for these ride-alongs, inasmuch there had been some customer complaints about the way some of the product deliveries were being made or handled. Be that as it may, it is clear that Respondent used this opportunity to speak to the drivers about the Union—which was the reason they had not received a wage raise given to others.

[18] Complaint par. 8(a) through (g).

[19] In this regard I would note that while Respondent generally denied these allegations in its answer to the complaint, except the layoff of Desborough which it admits, uncontradicted evidence shows that these changes took placed as alleged. Moreover, in its post-earing brief, Respondent concedes as much, and instead focuses on the argument that exigent circumstances legally justified its conduct, as will be discussed in more detail below.

[20] These schedule changes are also confirmed by payroll records admitted as Joint Exhibits (Jt. Exhs.) 27 (c), (j), (k), and (m).

[21] Thus, although the first page of Respondent's April 2 letter addresses measures being implemented at both the Alameda and Burbank facilities in response to COVID-19 pandemic, the second page, which addresses the reduction in hours, only references the Alameda facility.

[22] Jt. Exh 27 (a)-(m) shows the beginning and end of each driver's shifts, and the total number of hours worked (under the adjacent "Shift" and "Daily" columns) on a daily basis during the years 2017 to 2020, with a summation of totals for each driver, including OT, at the end of each calendar year.

[23] No testimony or other evidence was proffered by Respondent to the contrary.

Thus, on March 20, 2020, Union Representative Tullius wrote Respondent an email requesting that certain safety procedures and protocols be implemented in light of then current events, implying (although not mentioning) the newly resurgent COVID-19 pandemic, and that a $2-per-hour "hazardous pay" bonus be paid. (Jt. Exh. 11.) Respondent did not immediately respond to Tullius' March 20 letter, and he again wrote on April 2, this time inquiring about possible layoffs in Alameda and Burbank and requesting certain information about this. Respondent replied on the same date, denying that any such layoffs were planned at this time. By separate email the same date, Respondent informed Tullius of a number of measures it had implemented already in light of the "national unforeseen emergency" related to COVID-19 pandemic, which necessitated immediate actions without prior notice to the Union.[24] The email (letter) goes on state that in light of decreasing business, schedule changes were being implemented in *Alameda*—it said nothing of Burbank. The letter further informed Tullius that it was declining his proposal for a $2-per-hour hazard pay. The letter did not mention either the schedule changes in or OT pay changes in Burbank (Jt. Exhs. 12; 13).[25] By letter dated April 5, Respondent sent Tullius a list of Alameda and Burbank employees that he had requested and informed him that no layoffs were planned at either facility at the time—although scheduled changes had been implemented I Alameda, as previously noted. (Jt. Exh 14).

D. The Layoff of Desborough and Communications between the Parties about it

Respondent laid off Burbank driver Cameron Desborough on or about April 29, 2020, a fact which is not is dispute. What is disputed is whether Respondent gave prior notice and afforded the Union an opportunity to bargain about his layoff. The record shows as follows with regard to the communications/negotiations between the parties regarding Desborough's layoff.

On April 24, 2020, Respondent informed the Union (Tullius) by letter, that because of declining business volumes additional "mitigation" measures would have to be undertaken at the Burbank and Alameda facilities, including the layoff of three (3) drivers in Alameda and one (1) in Burbank, which would be done on the basis of "inverse order of seniority," on April 29, 2020. Accordingly, it notified the Union that Desborough, the last driver hired in Burbank (on 4/1/19), would be the Burbank driver to be laid off. It further advised the Union that should business volumes improved, these laid-off employees would be recalled to work according to seniority, provided it occurred within 12 months of their layoff. The letter also advised the Union that employees not represented by the Union were subject to a reduction-in-force ("RIF"), and were being separated from the Company, as opposed to being laid off with recall rights, and were thus being offered a severance package. It asked the Union to notify Respondent immediately if its members would instead be interested in such severance package, which would not include recall rights. Finally, the letter concludes as follows:

> ". . . although unexpected economic exigencies continue to compel rapid implementation of these mitigation measures, please take notice that Airgas remains willing to bargain over this matter, should the Union request it, regardless of the implementation date. Please contact me immediately if you wish to discuss." (Jt. Exh. 16.)

