UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SILGAN PLASTICS CORPORATION

and

Cases 25-CA-031870
25-CA-063058
25-CA-065281
25-CA-068259
25-CA-072644
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UNITED STEELWORKERS, AFL-CIO-CLC,
LOCAL UNION 822, a/w UNITED STEELWORKERS,
AFL-CIO-CLC

ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Submitted by: Kimberly R. Sorg-Graves

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Comes now Counsel for the Acting General Counsel and respectfully submits this Answering Brief to Respondent Silgan Plastics Corporation's Statement of Exceptions to the Administrative Law Judge's Decision. This Answering Brief specifically addresses each of Respondent's Exceptions numbered 1 through 53. Counsel for the Acting General Counsel hereby requests that said exceptions be denied and that the Administrative Law Judge's decision in respect to these exceptions be affirmed. In support of this position, Counsel for the Acting General Counsel offers the following:

I. STATEMENT OF THE CASE

Based upon charges filed by the United Steelworkers, AFL-CIO-CLC, Local Union No. 822, a/w United Steelworkers, AFL-CIO-CLC, herein the Union, the Regional Director for Region 25 issued a Consolidated Complaint which alleges that Silgan Plastics Corporation,

herein called Respondent, unlawfully delayed in providing information requested by the Union that was relevant to the Union's duties as the collective bargaining representative of certain of Respondent's employees, failed to process grievances and/or bargain concerning employees' terms and conditions of employment, engaged in direct dealing with bargaining unit employees, unilaterally implemented a new safety vest policy, and unilaterally implemented changes to the employees' health insurance benefits and premiums. On September 20, 2012, Administrative Law Judge Paul Bogas issued his decision regarding the instant cases. Judge Bogas found that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act, herein the Act, by failing to provide the Union with information relevant to its collective-bargaining duties in a timely manner, by unilaterally implementing a safety vest policy, and by unilaterally changing employees' health benefits and premiums.

II. THE ADMINISTRATIVE LAW JUDGE ACCURATELY SETS FORTH THE FACTS

Respondent did not except to credibility findings of the Administrative Law Judge and did not present an overview of the facts in its brief supporting its exceptions. Because the facts are important to the analysis of the arguments made herein, they are set forth for the Board's ease of reference.

A. BACKGROUND

Respondent, Silgan Plastics Corporation, produces plastic containers for food products and manufactured goods at various facilities, including its Seymour, Indiana facility. The production and maintenance employees at the facility have been represented by a series of unions as a result of mergers. The unit employees were first represented by Oil, Chemical

and Atomic Workers International Union Local No. 7-822, AFL-CIO, then by Paper, Allied Industrial, Chemical & Energy Workers International Union, Local No. 6-0822, AFL-CIO and finally by the United Steelworkers, AFL-CIO-CLC, and its Local Union No. 822 (GC Exhs. 3, 4, 5, and 6; Jt. Exh 1) (JD: 2-3). The United Steelworkers, AFL-CIO-CLC and its Local Union No. 822 are herein collectively referred to as the Union.

B. COLLECTIVE-BARGAINING AGREEMENT EXPIRATION AND RESPONSES OF THE PARTIES

The Union became the bargaining representative of the unit in April 2005 and became a party to the collective-bargaining agreement that was entered into by PACE and Respondent in December 2004 and was effective until February 28, 2011, herein referred to as the CBA (Jt. Exh. 1, TR 113-115) (JD: 2, 20-37). In 2010, the Union gave timely notice requesting to negotiate a successor contract and neither party offered to extend the CBA resulting in its expiration at the end of the day on February 28, 2011 (TR 285). Prior to February 29, 2011, there had been no lapse in successive contracts since at least 1990 (GC Exh. 3, 4, 5, 6; TR 115) (JD: 2, 27-30).

