

Since their bargaining relationship began, PTI and Local 1222 have operated with several negotiated employment levels. In the parties' bargaining parlance, employment levels constitute the negotiated categories of seniority or term of employment with PTI. The same employment levels apply uniformly throughout the bargaining unit at all of PTI's branches. Currently, there are seven employment levels, with Level 1 representing the lowest senior employees and Level 7 representing the highest senior employees.

Throughout the parties' bargaining relationship, PTI and Local 1222 have negotiated wage rates that are branch-specific and depend on numerous factors, including state law, area, trip configuration and PTI's ability to recruit. This joint understanding is so sacrosanct that it is expressly included in the wage rate section of the 2015-2018 CBA.

Wage rates, therefore, vary throughout the bargaining unit. Although the parties' collective bargaining agreements, including the 2015-2018 CBA, have always included a national minimum wage rate scale that sets the baseline wage rate associated with each employment level, the parties have also recognized negotiated branch-specific rates that are equal to or greater than the national minimum wage rate associated with each employment level. The national minimum wage rates, thus, serve as the wage floor for the bargaining unit. Like the national minimum wage rates, the branch-specific wage rate scales have always been negotiated by the parties.

From the beginning of the parties' bargaining relationship up through the first year of the 2015-2018 CBA, PTI provided wage rate increases on an employment level basis at all of its locations. Thus, if a *specific employment level was entitled to receive a wage rate increase*, **all PTI employees in that particular employment level received the increase**. This was true whether the employee made one of the national minimum wage rates or whether the employee made a negotiated branch-specific rate that was higher than the national minimum wage rate for

the employee's employment level. PTI consistently provided wage rate increases on an employment level basis before 2016 without regard to any other factor, including whether or not the employee was making one of the national minimum wage rates that the parties negotiated.

The current dispute arose after PTI decided for the first time in 2016 that the only employees eligible for the annual wage rate increases that the parties negotiated and included in Section 1(A) of Article 3 of the 2015-2018 CBA were the employees who were making the national minimum wage rates that went into effect on April 1, 2015. PTI contends that, with respect to the annual raises that the parties negotiated and included in the 2015-2018 CBA, it only has an obligation to pay the raises to the employees who are making the national minimum wage rates.

Although it acknowledges that 70% of the bargaining unit makes branch-specific rates that are more than the national minimum wage rates, PTI takes the position that it complies with the 2015-2018 CBA so long as it pays the annual raises that are included in the contract to the small segment of the bargaining unit that only makes the national minimum wage rates. According to PTI, Local 1222 negotiated an agreement that allows PTI to unilaterally decide whether all other bargaining unit employees will receive the negotiated annual increases during the term of the 2015-2018 CBA merely because these employees make branch-specific wage rates that are higher than the national minimum wage rates.

Despite PTI's attempt to demonstrate that its only contractual commitment with respect to wage rates is to the employees making the national minimum wage rates, this case is **not** about whether or not PTI has a right to unilaterally set branch-specific wage rates so long as it is paying the national minimum wage rates. It is uncontroverted that the branch-specific rates that are higher than the national minimum wage rates were negotiated, recognized by the parties and are part of the collective bargaining agreement. The key point is that, at all relevant times, some bargaining

unit employees have received the national minimum wage rates and some have received the higher branch-specific rates. The issue that the Arbitrator must resolve is whether the negotiated annual raises were also meant to be provided to employees making branch-specific rates that are higher than the national minimum wage rates. The Arbitrator therefore does not need to decide *how* the branch-specific rates came to be, but, rather, *who* is entitled to receive the annual raises that the parties negotiated.

The relevant contract language and undisputed record evidence conclusively establish that the annual raises that are included in Section 1(A) of Article 3 of the 2015-2018 CBA were negotiated for employees making the national minimum wage rates as well as for employees making higher branch-specific wage rates. With respect to the negotiated annual raises, the Arbitrator should reject PTI's attempt to draw an artificial distinction that does not exist between bargaining unit employees who make the national minimum wage rates and those employees who make more than the national minimum wage rates. The Arbitrator should conclude that PTI's application of the 2016 annual wage rate increase language by which it limited raises to only those employees earning minimum wage rates constitutes a violation of the 2015-2018 CBA for the following reasons.

- 1. The plain and unambiguous language of Section 1(A) of the 2015-2018 CBA provides that the 2016 annual wage rate increases should be provided to all Level 2 to Level 7 employees, whether or not they make national minimum wage rates.**
- 2. Although PTI makes much of the use of the word minimum in Section 1(A), there is no language in Section 1(A) or any provision of the 2015-2018 CBA that states that the 2016 annual raises were negotiated for and should only**

have been provided to employees who make the national minimum wage rates. To the contrary, the second chart in Section 1(A), which is the chart that provides what the 2016 increases will be, does not even include the word “minimum.”

3. Even if the language of Section 1(A) is ambiguous, extrinsic evidence establishes that the Arbitrator should conclude that the 2016 annual wage rate increases should be provided to all Level 2 to Level 7 employees because:
 - A. The parties’ bargaining history establishes that there is a longstanding, uninterrupted past practice that wage rate increases are supposed to be provided on an employment level basis to all employees who work in the employment level that is entitled to a wage increase, whether those employees make national minimum wage rates or higher branch-specific rates.
 - B. During the first year of the contract, PTI provided the 2015 annual wage rate increases on the basis of employment level to all employees without regard to whether or not the employees were making the national minimum wages.
 - C. Prior to 2016, no PTI representative ever took the position that PTI intended to change the parties’ long-standing past practice and establish a system under which the only employees who should receive negotiated wage rate increases were employees who made the national minimum wage rates.

- D. **In *Alberston's Inc.*, 106 LA 897 (Kaufman, 1996), a case that is nearly identical to this matter, the Arbitrator relied on points 3(A) to 3(C) above to conclude that an employer violated its collective bargaining agreement by denying annual raises to employees who made wage rates that were above the scale included in the contract.**
 - E. **Communications, including those between PTI and Local 1222, about the annual wage rate increases in negotiations, including PTI's bargaining proposals, show that the annual wage rate increases that the parties negotiated are supposed to be provided to all employees in an employment level that is entitled to a wage increase.**
 - F. **The Company's interpretation of the relevant contract language leads to illogical results because it wrecks the wage hierarchy the parties have developed.**
4. **The Local Union never waived the right to negotiate wage rate increases for any bargaining unit employees, including those making branch-specific wage rates, nor conferred the right to the Company to unilaterally decide which employees should receive the annual raises the parties negotiated.**

II. FACTS

A. Background

Beginning in 1980, PTI started its involvement in the rail crew hauling business. (Tr. 17, 244). PTI currently operates nationally in approximately 33 states at about 275 different railroad locations. (Tr. 18).

PTI contracts with major railroads. (Tr. 17). It provides two services. (Tr. 246). PTI's dedicated yard van or "DYV" service is provided to a specific railroad, typically in larger cities. (Tr. 246-247). A PTI shuttle operates within or in close proximity, e.g., a fifty mile radius, of a local rail yard. (Tr. 246-247). PTI employees transport the railroad's employees around the yard or to nearby hotels. (Tr. 247). DYV employees are paid on an hourly basis and work set shifts, e.g., 8:00 a.m. to 4:00 p.m. (Tr. 22, 246-247).

PTI also offers an on-demand over-the-road service that is not railroad-specific. (Tr. 17, 247). PTI's over-the-road drivers can transport railroad employees a few miles or up to 400 hundred miles depending on the client's needs. (*Id.*). They are paid on a cents-per mile mileage rate basis and they generally do not work 40 hours per week. (Tr. 22-23, 248).

Local 1222 has represented PTI's DYV and over-the-road drivers in a single bargaining unit since 1999. (Tr. 19). In 1999, the PTI bargaining unit had approximately 350 to 400 employees. (Tr. 21, 41). It ultimately expanded to approximately 7,200 employees. (Tr. 18). Local 1222 currently has approximately 4,500 bargaining unit employees. (*Id.*). The size of the bargaining unit fluctuates based on the expansion and contraction of PTI's business. (*Id.*).

PTI and Local 1222 have entered into several collective bargaining agreements. (Jt. Exs. 2-5). These contracts have benefitted PTI because its customers appreciate that the agreements have included a seniority system and no-strike clauses. (Tr. 248). The first agreement was in effect from July 1, 1999 to June 30, 2009 (the "1999 to 2009 CBA"). (Jt. Ex. 2).

B. The 1999-2009 CBA

1. Section 1, Rates, Of Article 3, Wage Rates, Of The 1999-2009 CBA Outlined The Parties' Agreement Regarding Employment Levels And National Minimum Wage Rates

The 1999-2009 CBA negotiations took place in 1999. (Tr. 21). Kevin Boyle, who has been Local 1222's President since 1999, represented the Local Union and Bob Tevault represented PTI in negotiations. (Tr. 19, 21-22).

PTI and Local 1222 established a seniority-based system for the PTI bargaining unit based on employment levels that did not previously exist. (Tr. 31-32). The parties agreed to five employment levels that each corresponded to a different employment seniority term with PTI. (*Id.*; Jt. Ex. 2, p. 3).

PTI and the Local Union also negotiated national minimum wage rates for each employment level. (Jt. Ex. 2, p. 3; Tr. 27). These rates constituted the minimum wage rates- the floor- that PTI had to pay bargaining unit employees based on their employment level/PTI employment term. (Jt. Ex. 2, p. 3; Tr. 25, 27-32). In this regard, Section 1(A) of Article 3 provided:

Effective July 1, 1999 the following minimum wage rates shall prevail:

Employment Term	Hourly Rates	Mileage Rates	Wait Time Rates	Dispatch Rates
Level 1/ Hire Date- 90 Days	\$5.25/hr	\$.11/mile	\$5.15	\$5.25
Level 2/ 90 Days- 1 Year	\$5.50/hr	\$.12/mile	\$5.25	\$5.50
Level 3/ 1 Year- 3 Years	\$5.75/hr	\$.13/mile	\$5.35	\$6.00
Level 4/ 3 Years- 5 Years	\$6.00/hr	\$.14/mile	\$5.45	\$6.25
Level 5/ 5 Years and After	\$6.25/hr	\$.15/mile	\$5.50	\$6.75

(Jt. Ex. 2, p. 3).

The hourly rates referred to in the national minimum wage chart were paid to DYV drivers. (Tr. 269). The mileage rates and the wait time rates were paid to over-the-road drivers. (Tr. 269). Initially, and through the present, the national minimum wage rates have generally applied to PTI branches in the South. (Tr. 32-33).

Bargaining unit employees could make more than the national minimum wage rates included in the chart in Section 1(A). (Tr. 23, 27-30). When PTI and Local 1222 negotiated the 1999-2009 CBA, each terminal or rail station that PTI serviced had its own negotiated wage scale with its own wage rates. The branch-specific rates could depend on economic conditions, state laws, competition rates and PTI's ability to attract drivers. (Tr. 27, 31). These branch-specific wage rates were negotiated. (Tr. 29). The employment levels that the parties negotiated and included in Section 1(A) were also used in each of negotiated PTI's branch-specific wage scales. (Tr. 31). The branch-specific wage rate scales included the minimum wage rates that employees could receive at each PTI branch based on their employment level. (*Id.*).

At the time the 1999-2009 CBA was negotiated, there were approximately 30 to 35 different negotiated wage rate scales for the PTI bargaining unit. (Tr. 29). A rail location that PTI serviced in Georgia, therefore, had a different wage rate scale than the Chicago wage rate scale. (Tr. 30-31). Consistent with the agreement between PTI and Local 1222 that employees could and did make more than the national minimum wage rates, Section 1(B) of Article 3 provided: "The above constitute the minimum pay rates required to be paid by the Employer." (Jt. Ex. 2, p. 3; Tr. 27-30).

2. Although The 1999-2009 CBA Did Not Outline Specific Wage Rate Increases, Wage Rates Could Increase During The Agreement Through Reopener Negotiations And Interest Arbitration

The 1999-2009 CBA did not include language that required PTI to provide specific wage rate increases during the term of the contract. (Jt. Ex. 2; Tr. 29-30). However, Article 28, Term Of Agreement, provided that the contract could be reopened for wages and benefits on September 1, 2000 and every twenty-four (24) months thereafter. (Jt. Ex. 2, p. 19). (Jt. Ex. 2, p. 19; Tr. 33).

If the parties could not reach agreement on wage proposals through reopener negotiations, then their dispute could be submitted to interest arbitration. (Jt. Ex. 2, p. 19 and Appendix A). Under the interest arbitration process, proposals regarding wages could be presented to a "Board of Arbitration" that had a PTI representative, a Local 1222 representative and a third impartial member/arbitrator. (*Id.* at Appendix A, p. 20). A "baseball style" arbitration approach was used in interest arbitration. (*Id.*). Under this approach, the Board of Arbitration selected from either party's final "best offer" position. (*Id.*).

3. Wage Rates Increased During The Term Of The 1999-2009 CBA Through Reopener Negotiations And Interest Arbitration; All Eligible Employees, And Not Just Employees Making The Minimum Rates Outlined In Section 1(A), Received These Increases

The 1999-2009 CBA was reopened in 2000 for wage and benefit negotiation. (Tr. 33). PTI and Local 1222 negotiated wage rate increases, but were unable to reach an agreement. (Tr. 33-34). An interest arbitration was, therefore, held in 2002. (Tr. 34-35). During the interest arbitration, Local 1222 proposed across-the-board wage rate increases for all PTI bargaining unit employees. (Tr. 35). In contrast, PTI only proposed wage rate increases for certain employees. (Tr. 35-36). PTI's wage rate increase proposals were not limited to the employees who were making the minimum wage rates that were outlined in Section 1(A) of Article 3 of the 1999-2009 CBA. (*Id.*). The arbitrator accepted PTI's proposal. (Tr. 35). As a result, all employees that PTI

proposed should receive wage rate increases, including those employees making negotiated branch-specific wage rates that were more than the national minimum wage rates outlined in Section 1(A) of Article 3, received the wage rate increases. (Tr. 35-36).

The 1999-2009 CBA was reopened again in 2004. (Tr. 36). This time, PTI and Local 1222, did agree on wage rate increases. (Tr. 36-37). The parties agreed that all Level 3 to Level 5 employees, including those making more than the national minimum wage rates outlined in Section 1(A) of Article 3, would receive wage rate increases. (*Id.*).

The 1999-2009 CBA was reopened again in 2007. (Tr. 37-38). PTI and Local 1222 negotiated wage rate increases, but were unable to reach an agreement. (*Id.*). An interest arbitration was held in 2007. (*Id.*). PTI proposed that all Level 3 to Level 5 employees receive wage rate increases. (Tr. 38). PTI's proposal was not limited to the employees who were receiving the national minimum wage rates that PTI was paying at that time. (*Id.*). The arbitrator accepted PTI's proposal. (*Id.*). As a result, all employees that PTI proposed received wage increases, including those employees making more than the national minimum wage rates that PTI was paying at that time, received the wage rate increases that PTI proposed. (*Id.*).

C. The 2009-2012 CBA

1. The 2009-2012 CBA Included Minimum Wage Rate Scales That Identified The National Minimum Wage Rates That Employees Could Receive Based On Their Level Of Employment

At the expiration of the 1999-2009 CBA, PTI and Local 1222 negotiated a successor collective bargaining agreement that was in effect from April 1, 2009 to March 31, 2012 (the "2009-2012 CBA"). (Tr. 38; Jt. Ex. 3). Boyle and Tevault were again the representatives for the Local Union and PTI, respectively. (Tr. 39; Jt. Ex. 3, p. 22).

PTI and the Local Union maintained the five employment levels that they established in connection with the 1999-2009 CBA with two minor changes.¹ (Jt. Ex. 3, p. 3). PTI and Local 1222 again agreed to national minimum wage rates for each employment level that they included in the 2009-2012 CBA. (Jt. Ex. 3, p. 3; Tr. 41-43). The parties negotiated two national minimum wage rate scales: 1) a scale that was in effect from April 22, 2009 to July 23, 2009; and 2) a scale that went into effect on July 24, 2009 and replaced the previous scale. (Jt. Ex. 3, p. 3).

These scales did not include a specific column for minimum hourly wage rates. (Jt. Ex. 2, p. 3; Tr. 41-42). The "minimum rates" included in the charts actually referred to the two hours of wait time that over-the-road drivers were entitled to receive in certain circumstances, e.g., if they had to make a short 15-minute run. (Tr. 269-270). The wait time rates in these charts served as the minimum hourly wage rates that employees could receive. (Jt. Ex. 2, p. 3; Tr. 41-42).