Later that same day, Tullius responded. He asked when the four drivers (3 in Alameda, 1 in Burbank) would be notified of their layoff, and requested a copy of the severance agreement being offered to the employees subject to the RIF, so he could advise the Union drivers being laid off (whether that may be a better option for them). He proposed that Respondent allow the laid-off drivers to keep their health benefits for 2 months following their layoff. (Jt. Exh. 17). Respondent did not respond immediately, so 3 days later, on April 27, 2020, Tullius again requested a copy of the severance agreement (being offered to RIF employees). (Jt. Exh. 18). The next day, on April 28, Respondent provided the information requested by Tullius on April 24, including a copy of the severance agreement, and responded that it was considering Tullius' proposal regarding the continuation of health benefits, and addressed other issues he had raised.[27] On April 29, Respondent's counsel (David Gonzalez) phoned Tullius to further clarify Respondent's positions, informing him that it would not be extending health benefits for laid-off drivers, or offering hazard pay, and explaining that the union drivers being laid off had the option of accepting the severance package being offered to RIF'd employees, but would give up recall rights if they took that option.

Desborough chose to be laid off with recall rights, and as described before, he was laid off on April 29, 2020. Respondent offered to recall him to work 4 or 5 months later to the Alameda facility, an offer that Desborough declined because the Alameda facility was farther away from his home than Burbank, a much longer commute, and he was already working for another employer.

IV. ANALYSIS

A. The Allegation Regarding the October Wage Raise

The complaint alleges that Respondent violated Section 8(a)(3) and (1) of the Act by failing to grant its (bargaining unit) drivers a wage increase on October 1, 2018, that it granted its production (non-bargaining unit) employees.[28] The General Counsel argues that this wage increase, which Respondent had granted across-the-board to all its (nonmanagerial) employees for several years, was an established past practice. As such, the General Counsel argues, Respondent would have routinely granted its drivers this raise, but for the fact that they chose to be represented by the Union, and that this represents unlawful discrimination. General Counsel further argues that under the

[24] These unilateral actions consisted primarily of relatively minor safety-related protocols and are not at issue in this case.

[25] Indeed, I would note that in its post hearing brief, Respondent admits that the schedule changes in Burbank were not related to COVID-19 pandemic but were rather part of a long-held practice of altering drivers' schedules pursuant to its business needs.

[27] Tullius had also asked if Respondent would oppose the laid-off drivers filing for unemployment benefits (they would not), and had again proposed a $2 per hour "hazardous pay" supplement (Respondent would not). Respondent did not agree to a continuation of health benefits for the laid-off employees.

[28] Complaint pars. 7(a) and 9.

Wright Line[29] analytical framework, it has established that the Respondent acted unlawfully. The Charging Party Union joins the General Counsel in this assertion, but also points out that Respondent's conduct in this regard was "inherently destructive" of Section 7 rights, and as such it was unlawful regardless of Respondent's motivation, obviating the need for a *Wright Line* analysis. Respondent, on the other hand, argues, first, that there was no established past practice with regard to the wage raises; second, that it acted lawfully because it could not grant a wage raise during the pendency of an election without violating the Board's "laboratory conditions" requirement; and finally, that after the drivers chose to be represented by the Union during the September 20, 2018 election, any raises to such drivers could not be granted because it was subject to collective bargaining—which the Union did not request. For the reasons discussed below, I find that the General Counsel and the Charging Party Union have the better argument, and that Respondent acted unlawfully when it failed or refused to grant the drivers the raise it granted other employees on October 1, 2018.

In determining whether a wage increase is an established (past) practice, the Board looks at a number of factors, including the number of years the program (raises) has been in place, the regularity with which the raises are granted, whether the employer used fixed criteria to determine whether employees would get raises, and the timing of the raises. *Omni Hotels Management Corp.*, 371 NLRB No. 53, slip op. at 3 (2022), citing *Rural Metro Medical Services*, 327 NLRB 49, 51 (1998). Other factors to consider include whether the employer has promised wage increases and whether employees would reasonably come to expect such wage increases during certain times. *All American Gourmet*, 292 NLRB 1111, 1134 (1989); *Omni Hotels*, supra., slip op. at 4; *Advanced Life Systems, Inc.*, 364 NLRB 1711, 1712 (2016), enf. denied 898 F.3d 38 (D.C. Cir. 2018).

