

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

In the Matter between)	
)	
KERRY INC.,)	
)	
Respondent,)	
)	
And)	Case Nos. GR-7-CA-52965 &
)	GR-7-CA-53192
LOCAL 70, BAKERY, CONFECTIONERY,)	
TOBACCO WORKERS AND GRAIN)	
MILLERS INTERNATIONAL UNION,)	
AFL-CIO,)	
)	
Charging Union.)	

**RESPONSE TO CHARGING UNION’S EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE’S DECISION**

Charging Union has filed Exceptions solely with respect to the portion of the Administrative Law Judge (“ALJ”) Decision and Order (“DO”) that found Kerry Inc. (“Respondent”) did not violate either the collective bargaining agreement (“CBA”) or the National Labor Relations Act (“Act”) by paying overtime after forty (40) hours per week instead of after eight (8) hours per day. Charging Union’s Exceptions should be denied because Charging Union failed to meet its respective burdens to prove that Respondent unilaterally changed its practice of paying overtime without bargaining or that Respondent violated the CBA by not paying daily overtime. Despite Charging Union’s arguments in support of its plea for backpay for alleged unpaid daily overtime, Charging Union has failed to provide any actual proof that Respondent ever changed its practice because Charging Union failed to prove that Respondent ever provided daily overtime pay to employees. Respondent, however, submitted numerous payroll records, documents from its “Lawson” payroll system, proposals from bargaining over the current CBA and credible testimony that unequivocally shows that

Respondent has neither violated the Act nor the CBA with respect to its payment of overtime. Accordingly, Charging Union's Exceptions should be denied in their entirety and the Board should adopt the DO, except as noted in Respondent's Exceptions¹.

I. The ALJ's Finding With Respect To Section 6.4 Of The Collective Bargaining Agreement Should Not Be Disturbed

The ALJ correctly found that Respondent had the right to decide whether to pay daily overtime and that Respondent had not previously paid daily overtime, which meant that it had not made any unlawful unilateral changes. Charging Union sets forth three arguments as to why the ALJ was supposedly incorrect when he found that Section 6.4 (overtime provision) of the CBA does not require the payment of daily overtime: (1) the CBA does not specifically allow the Respondent to unilaterally decide whether to pay daily overtime; (2) such a finding would be "nonsensical" because it would mean that the daily overtime language was superfluous; and (3) past practice should not be considered in interpreting the meaning of Section 6.4. Each of these arguments fails since (1) the past practice of the parties shows that Respondent has the right to decide whether to pay daily overtime; (2) Respondent has not paid daily overtime in the history between the parties; (3) parties often put language in a CBA that concerns elective matters or even matters governed by law; (4) the ALJ correctly interpreted the CBA based on the evidence in the record; and (5) Charging Union itself proposed that Respondent begin paying daily overtime during the most recent negotiations over the current CBA.

¹ While Charging Union did not specifically address the issue in its Exceptions, it is important to note that on November 10, 2011, Charging Union filed a Motion to Reopen Part of the Record. As background, the hearing in this matter closed on January 26, 2011. Parties filed post-hearing briefs on March 24, 2011, and the DO issued on September 27, 2011. Therefore, Charging Union filed its Motion approximately ten (10) months after the hearing closed and six (6) weeks after the DO issued. Respondent filed an Objection to Charging Union's Motion and the matter is currently pending at the Board. Therefore, this Response to Charging Union's Exceptions only considers the evidence currently contained in the Record. Should the Board grant Charging Union's Motion to Reopen over Respondent's Objection, Respondent reserves its right to address Respondent's Exceptions in light of a supplemented record.

A. Respondent Has the Discretion To Decide Whether to Pay Daily Overtime

Charging Union has unsuccessfully argued that Respondent does not have the right to unilaterally decide whether to pay daily overtime. In an attempt to support this argument, Charging Union submitted an irrelevant hypothetical attacking the ALJ's understanding of the implication of the daily and weekly overtime provision. Specifically, Charging Union submitted a calculation to allegedly show that the ALJ misconstrued the importance to the employees of how daily overtime is paid. This is irrelevant to the ALJ's finding because Charging Union would have to first prove an entitlement to daily overtime before the calculation becomes relevant, which based on the record, Charging Union has failed to prove. In other words, Charging Union's hypothetical fails to dispute, or even cast doubt upon, the ALJ's finding that the CBA provided Respondent discretion to decide whether to pay daily or weekly overtime.