The national minimum wage rate scales were included in Section 1(A)(1) and (2) of the 2009-2012 CBA. (*Id.*). Section 1(A)(1) provided:

Effective April 22, 2009, the following minimum wage rates shall prevail:

Employment Term	Mileage Rates	Wait Time Rates	Minimum Rates
Level 1/ Hire Date-60 Days	\$.130 mile	\$6.55	\$13.10
Level 2/ 60 Days ó 1 Year	\$.144 mile	\$6.55	\$13.10
Level 3/ 1 Year ó 3 Years	\$.162 mile	\$7.15	\$14.30
Level 4/ 3 Years ó 5 Years	\$.180 mile	\$7.76	\$15.52
Level 5/ 5 Years and After	\$.198 mile	\$8.28	\$16.56

¹ Under the 2009-2012 CBA, bargaining unit employees were considered Level 1 employees from their hire date through 60 days of employment (instead of 90 days of employment under the 1999-2009 CBA) and were considered Level 2 employees from 60 days of employment (instead of 90 days of employment) through their first year of employment. (Jt. Ex. 2, p. 3; Jt. Ex. 3, p. 3).

(*Id.*).

When the 2009-2012 CBA was negotiated, the federal hourly minimum wage rate was \$6.55. (Tr. 42). Thus, between April 22, 2009 and July 23, 2009, the minimum wait time/minimum hourly wage rates for Level 1 and Level 2 bargaining unit employees equaled the federal minimum wage rate. (*Id.*; Jt. Ex. 3, p. 3).

On July 24, 2009, the federal minimum wage rate increased from \$6.55 to \$7.25. (Tr. 43). Section 1(A)(2) reflected that increase. (*Id.*; Jt. Ex. 3, p. 3). It provided:

Effective July 24, 2009, the following minimum wage rates shall prevail:

Employment Term	Mileage Rates	Wait Time Rates	Minimum Rates
Level 1/ Hire Date-60 Days	\$.130 mile	\$7.25	\$14.50
Level 2/ 60 Days ó 1 Year	\$.144 mile	\$7.25	\$14.50
Level 3/ 1 Year ó 3 Years	\$.162 mile	\$7.25	\$14.50
Level 4/ 3 Years ó 5 Years	\$.180 mile	\$7.76	\$15.52
Level 5/ 5 Years and After	\$.198 mile	\$8.28	\$16.56

(Jt. Ex. 3, p. 3).

As a result of the federal minimum wage rate increase, the minimum wait time/minimum hourly wage rates increased to \$7.25 for Level 1 to Level 3 employees on July 24, 2009. (*Id.*; Tr. 53). Reinforcing that the wage rates that were outlined in Section 1(A)(1) and (2) were national minimum wage rates, Section 1(B) of Article 3 of the 2009-2012 CBA continued to provide: “The above constitute the minimum pay rates required to be paid by the Employer.” (*Id.*).

2. The Parties Continued To Negotiate And Use Branch- Specific Wage Rate Scales That Allowed Employees To Make More Than The National Minimum Wage Rates Outlined In Section 1(A)(1) And (2)

When the 2009-2012 CBA was negotiated, PTI's business had expanded. (Tr. 41, 251; Un. Ex. 1). As a result, the bargaining unit expanded to between 1,700 and 2,000 employees. (Tr. 21, 41). PTI and Local 1222 continued to utilize negotiated branch-specific wage rate scales. (Tr. 44). Many bargaining unit employees made wages that were higher than the national minimum wage rates that were associated with their employment levels and that were outlined in Section 1(A)(1) and (2). (Jt. Ex. 3, p. 3-4). The negotiated branch-specific wage rate scales continued to represent the minimum wage rates that employees made based on their employment levels at the different rail locations that PTI serviced. (Tr. 44-47).

In April of 2009, PTI gave the Local Union a spreadsheet that outlined all of the wage rate scales that were in effect on April 22, 2009 for each location that PTI serviced. (Tr. 48-49; Un. Ex. 1). The April 2009 spreadsheet shows, in part, that bargaining unit employees at the same employment level could make very different minimum wage rates depending on their employment location. (Jt. Ex. 3, p. 3; Un. Ex. 1).

The chart below is derived from information provided in the April 2009 spreadsheet. (Un. Ex. 1). It shows the broad variance in the wage rates that employees in the same employment level could make. (*Id.*). For example, while employees at the Beaumont, Texas facility made wage rates that equaled the national minimum hourly wage rates outlined in Section 1(A)(1), employees working in West Chicago, Illinois made anywhere from \$1.20 to \$2.38 an hour more than the Beaumont employees depending on their employment level because of higher branch-specific rates that had been negotiated for West Chicago. (*Id.*).

Employment Level	Min. Hourly Rates: 2009-2012 CBA	Min. Hourly Rates: Beaumont, TX	Min. Hourly Rates: Dexter, MO	Min. Hourly Rates: Collinsville, IL	Min. Hourly Rates: West Chicago, IL
Level 1	\$6.55	\$6.55	\$7.05	\$7.75	\$7.75
Level 2	\$6.55	\$6.55	\$7.15	\$8.00	\$8.00
Level 3	\$7.15	\$7.15	\$7.98	\$8.76	\$9.53
Level 4	\$7.76	\$7.76	\$8.47	\$9.06	\$9.88
Level 5	\$8.28	\$8.28	\$8.68	\$9.36	\$10.24

(Id.).

Boyle testified that the negotiated branch-specific minimum wage rate scales were not physically included as part of the 2009-2012 CBA because there were so many different wage scales. (Tr. 48). He explained that, if all of the scales had been included in the contract booklet, the collective bargaining agreement would have been a 400-page document. (Tr. 48).

3. Section 1(A)(3) Outlined The Annual Wage Rate Increases That Were Negotiated For And Provided To All Level 3 To Level 5 Employees

During the 2009 contract negotiations, PTI and Local 1222 agreed to annual wage rate increases for certain bargaining unit employees. (Jt. Ex. 3, p. 4; Tr. 53). These annual wage rate increases were included in Section 1(A)(3) of Article 3. (Jt. Ex. 3, p. 4). The annual wage rate increases went into effect on April 22nd of each contract year- 2009, 2010 and 2011. *(Id.)*. The annual wage rate increases were percentage increases that varied based on the contract year and on employment level. *(Id.)*. Eligibility for the annual wage rate increases was entirely dependent on one factor- employment level. *(Id.)*. The annual wage rate increases were negotiated for and provided to all Level 3, Level 4 and Level 5 employees. *(Id.)*. Section 1(A)(3) provided:

- Year 1 - Effective April 22, 2009:
- Level 3 wages - Increase all levels three percent (3%)
 - Level 4 wages - Increase all levels three and one-half percent (3.5%)
 - Level 5 wages - Increase all levels four percent (4%)
- Year 2 - Effective April 22, 2010
- Level 3 wages - Increase all levels three percent (3%)
 - Level 4 wages - Increase all levels three percent (3%)
 - Level 5 wages - Increase all levels three percent (3%)
- Year 3 - Effective April 22, 2011
- Level 3 wages - Increase all levels three percent (3%)
 - Level 4 wages - Increase all levels three percent (3%)
 - Level 5 wages - Increase all levels three percent (3%)

(Id.).

On April 22, 2009, all Level 3 employees received a 3% wage rate increase, all Level 4 employees received a 3.5% increase and all Level 5 employees received a 4% wage rate increase. *(Id.*; Tr. 44-46). These annual wage rate increases were provided without regard to these employees' current wage rates. (Tr. 44-46). Thus, both the Level 3, 4 and 5 employees who made the national minimum wage rates outlined in Section 1(A)(1) and the Level 3, 4 and 5 employees who made negotiated branch-specific wage rates that were higher than the national minimum wage rates received the April 22, 2009 annual wage rate increases. (Tr. 44-47, 50-52).

The 2009 wage rate increases were reflected in the spreadsheet that PTI produced and provided to Local 1222. (Un. Ex. 1; Tr. 48-52). That spreadsheet outlined the wage rate scales that were in effect on April 22, 2009 for all the branch locations that PTI serviced. *(Id.)*. The top of the first page of the spreadsheet included this chart, which outlined the April 22, 2009 wage rate increases.

	Employment Term	Increase
Level 1	To 60 Days	0.00%
Level 2	60 days to 1 year	0.00%
Level 3	1 year to 3 years	3.00%
Level 4	3 years to 5 years	3.50%
Level 5	5 years and beyond	4.00%

(Un. Ex. 1, p. 1). The rest of the spreadsheet included the various wage rates scales that were in effect at each of PTI's branches as of April 22, 2009. (Un. Ex. 1). These rates were referred to by PTI as the "UPSEU agreement rates." (*Id.*). Each negotiated branch-specific wage rate scale incorporated the April 22, 2009 annual wage rate increases. (*Id.*).

Section 1(A)(3) was applied the exact same way in 2010 and 2011 as it had been applied in 2009. (Tr. 53- 56). In 2010 and 2011, all Level 3, 4 and 5 employees received 3% annual wage rate increases on April 22nd. (*Id.*). These wage rate increases were provided without regard to these employees' current wage rates. (*Id.*). Therefore, every single Level 3, 4 and 5 employee received the 2010 and 2011 annual wage rate increases. (*Id.*).

In 2010 and 2011, PTI also provided Local 1222 wage rate table spreadsheets. (Tr. 54-56). The 2010 and 2011 wage rate table spreadsheets showed that each negotiated branch minimum wage rate scale was adjusted to reflect the 3% wage rate increases that were provided to all Level 3, 4 and 5 employees on April 22, 2010 and April 22, 2011. (*Id.*).

D. The 2012-2015 CBA

1. The 2012-2015 CBA Included A Minimum Wage Rate Scale That Identified The National Minimum Wage Rates That Bargaining Unit Employees Could Receive Based On Their Employment Levels

At the expiration of the 2009-2012 CBA, PTI and Local 1222 negotiated a collective bargaining agreement that was in effect from April 1, 2012 to March 31, 2015 (the "2012-2015 CBA"). (Jt. Ex. 4; Tr. 56). Boyle participated in the negotiations on behalf of Local 1222. (*Id.* at p. 29; Tr. 56, 60). PTI Vice President Steve McClellan negotiated for PTI. (*Id.*).

At the time the 2012-2015 CBA was negotiated, PTI continued to grow and it was operating in approximately 150 different locations. (Tr. 58). In 2012, PTI's west coast expansion alone led to the addition of 1,200 to 1,300 drivers to the bargaining unit. (Tr. 62).

Section 1(A), Rates, of Article 3, Wage Rates, of the 2012-2015 CBA outlined the national minimum wage rates that bargaining unit employees were entitled to receive based on their employment level. (Jt. Ex. 4, p. 8; Tr. 57). Section 1(A)(1) provided:

Effective April 1, 2012, the following minimum wage rates shall prevail:

	Hourly Rate	Mileage Rate	Wait Time Rate	Minimum Rate
Level 1	7.25	0.130	7.25	14.50
Level 2	7.25	0.138	7.25	14.50
Level 3	7.70	0.161	7.51	15.02
Level 4	7.84	0.173	7.51	15.02
Level 5	7.93	0.186	7.53	15.06

(Jt. Ex. 4, p. 8). Section 1(B) of the 2012-2015 CBA continued to provide: "The above constitutes the minimum pay rates required to be paid by the Employer." (*Id.*).

2. The Parties Continued To Negotiate And Use Branch-Specific Wage Rate Scales That Allowed Employees To Make More The National Minimum Wage Rates Outlined In Section 1(A)(1)

PTI and Local 1222 continued to operate with negotiated branch-specific wage rate scales during the term of the 2012-2015 CBA. (Tr. 58). Many bargaining unit employees made wages that were higher than the national minimum wage rates outlined in Section 1(A)(1) that were associated with their employment levels. (Jt. Ex. 3, p. 3-4). The negotiated branch-specific wage rate scales were the wages that those employees were contractually entitled to receive based on their employment levels at the different rail locations that PTI serviced. (Tr. 44-47).

PTI and Local 1222 added new language to the 2012-2015 CBA to expressly state that: 1) wage rates were branch-specific; and 2) the differences between wage rate scales depended on numerous factors. (Tr. 59-62; Jt. Ex. 3, p. 3-4). Section 1(A)(2) of Article 3 provided:

The above rates are minimum rates across all PTI Branch locations. Rates are Branch specific and depend on a number of factors, including, state law, area, trip configuration, PTI's ability to recruit. Rates may be more or less in each category than any other Branch, subject to minimum rates.

(Id.).

Local 1222 President Boyle testified that the Section 1(A)(2) language was added to the 2012-2015 CBA because PTI and Local 1222 wanted to explain in the contract that there were various branch-specific wage rate scales. (Tr. 60). Boyle commented that employees who moved from one PTI location to another or who talked to other PTI employees who worked at different locations wondered why they were not making the same wages. *(Id.)*. PTI and Local 1222 also wanted employees to know why there were different branch-specific wage rate scales and to explain the factors that caused the differences in the wage rate scales. (Tr. 60-61).

3. Section 1(A)(3) Outlined Annual Wage Rate Increases That Were Negotiated For And Provided To All Level 3 To Level 5 Employees

In 2012, PTI and Local 1222 negotiated annual wage rate increases for Level 3, Level 4 and Level 5 bargaining unit employees. (Jt. Ex. 4, p. 8; Tr. 57-58). These annual wage rate increases were included in Section 1(A)(3) of Article 3. (Jt. Ex. 4, p. 8). The wage rate increases went into effect on April 1st of each contract year- 2012, 2013 and 2014. (*Id.*). The annual wage rate increases were percentage increases that varied based on the contract year and employment level. (*Id.*). Eligibility for the annual wage rate increases was dependent on one factor- employment level. (*Id.*). The annual wage rate increases were negotiated for and provided to all Level 3, Level 4 or Level 5 employees. (*Id.*). Section 1(A)(3) provided:

Year 1 - Effective April 1, 2012:

Level 3 wages -	Increase by two percent (2%)
Level 4 wages -	Increase by two percent (2%)
Level 5 wages -	Increase by two percent (2%)

Year 2 - Effective April 1, 2013

Level 3 wages -	Increase by two percent (2%)
Level 4 wages -	Increase by two percent (2%)
Level 5 wages -	Increase by two percent (2%)

Year 3 - Effective April 1, 2013

Level 3 wages -	Increase by two and one-half percent (2.5%)
Level 4 wages -	Increase by two and one-half percent (2.5%)
Level 5 wages -	Increase by two and one-half percent (2.5%)

(*Id.*).

On April 1st of 2012, all Level 3, 4 and 5 bargaining unit employees, including those Level 3, 4 and 5 employees who made more than the minimum scale wage rates outlined in Section 1(A)(1) of Article 3 of the 2012-2015 CBA, received the 2% annual wage rate increases outlined in Section 1(A)(1) of Article 3 of the contract. (Tr. 58-59, 63-65). On April 1, 2013, all Level 3,

4 and 5 bargaining unit employees, including those Level 3, 4 and 5 employees who made more than the national minimum wage rates, received 2% annual wage rate increases. (Tr. 64-65). On April 1, 2014, all Level 3, 4 and 5 bargaining unit employees, including those Level 3, 4 and 5 employees who made more than the national minimum wage rates, received a 2.5% wage rate increases irrespective of their individual wage rates. (Tr. 64-65).

In 2012, 2013 and 2014, PTI produced annual wage rate tables that were provided to the Local Union. (Tr. 64-65). These wage rate tables were in substantially the same format as the wage rate spreadsheets that PTI had provided the Local Union during the term of the 2009-2012 CBA. (Tr. 59). The 2012 and 2013 wage rate tables showed that all Level 3, 4 and 5 employees received 2% wage rate increases on April 1, 2012 and April 1, 2013. (Tr. 59, 64). The 2014 wage rate table showed that all Level 3, 4 and 5 employees received 2.5% wage rate increases on April 1, 2014, regardless of whether their negotiated branch-specific wage was higher than the national minimum scale. (Tr. 65).

Local 1222 President Boyle explained the reasons that the 2012, 2013 and 2014 wage rate tables were not included with the 2012-2015 CBA. (Tr. 65-66). For one, the 2012-2015 CBA would have been unnecessarily large if each negotiated wage rate table was attached to contract. (*Id.*). In addition, if the wage rate tables were attached to the 2012-2015 CBA, then the employees could have seen exactly what employees made at other PTI locations. (*Id.*). This could have caused unnecessary dissension in the bargaining unit and potential in-fighting over why employees working at the same employment level made different wage rates. (*Id.*). To prevent that potential discord, PTI and Local 1222 decided not to attach the wage rate tables to the 2012-2015 CBA and, instead, sent each location the specific negotiated wage rate table that applied at each branch. (Tr. 66).

E. The 2015-2018 CBA Negotiations

1. While Preparing For Negotiations, Local 1222 Concluded That Increasing Wage Rates Increases Was The Most Important Issue For The Bargaining Unit

In the fall of 2013, Local 1222 entered into a "high-profile" partnership agreement for the PTI bargaining unit with the United Steelworkers (the "USW") that has been directly supervised by the USW's International President and International Vice President of Administration. (Tr. 67-68, 172-173, 181). If the USW and Local 1222 consider the partnership agreement to be a success, it leads to an affiliation agreement. (Tr. 182). Pursuant to the partnership agreement, the USW participated in the negotiations for the collective bargaining agreement that went into effect on April 1, 2015 and is set to expire on March 31, 2018 (the "2015-2018 CBA"). (Tr. 67-68, 174, 180).