All of these factors are present here—and more. Thus, as described in the facts section, documentary evidence firmly establishes that Respondent had, since 2014, granted raises every year for the 4 years preceding 2018, with 2018 being the fifth year in a row that said raises were granted, albeit excluding the drivers on that year. Indeed, testimonial and circumstantial evidence strongly indicates that in fact Respondent had granted those yearly raises even prior to 2014, granting them every year since at least 2004, with the possible exception of 2009—the year of the "Great Recession." While the timing of these raises may have varied over the years, depending on whether the corporate fiscal year ended in April or October, there can be no question that these raises had become a fixture that employees could reasonably count on from year to year. The process by which these raises were decided also followed a predictable pattern: the corporate leadership decided each year whether a raise was forthcoming, nation-wide, and set a "cap" or maximum allowable (typically around 3 percent).[30] It was then left to regional management to decide the particulars as to how much individual employees were to receive, with seniority and performance being the main—if not the only—factors considered, according to the evidence.[31] Thus, from 1997 through 2017 West Region VP McFarland was in charge of deciding the exact amount, within the corporate cap, each individual employee would receive, always using the same criteria, namely seniority and to a lesser degree performance, which he equated to accident avoidance. As discussed above, in 2018, West Region President Garner took over this function, for reasons that aren't completely clear, which was an unusual, if not unprecedented, move.[32] Moreover, employees were reasonably led to believe that raises were to be expected on a yearly basis, based on statements made to them during hiring interviews as well as other statements made to them in the wake of the Union campaign, with managers taunting drivers with the prospect of raises that they would lose if they chose to be represented by the Union (i.e., "October is coming"). Indeed, I note that even the term used by Respondent in describing the raise(s), such as "*Annual* Salary Increases" (Jt. Exhs. 9;10, emphasis supplied), suggest a recurrent, expected event.[33]

Accordingly, I conclude that by 2018, the year of the events at issue herein, Respondent had an established practice of granting annual across-the-board wage raises to its nonmanagerial employees; such yearly raises thus represented the *status quo*. Having concluded that these yearly raises were the established practice, I now turn to the issue of whether denying the drivers the raise granted to other employees on October 1, 2018, was unlawful. I conclude that it was. In *Advanced Life Systems, Inc.*, supra, the Board found that the employer violated Section 8(a)(3) and (1) of the Act by denying employees a planned wage raise that it would have otherwise granted them but for the fact that they had engaged in union activity—the exact situation that is present in this case. The Court of Appeals for the District of Columbia refused enforcement, primarily on the basis that the wage raises in question were not an established practice by the employer because such raises had been irregular—only two such raises within the past 5 years. In so doing, however, the court made this important observation:

> [i]f the employer has a "longstanding practice" of awarding the same "automatic increases" or bonuses, *Katz*, 369 U.S. at 746, 82 SC 1107, at "fixed" and "regular intervals," *Acme Die Casting v. NLRB*, 93 F.3d 854, 856–857 (D.C. Cir. 1996), the continuation of those payments is permitted. More than that, the failure to continue making the payments could be construed as

[29] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), *approved* in *NLRB v. Transportation. Mgmt. Corp.,* 462 U.S 393, 399–403 (1983).

[30] Little evidence was introduced as to what factors were considered by corporate management in determining whether a raise would be granted, but given that 2009 was apparently the only year in which such raise was not granted since at least 2004, it is reasonable to infer that over-all corporate profitability was likely the main factor.

[31] Regional management hence had no say or discretion as to whether a raise was granted any given year, or about its scope; it was a directive from above. Their only discretion was about specific the amounts given to individual employees.

[32] The explanation by Garner of the criteria he used to determine individual raises, as discussed earlier, and further discussed below, left much to be desired, and could not readily be differentiated from the one used by McFarland.

[33] Thus, in March 2019 Respondent advised its employees in a memo that "Starting this year in 2019, Airgas is adjusting the timing of our *annual* salary increases; they will now take effect in April *each year* instead of October" (emphasis supplied).

> evidence of discrimination against the employees' exercise of their unionization right, which is itself an unfair labor practice under Section 8(a)(3), 29 U.S.C. § 158(a)(3). See *Katz*, 369 U.S. at 746, 82 S.Ct.1107.