In addition, Charging Union states that the ALJ's finding is nonsensical because it means that Charging Union negotiated daily overtime language into the CBA and then left it up to Respondent to decide whether or not to abide by it. Charging Union, however, fails to address the fact that the agreed upon language does indeed have meaning, albeit meaning that is destructive to Charging Union's case. Section 6.4 introduces the idea of daily overtime into the CBA when, as Charging Union correctly stated in its Exceptions, an employer has no obligation under Michigan or federal law, to provide. The language is not superfluous because it identifies how the daily overtime provision would work should Respondent elect to pay daily overtime. It is well-established that an employer cannot provide more or less than the pay and benefits set forth in a CBA without bargaining. *NLRB v. Crompton-Highland Mills*, 337 U.S. 217 (1949) (employer committed an unfair labor practice by granting a higher wage increase than proposed to the union during negotiations). Thus, without the daily overtime language, no employee would have the hope of obtaining daily overtime. Consequently, the language is not superfluous,

but very meaningful to employees as it advises them that they must work a full week in order to qualify for daily overtime should Respondent elect to so provide it. The language lays out a means for Respondent to award employees who work hard, but ensures that an employee cannot abuse the award by choosing when to work. Thus, Charging Union's argument in support of its Exceptions fails.

B. Past Practice is a Necessary Component of Contract Interpretation and the Past Practice Favors Respondent

Charging Union cites an arbitration treatise in an attempt to persuade the Board that it should only examine the language in Section 6.4 of the CBA and should not factor in the past practice of the parties when examining the meaning of Section 6.4. Charging Union also argues briefly that past practice should not be considered because of Section 14.2 of the current CBA.

Charging Union's reliance on the arbitration treatise fails to account for the fact that the past practice has existed for several different contracts. Relying on language alone in this instance would actually be the worst way to determine the understanding between the parties. When parties have gone through several negotiations without any change to the practice or language, it is an indication that they have a mutual understanding that the practice is appropriate. This is the case here. Furthermore, when one of the parties attempts to change the language in the most recent negotiations and fails, but does not grieve the practice after the CBA is ratified, then the past practice will demonstrate exactly what the parties intended. Past practice is essential to understand the reason for a proposal to change the language in a past CBA. As discussed below, Respondent did not and would not have agreed to language that unequivocally granted employees daily overtime. If Charging Union actually believed that Respondent had agreed to unequivocally provide daily overtime, it certainly would not have agreed to the express language at issue in Section 6.4 and would not have proposed to change the language in an

attempt to secure daily overtime. The best evidence to interpret the relevant language is past practice.

In this case, past practice shows that Respondent understood the language as offering the choice to pay daily or weekly overtime, and Respondent chose to pay weekly. Accordingly, the ALJ was correct in his finding with respect to past practice. Furthermore, Respondent's payroll records show that employees did not receive daily overtime pay. (R. Ex. #'s 13, 14 and 15) Additionally, while Charging Union called numerous witnesses to testify regarding daily overtime pay, **none** of Charging Union's witnesses could confirm that daily overtime had ever been granted and **none** of Charging Union's witnesses could credibly explain why a grievance had never been filed before the schedule was changed from eight (8) to twelve (12) hour shifts (Tr. 80, Ins. 20-25, Tr. 155, Ins. 4-13, Tr. 352, Ins. 3-11) In fact, despite the unsupported testimony of Orin Holder, Charging Union's chief negotiator at the most recent negotiations, the contract language in the predecessor CBA clearly did not require daily overtime and presumably the employees knew this to be true because a grievance had not been filed by Charging Union until the schedule changed. As the ALJ noted, the relevant language in the predecessor agreement was as follows:

All employees will be paid time and one-half for all hours actually worked in excess of eight (8) hours per day or forty (40) hours per week **but not for both.**
(Emphasis supplied)

The highlighted language underscores the meritless nature of Charging Union's position that the predecessor CBA required payment of daily overtime. The language clearly and unequivocally says that daily or weekly overtime will be given, but not both. It does not mandate daily overtime. Therefore, if daily overtime were required by the contract, it would have to be supported by past practice of paying daily overtime, which it is not.