Upon the lapse of the CBA in early March 2011, Plant Manager Jim Stajkowski and Production Manager Steve Begley met with Local Union President Glen Carney and Local Union Vice President William Coffman to inform them that Respondent would no longer process dues deductions or honor the arbitration provision of the CBA (TR 120-21) (JD: 3, 19-24). In response, on March 5, 2011, United Steelworkers Staff Representative Chris Bolte sent a letter to Stajkowski informing him that "[i]f the Employer seeks any changes to the present terms and conditions of employment, the Union is demanding advance notice of such proposed change" and that "[a]ny future proposed changes by the Employer should be

submitted to me for processing" (Jt Exh. 2) (JD: 3, 25-35). Bolte took this action because "it is a lot different not having a CBA in place and working under the terms and conditions of an expired contract" and this situation was "different than what the Local Union officials were accustomed to" (TR 226). Bolte also states in his March 5, 2011 letter that the Union will not tolerate unilateral changes and will utilize the National Labor Relation Board to resolve any such issues (Jt Exh. 2) (JD: 3, 25-35).

David Rubardt, the lead negotiator for Respondent in contract negotiations, responded to Bolte's March 5 letter by a letter dated March 8, 2011. Rubardt reiterated Respondent's position that it would no longer follow the dues deduction and arbitration provisions of the CBA. Bolte responded by email on March 8, 2011, again informing Rubardt that "all further communications and notices shall be provided to me on behalf of the International Union." (GC Exh. 7) (JD: 4, 10-12). It was within this framework that the unfair labor practices found by the Administrative Law Judge occurred.

C. THE INFORMATION REQUESTS REGARDING EMPLOYEES WAGNER, HUDSON, DUNCAN, AND COE

1. The Request for Information regarding Respondent's Denial of Funeral Leave for Eric Wagner

On May 13, 2011, employee Eric Wagner's brother died and his body was donated to science. Wagner's wife called and spoke to Human Resources Assistant Kathy Williams who explained that since the body was being donated to science and no funeral service was planned, Eric Wagner was not eligible for funeral leave. Mrs. Wagner decided not to inform Eric Wagner of his brother's death that day (TR 42, 43-44, GC Exh. 31) (JD 4, 20-30). Prior to May 13, Eric Wagner had reached the maximum limit for attendance points and would have incurred another point causing his discharge if he missed work without an

allowable leave (TR 130-131; GC Exh. 31) (JD: 4, 24-26). Regional Human Resource Director Deanna Lawyer testified that they had not had such an experience before and that the funeral leave policy required documentation (TR 45, GC Exh. 31) (JD: 4, 30-31).

On May 14, 2011, Eric Wagner reported to work but was upset and crying on the plant floor. Wagner was told that he would not qualify for funeral leave at that time even if there was a future memorial service that he planned on attending (GC Exh. 31) (JD: 4, 22-23). Local Union Vice President Will Coffman contacted Lawyer and asked if there was any way they could get Wagner out of the plant because he was crying on the plant floor (TR 123-24, 158) (JD 4, 22-24). Lawyer again said that Wagner was not eligible for funeral leave because no service was planned. Coffman questioned Lawyer if there was any way that Wagner could use vacation time to be excused from work. Lawyer arranged for Wagner to take vacation leave for the rest of that day and the next day and waived the 24-hour notice requirement to take vacation leave on a non-precedent setting basis (TR 125) (JD: 5, 1-4).

In an attempt to secure bereavement leave for Wagner instead of him having to use vacation time, Chief Union Steward Dianna Kreutzjans filed a grievance on May 14, 2011, concerning the denial of funeral/bereavement leave (GC Exh. 8) (JD: 5, 8-9). On May 16, 2011, Stajkowski called Coffman into his office and they spoke with Lawyer via speaker phone (TR 47, 126) (JD: 4, 14-15). They informed Coffman that they wanted to speak to him about the Wagner grievance. Coffman told them that he agreed to meet and discuss the Wagner grievance but that he did not think he had the authority to settle it (TR 126, 161-62) (JD: 5, 15-19). Lawyer explained that they had handled Wagner's situation poorly due to its novelty and the fact that it happened on a weekend. Lawyer offered to reinstate Wagner's vacation time if he was able at some future date to bring in a slip from a memorial service

where a minister was present. Coffman told Lawyer that this was agreeable to him but again told her that he did not think he had the authority to settle the grievance and would have to contact Bolte before he could take any action (TR 127) (JD: 5, 15-19).