Advanced Life Systems Inc. v. NLRB, 898 F.3d 38, 46 (D.C. Cir. 2018). As discussed above, unlike in the case before the court, the employer in this case had granted such increases every year for 5 years, and likely much longer, and as such was an established practice. As noted by the court, the discontinuation of such practice in response to its employees' union activity can be seen as evidence of discrimination in violation of Section 8(a)(3) of the Act. I conclude, moreover, than in this case such conduct can not only be deemed as evidence of discriminatory intent, but more than that, it is conduct that is "inherently destructive" of employee rights under Section 7, pursuant to the doctrine first announced by the Supreme Court in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). As such, the employer's conduct can be proscribed without need for proof of an underlying improper motive. *United Aircraft Corp.*, 199 NLRB 658, 662 (1972).[34] Accordingly, I believe that a *Wright Line* analysis is unnecessary in these circumstances, although as discussed below, I find the General Counsel has met its burden under that analytical framework as well.

Moreover, a long line of Board cases, although not directly relying on the "inherently destructive" doctrine, have likewise established that an employer violates the Act when it withholds wage raises that would have otherwise been granted but for its employees' union activities. Thus, in *Modesto Convalescent Hospital*, 239 NLRB 1059, 1067 (1978), the Board stated, "[w]henever the employer, by promises or conduct, has made a particular benefit part of an established system, then he is not at liberty to deviate from the system during the union campaign." Likewise, in *Cutter Laboratories, Inc.*, 221 NLRB 161, 168 (1975), the Board observed "[I]t is well settled that an employer's legal duty during the pendency of a representation petition is to proceed as he would have done had the union not been on the scene" (internal citations omitted). Further, the Board has made clear "that withholding employees' wage increases because of their union activities, which otherwise would have been granted, and so advising them, is a violation of the Act." *Baker Industries, Inc.*, 224 NLRB 1111, 1113 (1976).

This is precisely what Respondent has done here. Given that these wage raises were an established practice, Respondent cannot take refuge in the *laboratory conditions* defense in these circumstances.[35] Such defense would have been valid had Respondent announced to its employees that it was temporarily withholding the yearly wage increase so as to not improperly influence the outcome of the election but given assurances that the wage increase would be granted after the election, regardless of its outcome. See, e.g., *Cutter Laboratories*, supra., citing *Standard Coil Products*, 99 NLRB 899 (1952); and *Uarco, Inc.*, 169 NLRB 1153 (1968). Respondent did not do this, but rather announced that a wage freeze, applicable only to its drivers, was in place because of the petition, and made statements suggesting that the drivers would lose out on receiving the wage increase if they chose to be represented by the Union. Moreover, the "critical period" during which "laboratory conditions" should be maintained officially ends on the day of the election. *Ideal Electric*, supra. Respondent announced the (nation-wide) wage raise on September 20, the day of the election, but the raise did not go into effect until October 1, well after the critical period was over. Thus, this defense is unavailable to Respondent in these circumstances, and bears the appearance of a pretext in that regard.

Perhaps suspecting the weakness of such defense, Respondent proffered a second, and even less plausible, defense for its failure to grant the October 1 raise to its drivers. Thus, according to the testimony of West Region President Garner, in 2018 he decided to use a different formula than had previously been used by VP McFarland for many years to determine the precise raise each individual employee would receive. According to Garner, this new formulation represented "a change in the status quo that needed to be collectively bargained" with the Union.[36] There are two basic and fundamental problems with this defense, however, which renders it meritless. First, by admitting that the wage raises in question represented the "status quo," Garner unwittingly affirms and advances the General Counsel's and Charging Party's argument that these raises were the established (past) practice, triggering Respondent's obligation to grant the wage raises to the drivers pursuant to the doctrine discussed in the cases cited above, regardless of the petition or election outcome. Secondly, Garner's unpersuasive testimony failed to establish how his new formulation varied in any significant way from the manner in which McFarland had decided to parcel out the raises in the past—a process which Garner admitted he did not review, let alone understand. Thus, Garner's 2018 formulation was at most a distinction without a difference, having changed little, if anything, of the "status quo." In that regard, it is notable that Garner had no say on the two most important factors in determining whether the raises were consistent with established past practice: whether raises would be given at all, or the target amount ("cap") of the raise, both of which were decided by the national corporate leadership. Indeed, the raises received on October 1, 2018, by the production employees did not differ in any significant way from the raises that all the employees, including the drivers, had received during the 4-year period from 2014 to 2017, which remained consistent with past practice. In these circumstances, it is apparent that Garner's defense that Respondent could not grant the drivers the October 1 raise without first bargaining with the Union is a pretext, likely an after-thought for its