Ike Gittlen works as a Technician in the USW Organizing Department. (Tr. 171-172). Since 2013, Gittlen has been assigned to coordinate the partnership agreement with respect to the servicing of the PTI bargaining unit. (Tr. 172). Gittlen participated in the negotiations for the 2015-2018 CBA. (Tr. 174). Gittlen sat at the bargaining table and took primary responsibility for resolving outstanding grievances and language issues. (*Id.*). Gittlen also helped Local 1222 President Boyle, who chaired the economic portion of the negotiations, formulate the Local Union's economic proposals and prepare for the economic part of negotiations. (Tr. 68, 174).

To gauge the issues of importance to the PTI employees, Gittlen prepared a comprehensive survey that was distributed to the PTI bargaining unit. (Tr. 174-175). Gittlen explained: "The main purpose of the survey was to make sure that this round of negotiations reflected what it was that the drivers were interested in getting out of the agreement." (Tr. 175). There was a significant

response to the survey from the bargaining unit. (Tr. 176). The survey showed that the number one issue, by far, to the bargaining unit was the negotiation of higher wages. (*Id.*).

The USW has a program that allows it to analyze wages by job by region. (Tr. 178). Prior to negotiations, Gittlen performed an analysis of the wage rates that PTI was paying at each location. (Tr. 178-179). This analysis showed that, even though wage rates varied throughout the PTI bargaining unit, the wage rates for bargaining unit employees were all low from a standard of living standpoint. (*Id.*). Gittlen explained: "The fact that somebody in Chicago is making \$11 an hour doesn't make them wealthy because \$11 an hour in Chicago is still basically an entry level wage even if somebody in North Carolina may be making [\$7 to \$8 an hour], the equivalent in terms of cost of living and all the rest of it is pretty much the same." (Tr. 178).

2. At The Outset Of Negotiations, Local 1222 Explained The Significance Of Across-The-Board Wage Rate Increases And Advised PTI That It Was Seeking Higher Wage Rates For All Employees

When negotiations began, PTI was operating out of 33 or 34 states in approximately 300 to 350 locations. (Tr. 68). There were approximately 90 different negotiated wage scales at these locations. (Tr. 182-183). The bargaining unit had about 7,200 employees. (Tr. 68).

In addition to Gittlen, several other USW officers participated in negotiations on behalf of Local 1222. (Tr. 180-181). Boyle served as the chief negotiator/lead spokesperson for the Local Union with respect to wage rates and wage rate increases. (Tr. 69).

The chief negotiator/lead spokesperson for PTI with respect to wage rates and wage rate increases was PTI Vice President McClellan. (Tr. 69, 199). PTI's Human Resource Director Steve Greulich and Vice President of Administration Ryan Kassenbrock- PTI's "numbers cruncher" also participated in the economic portion of negotiations. (Tr. 198-199; Un. Ex. 7).

The Local Union's main goal in negotiations was to increase wages and benefits for all employees. (Tr. 70, 187). The Local Union's negotiators made that goal clear to PTI at the beginning of negotiations. (Tr. 70). When negotiations commenced in January 2015, the Local Union presented a Powerpoint presentation to PTI that summarized the results of its survey. (Tr. 68, 175, 177). The Local Union made that presentation when negotiations started so that PTI would understand that its push for wage rate increases "wasn't something that [the Local Union] dreamt up in a back room." (Tr. 177-178). On the contrary, the push for higher wages "was the desire of their employees," and that "the bargaining agenda was critical to address because it came from the needs of their workforce." (Tr. 177-178).

The Powerpoint presentation made it clear that Local 1222 was not solely interested in raising the wage rates of those employees who were making the national minimum wage rates. (Tr. 178). In connection with the presentation, the Local 1222 negotiators also told PTI negotiators that the Local Union was not solely interested in raising the wage rates of those employees who made the national minimum wage rates. (*Id.*). When the survey results were presented to PTI, the Company negotiators, consistent with how wage rates had been negotiated in the past, did not indicate that PTI was only interested in negotiating the wage rates of employees making the national minimum wage rates. (Tr. 179-180)

The survey results and a synopsis of the Powerpoint presentation were distributed by Local 1222 throughout the PTI bargaining unit. (Tr. 177, 184-185). Gittlen also prepared a March 11, 2015 document titled, "Union Update #2," that was distributed to the bargaining unit. (Tr. 184-185; Un. Ex. 5). It advised employees that the survey results showed that wages topped the list of significant issues for the bargaining unit and that Local 1222 let PTI know that at the start of negotiations. (Tr. 184-185; Un. Ex. 5).

3. PTI And The Local Union Discussed Negotiation Of Wage Rate Increases For Employees Who Made More Than The National Minimum Wage Rates

The negotiation of wage rates and wage rate increases was a back and forth process in which the parties exchanged multiple proposals. (Tr. 71). Boyle and Gittlen testified that, when they were negotiating with the Company over wage rate increases, it was clear that the parties were discussing the application of increases to employees who made more than the national minimum wage rates. (Tr. 78, 195).

Boyle testified that the Company showed him calculations during negotiations in which it was costing out what wage rate increases for employees making more than the national minimum wage rates. (Tr. 78). For example, PTI negotiators showed him spreadsheets that estimated how much certain annual raises would cost if they were provided to all employees in specific employment levels. (Tr. 78, 82). Boyle also recalled that, in discussions about the ramifications of the wage rate increases, Company negotiators would say: "We have a lot of people in Level 3, we have a lot of people in Level 5." (Tr. 82). PTI negotiators additionally discussed employees who were "off schedule" receiving wage rate increases. (Tr. 82-84). Off schedule employees have worked so long for PTI and received so many raises over the years in light of their seniority that they make significantly more than their employment level would otherwise dictate, e.g. \$14 to \$15 hour. (Tr. 44-47, 82-84).

Boyle testified that the bargaining table conversations and the off-the-record conversations with PTI representatives made it clear that PTI and Local 1222 were not just negotiating raises for employees who made the national minimum wage rates. (*Id.*). He explained: "[T]hey knew it was everybody, we knew it was everybody, there was no secret [that] it was everybody." (*Id.*).

Gittlen similarly testified that PTI lead negotiator McClellan made it clear in his discussion of wage rate increases that the raises would be applied "everywhere" to employees making more than the national minimum wage rates. (Tr. 187-188). Gittlen testified: "[I]n every discussion at the table about the specific wage proposals for the wage scale, McClellan made it clear that he was talking about its impact across everybody." (190). Gittlen noted that no one in the Company ever indicated during negotiations that the negotiated wage rate increases would only apply to employees making the national minimum scale wages. (Tr. 183, 190). Gittlen testified that such a comment would have led to "a complete breakdown of the discussions." (Tr. 190).

4. PTI's 4/22/15 Proposal #1

PTI submitted a proposal to Local 1222 at 8:00 a.m. on April 22, 2015 that addressed wage rates and wage rate increases (PTI's 4/22/15 Proposal #1). (Tr. 72; Un. Ex. 2). In this regard, the 4/22/15 Proposal #1 had three main elements: 1) the creation of employment levels 6 and 7; 2) guarantees that Level 1 rates would be a minimum of 1.25% over state/federal minimum wage rates and that Level 2 rates would be 1.25% above Level 1 rates; and 3) proposals for annual wage level increases for all employment levels. (Un. Ex. 2; Tr. 73).

Section 1, Rates, of PTI's 4/22/15 Proposal #1 addressed Level 6 and 7 employees. (Un. Ex. 2). PTI proposed that employment Level 6 be established for employees with at least 10 years of service and that employment Level 7 be established for employees with at least 15 years of PTI service. (*Id.*). PTI further proposed that Level 6 employees make 1.015% "above Level 5" employees and that Level 7 employees make 1.105% "above Level 6" employees.² (*Id.*).

Section 2, Rates, of PTI's 4/22/15 Proposal #1 addressed rate guarantees for Level 1 and Level 2 employees and annual wage level increases for all employment levels. (Un. Ex. 2). With

² In fact, PTI actually intended to propose that Level 7 employees make 1.015% more than Level 6 employees. (Tr. 73). It corrected this mistake in its second April 22, 2015 proposal. (*Id.*; Un. Ex. 3).

respect to Level 1 employees, PTI proposed that: “Level 1 rates will be at a minimum of state/federal minimum wage x 1.25%.” (*Id.*). With respect to Level 2 employees, PTI proposed that: Level 2 rates will be 1.25% above Level 1 rates.” (*Id.*). PTI’s 4/22/15 Proposal #1 further stated: “This equates to a 1.5% overall wage increase combined for Level 1 and 2. Each *Wage Level* will be no less than 1.25% above *prior level*.” (*Id.*)(emphasis added).

Below its proposals for Level 1 and 2 employees, PTI summarized its wage rate increase proposals for all employment levels for each year of the contract in the “Wage Level Increases” portion of Section 2 of its proposal. (*Id.*). PTI’s 4/22/15 Proposal #1 stated:

Wage level increases					
<u>Year 1</u>		<u>Year 2</u>		<u>Year 3</u>	
Level 1	addressed above				
Level 2	addressed above				
Level 3	1%	Level 3	1.25%	Level 3	1.5%
Level 4	2%	Level 4	2.25%	Level 4	2.5%
Level 5	2%	Level 5	2.5%	Level 5	3.0%
		Level 6	addressed	Level 6	addressed
			in 1 above		in 1 above
		Level 7	addressed	Level 7	addressed
			in 1 above		in 1 above

(*Id.*). Boyle testified that he interpreted PTI’s proposal as applying to all employees, not just those making the national minimum wage rates, because the parties were discussing wage rate increases for all employees. (Tr. 77).

5. PTI’s 4/22/15 Proposal #2

Local 1222 did not accept PTI’s 4/22/15 Proposal #1. (Tr. 76-77). PTI submitted a second proposal to the Local Union on April 22, 2015 (PTI’s “4/22/15 Proposal #2”). (*Id.*; Un. Ex. 3). PTI’s 4/22/15 Proposal #2 followed the same format as its earlier proposal with respect to wage rates and wage rate increases. (Un. Ex. 3). Section 1 addressed Level 6 and 7 employees and

Section 2 addressed rate guarantees for Level 1 and Level 2 employees and annual wage level increases for all employment levels. (*Id.*).

PTI modified its proposal regarding Level 6 and 7 employees in Section 1. (Un. Ex. 3). It proposed that Level 6 employees have at least 9 years of service and that Level 7 employees have at least 12 years of service. (*Id.*). With respect to wage rates, PTI proposed that Level 6 wage rates be “fixed @ 1.015[%] above Level 5 going forward (reduced 1 year)” and that Level 7 wage rates be “fixed at 1.015[%] above Level 6 going forward (reduced 1 year). (*Id.*).

With respect to Level 1 employees, PTI proposed in Section 2 of its 4/22/15 Proposal #2 that: “Level 1 rates will be a minimum 1.25% above state/federal minimum wage, *any Level 1 rate already above this amount will not be adjusted.*” (*Id.*) (emphasis added). With respect to Level 2 rates, PTI proposed that: “Level 2 rates will be a minimum 1.25% above Level 1 rates *at every location.*” (*Id.*)(emphasis added).

Below its proposals for Level 1 and 2 employees, PTI summarized its annual wage rate increase proposals for all employment levels for each year of the contract in Section 2 of its 4/22/15 Proposal #2. (Un. Ex. 3). This portion of its proposal was now titled, “Wage Level Increases *Across All Rates.*” (*Id.*)(new language italicized). It stated:

Wage level increases across all rates

<u>Year 1</u>		<u>Year 2</u>		<u>Year 3</u>	
Level 1	addressed above				
Level 2	addressed above	Level 2	0.5%	Level 2	0.5%
Level 3	2.0%	Level 3	2.0%	Level 3	2.5%
Level 4	2.5%	Level 4	3.0%	Level 4	3.0%
Level 5	2.5%	Level 5	3.0%	Level 5	3.25%
		Level 6	addressed	Level 6	addressed
			in 1 above		in 1 above
		Level 7	addressed	Level 7	addressed
			in 1 above		in 1 above

(*Id.*). The Wage Level Increases Across All Rates portion of PTI’s 4/22/15 Proposal #2 also included one additional line that was not included in its 4/22/15 Proposal #1. (*Id.*). This line was included below the summary of wage level increase proposals and stated: “ALL benefits earned based on time of service.” (*Id.*).

F. Section 1 Of Article 3 Of The 2015-2018 CBA Outlines The Parties’ Agreement On Wage Rates And Annual Wage Rate Increases

The parties ultimately reached an agreement on wage rates and wage rates increases. (Tr. 86, 98). Their agreement is memorialized in Section 1(A), Rates, of Article 3, Economics, of the 2015-2018 CBA. (Jt. Ex. 5, p. 14-15). Section 1(A) includes a chart that outlines the annual percentage wage increases for all employment levels and the national minimum wage rates for all employment levels, effective April 1, 2015. (*Id.* at p. 14). It also includes another chart that just outlines the 2016 and 2017 annual percentage wage increases for all employment levels. (*Id.*). Both charts include the employment levels 6 and 7 that the Company proposed adding in its 4/22/15 Proposal #2. (*Id.* at p. 14-15).

The first chart in Section 1(A) provides:

Effective April 1, 2015, the following minimum wage rates shall prevail:

	Years	Increase	Hourly	Mileage	Wait Time	Minimum
Level 1	0 ó 60 days	1.25%	7.34	.160	7.34	14.68
Level 2	61 days ó 1 Year	L1 x 1.25%	7.43	.168	7.43	14.86
Level 3	1 Year ó 3 Years	2%	8.21	.175	8.01	16.02
Level 4	3 Years ó 5 Years	2.50%	8.42	.185	8.05	16.10
Level 5	5 Years ó 9 Years	2.50%	8.50	.200	8.07	16.14
Level 6	9 Years ó 12 Years	L5 x 1.015%	8.62	.203	8.19	16.38
Level 7	12 Years and above	L6 x 1.015%	8.75	.206	8.31	16.62

The second chart provides:

	Years	2016 Increase	2017 Increase
Level 1	0 ó 60 days		
Level 2	61 days ó 1 Year	0.50%	0.50%
Level 3	1 Year ó 3 Years	2%	2.50%
Level 4	3 Years ó 5 Years	3%	#%
Level 5	5 Years ó 9 Years	3%	3.35%
Level 6	9 Years ó 12 Years	L5 x 1.015%	L5 x 1.015%
Level 7	12 Years and above	L6 x 1.015%	L6 x 1.015%

The remainder of Section 1(A) provides:

Legacy Level 6 rates will be integrated into the wage scale per mutual agreement.

The above rates are minimum rates across all PTI Branch locations. Rates are Branch specific and depend on a number of factors, including, state law, area, trip configuration, PTI's ability to recruit. Rates may be more or less in each category than any other Branch, subject to minimum rates.

(Jt. Ex. 5, p. 15).

The parties also modified Section 1(B) of Article 3. (Jt. Ex. 5, p. 16). The new Section 1(B) includes provisions that were included in the parties' previous collective bargaining agreements in Section 1(C) and (D) of those agreements. (*Id.*; Jt. Ex. 2, p. 3; Jt. Ex. 3, p. 4; Jt. Ex. 4, p. 8). The first sentence of Section 1(B) now provides:

No employee shall suffer a reduction in wages because of the rates listed above.

(*Id.*).

PTI and Local 1222 also added new contract language in Section 1(B) that had not been in earlier agreements. (Jt. Ex. 5, p. 16; Tr. 106-107). The new language states: "The Company will provide each location a Wage Table that reflects the contractual increases contained in this agreement prior to April 1 of each contract year." (Jt. Ex. 5, p. 16).

Section 1(C) includes the parties' final agreement on the wage rate guarantees for Level 1 and Level 2 employees. (Jt. Ex. 5, p. 16-17). Section 1(C), Guaranteed Scale Above Minimum Wage, provides, in relevant part:

- a. Level 1 rates will be a minimum of 1.25% above any state/federal minimum wage.
- b. Any Level 1 rate already above this amount will not be adjusted.
- c. Level 2 rates will be a minimum of 1.25% above Level 1 rates at all locations.

(*Id.*)

Section 1(D), Consumer Price Index, of Article 3 carries over the basic consumer price index language that the parties previously included in the 2012-2015 CBA, with slight updates to make the language current for this contract. (Jt. Ex. 5, p. 17). Section 1(D) provides:

In the event the C.P.I. exceeds six percent (6.0%) for the twelve (12) month period ending February 28, 2016, *above 2016 percentage increase for Level 3, 4, and 5* will be adjusted by one percent (1%) to three percent (3%). Separately, in the event the C.P.I. exceeds six percent (6%) for the twelve (12) month period ending February 28, 2017, *above 2017 percentage increases for Level 3, 4, and 5* will be adjusted by one percent (1%) to three and one-half percent (3.5%). Additional earning incentives see Appendix A.

(*Id.*)(emphasis added).