On May 17, 2011, Coffman was accompanied by Diana Kruetzjans in yet another meeting with Lawyer and Stajkowski concerning Wagner's grievance. At this meeting Coffman verified that he did not have the authority to settle the grievance (TR 128) (JD: 5, 24-25 and 27-31). In her testimony, Lawyer never denied Coffman's claims that he had told her and Stajkowski during their May 16 and 17 meetings that he did not have the authority to settle the grievance.

Also on May 17, 2011, Bolte sent a letter to Stajkowski requesting information in relation to Wagner's funeral leave grievance and to "bargain regarding the Employer's decision regarding Eric Wagner." (Jt Exh. 4) (JD: 5, 23-24). Bolte requested information seeking to ascertain the exact circumstances of Eric Wagner's situation, whether any other employee had ever been similarly situated, and whether Respondent had a past practice of handling similarly situated employees in a particular manner (TR 231-32; Jt Exh. 4) (JD: 7, 23-28). Bolte offered May 25 and 26 as specific dates during which he could be available to bargain about the Eric Wagner situation (TR 233) (JD: 8, 4-6).

Lawyer responded to Bolte's information request by letter on May 19, 2011, insisting that the Wagner grievance had been settled. Lawyer testified that her claim in this letter that Respondent had reached a mutual agreement with the Local Union officer was referring to her telephone conversation with Coffman on May 14, 2011 (TR 48) (JD:8, 8-15). Lawyer was not able to explain why Coffman was called into the May 16 meeting concerning Wagner's grievance if the matter had been resolved at the May 14 meeting (TR 49-50) (JD 5, 23-29).

The offer to retroactively convert Wagner's vacation leave to funeral leave that appears in the second bullet contained in the May 19 letter was not even made until the May 16 meeting (TR 126) (JD: 5, 14-17).

In his May 20, 2011 letter to Lawyer, Bolte renewed his request for information concerning the Wagner grievance, renewed his request to meet and bargain regarding Wagner's grievance, renewed his March 5, 2011 request that any future changes be submitted to him for processing, and stated his position that the Union did not consider the Wagner grievance resolved (Jt Exh. 6) (JD: 9, 10). These same positions by the parties were reiterated in two subsequent exchanges of letters between Lawyer and Bolte. (Jt Exh. 7, 8, 9) (JD: 9, 11-25).

With regard to Bolte's request for information concerning the Wagner grievance, Deeny in his August 11 letter requested that Bolte contact him to discuss the parameters of what documents should be provided by his client (Jt Exh. 13) (JD: 12, 6-17). In his August 11 letter, Deeny also specifically requested that Bolte "direct further communications to me for processing regarding the above matters," which referenced Jonathon Coe, Oliver Marshall Hudson, Lisa Duncan and Eric Wagner[1] (Jt Exh. 13) (JD: 12, 3-6). Bolte responded by email on August 11, 2011, informing Deeny he would get back with him about meeting to discuss the information requests when he returned from being out of town (JD: 13, 1-5).

On August 27, 2011, Bolte responded to Deeny by letter addressing the clarifications/objections that Deeny raised to the information requests concerning Coe, Hudson, and Duncan and requested that Deeny contact him promptly if he wanted to discuss the information request further (Jt Exh. 14) (JD: 13, 12-19). Bolte received no response from

[1] Jonathon Coe, Lisa Duncan, Oliver Marshall Hudson are discussed more fully below.

Deeny (TR 247). Instead, he was contacted by David Rubardt through a September 22, 2011 letter sent by email (GC Exh. 11, TR 247-48) (JD: 13, 25-17). This started an exchange of emails where Rubardt requested to meet about the information requests and Bolte repeatedly informed him that Deeny, as Respondent's Counsel, had requested that Bolte deal directly with him on these matters (GC Exh. 12 and 13; TR 248) (JD: 13, 27-36). At no time during this interchange did Deeny communicate to Bolte that he could deal directly with Rubardt about these matters (TR 249). It wasn't until a November 13, 2011, email from Deeny to Bolte regarding an exchange of letters concerning pending NLRB charges involving Coe, Hudson, Duncan, and Wagner that Deeny told Bolte that he can communicate with Rubardt concerning these matters.