[34] I believe this case fits squarely within the mold of *United Aircraft* and covered by the *Great Dane* doctrine that appears to have become dormant, for reasons that are not apparent. In that regard, I can't conceive of conduct that could be more inherently destructive of Sec. 7 rights than denying an entire group of employees a wage raise, on account of their union activity, that everyone else received, except for perhaps the shutting down of an entire plant, acts of violence, or threats thereof. I find that in this case Respondent's taunting of the drivers, by reminding them that but for their union activity they would have received the wage raise granted to other employees, represented a "twisting of the knife" that imparted coercive flavor to the "inherently destructive" conduct.

[35] The "laboratory conditions" doctrine normally applies during the critical period from the date a petition is filed through the date of the election. *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961).

[36] Tr. 536.

discriminatory policy. This is particularly true given that Respondent never notified the Union that it had granted the wage raise to other employees, nor explained to the drivers that "laboratory conditions" or its obligation to bargain prevented them from giving the otherwise automatic wage raise. Rather, Respondent sought to blame the Union, informing drivers that everything was "frozen" because of the Union, or teasing that they had come "this close" to getting a raise, or taunting them with the phrase 'October is coming." See, e.g., *KAG-W, LLC*, 362 NLRB 981 (2015). In these circumstances Respondent's obligation was not to refrain from granting the drivers their due raise in light of the Union's new status as their bargaining representative, but rather notifying the Union that it would, consistent with past practice, grant the drivers the raise—and inquire if the Union had any objection. It is inconceivable that the Union would have so objected.

As discussed above, I do not believe that a *Wright Line* analysis is required in these circumstances, given my conclusion that Respondent's conduct was inherently destructive of Section 7 rights and unlawful motivation need not be established.[37] Nonetheless, should the Board disagree and conclude that this conduct does not fit the *Great Dane Trailers* and *United Aircraft* mold, I conclude that the General Counsel has met its *Wright Line* burden in these circumstances. I would also find that Respondent did not correspondingly meet its burden to show that it would have acted in the same manner in the absence of protected activity. In that regard, I would observe that protected activity and knowledge of that activity are both undeniable—the Union filed a petition on August 27, which Respondent admitted receiving on the same date. There is ample evidence of animus that can be imputed from the various statements made by management representatives blaming the Union for the drivers' failure to get a raise, or warning that selecting the Union s their representative would cost them the raise or have other adverse consequences. Finally, there was an adverse consequence in that the drivers did not get the raise that they had repeatedly received in prior years. The burden then shifts to Respondent to show that this adverse consequence would have occurred even in the absence of union activity. This defense is plainly unavailable to Respondent, for the reasons discussed above, since it admitted that the *only* reason it did not grant the drivers a raise was because the Union was in the picture, that is, the purported need to maintain "laboratory conditions," and then the duty to bargain once the Union was selected as the drivers' representative.

Accordingly, for the above reasons, I find that Respondent violated Section 8(a)(3) and (1) of the Act by denying the drivers the 2018 raise that by then had become an established practice.[38]

B. The Change in the Working Conditions

It is undisputed, as set forth in the facts section, that in March 2020 Respondent changed the starting time and ending time of the shifts for its drivers, and that in April 2020 it shortened the number of days and hours that the drivers worked, from 5 days/40 hours per week, to 4 days/32 hours per week. Respondent also started reducing overtime hours significantly, although this change may have occurred earlier, perhaps as early as February. It is also undisputed that at no time Respondent notified the Union of these changes, nor bargained with the Union about them.

It is well settled that an employer must notify and bargain with the collective-bargaining representative of its employees prior to making any unilateral changes in mandatory subjects of bargaining, such as the wages, hours and working conditions of the represented employees. Any unilateral change in such mandatory subjects of bargaining constitutes a *per se* violation of Section 8(a)(5) and (1) of the Act. *NLRB v. Katz*, 369 U.S. 736 (1962). Moreover, when the employer and union are in the process of negotiating their first collective-bargaining agreement, such as in the present case, the employer must refrain from making any unilateral changes until an overall impasse has occurred in the contract negotiations—which discourages piecemeal bargaining and protects the integrity of contract negotiations. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). There can be no question that changes to working schedules are a mandatory subject of bargaining, *Pepsi Cola Bottling Co. of Fayetteville*, 330 NLRB 900, 904 (2000), citing *Our Lady of Lourdes Health Center*, 303 NLRB 337, 339 (1992), and that even minute changes in such schedules trigger an obligation to bargain, *Hedison Mfg. Co.*, 260 NLRB 590, 592–594 (1982), (involving a 5-minute change in the starting time).