G. Communications About The Annual Wage Rate Increases Included In Section 1 Of Article 3 Of The 2015-2018 CBA

1. Local 1222 Provided Employees The "UPSEU/USW 2015 PTI Contract Wages- How To Calculate" Document To Explain The Parties' Agreements On Wage Rates And Annual Wage Rate Increases

Before the 2015-2018 CBA was issued to the bargaining unit, the Local Union held mass conference calls with Local 1222 stewards at each PTI location to discuss the new contract. (Tr. 194-195). Because there were over 90 different negotiated wage scales in effect across PTI's nearly 300 locations, the calls led to confusion about the wage rate increases that were negotiated

in the 2015-2018 CBA. (*Id.*; Un. Ex. 6). Gittlen therefore prepared a document for the bargaining unit titled: "UPSEU/USW 2015 PTI Contract Wages- How To Calculate," (the "How to Calculate document") to clarify what Local 1222 and PTI agreed to regarding wage rates and wage rate increases during the 2015-2018 CBA negotiations. (Tr. 194-196; Un. Ex. 6). This document was submitted to PTI before it was provided to the bargaining unit. (Tr. 195-196). PTI did not get back to the Local Union with any comments in a timely fashion. (Tr. 91). The Local Union needed to communicate with the Local Union about the negotiations so it sent the How to Calculate document without hearing back from the Company. (*Id.*).

The How to Calculate document showed employees how to calculate their wage rates and their wage rate increases for each year of the contract based on their respective employment levels/length of service with PTI. (Un. Ex. 6). It states: "**To figure out what the contract does for a particular driver, you need to know what the wage scale for your location is right now and what Level that driver is at right now.**" (*Id.*; Tr. 195). Gittlen bolded this language because he did not want employees to make the mistake that the minimum wage rates outlined in the first chart in Section 1(A) applied to all bargaining unit employees. (Tr. 196).

Unfortunately, the How to Calculate document included two numerical errors. (Tr. 197-198). Gittlen incorrectly stated that a Level 1 employee would make a minimum of \$7.43 an hour and that Level 2 employee would make a minimum of \$7.62 an hour. (*Id.*; Jt. Ex. 5, p. 14). Gittlen's errors were in conflict with the parties' actual agreement.³ (Tr. 197).

³ In addition to these two errors, the How to Calculate document also indicated that Level 5 employees would receive a 3.5% wage rate increase in the third year of the contract. (Tr. 196-197). Gittlen and Boyle believed that Level 5 employees were entitled to this increase based on their negotiation notes. (Tr. 90-91, 196-197). However, the Local Union ultimately agreed that Level 5 employees were entitled to a 3.35% wage rate increase for 2017. (Tr. 197).

2. PTI And Local 1222 Discussed The Errors In The How To Calculate Document

Gittlen communicated with PTI's Vice President of Administration Kassenbrock regarding the numerical errors. (Tr. 198-199). In a May 6, 2015 e-mail sent at 7:34 a.m., Gittlen provided his worksheet and formulas to Kassenbrock so that the parties could discuss the discrepancies in the How to Calculate document. (Un. Ex. 7; Tr. 201).

Kassenbrock responded to Gittlen by e-mail on May 6, 2015 at 5:19 p.m. (Un. Ex. 7). He wrote:

- Your starting point is wrong. You are double dipping on the 2012 base rates. The rates you have listed as "2012 base rates" were effective 4/01/2012, and should be the starting point, but they do not get another increase on top.
- You are actually applying 2.50% to levels 1 & 2 and should be 1.25%
- We agreed to maintain the mileage rate differential between Level 1 and 2 with applying the \$0.16 per mile minimum, but not throughout all pay levels. Increases will maintain this separation going forward in Levels 3-7.

(*Id.*).

Gittlen responded to Kassenbrock by e-mail on May 6, 2015 at 5:34 p.m. (Un. Ex. 7). Kassenbrock included the text of Gittlen's e-mail in his own May 8, 2015 email to Gittlen. (*Id.*; Tr. 206). Gittlen's May 6th 5:34 p.m. e-mail (with Kassenbrock's May 8th e-mail responses identified in bold) are provided here:

We didn't start from 2012 Ryan. On the Level 1 we started with the current federal minimum wage of \$7.25/hr. We agreed to 1.25% above minimum. That will vary according to minimum wage levels per site, but that is the base. We then put the 1.25% on top of that to get to Level 2. **AGREE, but your starting point was incorrect. The minimum wage rate table listed in the previous CBA already has 2012 rate increases baked in. You should only add 2013 and 2014 increases to this table to get to the CURRENT WAGES.**

For levels 3, 4, 5 we simply took the current 2014 wage rates and put the appropriate percentage to those levels. **AGREED**

For Level 6 we multiplied by the 1.015% on top of Level 5 and for Level 7 we multiplied 1.015% on top of Level 6. **AGREED**

Our understanding is that we would bump mileage up to \$0.16 and maintain the deltas (spread) between the levels. Our chart reflects that as well. **We agreed to maintain the delta only between level 1 and 2 mileage, not 3-7**

We also agreed to make the wait time equal to the hourly rate. **DISAGREE. These are different service types. Hourly is typically paid to yard service vs. wait time.**

Once the base was established, we applied the percentage increases to levels 2, 3, 4, 5 for the 2nd and 3rd year of the contract and bumped levels 6 and 7 up by applying the additive 1.015% to each level. **AGREE**

If this calculation isn't acceptable then let me know and I'll consult with Kevin and Alan as to we get concurrence. [No Response]

(Id.).

On May 8, 2015, Kassenbrock sent Gittlen a separate e-mail in which he provided the Company's position on the minimum pay rate schedule with calculation formulas. (Un. Ex. 8; Tr. 207-208). The e-mail or the attachment did not indicate that it only applied to the employees making the national minimum wage rates outlined in Section 1(A) of Article 3 of the 2015-2018 CBA. (Tr. 207-208). Kassenbrock never told Gittlen in any of their discussions that PTI believed the wage rate increases outlined in the first and second charts included in Section 1(A) only applied to the employees making the national minimum wage rates that were outlined in the first chart included in Section 1(A). (Tr. 208). Kassenbrock also never disagreed with the language Gittlen bolded in the How To Calculate document that provides: **“To figure out what the contract does for a particular driver, you need to know what the wage scale for your location is right now and what Level that driver is at right now.”** (Un. Ex. 6; Tr. 195, 208).

Boyle also had discussions with PTI officers in connection with the How to Calculate document. (Tr. 94). He testified that nothing in those communications indicated to him that PTI

believed that the annual wage rate increases only applied to those employees making the national minimum wage rates. (*Id.*).

3. Local 1222 Provided An Update To The Bargaining Unit And To PTI That Summarized The Provisions Of The 2015-2018 CBA, Including The Provisions Relating To Wage Rates And Annual Raises

After his communications with Kassenbrock, Gittlen prepared a document titled, "Union Update #3 SPECIAL 2015 CONTRACT EDITION (Revised)" to summarize the 2015-2018 CBA for the bargaining unit. (Tr. 208-209; Un. Ex. 4). Before it was mailed to the bargaining unit, the update was provided to PTI for its review and approval. (Tr. 93, 209). Due to the issue with the errors in the How to Calculate document, Local 1222 wanted PTI to approve Union Update #3 to ensure everything that it put out regarding the 2015-2018 CBA was accurate. (Tr. 209).

Union Update #3 addressed wages and wage rate increases. (Un. Ex. 4, p. 1). For example, it states: "We have moved wages upward," and "The impact of wage increases actually will be magnified because we are in a period of relatively low cost of living." (*Id.*).

Union Update #3 also included a June 10, 2015 letter to the bargaining unit from Boyle. (Un. Ex. 4, p. 2; Tr. 88-92). In his letter, Boyle advised that the How to Calculate document included a misunderstanding between the Company and the Local Union regarding how the wage scales should be calculated for mileage, wait time and the annual wage percentage increase for Level 5 employees in the contract's third year. (Un. Ex. 4, p. 2). Boyle also indicated that the Company and the Local Union had thorough discussions to clarify the agreement and that they adjusted the wage scale in a document attached to the update. (*Id.*). In his letter, Boyle states that the rates in that document are "minimum national rates." (*Id.*). He further advised that the Local Union would "have available the new wage scale for each location so that you know exactly what your wages will be calculated on under the new agreement." (*Id.*). Boyle testified that he

put these statements in his letter because he wanted to make it clear that the negotiated wage rate increases did not only apply to employees making the national minimum wage rates. (*Id.*).

Boyle's letter also generally addressed the significance of the wage rate increases that the Local Union had secured in negotiations. (*Id.*). Boyle advised: "[T]he wage rates reflect what PTI can provide without losing business and your jobs to lower wage competitors; the PTI/UPSEU agreement is far superior to the wages and working conditions of our competitors." (*Id.*). Boyle similarly stated that the 2015-2018 CBA "allows us to move forward and improve both wages and working conditions in substantial ways." (*Id.*).

The document that Boyle referred to in his letter and that was included in Union Update #3 was derived from Gittlen's communications with Kassenbrock. (Un. Ex. 4, p. 3; Tr. 210). It represented the agreement between the two on the appropriate wage charts. (*Id.*). With respect to wage rates and wage rate increases, the attachment to the update provides, in relevant part:

New Pay Levels:

- Level 6 - 9 years of service to 12 years of service ó 1.015% above Level 5
- Level 7 ó 12 years and above ó 1.015% above Level 6
- Legacy Level 6 rates will be integrated into the wage scale per mutual agreement

Guaranteed Scale Above Minimum Wage

- Level 1 rates will be a minimum of 1.25% above any state/federal minimum wage
 - * Any Level one rate already above this amount will not be adjusted
- Level 2 rates will be a minimum of 1.25% above Level 1 rates at all locations
- 1st Year Level 1 mileage will start at \$0.16 and maintain the same cents/mile differences between Levels 1 and 2 that existed as a result of the 2012 Agreement. The Level 3 minimum mileage rate will further be increased to .175/mile in Year 1.
- These rates will apply to all forms of payments

General Wage Increase

	Years	Increase	Hourly	Mileage	Wait Time	Minimum
Level 1	0 ó 60 days	1.25%	7.34	.160	7.34	14.68
Level 2	61 days ó 1 Year	L1 x 1.25%	7.43	.168	7.43	14.86
Level 3	1 Year ó 3 Years	2%	8.21	.175	8.01	16.02
Level 4	3 Years ó 5 Years	2.50%	8.42	.185	8.05	16.10
Level 5	5 Years ó 9 Years	2.50%	8.50	.200	8.07	16.14
Level 6	9 Years ó 12 Years	L5 x 1.015%	8.62	.203	8.19	16.38
Level 7	12 Years and above	L6 x 1.015%	8.75	.206	8.31	16.62

	Years	2016 Increase	2017 Increase
Level 1	0 ó 60 days		
Level 2	61 days ó 1 Year	0.50%	0.50%
Level 3	1 Year ó 3 Years	2%	2.50%
Level 4	3 Years ó 5 Years	3%	#%
Level 5	5 Years ó 9 Years	3%	3.35%
Level 6	9 Years ó 12 Years	L5 x 1.015%	L5 x 1.015%
Level 7	12 Years and above	L6 x 1.015%	L6 x 1.015%

- The above rates are minimum rates across all PTI branch locations. Rates are Branch specific and depend on a number of factors, including, state law area, trip configuration, PTI's ability to recruit. Rates may be more or less in each category than another Branch, subject to minimum rates.

(Un. Ex. 4, p. 3).

On page 4 of Union Update #3, Gittlen included a bolded bullet point that states: **“The Company will provide each location a Wage Table that reflects the contractual increases contained in this agreement prior to April 1 of each contract year.”** (Un. Ex. 4, p. 4). Gittlen testified that he bolded this line to make it clear to employees that, although the national minimum wage rates were provided, employees still had to look to the applicable rates negotiated for their

location to ascertain their specific rates and that PTI would be posting those rates at each location. (*Id.*; Tr. 196, 210-211). Union Update #3 was sent to PTI's Human Resources Director, Steve Gruelich before it was submitted to the bargaining unit. (Tr. 209-210). No PTI representative ever notified the Local Union that PTI disagreed with any of the content in Union Update #3. (Tr. 92-94).

H. In 2015, PTI Provided All Employees With The Wage Rate Increases Outlined In The First Chart Of Section 1(A) of Article 3 Of The 2015-2018 CBA

In 2015, during the first year of the 2015-2018 CBA, every bargaining unit employee received the wage rate increase that corresponded to the employee's respective employment level and that was outlined in the first chart included in Section 1(A) of the 2015-2018 CBA. (Tr. 100-101). Therefore, in the first year of the 2015-2018 CBA, employees who made the national minimum wage rate increases outlined in Section 1(A) and employees who made higher negotiated branch-specific wage rates that were not outlined in Section 1(A) received the wage rate increases outlined in Section 1(A). (*Id.*).

The Local Union believed that PTI properly applied the wage rate increase language in Section 1(A) of Article 3 in 2015. (Tr. 102-103, 211). As Local President Boyle testified: "[T]he rate increases were applied across the board. The increases in the levels were applied to everybody. Everybody got their raises." (Tr. 102).

I. In 2016, The Only Employees Who Received Wage Rate Increases Were The Employees Who Made The National Minimum Wage Rates Set Out In The First Chart In Section 1(A)

In or around March 2016, PTI lost a substantial portion of business from one of its customers. (Tr. 139, 273). In addition, PTI also was losing business because certain railroads started doing in-house the work that PTI performs. (Tr. 282-283).

In early March 2016, the Local Union began receiving inquiries from bargaining unit employees about the 2016 wage rate increases. (Tr. 213; Jt. Ex. 5, p. 15). These inquiries were made via telephone to a Local Union hotline, via e-mail and through communications to Local 1222 representatives. (Tr. 213). Initially, employees wanted to know when they would receive the April 2016 annual wage increases. (Tr. 213).

After Gittlen was informed of these inquiries, he contacted several PTI officials. (Tr. 213-214). Gittlen was told that the April 2016 annual wage increases would be provided. (Tr. 214). Nevertheless, the Company did not provide the April 2016 annual wage increases to anyone in April 2016. (Tr. 213-214).

Gittlen again contacted PTI. (*Id.*; Un. Ex. 9). He was told by PTI representatives that the Company was experiencing computer problems and that the wage rate increases would be provided on May 5 and 6, 2016. (*Id.*). Gittlen subsequently provided the bargaining unit a written update in April 2016 that advised employees that the April 2016 wage rate increases would be distributed on May 5 and 6, 2016 and that retroactive pay for the period of April 1 to April 12 would be distributed as special pay on April 28, 2016. (Un. Ex. 9).

On May 5 and 6, 2017, Local 1222 received notice from bargaining unit employees that, while some employees had received their annual wage increases, many other employees had not received the 2016 wage rate increases. (Tr. 213, 217). Gittlen initially believed that an error in PTI's payroll system had led to this discrepancy. (Tr. 217). Gittlen again contacted PTI to advise it of the reports that the Local Union had been receiving. (*Id.*). PTI's Payroll Manager Brad Harrison told Gittlen that the Company had paid the 2016 wage rate increases. (Tr. 217, 243-244).

At 8:52 a.m. on May 6, 2016, Gittlen e-mailed an information request regarding the 2016 annual wage rate increases to the Company. (Un. Ex. 10, p. 3). Gittlen submitted the information

request because the Local Union wanted to know how the Company was applying the wage rate increase language of the contract. (Tr. 219-220). Gittlen requested: 1) a list of every employee covered by the CBA that did not receive the full raise; 2) the reason the full raise was denied (i.e., Minimum Wage, Enhanced Rate, etc.); 3) the rate applied as of 4/1/2016 by PTI for each employee who didn't receive a raise or who was only paid a partial raise under the PTI application of the CBA April 1, 2016 provisions; and 4) sample rate calculations that explain how PTI applied (or didn't apply) the April 1, 2016 wage increase. (*Id.*).

On May 11, 2016, PTI Human Resource Director Greulich submitted PTI's response to the Local Union's information request. (Un. Ex. 10, p. 1). PTI's response confirmed that it did not provide wage rate increases to all Level 2 to Level 7 employees in 2016. (*Id.*; Tr. 103-104). PTI contended that every eligible employee had received the full raise called for in the contract. (Un. Ex. 10, p. 2). Greulich stated: "There are employees that did not receive a raise because the provisions outlined in Article 3, Section 1A do not apply. Pay levels in these locations are already at rates that exceed the 4/1/16 Minimum Rates identified in the CBA." (*Id.*).