On October 5, 2011, Respondent finally provided the Union with information in response to Bolte's information requests regarding Coe, Hudson, Duncan and Wagner (JD: 14, 19-20). This response was sent exactly one week after the September 28, 2011 issuance of the first Complaint and Notice of Hearing in this matter alleging the failure to provide information pursuant to Bolte's May 17 and 20 requests for information concerning Wagner's grievance (GC Exh. 1(i)) (JD: 22, 14-16).

2. The Request for Information Concerning Respondent's Denial of Funeral Leave for Oliver Marshall Hudson

Somewhat similar to the Wagner situation, employee Oliver Marshall Hudson requested funeral leave for the death of his father when there was no funeral/memorial service planned. Hudson's father was cremated and their family was planning a private gathering in a park. Hudson made this request on July 1, 2011 and was denied funeral leave because he stated that he would not have proof of a funeral service (GC Exh. 30; TR 241) (JD: 6, 20-25).

Hudson was also informed that his absence from work would be unexcused because he did not qualify for funeral leave. Therefore, he received an occurrence on his attendance record, did not receive any pay for his absence, and was not eligible for the Fourth of July vacation pay (GC Exh. 30) (JD 6, 25-35). Lawyer admitted that Respondent had not dealt with a situation like this where no funeral service was held (TR 45). Lawyer said that they had had other situations where an employee's family member's body was cremated and a service was still held from which documentation was submitted (TR 57).

On July 8, 2011, Chief Union Steward Dianna Kreutzjans filed a grievance on Hudson's behalf over Respondent's refusal to grant Hudson funeral leave (JD: 6, 27-29). Bolte learned of this grievance during a July 26, 2011 meeting with the Local Union Bargaining Committee members during contract negotiations (TR 236-37) (JD: 9, 34-37). In an attempt to resolve this grievance, Bolte requested in Counter Proposal #14 submitted by the Union in contract negotiations that Hudson be granted funeral leave and made whole (TR 237-38, GC Exh. 10) (JD: 6, 33-35). Respondent denied the entire counter proposal leaving the Hudson grievance unresolved.

On July 29, 2011, Bolte sent a letter to Stajkowski concerning the Hudson grievance in which he requested information concerning the circumstances of Hudson's funeral leave request, information concerning whether any other employee had been similarly situated, and how such matters had been handled in the past. Bolte also requested that he be contacted "in order to schedule a date to bargain regarding this matter" (Jt Exh. 11; TR 241) (JD 9, 33-36).

As discussed above, in response to Bolte's request to bargain about Hudson's grievance and requests to bargain about other employee grievances/situations, Respondent's Counsel Raymond Deeny sent a letter to Bolte dated August 11, 2011. As discussed above,

Respondent delayed until October 15, 2011, in providing information responsive to Bolte's requests for information relevant to Hudson's grievance. Similar to the Wagner situation, the information provided showed that funeral leave was only granted to employees who submitted evidence of attending a funeral service (Jt Exh. 15, pages 10 – 148). These documents verify Lawyer's testimony that Respondent had not had a situation where an employee's immediate family member had died and no formal memorial/funeral service was held (TR 45) (JD: 5, 4-6).

3. Request for Information Concerning Lisa Duncan's Discharge

On about June 13, 2011, unit employee Lisa Duncan submitted a doctor's statement to Respondent concerning her ability to return to work with no restrictions (Jt Exh. 15, page 196) (JD: 6 3-19). Respondent contended that Duncan had falsified the statement by writing "return with no restrictions" which Duncan denied (Jt Exh. 15, page 196; TR 60-61). Duncan was suspended and given the opportunity to seek a statement from her physician to clarify the matter by July 10, 2011 (Jt Exh. 15, page 198 and 200). Duncan did not submit the required documentation by July 10 and was discharged at that time. No grievance was filed over Duncan's discharge (JD: 6, 3-19).