In its post hearing brief, Respondent argues that the economic decline and loss of business in the wake of the COVID-19 pandemic justified the changes in scheduling and failure to notify and bargain with the Union in March and April 2020 about these changes. I disagree. It is well established that only truly exigent circumstances, such as an emergency, may temporarily excuse the obligation to bargain. As the Board stated in *Seaport Printing & AD Specialties, Inc.*, 351 NLRB 1269–1270 (2007), enfd. 589 F.3d 812 (5th Cir. 2009), "The Board has consistently maintained a narrow view of the economic exigency exception. It has limited 'economic exigencies' to 'extraordinary events which are an unforeseen occurrence, having a major economic effect requiring the company to take immediate action' (citations omitted). In that regard, 'absent a dire economic emergency, . . . economic events such as the loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages do not justify unilateral action." (footnotes omitted.) Thus, while there can be no question that because of COVID-19 pandemic Respondent's operations started experiencing declining business in March 2020, such decline does not justify or excuse

[37] Where all the acts have been fully litigated, such as in this case, I am permitted to find a violation on a different theory than explicitly plead or advanced by the General Counsel. *Hawaiian Dredging Construction Co.*, 362 NLRB 81 fn. 6 (2015), and cases cited therein; *Noel Canning*, 364 NLRB 503, 507 (2016).

[38] The Charging Party Union urges me to additionally find that Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to negotiate with the Union the denial of the drivers' wage raises. Unlike finding a violation on a slightly different theory than advanced by the General Counsel (see note 37 above), however, the General Counsel controls the allegations of the complaint, and I do not have the authority to add allegations not already in the complaint. See, e.g., *GPS Terminal Services*, 333 NLRB 968, 968–969 (2001); *Hobby Lobby Stores*, 363 NLRB 1965 fn. 2 (2016).

Respondent's unilateral action.[39] Respondent also argues that the changes were "minor violations of the Act" and short lived, and that the losses incurred by the drivers were minor.[40] Again, I disagree. First, a work reduction from 5 days per week (40 hours) to 4 days a week (32 hours) represents a 20-percent reduction in work and wages—which is significant, even if short-lived. Additionally, starting and finishing shifts earlier can significantly impact workers lives. Moreover, there was a significant reduction in overtime hours, and correspondingly of overtime pay. Simply put, to brand these changes as "minor" abuses the word "minor." I would also observe that the sin here not only lies in the financial or lifestyle impact that these unilateral changes had on the members of the bargaining unit, which is significant, but just as importantly on the impact this conduct could have on the image of the Union in the eyes of the employees it represents. Such unilateral actions by Respondent cannot but have the effect of signaling to employees that the Union is impotent and powerless to protect them, conveying the message that their selection of the Union as their representative was a futile act. This is particularly true where, as in here, the Union was newly certified and was still in the process of negotiating its first contract. See, *NLRB v. Advertisers Mfg. Co*, 823 F.3d 1086, 1090 (7th Cir. 1987).

Accordingly, and for these reasons, I find Respondent violated Section 8(a)(5) and (1) of the Act by failing to notify the Union, or giving it an opportunity to bargain, regarding the reduction of overtime for drivers, the change in drivers' schedules, and the reduction of work hours for the drivers.

C. The Layoff of Desborough

As described earlier, on April 24, 2020, Respondent notified the Union that because of a reduction in business, it would have to lay off Cameron Desborough, who was the least senior driver, on April 29, 5 days later. Unlike the unilateral changes discussed above, where no notice or opportunity to bargain was proffered to the Union, Respondent did notify the Union of Desborough's layoff, albeit with only 5 days' warning. During those 5 days, an understandably very limited amount of bargaining took place via letters and/or emails, and ultimately Respondent and the Union agreed that Desborough would be offered a choice of being laid off with recall rights or accepting a severance package that would terminate his status as an employee. Desborough chose the former, although he later declined reinstatement to a different facility.