PTI's response included an attachment that showed how it applied the 2016 annual wage rate increase contract language. (*Id.*, p. 2, 6). The attachment confirmed that PTI only provided the April 2016 annual wage rate increases to those who made the minimum wage rates that were contained in the first chart of Section 1(A). (*Id.*, p. 6; Tr. 274). The attachment states:

April 1, 2015 Minimum RATES

	Hourly Rate	Mileage Rate	Wait Time Rate	Minimum Rate
Level 1	7.34	0.160	7.34	14.68
Level 2	7.43	0.168	7.43	14.86
Level 3	8.21	0.175	8.01	16.02

Level 4	8.41	0.185	8.05	16.10
Level 5	8.50	0.200	8.07	16.14
Level 6	8.62	0.203	8.19	16.38
Level 7	8.75	0.206	8.31	16.62

April 1, 2016 Minimum RATES

	Hourly Rate	Mileage Rate	Wait Time Rate	Minimum Rate
Level 1	7.34	0.160	7.34	14.68
Level 2	7.47	0.169	7.47	14.94
Level 3	8.37	0.179	8.17	16.34
Level 4	8.66	0.191	8.29	16.58
Level 5	8.75	0.206	8.31	16.62
Level 6	8.84	0.208	8.40	16.80
Level 7	8.93	0.210	8.48	16.96

(Un. Ex. 10, p. 6). Based on how it applied the April 2016 annual wage rate increase language, PTI only provided wage rate increases to approximately 30% of the Local 1222 bargaining unit in 2016. (Tr. 104-105). PTI's owner Ron Romain made the decision to only provide the 2016 annual raises to employees who were making the national minimum wage rates. (Tr. 287-289).

Gittlen testified that, prior to receiving PTI's May 11, 2016 information request response, no PTI representative had ever advised him that PTI contended that the wage rate increases outlined in the 2015-2018 CBA only applied to those employees who made only the national minimum wage rates outlined in the first chart Section 1(A) of the 2015-2018 CBA. (Tr. 221).

The Local Union requested additional information from the Company. (Tr. 222-223). This information request was ultimately resolved a few months before the arbitration hearing after the National Labor Relations Board threatened to take the Company to a hearing. (Tr. 223).

J. On April 1, 2016, Local 1222 Filed A Grievance To Challenge PTI's Application Of The 2016 Annual Wage Rate Increase Language

The Local Union did not believe that PTI implemented the 2016 annual wage rate increase properly. (Tr. 103-104). It believed that the 2016 annual wage rate increases outlined in Section 1(A) of Article 3 of the 2015-2018 CBA were supposed to be provided to all Level 2 to Level 7 employees, including those employees who made more than the national minimum wage rates outlined in Section 1(A) of Article 3 of the 2015-2018 CBA in 2015. (Tr. 101-104).

The Local Union filed a grievance to challenge PTI's action. (Jt. Ex. 1; Tr. 107, 223). The grievance alleges that PTI failed to provide the April 2016 wage increases that it was required to provide under the 2015-2018 CBA. (Jt. Ex. 1). It also alleges that the Company's practice in 2016 deviated from what it had done with respect to all prior wage rate increases. (*Id.*). The Local Union requested that PTI provide the contractually-required wage rate increases and that it provide backpay with interest to all eligible bargaining unit employees, including those drivers who were no longer working for PTI. (*Id.*).

III. ARGUMENT

A. The Grievance Is Arbitrable

PTI and Local 1222 stipulated to the arbitrability of the grievance. (Tr. 5).

B. The Arbitrator Should Reject PTI's Argument That The Contract Sets A Wage Ceiling And That It Does Not Have Contractual Obligations With Respect To Employees Making Branch-Specific Rates That Are Higher Than The Ceiling

PTI's central argument is that it is only contractually committed under the 2015-2018 CBA to provide annual wage rate increases to those employees making the national minimum wage rates. Though it acknowledges that there are branch-specific rates that are higher than these national minimum wage rates, it suggests that these rates are of no import because they are not physically included in the parties' collective bargaining agreements, including in the 2015-2018 CBA. PTI, thus, contends that the 2015-2018 CBA sets a wage ceiling and that employees making branch-specific wage rates that are higher than the national minimum rates in the contract, are entitled to whatever PTI decides they shall receive with respect to wage rate increases.

This argument should be rejected for two reasons. For one, the plain language of Section 1(A) and the uncontroverted evidence establish that branch-specific rates are negotiated and are part of the parties' collective bargaining agreements, including the 2015-2018 CBA. In addition, because it is undisputed that branch-specific rates higher than the national minimum wage rates have been recognized at all times, the key issue before the Arbitrator is not how these branch-specific rates came to be, but, rather, whether annual raises were negotiated for employees making the branch-specific rates.

1. Branch-Specific Wages Have Been Negotiated By The Parties And Have Been Incorporated Into The 2015-2018 CBA

The Arbitrator need to look no further than Section 1 of the 2015-2018 CBA to conclude that negotiated branch-specific wage rates that are higher than the national minimum wage rates are part of the collective bargaining agreement. The last two collective bargaining agreements, including the 2015-2018 CBA, have expressly referred to the branch-specific rates in Section 1,

the wage rate sections of the agreements. (Jt. Ex. 4, p. 8; Jt. Ex. 5, p. 15). Section 1(A) of the 2015-2018 CBA expressly provides:

The [national minimum wage rates] are minimum rates across all PTI Branch locations. Rates are **Branch specific** and depend on a number of factors, including, state law, area, trip configuration, PTI's ability to recruit. *Rates may be more or less in each category than any other Branch, subject to minimum rates.*

(Jt. Ex. 5, p. 15)(emphasis added). Although PTI now would conveniently like to distance itself from the negotiated branch-specific rates that are higher than the national minimum wage rates to prove to the Arbitrator that it has no obligation with respect to these branch-specific rates, the unambiguous language of Section 1(A) reflects the parties' mutual contractual commitment to branch-specific rates that are higher than the national minimum wage rates. PTI's additional contractual commitment in Section 1(B) to provide each location a Wage Table that reflects the contractual increases contained in the agreement prior to April 1 of each contract year only underscores that it has agreed in the 2015-2018 CBA that it owes a contractual obligation to employees who make branch-specific rates that are higher than the national minimum wage rates. (*Id.* at p. 16).

Consistent with the express language of the 2015-2018 CBA, the relevant record evidence further establishes that the parties negotiated branch-specific wage rates and that these rates are part of the CBA. As with most evidence in this case, the evidence the Local Union produced regarding the branch-specific rates is uncontroverted. PTI's lone witness- Brad Harrison- was not involved in negotiations for any collective bargaining agreement, including the 2015-2018 CBA. (Tr. 281). Harrison had no role in collective bargaining until 2016. (Tr. 249-250, 260, 262, 296). Prior to that, he was Vice President in charge of accounting. (Tr. 286). Prior to 2016, Harrison had no role in establishing the wage rates of bargaining unit employee. (Tr. 291). He also was not involved in discussions about the setting of branch-specific rates and had no direct knowledge

of those discussions prior to 2016. (Tr. 291-290, 296). Harrison conceded during cross-examination that he did not know whether branch-specific rates had been subject to negotiations. (Tr. 296).

In contrast, the Local Union produced ample unrefuted and credible evidence that branch-specific rates have always been negotiated. (Tr. 61-63, 114-115, 138, 167-168, 170, 224). For example, President Boyle, who has represented Local 1222 since the beginning of its bargaining relationship with PTI, repeatedly testified, without contradiction, that PTI and Local 1222 have always negotiated the branch-specific rates. (Tr. 61-62, 167-168). When a new branch was added, the Local Union negotiated a wage scale for the particular branch. (Tr. 29). There would be a conversation with the Company to come up with wages for that particular group. (*Id.*) This negotiation established the wage levels for the particular branch going forward subject to negotiations. (*Id.*).

When PTI picked up a new group of employees, the Local Union often agreed that the employees would come in at the wage rates at which they were currently working, since they were generally higher than the national minimum wage rates. (Tr. 114-115, 138). The negotiations between the Company and the Local Union over the branch-specific rates were, at times, brief; however, they occurred each time a branch was added. (Tr. 62-63).

The Local Union has also negotiated with PTI over other branch-specific matters, such as Level 5 status for bargaining unit employees being hired off the street when competition for employees created that condition. (Tr. 26). Similarly, any changes to the seniority of newly hired employees were first negotiated with the Local Union. (*Id.*). An example of a more involved negotiation between PTI and Local 12222 on the seniority level for a new branch of employees occurred in Georgia about three or four years ago. (Tr. 136-137). These negotiations were between

the Local Union and PTI Vice President McClellan and HR Director Greulich. (*Id.*). There have also been instances when the parties have not agreed on the initial terms and conditions of employment for and new group of PTI employees with respect to wages. (Tr. 184).

PTI had the ability to raise wages if economic conditions dictated that result, but it could do so only after negotiation with the Local Union, which was unlikely to be opposed to raising wages. (Tr. 111, 114). PTI also could not lower branch wages without agreement from the Union. (Tr. 168, 170). As Gittlen correctly observed, wage rates are a mandatory subject of bargaining and they cannot go up or down without the agreement of the Local Union during the term of a collective bargaining agreement. (Tr. 224)

Even Harrison acknowledged that he has engaged in bargaining with the Local Union over branch-specific rates since he became responsible for dealing with the Local Union. (Tr. 296-297, 311). Harrison also testified that the establishment of wage rates requires collaboration and bargaining with the Local Union. (Tr. 311). Harrison was asked on cross examination whether PTI and its owner Ron Romain can set wage rates at any time without negotiation with the Local Union so long as it is paying the minimum wage rates outlined in the contract. (*Id.*). Harrison replied: "No, that's not my position." (*Id.*). Harrison also conceded that PTI cannot unilaterally change wage rates that have already been established over the Local Union's objection. (*Id.*).

The parties did not attach all of the branch-specific wage rates to the collective bargaining booklet because: 1) the collective bargaining booklet would be hundreds of pages long (Tr. 48); and 2) the discrepancies in the geographic wage rates might cause dissension among the employees. (Tr. 65). The Local Union and PTI mutually agreed and made a joint decision not to include the branch-specific rates in the collective bargaining agreement. (Tr. 61, 65-66). As a replacement, PTI annually sent the Local Union a spreadsheet containing the negotiated wage rates

applicable to each of the Company's work locations. (Tr. 49, 56, 65). The negotiated wage scale applicable to a particular branch was sent to each branch. (Tr. 66).

It further clear that branch-specific wage rates are negotiated and included in the 2015-2018 CBA because it is undisputed that every single negotiated raise has been applied to employees who make branch-specific rates that are higher than the national minimum wage rates.

The negotiated wage rates of the branches, including those that are higher than the national minimum wage rates, are part of the collective bargaining agreement. (Tr. 134). They are mandatory terms and conditions of employment that cannot be altered without the agreement of the Local Union. By custom, the parties have not included all of the branch rates in the contract booklet. However, PTI has provided the Local union with that data as it is now expressly required to do under the current labor agreement. (Tr. 106-107). Contrary to the assertion of PTI, it does not have unilateral authority with respect to branch-specific wage rates or increases to those rates.

2. Because Branch-Specific Rates That Are Higher Than The National Minimum Wage Rates Have Been In Effect At All Times, The Arbitrator Must Decide Whether The Parties Who Receive These Rates Are Entitled To Annual Increases

The Arbitrator should reject PTI's attempt to make this case about the negotiation of branch-specific rates. This case is ultimately not about whether or not PTI has a right to unilaterally set branch-specific wage rates so long as it is paying the national minimum wage rates. The key point is that, at all times, including during the negotiation and term of the current contract, 30% of the bargaining unit has received the national minimum wage rates while 70% received higher branch-specific rates. Because the CBA explicitly provides for branch-specific rates and because it is undisputed that employees have always made branch-specific rates, the issue that the Arbitrator must resolve is whether the negotiated annual raises were also meant to be provided to

employees making branch-specific rates that are higher than the national minimum wage rates. Resolution of this issue does not hinge on how the branch-specific rates came into existence.

In a different set of circumstances the issue of the negotiation of branch-specific rates could be directly relevant. For example, the Arbitrator would undoubtedly have to decide the parties' specific rights with respect to the branch rates had PTI unilaterally lowered the branch-specific rates that are higher than the national minimum wage rates without the Local Union's consent. However, in this case and on the undisputed facts currently before the Arbitrator, the Arbitrator can refrain from reaching such an overarching decision. For the purposes of this case, the point that matters is that it is undisputed that branch-specific rates have been recognized and in effect at all relevant times, including during the term of the 2015-2018 CBA and during the negotiation of the annual wage rate increases that the parties negotiated and memorialized in Section 1(A). These annual wage rate increases, including the 2016 annual raises, were either intended to be provided to employees making branch-specific rates that are higher than the national minimum wage rates or not. Thus, try as PTI might to persuade the Arbitrator that the branch-specific rates that are higher than the national minimum wage rates are irrelevant, PTI cannot escape the undeniable fact that branch-specific rates, including those that are higher than the national minimum wage rates, have been in effect at all relevant times.

Because it is undisputed that branch-specific rates that are higher than the national minimum wage rates *exist and have existed at all relevant times*, the Arbitrator therefore does not need to decide *how* the branch-specific rates came to be, but, rather, *who* is entitled to receive the annual increases that the parties negotiated. As explained below, the relevant contract language, bargaining history, past practice of the parties and record evidence establish that the grievance should be sustained because the parties negotiated annual wage rate increases for all employees,

i.e., those making the national minimum wage rates and those making higher, branch-specific rates.

C. The Annual Wage Increase Chart In Section 1(A) Of Article 3 Of The 2015-2018 CBA Unambiguously States That All Level 2 To Level 7 Employees Were Supposed To Receive Wage Rate Increases In 2016

Where no ambiguity exists in the applicable contract language, then the obvious intent of that contract language governs and must be enforced. *Kennecott Copper Corp., Ray Mines Division*, 70-2 ARB ¶8849 (Abernathy, 1970). Under that reasoning, the language of the contract is sufficiently clear so as to enable the arbitrator to reasonably ascertain the intent of the contract language and to enforce the intent of the words of the agreement. *Id.*

The deal that the parties made in connection with the 2016 annual wage rate increases is embodied in the second chart that the parties included in Section 1(A) of Article 3 (the "2016/2017 Annual Wage Increase Chart"). This chart expressly states that all Level 2 to Level 7 employees were entitled to receive annual wage rate increases in 2016. Because PTI only provided the 2016 annual wage rate increases to Level 2 to Level 7 employees who made national minimum wage rates, the Arbitrator is empowered to conclude solely on the basis of the plain language of the 2016/2017 Annual Wage Increase Chart that PTI violated the plain language of the contract.

1. The 2016/2017 Annual Wage Increase Chart

During the negotiations for the 2015-2018 CBA, PTI and Local 1222 negotiated annual wage rate increases, to be provided in April of each contract year- 2015, 2016 and 2017- for all bargaining unit employees. The parties memorialized their agreement on the 2016 annual wage rate increases in the 2016/2017 Annual Wage Increase Chart. (Jt. Ex. 5, p. 15).

The 2016/2017 Annual Wage Increase Chart substantively addresses only the 2016 and 2017 annual wage rate increases. (Jt. Ex. 5, p. 15). This chart has four columns. (*Id.*). The first

column of the chart includes the seven levels of employment that the parties agreed to in the 2015-2018 CBA negotiations. (*Id.*). The second column of the chart, titled, "Years," includes the PTI employment or seniority term that is associated with each employment level. (*Id.*). The annual wage rate increases are outlined in the third and fourth columns of the 2016/2017 Annual Wage Increase Chart, which are titled, "2016 Increase" and "2017 Increase," respectively. (*Id.*). The 2016 and 2017 annual raises vary by employment level. (*Id.*). The annual wage raises for 2016 generally increased for higher employment level employees. (*Id.*). The 2016 and 2017 annual wage increases are directly linked to and dependent on one factor and one factor only- employment levels. (*Id.*). Significantly, neither the word "minimum" nor the phrase "minimum rate" even appear in the chart. (*Id.*).

The 2016/2017 Annual Wage Increase Chart provides:

	Years	2016 Increase	2017 Increase
Level 1	0 ó 60 days		
Level 2	61 days ó 1 Year	0.50%	0.50%
Level 3	1 Year ó 3 Years	2%	2.50%
Level 4	3 Years ó 5 Years	3%	3%
Level 5	5 Years ó 9 Years	3%	3.35%
Level 6	9 Years ó 12 Years	L5 x 1.015%	L5 x 1.015%
Level 7	12 Years and above	L6 x 1.015%	L6 x 1.015%

(Jt. Ex. 5, p. 15).

2. The 2016/2017 Annual Wage Increase Chart Unambiguously States That All Level 2 To Level 7 Employees Were Entitled To Receive The 2016 Wage Rate Increases

PTI emphasizes the significance of the term "minimum" to support the action it took with respect to the 2016 annual raises. However, because the issue in this dispute is whether the Company properly provided the 2016 annual increases, the task of the Arbitrator is to ascertain the meaning of the term "increase." With respect to 2016, the meaning given to the term increase is

plainly evident in the 2016/2017 Annual Wage Increase Chart included in Section 1(A). This chart makes it clear that the parties agreed that a negotiated "increase" is an annual wage rate increase for an employment level that all employees who work in that level are entitled to receive, whether they made the national minimum wage rates or higher branch-specific rates.