As the ALJ correctly stated, it was Charging Union's burden to show a deviation from past practice in order to establish a Section 8(a)(5) and (1) violation of the Act and Charging Union failed to meet its burden. Additionally, in order to establish an 8(d) violation, Charging Union has to show that Respondent violated an express provision of the CBA. Once again, Charging Union failed to establish a violation of the Act because as the ALJ found, the language of Section 6.4 does not mandate that Respondent pay daily overtime. In accordance with Section 6.4, Respondent chose to pay weekly overtime both during the current CBA and, as discussed more fully below, during the predecessor CBA. Therefore, the ALJ was correct in finding that the CBA did not mandate which party would decide how to pay overtime, and therefore, Respondent did not violate the Act by paying weekly overtime.

C. Charging Union's Submission Of A Proposal For Daily Overtime During Negotiations Over The Current Collective Bargaining Agreement Proves Charging Union Was Aware That Section 6.4 Does Not Require Daily Overtime

Charging Union's Exceptions brief fails to address the fact that Charging Union submitted a proposal during negotiations over the current CBA to mandate daily overtime pay for work over eight (8) hours. More specifically, in July, 2008, Charging Union submitted a proposal during negotiations over the current CBA for daily overtime pay after eight (8) hours and later withdrew it after Respondent rejected the proposal. (Tr. 216, Ins. 13-19, Tr. 80, Ins. 8-19, R. Ex. #1, ¶6) Charging Union's written proposal was as follows: "Any work over 8 hours per day be paid at 1½ times." (R. Ex. #1, ¶ 6) The mere fact that this proposal was submitted by Charging Union shows that it was aware in 2008 (and before) that the predecessor CBA (which contained the same language in Section 6.4) did not require Respondent to pay daily overtime and that Respondent was not paying daily overtime. Charging Union presented a witness (William Arends) who attempted to correct the testimony of another Charging Union witness

(Orin Holder) and claim that the proposal was for another purpose, but the ALJ found the claim not credible. Thus, Charging Union failed to offer any credible explanation for why it would submit a proposal for daily overtime if it believed the relevant language already mandated daily overtime.

Specifically, on cross examination, Respondent asked Holder why Charging Union had submitted a proposal for daily overtime. (Tr. 80, Ins. 8-19) Holder attempted to overcome the obvious implication raised through the submission of the proposal, i.e., that employees were not receiving daily overtime under the predecessor CBA, by stating that the proposal was withdrawn because daily overtime was “already in the contract language.” (Tr. 80, Ins. 8-10) When asked why he would make a proposal for language already in the CBA, Holder testified that the proposal was made because Charging Union received this proposal from its members and it takes all proposals that come from its members to the Company. (Tr. 80, Ins. 11-19) The ALJ correctly observed that the members would not have submitted a proposal for daily overtime if they were already receiving it. (DO 15) Thus, if the proposal did come from the members as Holder testified, the implication is obvious: they weren’t receiving daily overtime and they wanted it.

It is further illogical for Charging Union to have submitted a proposal for daily overtime only to later withdraw it on the premise that the contract language already provided it. If so, the only outcome is that Charging Union would look foolish at the bargaining table. Indeed, if the predecessor CBA already provided for what was requested in the proposal, Charging Union would be wasting time at the bargaining table by bringing such a proposal. Charging Union would also be potentially harming itself by attempting to negotiate new language when past practice already dictated what it wanted. Charging Union’s position did not fool the ALJ and

should not fool the Board. Charging Union would have the Board believe that it submitted the proposal not because it wanted daily overtime in a new CBA, but because it was merely serving as a “middle man” bringing everything requested by its members to Respondent regardless of whether it made sense. Rather, Charging Union submitted the proposal because its members were not receiving daily overtime under the language of the predecessor CBA and Charging Union knew it to be true. Charging Union failed to obtain daily overtime when its proposal was rejected and the Board should not allow Charging Union to obtain a benefit for its members that it failed to obtain through good faith bargaining.