It is well established that employers must notify and bargain with the collective-bargaining representatives of their employees prior to making a decision to lay off employees. In other words, employers must bargain about the decision itself, not just its effects. *NLRB V. Katz*, supra; *Bottom Line Enterprises*, supra; *Farina Corp.*, 310 NLRB 318, 321 (1993). In this case, Respondent notified the Union only 5 days before the layoff, which was by then a fait accompli, since Respondent's message made clear that April 29 would be Desborough's last day. *Sutter Health Central Valley* Region, 362 NLRB 1833 (2015). Thus, although limited and truncated bargaining took place over those 5 days, the Union was already boxed-in about a decision that had already been made and was thus limited to bargaining only about the effects of the layoff, not the decision itself. As with the unilateral changes discussed above, Respondent has not established that it found itself in a dire financial situation or some other type of exigent circumstances that would justify and excuse its conduct. *RBE Electronics of S.D.*, 320 NLRB 80 (1995).

Accordingly, and for the above reasons, I find that Respondent violated Section 8(a)(5) and (1) of the Act by not affording the Union the opportunity to bargain about its decision to lay off Desborough.

CONCLUSIONS OF LAW

1. Airgas USA, LLC (Respondent) is an employer engaged in commerce withing the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Teamsters Wholesale Delivery Drivers, General Truck Drivers, Chauffeurs, Sales, Industrial and Allied Workers Local 848 (the Union) is a labor organization within the meaning of Section 2(5) of the Act and has at all times material herein been the certified exclusive collective- bargaining representative for purposes of collective bargaining of Respondent's employees in the following described unit:

> Included: All full-time and regular part-time route drivers, distribution drivers, inventory specialists and dispatchers with commercial driver licenses employed by Respondent working out of its facility currently located at 10675 Vanowen St., Burbank, CA; Excluded: All other employees, office clericals, professional employees, confidential employees, managerial employees, guards, and supervisors as defined by the Act, as amended.

3. Respondent violated Section 8(a)(3) and (1) of the Act by failing to grant or withholding the across-the-board October 2018 wage increase to the bargaining unit employees at the Burbank facility.

4. Respondent violated Section 8(a)(5) and (1) of the Act by failing to give the Union notice or the opportunity to bargain with regard to changing its drivers' schedules, reducing their number of hours of work, and reducing their overtime work.

5. Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union about the decision to lay off Cameron Desborough.

6. The unfair labor practices committed by Respondent, as described above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

The appropriate remedy for the Section 8(a)(5), (3), and (1) violations I have found is an order requiring Respondent Airgas USA, LLC to cease and desist from such conduct and take certain

[39] Respondent cited memoranda from the Division of Advice issued in the spring and summer of 2020 in support of the proposition that the COVID-19 pandemic should permit some employer discretion in implementing unilateral changes. Whether or not this is the correct interpretation of such memoranda is beside the point—Division of Advice memoranda have no precedential value, and I need not consider such.

[40] I note that no evidence was introduced as to when these changes were rescinded.

affirmative action consistent with the policies and purposes of the Act.

Specifically, I recommend that Respondent be ordered to cease and desist from withholding its October 2018 wage increase to the bargaining unit employees; to cease and desist from reducing the hours of work of bargaining unit employees, changing their working schedules, reducing the amount of overtime work they are offered, or otherwise changing the terms and conditions of employment of bargaining unit employees, without first notifying the Union and providing the Union with the opportunity to bargain; and to cease and desist from laying off bargaining unit employees without first notifying the Union and affording the Union an opportunity to bargain about the decision to lay off such individual(s). I shall also recommend that Respondent be ordered to cease and desist, in any other manner, from interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

Having found that Respondent violated Section 8(a)(3) and (1) by discriminatorily denying the bargaining unit employees the October 2018 wage increase I recommend that Respondent be ordered to make unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them. Backpay shall be computed as in *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, I recommend that Respondent be ordered to compensate unit employees for any adverse tax consequences of receiving a lumpsum backpay award and to file, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report with the Regional Director for Region 31 allocating the backpay awards to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016). I shall also recommend that Respondent be ordered to file, 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, a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.[41]

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by failing to give the Union notice or the opportunity to bargain with regard to changes in the drivers' work schedules, reducing their number of hours of work, and reducing their overtime work, I recommend that upon request of the Union, Respondent be ordered to rescind these changes, to the extent it has not already done so, and to bargain with the Union about such changes. I further recommend that Respondent be ordered to make employees whole for any losses suffered by them by reason of these unilateral changes, in the manner set forth above.