The process of determining whether an employee is entitled to receive an annual wage increase in 2016 is neither complicated nor arduous. There are no ambiguities in the 2016/2017 Annual Wage Increase Chart. The 2016 annual wage rate increases are solely dependent on an employee's employment level. No other factor is relevant to that eligibility determination. The first two columns of the 2016/2017 Annual Wage Increase Chart include the employment levels and PTI seniority/years of employment that are associated with each employment level. The other two columns define the annual percentage wage rate increases for 2016 and 2017, respectively. Critically, there is no other information in this chart. There is also no reference to any other provision of the contract that qualifies or restricts the straightforward language of the 2016/2017 Annual Wage Increase Chart.

The parties' intent with respect to the 2016 annual wage rate increases is obvious from the plain language in the chart. The 2016/2017 Annual Wage Increase Chart shows that, consistent with how the parties always negotiated annual wage rate increases, annual raises were negotiated for employment levels. The 2016 annual raises were negotiated for employment levels 2 to 7.

In spite of the unequivocal language of the 2016/2017 Annual Wage Increase Chart, PTI did not provide all Level 2 to Level 7 employees the annual wage rate increases that are outlined in the 2016 Increase column. (Un. Ex. 10, p. 1; Tr. 103-104). Instead, it only provided the 2016 annual wage rate increases to employees who made the national minimum wage rates that went into effect on April 1, 2015 and that are outlined in a separate chart in Section 1(A). (*Id.*). As a

result, only approximately 30% of the bargaining unit received annual wage rate increases in 2016. (Tr. 104-105).

Any PTI official, Local Union officer, bargaining unit employee or objective person reviewing the 2016/2017 Annual Wage Increase Chart would reasonably conclude that: 1) eligibility for the 2016 annual wage rate increases was solely dependent on one factor-employment level; and 2) all Level 2 to Level 7 employees were entitled to receive the annual percentage wage rate increases in 2016 that were associated with their employment level. The Arbitrator needs to look no further than the 2016/2017 Annual Wage Increase Chart to decide this matter. The grievance should be sustained because PTI violated the plain language and obvious meaning of the 2016/2017 Annual Wage Increase Chart. Any contrary finding would be tantamount to a modification of the terms and conditions of the 2015-2018 CBA, which precludes the Arbitrator from altering the terms and conditions of the agreement. (Jt. Ex. 5, p. 73).

C. The 2015 Annual Wage Increase And Minimum Wage Chart Does Not Nullify The Language Of The 2016/2017 Annual Wage Increase Chart

PTI erroneously asserts that a separate chart included in Section 1(A) of Article 3 restricts the clear and unambiguous language of the 2016/2017 Annual Wage Increase Chart. The chart that PTI is relying on outlines the April 2015 annual wage increases and the national baseline minimum wage rates for each employment level effective April 1, 2015 (the "2015 Annual Wage Increase And Minimum Wage Chart").

PTI's reading of the Section 1(A) charts is wrong. There is no language in the 2015 Annual Wage Increase And Minimum Wage Chart that expressly or implicitly provides that only the employees who made the national minimum wage rates outlined in the 2015 Annual Wage Increase And Minimum Wage Chart were eligible for the 2016 annual wage rate increases. When the two charts are properly read together and PTI's own application of the 2015 annual wage rate

increase language is considered, it is clear that all Level 2 to Level 7 employees were entitled to receive the 2016 raises outlined in the 2016/2017 Annual Wage Increase Chart in 2016.

1. The 2015 Annual Wage Increase And Minimum Wage Chart

The two charts included in Section 1(A) of Article 3 are different in one respect. Unlike the 2016/2017 Annual Wage Increase Chart, the 2015 Annual Wage Increase And Minimum Wage Chart includes the national minimum wage rates that the parties negotiated for each employment level. (Jt. Ex. 5, p. 14-15). Columns four through seven of the 2015 Annual Wage Increase And Minimum Wage Chart outline the floor national minimum wage rates that went into effect on April 1, 2015. (Jt. Ex. 5, p. 14). The 2015 Annual Wage Increase And Minimum Wage Chart included in Section 1(A) provides:

Effective April 1, 2015, the following minimum wage rates shall prevail:

	Years	Increase	Hourly	Mileage	Wait Time	Minimum
Level 1	0 ó 60 days	1.25%	7.34	.160	7.34	14.68
Level 2	61 days ó 1 Year	L1 x 1.25%	7.43	.168	7.43	14.86
Level 3	1 Year ó 3 Years	2%	8.21	.175	8.01	16.02
Level 4	3 Years ó 5 Years	2.50%	8.42	.185	8.05	16.10
Level 5	5 Years ó 9 Years	2.50%	8.50	.200	8.07	16.14
Level 6	9 Years ó 12 Years	L5 x 1.015%	8.62	.203	8.19	16.38
Level 7	12 Years and above	L6 x 1.015%	8.75	.206	8.31	16.62

(*Id.*). The 2015 Annual Wage Increase And Minimum Wage Chart does not discuss or reference the 2016 raises. (*Id.*).

2. The Only Chart That Is Relevant To The 2016 Annual Raises Is The 2016/2017 Annual Wage Increase Chart

It is unclear why PTI looked beyond the 2016/2017 Annual Wage Increase Chart when it decided which employees are eligible for the 2016 annual wage rate increases. The 2016/2017 Annual Wage Increase Chart is the only provision in the contract that should be consulted to determine which employees are eligible for the 2016 raises. The 2016/2017 Annual Wage Increase Chart outlines the annual wage rate increases for 2016, and it clearly and unmistakably shows that all Level 2 to Level 7 employees were entitled to annual raises in 2016. PTI, thus, erred by even consulting the 2015 Annual Wage Increase And Minimum Wage Chart to determine who was eligible for the 2016 annual wage rate increases.

3. The 2015 Annual Wage Increase And Minimum Wage Chart Does Not State That Employees Had To Make The National Minimum Wage Rates To Receive Annual Wage Rate Increases

PTI's reliance on the 2015 Annual Wage Increase And Minimum Wage Chart is perplexing. There is **no language** in this chart that expressly or implicitly states that employees had to earn national minimum wage rates to be eligible for annual raises in 2016 (or any other year). The 2015 Annual Wage Increase And Minimum Wage Chart does not identify the 2016 and 2017 annual raises. (Jt. Ex. 5, p. 14). This chart also does not link eligibility for annual wage rate increases in any year, including 2016, to the national minimum wage rates that are outlined in the chart. There is no reference in the 2015 Annual Wage Increase And Minimum Wage Chart to the 2016/2017 Annual Wage Increase Chart. The national minimum wage rates included in the 2015 Annual Wage Increase And Minimum Wage Chart, therefore, are irrelevant to the determination of which employees were eligible for the 2016 raises. PTI, thus, violated the plain language of the 2016/2017 Annual Wage Increase Chart by making eligibility for the 2016 raises contingent on whether or not employees made the national minimum wage rates.

4. Although The 2015 Annual Wage Increase And Minimum Wage Chart Outlines The April 1, 2015 National Minimum Wage Rates, Annual Raises Are Not Dependent On These National Minimum Wage Rates

PTI makes much of the fact the term "minimum" is used in the 2015 Annual Wage Increase And Minimum Wage Chart. Yet, the issue in this case is the determination of which employees were entitled to the annual wage rate "increases" that the parties negotiated and included in Section 1(A). PTI errs by conflating wage increases with minimum wage rates.

Time and again, PTI's counsel tried to elicit admissions from the Local Union witnesses that PTI is in compliance with the 2015-2018 CBA so long as it is paying the national minimum wage rates. (Tr. 121, 134, 230-231). By focusing on whether PTI complied with the language in the contract that requires it to pay minimum national minimum wage rates, PTI is emphasizing an irrelevant piece of the puzzle. It is undisputed that PTI has complied with the language requiring it to pay national minimum wage rates. However, as both of the Local Union witnesses pointed out, there is a distinct difference between the contract language that obligates PTI to pay the national minimum wage rates and the contract language that requires it to pay annual wage rate increases. (Tr. 231, 238, 239). While PTI is, of course, in compliance with the language in Section 1(A) that requires it to pay national minimum wage rates so long as it is paying those rates, PTI is not in compliance with the language in Section 1(A) that requires it to pay annual wage rate increases where, as here, it denies those negotiated raises to all of the employees who are entitled to receive these wage rate increases.

The 2015 Annual Wage Increase And Minimum Wage Chart serves two independent purposes: 1) it outlines the annual wage increases that all employees were entitled to receive on April 1, 2015 based on their employment level; and 2) it outlines the national minimum wage rates that employees could receive as of April 1, 2015 based on their employment level. (Jt. Ex. 5, p.

14). There were, thus, clearly negotiated raises for 2015 and, at the same time, there were national minimum wage rates for each employment level that went into effect on April 1, 2015 for each employment level.

The 2015 Annual Wage Increase And Minimum Wage Chart does not, by express or implicit terms, make annual wage rate increases for any year dependent in any way on the national minimum wage rates. The mere inclusion of the 2015 annual wage rate increases in the same chart with the national minimum wage rates that went into effect on April 1, 2015 does not signify that employees had to make national minimum wage rates to receive annual wage rate increases. This is particularly true given that the term "minimum" is not included expressly or by reference in the 2016/2017 Annual Wage Increase Chart.

The April 2015 annual increases and the April 1, 2015 national minimum wages were included in the same chart not because they are causally related in that employees had to earn national minimum wage rates in order to be eligible for annual raises. The parties, instead, clearly wanted to use one chart to outline the initial minimum wage floor and to delineate the 2015 annual increase for each employment level because the 2015 raises and the April 1, 2015 national minimum wage rates were both directly dependent upon employment levels. The reason that they could do this is that both the 2015 raises and the April 1, 2015 national minimum wage rates were independently linked to employment level. As is the case with most charts, the first column of the 2015 Annual Wage Increase And Minimum Wage Chart, the employment level column, is the focal point for the other columns in the chart. Yet, this did not mean that the 2015 annual raises were dependent on the April 1, 2015 national minimum wage rates or that employees had to earn national minimum wage rates to receive the 2015 annual raises. It, instead, meant that both the April 2015 raises and the April 1, 2015 national minimum wage rates were independently linked

to employment level. Consistent with the fact that the 2015 annual raises were dependent on the April 1, 2015 national minimum wage rates, in 2015, PTI provided annual raises to all employees, including those who made negotiated branch-specific wage rates that were higher than the national minimum wage rates.

5. The Term Minimum Indicates That There Are Employees Who Make More Than The National Minimum Wage Rates

Under the 2015-2018 CBA, PTI and Local 1222 have negotiated and utilized branch-specific wage rate scales that allow employees to make more than the national minimum wage rates outlined in the 2015 Annual Wage Increase And Minimum Wage Chart associated with their employment levels. (Tr. 99-104). The parties have expressly memorialized their commitment to branch-specific wage rate scales in Section 1(A). Section 1(A)(a) provides that the national minimum wage rates outlined in Section 1(A) in the 2015 Annual Wage Increase And Minimum Wage Chart are "minimum rates across all PTI branch locations." (Jt. Ex. 5, p. 15). At the same time, this provision also confirms that rates are "Branch specific" and depend on numerous factors, including, state law, area, trip configuration, and PTI's ability to recruit. (*Id.*). As such, "Rates may be more or less in each category than another branch, subject to minimum rates." (*Id.*).

PTI's interpretation of the term "minimum" and its supposed effect on who is eligible for annual wage rate increases is entirely off base. The parties did not intend for the term minimum in the 2015 Annual Wage Increase And Minimum Wage Chart to signify that these rates are the "exclusive" or "sole" wage rates that PTI is obligated to provide. And, they certainly did not use the "minimum" in that chart to mean that the eligibility for annual wage rate increases was "exclusively" or "solely" for employees who made the national minimum wage rates. The term "minimum" was, instead, used in the 2015 Annual Wage Increase And Minimum Wage Chart to underscore the parties' agreement that the wage rates outlined in the 2015 Annual Wage Increase

And Minimum Wage Chart are the “least” or “lowest” amount of wages, i.e., the wage floor, that employees can make based on their employment levels at any PTI location.

Consistent with the express statement in Section 1(A)(a) that rates are “Branch specific,” the minimum rates included in the 2015 Annual Wage Increase And Minimum Wage Chart also reflect a mutual understanding of the undisputed bargaining reality that many employees make branch-specific wage rates that are more than these national minimum wage rates. The parties’ usage of the word minimum in Section 1(A) therefore actually reinforces the point that the employees making wage rates that are higher than the national minimum wage rates are also entitled to annual wage rate increases if a higher branch-specific wage rate has been negotiated for their employment level. This point is borne out by PTI’s provision of the 2015 annual raises to employees who made the national minimum wage rates and to employees who made higher branch-specific wage rates.

6. PTI’s Interpretation Of The Annual Wage Rate Increase Language Is Inconsistent With The Plain Language Of The Section 1(A) Charts

The parties generally define annual wage rate increases on a straight percentage basis, e.g., 3%, etc. in both the 2015 Annual Wage Increase And Minimum Wage Chart and the 2016/2017 Annual Wage Increase Chart. (Jt. Ex. 5, p. 14-15). However, the parties also consciously decided to define certain annual raises by multiplying a specific percentage by an abbreviation that stood for the applicable wage rate for a specific employment level. (*Id.*). For example, in the 2015 Annual Wage Increase And Minimum Wage Chart, the 2015 annual increase for Level 2 is defined as “L1 x 1.25%.” (*Id.* at. p. 14). The term “L1” stands for the applicable Level 1 wage rate in effect at each PTI branch. (*Id.*; Tr. 99-100). The 2015 annual wage rate increase for a Level 2 employee was therefore 1.25% multiplied by the applicable branch-specific rate. (Tr. 99-100). The same procedure was used to define several other annual wage rate increases in both the 2015

Annual Wage Increase And Minimum Wage Chart and the 2016/2017 Annual Wage Increase Chart. For example, in the 2015 Annual Wage Increase And Minimum Wage Chart, the 2015 annual increase for Level 6 increase is defined as $\text{L5} \times 1.015\%$ and the 2015 Level 7 increase is defined as $\text{L6} \times 1.015\%$ (*Id.* at p. 14). Similarly, in the 2016/2017 Annual Wage Increase Chart, the Level 6 increases for both 2016 and 2017 are defined as $\text{L5} \times 1.015\%$ and the Level 7 increases for both 2016 and 2017 are defined as $\text{L6} \times 1.015\%$ (*Id.* at p. 15).

The fact that several annual wage rate increases are defined in terms of the applicable wage rates for specific employment levels at all PTI branches is a direct indicator that the parties recognized that annual wage rate increases were negotiated on an employment level basis and were to be provided to all employees in a given employment level. Through the abbreviations that stand for the applicable wage rate for a specific employment level, e.g., L1, L2, etc., the parties made a conscious choice to reference the applicable branch-specific wage rate in the definition of several annual wage rate increases. By referencing the applicable branch-specific wage rate in the definition of several annual wage rate increases, the parties showed that the negotiated raises were intended to apply across-the-board to all employees in an employment level eligible for a wage rate increase.

PTI's interpretation of the annual wage rate increase language, thus, cannot be squared with the plain language of the 2015 Annual Wage Increase And Minimum Wage Chart and the 2016/2017 Annual Wage Increase Chart. According to PTI, the only wage rates that matter for purposes of determining eligibility for annual wage rate increases are the national minimum wage rates. If PTI's interpretation of the applicable contract language were correct, then the parties would not have referenced branch-specific rates e.g., L1, L2, etc., when they defined certain

increases in the 2015 Annual Wage Increase And Minimum Wage Chart and the 2016/2017 Annual Wage Increase Chart because those rates would have been irrelevant.

In fact, if the Company's position is taken to its logical conclusion, there would have been no reason for the parties to include the 2016/2017 Annual Wage Increase Chart in the contract. If the only employees who were entitled to annual wage rate increases were the employees making the national minimum wage rates, the parties could have simply calculated the dollar amount of the annual increased minimum wage rate for employment level and each contract year and included dollar amounts in the contract, as they did for 2015. The 2016/2017 Annual Wage Increase Chart, which is based on percentage increases, would have been unnecessary. That the parties included the 2016/2017 Annual Wage Increase Chart in the contract and did simply not calculate and include the dollar value of the national minimum wage rates for each year of the contract, shows that the Company's position is incorrect.⁴

7. PTI's Application Of The 2015 Annual Raise Language Supports A Finding That The Contract Unambiguously States That All Level 2 To Level 7 Employees Were Entitled To The 2016 Raises

PTI's current position is directly undercut by how it interpreted and applied the 2015 annual wage rate increase language. In 2015, PTI provided all bargaining unit employees with the annual wage rate increases that are outlined in the Increase column of the 2015 Annual Wage Increase And Minimum Wage Chart. (Tr. 100-101). PTI, therefore, paid no regard to whether employees were making only national minimum wage rates when it disbursed the 2015 annual

⁴ PTI does not have a legitimate argument that the increase language in the 2015 Annual Wage Increase And Minimum Wage Chart and the 2016/2017 Annual Wage Increase Chart was only drafted the way it was because the parties agreed in Section 1(C) to provide all Level 2 employees with wages that are 1.25% higher than Level 1 employees "at all locations." (Jt. Ex. 5, p. 17). There are no similar contractual wage guarantees with respect to any other employment levels, including Level 6 and Level 7 employees. However, the parties defined the wage increases for Level 6 and Level 7 employees by referencing the negotiated branch-specific rates for each of these employment levels.

wage rate increases to all employees. In so doing, PTI applied the 2015 annual wage increase language in precisely the way that the Local Union contends it should have applied the 2016 annual wage increase language. The Company's application of the 2015 wage rate increase language can only logically be interpreted as an understanding that annual raises were negotiated for employment levels and not exclusively for employees making the national minimum wage rates.