II. The ALJ’s Credibility Findings and Findings Regarding the Weight of the Relevant Evidence Should Not Be Disturbed

One of the ALJ’s central roles is to weigh the credibility of witness testimony and make factual findings in the face of conflicting testimony and evidence. Absent a clear error based on a review of all of the relevant evidence, the Board typically defers to the ALJ’s findings in this regard. *Meda-Care Ambulance*, 285 NLRB 471, fn. 2 (1987) In this case, the ALJ correctly found that Charging Union’s evidence was not as compelling as the evidence submitted by the Respondent, and Charging Union’s witnesses were not as credible as Respondent’s witnesses. For example, the ALJ correctly found that William Arends, former President of Charging Union, who testified why Charging Union submitted the daily overtime proposal in 2008, was not credible. Charging Union called Arends as a witness in an attempt to support the explanation given by Holder for Charging Union submitting its daily overtime proposal in 2008.² Despite being called as a witness to support Holder’s testimony, Arends’ testimony actually conflicted

² By way of background, Respondent moved to sequester Charging Union’s witnesses when the hearing commenced. (Tr. 8, lns. 14-19) Despite Charging Union’s agreement to sequester witnesses, Arends was not sequestered. It was not until the second day of the hearing that Charging Union called Arends to testify as its final witness. The ALJ permitted him to testify over Respondent’s objection. (Tr. 347, lns. 6-22)

with that of Holder. Arends testified that the daily overtime proposal that Charging Union submitted at negotiations over the current agreement “did not come from the floor.” (Tr. 350, lns. 18-19) Rather, Arends stated it came from the bargaining committee. (Tr. 350, lns. 18-19) By contrast, Holder stated that the proposal came from the members and that is why it was submitted to the Company. (Tr. 80, lns. 11-19)

Additionally, the ALJ correctly gave little weight to the testimony of Edras Rodriguez-Torres who Charging Union also attempted to use to support its daily overtime argument. Rodriguez testified that he would not know whether employees received daily overtime pay and that he was not aware of employees ever complaining to him about not receiving daily overtime. (Tr. 155, lns. 4-13) Based on this testimony, the ALJ correctly found that Rodriguez’ testimony did not support its daily overtime argument.

The ALJ, however, found that Respondent’s witnesses credibly testified that Respondent did not provide daily overtime. (Tr. 217, lns. 6-7, Tr. 295, lns. 17-18; R. Ex. #'s 13, 14 and 15) Respondent’s testimony was further supported by its payroll records which also showed that Respondent did not pay daily overtime. (R. Ex. #'s 13, 14 and 15) Accordingly, based on the extensive evidence in the record showing that past practice was to pay weekly overtime and that Charging Union understood that the contract language did not mandate daily overtime, the ALJ correctly found that Respondent did not violate the Act with respect to its payment of weekly overtime.

III. Respondent Is Not Presently Paying Daily Overtime

Contrary to Charging Union’s Footnote 5 in its Exceptions, not only is there no evidence in the record of Respondent presently paying daily overtime, but Charging Union’s statement is patently inaccurate. In fact, since reverting back to a five (5) day, eight (8) hour schedule, consistent with past practice, Respondent has continued to pay weekly overtime for work over

forty (40) hours. Charging Union's unsupported statement in its Exceptions is further evidence that Charging Union's argument for daily overtime lacks any merit whatsoever.³

IV. Conclusion

For the foregoing reasons, the Board should dismiss Charging Union's Exceptions and adopt the ALJ's findings that Respondent did not violate the Act or the CBA through its payment of weekly overtime.

DATED: December 6, 2011

Respectfully submitted,

KERRY INC.



By: _____

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³ It is also significant to note that the General Counsel has refrained from filing Exceptions on any issue with respect to the DO.

STATEMENT OF SERVICE

On December 6, 2011, the undersigned, an attorney, filed with the National Labor Relations Board, Office of the Executive Secretary, via the Board's electronic filing system, an electronic copy of the foregoing Respondent's Response to Charging Union's Exceptions To The Administrative Law Judge's Decision, and served copies of same upon the parties below:

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