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally laying off Cameron Desborough without bargaining with the Union, I recommend that Respondent be ordered to offer Desborough full and immediate reinstatement to his former or substantially employment, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of Respondent's unlawful conduct, less any net interim earnings, plus interest. Backpay shall be computed as in *F. W. Woolworth Co.*, supra, plus interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In addition, I recommend that Respondent be ordered to compensate Desborough for any adverse tax consequences of receiving a lumpsum backpay award and to file, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report with the Regional Director for Region 31 allocating the backpay awards to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, supra. I shall also recommend that Respondent be ordered to file, 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, a copy of Desborough's W-2 form(s) reflecting the backpay award. Finally, I recommend that Respondent be ordered to remove from its files any reference to the unlawful layoff of Desborough, and within 3 days thereafter notify him that this has been done and that his unlawful layoff will not be used against him in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[42]

ORDER

The Respondent, Airgas USA, LLC, Burbank, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withholding the October 2018 wage increase from the bargaining unit employees.

(b) Reducing the working hours of bargaining unit members, changing their work schedules, reducing the amount of overtime offered to them, or otherwise changing the terms and conditions of employment of bargaining unit employees, without first notifying the Union and providing the Union with the opportunity to bargain.

(c) Laying off bargaining unit members without first notifying the Union and providing the Union with the opportunity to bargain.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole the bargaining unit employees for any loss of earnings or other benefits as a result of their failure to receive the October 2018 wage raise, in the manner set forth in the remedy section above.

(b) Make whole the bargaining unit employees for the loss of any earnings or other benefits suffered as a result of the reduction in their work hours, change of work schedules, or reduction in the mount of overtime work offered, in the manner set forth in

[41] See *Omni Hotels Mgmt. Corp.*, 371 NLRB No. 53, slip op. at 6 fn. 17 (2022).

[42] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

the remedy section above.

(c) To the extent that it has not already done so, rescind the unilateral changes described in section (b) above, and notify and upon request bargain with the Union prior to making any changes to the terms and conditions of bargaining unit employees.

(d) Offer Cameron Desborough full and immediate reinstatement to his former or substantially employment, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of his unlawful layoff.

(e) Remove from its files any reference to the unlawful layoff of Desborough, and within 3 days thereafter notify him that this has been done and that his unlawful layoff will not be used against him in any way.

(f) Within 14 days after service by the Region, post at all its facility in Burbank, California, where notices to employees are customarily posted, copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 29, 2018.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 31, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

In recognition of these rights, we hereby notify employees that:

WE WILL NOT refuse to grant employees a wage raise because they have joined or otherwise supported the International Brotherhood of Teamsters Wholesale Drivers, Wholesale Delivery Drivers, General Truck Drivers, Chauffeurs, Sales, Industrial, and Allied Workers Local 848 (the Union).

WE WILL NOT reduce the working hours of bargaining unit members, change their work schedules, reduce the amount of overtime offered to them, or otherwise change the terms and conditions of employment of bargaining unit employees, without first notifying the Union and providing the Union with the opportunity to bargain.

WE WILL NOT lay off bargaining unit members without first notifying the Union and providing the Union with the opportunity to bargain.

WE WILL NOT in any like or related matter interfere with, restrain, or coerce you in the exercise of rights listed above.

WE WILL make whole the bargaining unit employees for any loss of earnings or other benefits as a result of their failure to receive the October 2018 wage raise.

WE WILL make whole bargaining unit employees for the loss of any earnings or other benefits suffered as a result of the reduction in their work hours, change of work schedules, or reduction in the mount of overtime work offered.

WE WILL offer Cameron Desborough full and immediate reinstatement to his former or substantially employment, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of his unlawful layoff.

WE WILL remove from our files any reference to the unlawful layoff of Desborough, and within 3 days thereafter notify him that this has been done and that his unlawful layoff will not be used against him in any way.

AIRGAS USA, LLC

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/31-CA-226568 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board,

[23] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notice may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent/Employer customarily communicates with its employees by electronic means. If this Order is enforced by a Judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" Shall Read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.