E. If Section 1(A) Is Ambiguous, The Extrinsic Evidence Conclusively Establishes That All Level 2 To Level 7 Employees Were Entitled To The 2016 Raises

There is no language in the 2015-2018 CBA, including in Section 1(A), that expressly states that the only employees who are eligible for the 2016 annual wage rate increases are those who made the national minimum wage rates that went into effect on April 1, 2015. Thus, at worst, the language of Section 1(A) is ambiguous in spelling out the Company's obligations with respect to the 2016 annual wage rate increases. If the Arbitrator concludes that the relevant contract language is ambiguous with respect to PTI's obligation to provide the 2016 raises, the relevant extrinsic evidence confirms that PTI did not properly apply the 2016 wage rate increase language.

1. The *Albertson's Inc.* Decision Establishes That All Level 2 To Level 7 Employees Were Entitled To The 2016 Wage Rate Increases

The *Albertson's Inc.* decision is directly on point. 106 LA 897 (Kaufman, 1996)(a copy of this decision is attached hereto). In *Albertson's Inc.*, Arbitrator Kaufman concluded that the employer was required to provide annual wage rate increases to employees whose wage rates were above the scale that was included in the contract.

Like the 2015-2018 CBA, the collective bargaining agreement in *Albertson's Inc.* included a wage scale for the two janitor classifications- Janitor Foreman and Experienced Janitor and Maintenance Person. 106 LA at 898. Annual wage rate increases of 20 cents per hour during the first year of the contract, 25 cents per hour during the second year of the contract and 10 cents per

hour during the third year of the contract were bargained and agreed upon in negotiations. *Id.* These increases were incorporated into the wage scale in the contract. The wage scale stated:

	<u>1/14/91</u>	<u>1/13/92</u>	<u>1/11/93</u>
Janitor Foreman	\$8.615	\$8.815	\$8.965
Experienced Janitor and Maintenance Person	\$8.365	\$8.565	\$8.715

Fourteen of the twenty-three janitors in the bargaining unit had pay rates that were higher than the wage rates outlined in the wage scale in the contract. *Id.*

During the first year of the contract, all of the janitors, including the ones who made wage rates that were higher than the scale included in the contract, received the 20 cent per hour annual increase. *Id.* at 898-899. However, shortly before the second annual raise was set to take effect, the employees who were making above scale wage rates were advised that they would not receive future scheduled increases until their hourly rates equaled the contract-scale rates. *Id.*

The issue was whether the annual raises were meant to be applied across the board for all bargaining unit employees. *Id.* at 899. The union contended that the negotiation history and past practice, including during the first year of the contract, showed that negotiated wage rate increases were always provided to all bargaining unit employees. *Id.* The employer contended that such increases conflicted with the contract language and that acceptance of the union's argument would be tantamount to adding a new provision to the contract. *Id.* at 899-901.

Arbitrator Kaufman concluded that across-the-board increases were not discussed during negotiations. *Id.* at 900. Nevertheless, he found that no contract provision precluded all employees from receiving the negotiated annual raises. *Id.* at 900-901. He determined that the employer's position subordinated its undisputed practice of paying above-scale employees the same increases that it paid to employees who made the contract scale wages. *Id.* at 900-902. Providing wage rate

increases to above-scale employees was therefore “an understood and accepted way of doing things over an extended period of time” and gave rise to “reasonable expectations.” *Id.* As such, the established past practice could not be unilaterally changed by the company during the life of the collective bargaining agreement. *Id.*

It was also highly relevant that the company never indicated in contract negotiations that it wanted to alter the past practice of paying wage increases to all bargaining unit employees, regardless of the wage rate that they were making. *Id.* at 900-901. To escape an established past practice, an employer must advise the union during contract negotiations that it will no longer consent to the continuation of the past practice. *Id.* Arbitrator Kaufman found that, in negotiations, the company had not alerted the union to a prospective change in the past practice of providing wage increases to all bargaining unit employees. *Id.* On the contrary, it actually adhered to the past practice during the first year of the contract when it provided the first year wage rate increases to all employees. *Id.*

Arbitrator Kaufman concluded that the company, by entering into the collective bargaining agreement without raising the issue of whether all employees would receive the annual wage rate increases, had to be held to have agreed to its practice of providing wage rate increases to the above-scale janitors in the same amounts and on the same effective dates as the increases negotiated for the janitors who were not above scale. *Id.* at 900-902.

i. There Is An Established Past Practice Of PTI Paying Annual Wage Rate Increases On An Employment Level Basis To Employees Who Make Branch-Specific Rates That Are Higher Than The National Minimum Wage Rates

In this case, the parties have a long history with respect to the negotiation of annual wage rate increases and the Company’s provision of those annual raises to eligible bargaining unit employees. As in *Alberston’s Inc.*, this history conclusively shows that there is an established past

practice of PTI providing annual wage rate increases on an employment level basis to all employees in an employment level that is entitled to receive a wage rate increase, irrespective of their wage rates.

With the exception of their first contract, all of the CBAs have included language requiring PTI to provide negotiated annual wage rate increases to all eligible employees. Thus, since 2009, PTI has paid annual wage rate increases that PTI and Local 1222 negotiated and included in their collective bargaining agreements. The relevant history regarding wage rate increases establishes that the parties have a past practice of negotiating annual wage rate increases for employment levels so that all employees in an employment level eligible for an annual increase receive that increase, regardless of their wage rates. It is undisputed that, prior to 2016, PTI has applied the annual wage rate language consistently with this principle.

Even assuming *arguendo* that the language of Section 1(A) is ambiguous with regard to the 2016 annual raises, the parties' established past practice fills the gap in the contract language and makes the parties' intent clear. The parties' past practice both informs us as to what the parties negotiated and shows us how PTI should have disbursed the 2016 annual raises. In accordance with the parties' past practice, it is clear that, as in the past, the 2016 annual wage rate increases were negotiated on an employment level basis for employment levels 2 to 7. PTI, thus, should have provided the 2016 annual raises to all Level 2 to Level 7 employees, including those employees making branch-specific rates that are higher than the national minimum wage rates for Levels 2 to Level 7.

Moreover, even under the 1999-2009 CBA, which did not include annual wage rate increase language, when the parties agreed or when PTI proposed that all employees in certain employment levels receive wage rate increases, all employees received the proposed wage rate

increases. This is true even if the employees made more than the national minimum scale wage rates.

Just as in *Albertsons, Inc.*, there is an established past practice of PTI providing annual raises to employees who make more than the minimum scale wages outlined in the collective bargaining agreement. 106 LA at 900-902. In addition, as in *Albertsons, Inc.*, PTI adhered to this established past practice in the first year of the contract when it implemented the 2015 annual wage rate increase language and it provided the 2015 raises to all bargaining unit employees, without regard to whether they were making national minimum wage rates or more than those rates. *Id.*

As *Albertsons, Inc.* therefore instructs, this past practice is a term of the 2015-2018 CBA. *Id.* See also, *Elkouri and Elkouri, How Arbitration Works*, p. 606 (Ruben, 6th Ed.). Even if the past practice is not a term of the agreement, it still disambiguates any ambiguous contract language regarding the 2016 annual raises by showing that the 2016 annual raises should have been provided to all Level 2 to Level 7 employees, regardless of their wage rates. *Id.* at p. 605. Either way, the past practice of providing negotiated wage rate increases to employees irrespective of their wage rates could not be unilaterally changed by PTI during the 2015-2018 CBA. PTI deviated from this past practice and violated the contract by not providing all Level 2 to Level 7 employees with the annual wage rate increases that they were entitled to receive in 2016.

ii. PTI Never Sought To Discontinue The Past Practice During Negotiations So The Past Practice Remains Binding

As *Albertson's Inc.* makes clear, a past practice remains binding and a part of the collective bargaining agreement unless and until the employer makes it clear in contract negotiations that it is seeking to discontinue the practice. *Id.* at 900-901. At that point, and only at that point, the union is on notice that it must secure a clause in the collective bargaining agreement making the practice an express part of the contract. *Id.* To the extent that PTI wanted to deviate from the

established past practice of providing negotiated annual wage rate increases on an employment level basis to all employees eligible for an annual increase, it was incumbent on PTI to make that position known to the union in contract negotiations. Because it is undisputed that PTI never indicated to Local 1222 that it wanted to deviate from or discontinue the past practice of providing increases to all employees in an employee level eligible for an increase, PTI cannot change this longstanding past practice, which is part of the 2015-2018 CBA, during the term of the agreement.

PTI only produced one witness-Brad Harrison- at the arbitration. He did not participate in the negotiations for the 2015-2018 CBA or any other collective bargaining agreement. (Tr. 288-296, 304) He was not able to speak to anything that took place during the negotiations for the 2015-2018 CBA. In contrast, the Local Union had President Boyle, who has participated in the negotiations for every CBA, including the 2015-2018 CBA, testified. USW representative Gittlen, who participated in the 2015-2018 CBA negotiations, also testified for the Local Union. The testimony of both of the Local 1222 witnesses that no PTI negotiator raised an issue of limiting wage increases to employees making the national minimum rates is uncontroverted. (Tr. 77-84, 177-180, 187-190, 195). Boyle and Gittlen also credibly testified that they both made it clear throughout negotiations that the Local Union was seeking wage rate increases for employees who made more than the minimum scale wages. (*Id.*).

Hence, prior to 2016, PTI never took the position that the only employees eligible for annual wage rate increases are employees who make the national minimum wage rates. PTI lost any opportunity to change the parties' practice of paying annual wage rate increases to employees irrespective of their wage rates by waiting until 2016 to contend for the first time that the only employees eligible for annual raises are the employees making national minimum wage rates. 106

LA at 900-901. *See also, National Tea Co.*, 94 LA 730, 733-734 (Baroni, 1990)(past practice continued because there was no “deliberate treatment” of the practice in negotiations).

As a result, the parties’ past practice with respect to annual wage rate increases remained undisturbed and a part of the 2015-2018 CBA at the time that PTI provided the 2016 annual wage rate increases.

iv. PTI Has No Valid Zipper Clause Argument

In *Albertson’s, Inc.*, Arbitrator Kaufman rejected the employer’s argument that there was a clause in the contract in the form of a zipper clause that restrained the Arbitrator from concluding that there was an established past practice. 106 LA at 901. That clause stated that the contract was “complete and no additions, alterations or modifications shall occur during its life unless voluntarily and mutually agreed to.” *Id.* Arbitrator Kaufman concluded that this provision was not relevant because the union was not seeking to bargain across-the-board increases. *Id.* Instead, it was contending that those increases were, in effect, a part of the agreement already. *Id.*

During the hearing, PTI’s attorney pointed out Section 3, Precedent of Agreement, of Article 28, Separability, Savings Clause and Precedence of Agreement. Section 3 provides: “This Agreement shall in all respects take precedence over all other agreements by and between the Employer and other labor organizations.” (Jt. Ex. 5, p. 86) (emphasis added).

It is anticipated that PTI may argue that this provision is in the form of a zipper clause that would preclude the Arbitrator from concluding that the past practice discussed above and/or the branch-specific scales are not part of the 2015-2018 CBA. This argument should be rejected for two reasons. For one, the clause that PTI relies does not even apply to Local 1222. By its own express terms, it applies to agreements between PTI and **other labor organizations**. (Jt. Ex. 5, p. 86)

In addition, even if the 2015-2018 CBA had a zipper clause (it does not), such a clause does not obviate the basic fact that the negotiated branch-specific scales are part of the parties' collective bargaining agreement and that there is an established past practice whereby all employees in an employment level receive the annual raises for that level. Just as in *Albertson's, Inc.*, the Local Union is not seeking to introduce a new practice of bargaining across-the-board annual increases during the agreement. As in *Albertson's, Inc.*, annual increases, the first of which PTI provided in 2015, are already part of the 2015-2018 CBA.

3. The Communications Regarding The Annual Wage Rate Increases Included In The 2015-2018 CBA Support The Local Union's Position

i. The Bargaining Table Communications

It again must be emphasized that PTI did not produce any witness who had first-hand knowledge regarding any contract negotiations, including the 2015-2018 CBA negotiations. (Tr. 288-296). In contrast, Local 1222 President Boyle, who has participated in each set of contract negotiations, and USW representative Gittlen, who participated in the 2015-2018 CBA negotiations, testified for the Local Union. (Tr. 77-84, 177-180, 187-190, 195). The Local Union's evidence about what transpired during contract negotiations is, thus, uncontroverted. In addition, because the Company chose not to produce a witness, the Arbitrator was not able to judge the credibility of any Company witness who had knowledge of what the parties negotiated in 2015 with respect to annual raises. Since PTI did not produce any witnesses with knowledge about the 2015-2018 CBA negotiations, even though its HR Director Grulich participated in those negotiations and also attended the hearing, it is reasonable for the Arbitrator to draw a negative inference from the fact that PTI shielded the Company witnesses who had knowledge about the 2015-2018 CBA negotiations from testifying. *Elkouri and Elkouri, How Arbitration Works*, p. 381-382 (Ruben, 6th Ed.) (the failure of a party to call as a witness a person who is available to it

and who should be in a position to contribute informed testimony can permit the arbitrator to infer that, had the witness been called, the testimony would have been adverse to the position of the party.).

Boyle and Gittlen credibly testified that they made it clear throughout negotiations that they were interested in negotiating and obtaining wage rate increases for all employees, not just those making national minimum wage rates. They first made this point clear when negotiations began and they presented the Powerpoint presentation that summarized the results of the bargaining unit survey and that showed that the number one issue to the entire bargaining unit was the negotiation of higher wages. (Tr. 177-180). The Local Union also repeatedly made it clear throughout negotiations in discussions about wage rates increases and in proposals that they were negotiating annual wage rate increases for all bargaining unit employees. (Tr. 77-84, 187-190, 195). Boyle and Gittlen also credibly testified that no PTI representative ever indicated that PTI was only negotiating wage rate increases for those employees making the national minimum wage rates. (*Id.*). On the contrary, it was clear to Boyle during the negotiations that PTI was costing out wage increase proposals for the entire bargaining unit and not just for those employees making the national minimum wage rates. (Tr. 77-84).

PTI's own proposals confirm that the parties were negotiating annual wage rate increases on an employment level basis and that the parties were not only bargaining annual raises for the employees making national minimum wage rates. There is no language in either the 4/22/15 Proposal #1 and the 4/22/15 Proposal #2 that states that annual raises were only being negotiated for employees making national minimum wage rates. (Un. Exs. 2, 3).

In fact, the language in both proposals confirms that the parties were negotiating annual raises on an employment level basis. (*Id.*). For example, in the 4/22/15 Proposal #1, PTI indicated

that it was proposing “*wage level increases*.” (Un. Ex. 2) (emphasis added). It then outlined its annual wage rate proposals for each year of the contract by stating the proposed percentage increase for each employment level, e.g., Level 3- 1.25%, Level 4- 2.25%, etc. (*Id.*). By specifically describing the proposed annual increase for each employment level, PTI acknowledged that it was negotiating annual raises on employment level basis.

The discussion of the wage guarantees for Level 1 and Level 2 employees further confirms this point. In the 4/22/15 Proposal #1, PTI proposed, “Level 1 rates will be at a minimum of state/federal minimum wage x 1.25%” and that “Level 2 rates will be 1.25% above Level 1 rates.” (*Id.*). Again, PTI made its wage rate proposals on an employment level basis. This point is also supported by PTI’s additional proposal that, “Each *Wage Level* will be no less than 1.25% above prior *level*.” (*Id.*).

If PTI’s 4/22/15 Proposal #1 did not make it sufficiently clear that annual raises were being negotiated on an employment level basis for all employees in an employment level entitled to an increase, then its 4/22/15 Proposal #2 concretely confirmed that point. In the section of the 4/22/15 Proposal #2 in which PTI made its annual raise proposals, PTI expressly indicated that it was proposing “*wage level increases across all rates*.” (Un. Ex. 3) (emphasis added). It then again outlined the wage rate increases it was proposing for each employment level. (*Id.*). PTI also included a note under its annual raise proposals for each employment level that confirmed all benefits were “based on time of service.” (*Id.*).

Other aspects of PTI’s wage rate proposals in the 4/22/15 Proposal #2 also confirmed that the parties were not only negotiating wage rate increases for employees who were making the national minimum wage rates. For example, PTI confirmed that the wage guarantee for Level 2 employees would apply “at every location.” (*Id.*). It also noted that, if Level 1 employees already

made more 1.25% above the applicable federal/state minimum wage, then their rates would not be adjusted. (*Id.*). Thus, where PTI was proposing a restriction on a wage rate increase for employees making branch-specific rates, it made that proposed restriction clear. Since it did not make a similar qualification with respect to the annual wage rate increases, it is clear that PTI was not limiting its annual raise proposals to employees who made the national minimum wage rates.

ii. The Communications Over The How To Calculate Document

The discussions between the Company and the Local Union on the errors that were included in the How to Calculate document that Gittlen prepared additionally confirm the parties' mutual understanding that annual wage rate increases were negotiated for employees making more than the national minimum wage rates. On its face, the How to Calculate document makes it clear that the Local Union understood that it had negotiated annual raises for employees who made more than the national minimum wage rates. (Un. Ex. 6). Gittlen specifically referenced the 90 different negotiated branch-specific wage scales in this document. (*Id.*). The How to Calculate document also gave general instructions to all employees, not just those making the national minimum wage rates, as to how they could calculate their annual raises. (*Id.*).

The How to Calculate document contained two calculation errors. Gittlen had discussions with PTI's VP of Administration Kassenbrock about these errors. They had these discussions to clarify what the parties had actually negotiated with respect to annual wage rate increases. Gittlen credibly testified Kassenbrock never told him that PTI believed that it had only negotiated annual wage increases for employees making the national minimum wage rates. (Tr. 208). On the contrary, in his first e-mail to Gittlen, Kassenbrock indicates that the parties negotiated on an employment level basis. (*See*, Un. Ex. 7).

In addition, when Gittlen explained in a May 2015 e-mail what he did in his How to Calculate document, he stated: "For levels 3, 4, 5 we simply took the current wage rates and put

the appropriate percentage to those levels,ö Kassenbrock wrote back, öAGREED.ö (Un. Ex. 7)(emphasis added). Similarly, when Gittlen wrote: öFor Level 6, we multiplied by the 1.015% on top of Level 5 and for Level 7 we multiplied 1.015% on top of Level 6,ö Kassenbrock wrote: öAGREED.ö (*Id.*)(emphasis added). Gittlen's e-mail comments clearly express the Local Union's position that employees who made more than the national minimum wage rates were eligible for annual raises and Kassenbrock's responses indicate his agreement with that position.

If the parties had not in fact negotiated annual wage rate increases for employees making more than the national minimum wage rates, then Kassenbrock should have been expected to make that point during the discussions over the errors in the How to Calculate document. Kassenbrock's silence speaks volumes and shows that PTI did not believe that annual raises had only been negotiated for employees making the national minimum wage rates.

iii. The Local Union's Subsequent Communications To The Bargaining Unit About The Annual Raises

After the mix-up with the How to Calculate Document, the Local Union produced Union Update # 3 for the bargaining unit. The update, in part, described the annual raises that were agreed to during the negotiations. The Local Union produced the document to PTI in advance of providing it to the bargaining unit and had PTI clear the update before it was sent. (Tr. 92). The update made it clear that Local 1222 had not just negotiated wage rate increases for employees making the national minimum wage rates. (Un. Ex. 4).

For example, Local President Boyle advised employees that the Local Union and PTI had discussions over öthe percentage increase for Level 5ö in the third year of the contract. (*Id.*). Boyle also let employees know that a wage scale for each location would be sent so employees would öknow exactly what your wages will beö under the new agreement. (*Id.*).

Upon receipt of Union Update #3, PTI had the perfect chance in 2015 to tell the Local Union that its understanding of the terms of the new agreement were mistaken. Because there is no evidence that it did so, it should be determined that it also understood that the annual raises had only been negotiated for employees making the national minimum wage rates.

4. PTI's Interpretation Is Inconsistent With Related CBA Provisions

PTI's interpretation of the 2016 wage increase language is also inconsistent with several related contract provisions in Section 1 of Article 3. For example, PTI's interpretation is inconsistent with the provision in Section 1(B) that states: "The Company will provide each location a Wage Table that reflects the contractual increases contained in this Agreement prior to April 1 of each contract year." (Jt. Ex. 5, p. 16). This provision does not state or suggest that the only branches that need a Wage Table reflecting the annual contractual increases are those branches where employees are making the national minimum wage rates. On the contrary, it plainly states that **each location** will be provided with a Wage Table that reflects the annual "contractual increases" prior to April 1 of each contract year. This sentence should reasonably be interpreted as confirmation that each PTI branch, including those branches where employees made more than national minimum scale wages, was going to be impacted by the annual raises. That is precisely why PTI committed to provide each PTI branch with a Wage Table prior to April 1 of each year of the contract. As Gittlen testified, there would be no reason for PTI to provide each branch with a Wage Table reflecting the annual contractual increases if employees at all branches were not going to receive the annual raises. (Tr. 238).

PTI's interpretation also is in direct conflict with its Section 1(D) commitments. Section 1(D) states that, in the event that the Consumer Price Index ("C.P.I.") exceeds six percent 6.0% for the twelve month period ending February 28, 2016, the "above 2016 percentage increase for Level

3, 4 and 5 will be adjusted by 1% to 3%.ö (Jt. Ex. 5, p. 17). Notably, the contract does not state that the 2016 annual increases will only be adjusted for Level 3 to Level 5 employees making the national minimum wage rates. Consistent with how annual raises have always been negotiated and distributed, this provision further demonstrates that annual raises were to be provided on an employment level basis to all Level 3, 4 and 5 employees regardless of whether or not they made more than the national minimum rates.

5. PTI's Interpretation Of The Annual Wage Rate Increase Language In Section 1(A) Leads To Illogical And Unacceptable Results

PTI's interpretation of the relevant contract language also leads to illogical and unacceptable results. As the Local Union witnesses testified, it makes no sense that the Local Union would only negotiate wage rate increases for the bargaining unit employees who make the national minimum wage rates while, at the same time, leaving the rest of the bargaining unit with nothing in terms of wage rate increases. (Tr. 84-85, 195). This is particularly true given that wage rate increases topped the list of issues of importance to all bargaining unit employees and that employees making the national minimum wage rates only comprise 30% of the bargaining unit. (Tr. 84-85, 178-179).

PTI's application of the 2016 annual raise language also wreaks havoc on the branch-specific wage scales that the parties have taken great care in developing over the years and that are expressly referred to and part of the contract. By providing the annual raises only to employees making the national minimum wages, PTI is allowing minimum wage employees to jump over employees who are supposed to be making higher branch-specific rates. The parties did not intend to negotiate a random and arbitrary wage rate increase system. On the contrary, they negotiated an orderly, seniority-based system whereby the national minimum wage floor was intended to be preserved as annual raises were provided. If PTI had applied the contract properly, then there

would still be a defined wage floor because all of the Level 2 to Level 7 employees making the national minimum wage rates and all the Level 2 to Level 7 employees making more the national minimum wage rates would have received the 2016 raises. That system can only be preserved if all Level 2 to Level 7 employees receive the annual wage rate increases that they are entitled to receive.

E. The Preamble To The Contract Does Not Permit PTI To Ignore Contractual Commitments Regarding Annual Raises To Alleviate Economic Hardship

It is anticipated that PTI will make a waiver argument similar to the argument rejected in *Albertsons, Inc.* In *Albertsons, Inc.*, the company argued that it retained the right to modify and discontinue its practice of paying wages in excess of the contractually prescribed wage rates. 106 LA at 901-902. The company relied on a contract provision that stated that "voluntary and/or extra-contractual benefits" may be modified, discontinued or amended at any time. *Id.* The company contended that this provision applied to wages and that it could discontinue any benefits in excess of what the contract required without negotiation with the union pursuant to the "enabling language" in this provision. *Id.*

During the hearing, PTI's attorney pointed to the preamble of the 2015-2018 CBA. The preamble provides, in relevant part:

The Union recognizes that the Employer must keep abreast of business developments, and must operate efficiently and economically if they are able to meet the rising costs of operations, including rates of pay and working conditions to members of the Union. Accordingly, the Union agrees that it will cooperate with the Employer to the end that his business may be operated efficiently and further agrees that it will not interfere in any way with the Employer's right to operate and manage its or his business **provided that nothing herein will permit the Employer to violate any of the terms and conditions of this Agreement.**

(Jt. Ex. 5, p. 7; Tr. 166, 308-309) (emphasis added).

The Arbitrator should reject any argument by PTI that the preamble conferred the right to PTI to modify and discontinue its practice of paying wages in excess of the national minimum wage rates by refusing to recognize branch-specific rates that are higher than the national minimum wage rates and/or by refusing to provide annual raises to employees making more than the national minimum wage rates.

To demonstrate that the Local Union waived the right to enforce branch-specific wage rates and wage rate increases, PTI must establish that there is clear and unmistakable contract language showing that it waived that right. *See, e.g., Graymont, PA, Inc.*, 364 NLRB No. 37, 206 LRRM 1723 (2016)(National Labor Relations Board rules that employers must meet a very high level of specificity to demonstrate that a union unequivocally waived its right to bargain over an employer's action); *NLRB v. C & C Plywood*, 385 U.S. 421(“clear and unmistakable” waiver standard “requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain”). The preamble does not include such language. The preamble does nothing more than generally require the Local Union to cooperate with PTI so that PTI's business can run efficiently. There is no language permitting discontinuance of a provision in the collective bargaining agreement or a past practice that is part of the collective bargaining agreement. In fact, the preamble expressly states that it cannot be used to permit PTI to violate the terms of the 2015-2018 CBA.

The preamble language cannot reasonably be construed as giving PTI the authority to only provide wage rate increases to employees making the national minimum scale wages. The reference to “rates of pay” in the preamble is, at most, a clarification that PTI's business will include “rising costs of operation” like “rates of pay” and better “working conditions to members

of the Union. It is not an express or implicit statement that Local 1222 has agreed that PTI can freeze or reduce the wages of those employees who make more than the national minimum wage rates at any time so it can run its business how it sees fit. There is also no evidence that the parties discussed conferring such expansive authority on PTI during negotiations.

The preamble is far weaker than the clause in *Albertsons, Inc.*, which actually allowed the employer to modify, discontinue or amend voluntary and/or extra-contractual benefits. Arbitrator Kaufman concluded that even that language did not vest the employer with the unfettered authority to modify above minimum or contract-scale wage rates unilaterally or to refuse to provide annual raises to employees making above minimum or contract-scale wages.

Moreover, as in *Alberston's Inc.*, there is a provision in Section 1(B) of the 2015-2018 CBA that expressly provides that no employee shall suffer a reduction in his wages because of the rates listed in Section 1(A). (Jt. Ex. 5, p. 16). Therefore, PTI cannot unilaterally reduce the wages of employees making branch-specific rates that are more than the national minimum wage rates. By not providing above-minimum wage scale employees with the annual raises that they are entitled to receive, PTI has also effectively reduced the wages of these employees.

PTI is in effect contending that, as long as it pays employees the national minimum wage rates, with annual increases, it is in compliance with the contract. It is asking the Arbitrator to conclude that Local 1222 entered an agreement under which the Company could subject all employees making more than the national minimum wage rate scale wages to receiving no wage rate increases for the entire term of the 2015-2018 CBA at a whim and without a word of dialogue with the Local Union. 106 LA at 902. The arbitrator chose not to accept this position in *Alberston's Inc.* and the same determination should be made here.

The preamble is nothing more than an obvious expression of the parties' intent to get along for the good of the business. The preamble does not trump the Local Union's contractual right to be the exclusive representative of the bargaining unit employees for terms and conditions of employment. The Local Union manifested its commitment to the principles in the preamble by readily agreeing during negotiations to the initial wages of new branches of employees added to the bargaining unit so long as the wages were equal or above the national minimum wage standard. Moreover, when the Company wanted to increase the rates of pay at a particular branch because of something that happened, the Union cooperated with the Company. (Tr. 114-115, 138).

If any party has acted inconsistently with the preamble, it is PTI. What the Company did in 2016 is entirely incompatible with the parameters of the preamble. In 2016, the Company experienced an economic setback. (Tr. 272-273). In or around March 2016, PTI lost a substantial portion of business from one of its customers. (Tr. 139, 273). In addition, PTI also was losing business because certain railroads started doing the work that PTI performs in-house. (Tr. 282-283). To offset that setback, the Company failed to carry out its responsibility to provide the contractually agreed on wage increases to all bargaining unit employees, based on their level and negotiated branch rate, despite the fact that it had done so in 2015. (Tr. 274).

There is no evidence that PTI ever went to the Local Union and asked for it help in connection with the economic difficulties it contends it was experiencing. On the contrary, PTI witness Harrison admits that Ron Romain, the owner of PTI, unilaterally made the decision of whether or not to provide wage increases to bargaining unit employees making about the contractual minimum wage rates rested with Romain. (Tr. 288-289, 293-294, 304-305). Harrison testified that PTI's loss of business caused a "reshuffling of the deck" with respect to the annual rate increases. (Tr. 273-274).

Romain obviously made his decision because the Company was experiencing economic difficulties and he was looking for ways to save the Company money.⁵ Because he did so unilaterally, PTI has no legitimate claim the Local Union violated the terms of the preamble. Quite frankly, even if the preamble did apply, Local 1222 was never given the chance to cooperate with PTI regarding the economic difficulties it claims it was experiencing.

PTI used the preamble to swallow up the terms of the rest of the labor agreement. PTI's excuse for Romain's decision- that the Local Union agreed in the preamble that it could shirk its commitments with respect to annual raises- should be rejected. The preamble does not give PTI the right establish wages or working conditions for branch employees without negotiation with Local 1222. The language of the preamble makes it clear that the Local Union did not clearly and unmistakably waive the right to the negotiated annual increases for the employees making more than the national minimum wage rates. Harrison acknowledged that there is no provision in the 2015-2018 CBA that allows PTI to refuse to provide negotiated wage rate increases just because it is experiencing economic hardship. (Tr. 307). Finally, the Company's argument must be rejected because the wages of the 70% of the bargaining unit employees that makes more than the contractual minimum would, in effect, become "at will" depending on the desires of Romain. The contractual increases that the Union negotiated for the vast majority of bargaining unit employees making more than the contractual minimum would be illusory.⁶

⁵ Harrison also claimed that the decision not to provide the 2016 annual increases was made because of an increasing number of states raising their minimum wage rates. (Tr. 260-261, 298). Yet, by Harrison's own account, these state minimum wage law increases have been going on for some time and PTI still nevertheless consistently provided contractual annual raises to employees irrespective of their wage rates prior to 2016. (Tr. 260-261, 298, 303).

⁶ PTI did not contend at the hearing that it made a mistake in interpreting the relevant contract language. On the contrary, its preamble argument makes it clear that it is apparently not asserting that it mistakenly interpreted the relevant contract language. Nevertheless, if PTI contends in its post-hearing brief that it mistakenly interpreted the applicable contract language governing the 2016 raises, the Arbitrator should not allow PTI to skirt its obligations with respect to the 2016 raises. As shown above, there is no evidence

IV. CONCLUSION AND REMEDY

For the foregoing reasons, Local 1222 respectfully requests that the grievance be sustained and that the relief requested below be granted.

PTI's contract violation has been particularly damaging for the bargaining unit. Since April 2016, thousands of employees have been denied their annual wage rate increases. PTI's action has not just had a one-time effect on these affected employees. Every time they worked, they incurred damages because they were not paid the wage rates that they should have received. Therefore, every paycheck that PTI issued to a Level 2 to Level 7 employee that did not receive the April 2016 raise he was entitled to receive has been lower than it should have been. While numerous employees have felt the unnecessary pain of not receiving the wages that they are supposed to receive, PTI has unfairly benefited from the money that it has improperly withheld since April 2016.

Swift and sweeping remedial relief should be provided to correct PTI's egregious action. First, PTI must be ordered to provide backpay to all employees who did not receive the April 2016 raises that they should have received. This includes employees who are no longer working for the Company, but who were nonetheless impacted at some point after April 2016 when they worked for PTI but were not paid at the proper rate.

Since PTI has reaped a significant benefit by keeping money that it was not entitled to keep, it should be ordered to pay interest on the backpay that it should be required to pay to all affected employees.

that Local 1222 mistakenly interpreted the applicable contract language governing the 2016 raises. Arbitrators will not rescind a contractual obligation because a party made a unilateral mistake and the contract has become more burdensome or difficult to perform. *Elkouri and Elkouri, How Arbitration Works*, p. 1231 (Ruben, 6th Ed.). In addition, rescission of PTI's contractual obligations is not available because there is no evidence that Local 1222 knew PTI made a mistake and took advantage of that mistake. *Id.*

Additionally, PTI should be ordered to prospectively pay all affected Level 2 to Level 7 employees at rates that are at least commensurate to the wage rates that they were entitled to receive by virtue of the April 2016 raises.

Finally, since PTI has improperly held onto the money that should it should have disbursed, Local 1222 requests that PTI be ordered to make the affected employees whole with the relief requested above within 45 days of the Arbitrator's decision. The Local Union also requests that the Arbitrator retain jurisdiction of this matter to ensure that PTI provides all of the appropriate relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to the agreement of the parties, I certify that this document will be served by e-mail on September 7, 2017 on:

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