Bolte learned of Duncan's discharge at the July 26, 2011 meeting with Local Union Bargaining Committee members during contract negotiations (TR 236-37) (JD: 9, 33-34). Bolte had not been informed about her discharge as the Union's point of contact as he had requested in his March 5, 2011 letter. In an attempt to resolve the Duncan matter Bolte requested in Counter Proposal #14 submitted by the Union in contract negotiations that Hudson be reinstated and made whole (TR 237-38, GC Exh. 10) (JD: 6, 33-35). As discussed above, the entire counter-proposal was rejected by Respondent.

Because Duncan's discharge remained unresolved, on July 29, 2011, Bolte requested information concerning the circumstances of Duncan's discharge, information concerning whether any other employee had been similarly situated, and how such matters had been handled in the past (JD: 9, 34-37). Bolte also requested that he be contacted "in order to schedule a date to bargain regarding this matter" (Jt Exh. 11) (JD: 9, 40—10, 1). Bolte did not receive the requested information concerning Duncan's discharge until October 5, 2011. That information shows that since 2004, Respondent has only discharged one employee for falsifying medical documentation (Jt. Exh. 15, pages 207-11). That situation is distinguishable from Duncan's situation because that employee admitted to falsifying the document while Duncan denied doing so (TR 65-66). It was this type of information that the Union needed to effectively determine how to handle Duncan's discharge.

4. Request for Information Concerning Jonathon Coe's Discipline

During one of his twenty-minute breaks on July 24, 2011, employee Jonathon Coe fell asleep on the picnic table in one of the designated break areas. Coe overslept and was about 10 minutes late for returning to work from his break (TR 102-03) (JD 6: 36-37). Supervisor Carey Ruwe, who witnessed Coe sleeping beyond his break, suspended and sent him home (TR 104) (JD: 6, 37-39).

As Coe's next regularly assigned work day approached he called the Human Resources Office and was told to report back for his next shift on July 27, 2011 (TR 106) (JD: 6, 42-43). Upon arriving for work, he was called into a meeting with Manager Earlene Shultz. Shultz questioned Coe about whether he knew what he had done was wrong and Coe agreed (TR 107) (JD: 7, 3-5). Shultz gave Coe a document settling the matter and returning Coe to work. Coe reviewed and signed the document because he was not getting into any

more trouble for the incident (TR 107-08) (JD: 7, 4-5). The document states that his employment was being reinstated to active status on a non-precedent setting basis." (Jt Exh 15, page 150). No Union representative was present for this meeting and no Union representative was consulted concerning the resolution of Coe's suspension (TR 67, 108, 132) (JD: 7, 1-3 and 9-11). This document was not provided to the Union until the information requests were complied with on October 5, 2011.

Bolte, having learned of Coe's suspension but being unaware of the full circumstances surrounding his suspension and return to work, requested information related to Coe's suspension in his July 29, 2011 letter to Stajkowski (Jt. Exh. 11) (JD 9, 34-36). This request was made only five days after the incident in an attempt to clarify whether or not a grievance should be filed over the matter. The document that Coe signed and other related information was not provided to the Union until the information requests were complied with on October 5, 2011.

D. Respondent Unilaterally Implemented Changes to Employee Health Insurance Benefits and Premiums

1. The CBA Language Concerning Health Benefits Expired with the Collective-Bargaining Agreement

Under Article XV, Benefit Plans, Subsections F and G of the CBA the Union arguably waived its right to bargain over changes to the unit employees benefit plans and premiums during the term of contract (Jt Exh. 1, page 22) (JD: 15, 10-24). This language had been carried over from previous contracts, but there had been no hiatus between contracts since at least 1990 until the CBA expired on February 28, 2011 (GC Exh. 3, 4, 5, 6; TR 115) (JD 2, 28-30). There was no extension of the any portion of the CBA beyond February 28, 2011 and the language of Article XV Benefit Plans limits that provision to "during the term of this

contract" (Jt Exh. 1, page 22; TR 35, 119-20) (JD: 2, 30-33). There is no evidence that health insurance benefits or premiums were ever changed during a period when the Article XV Benefit Plans language was not in effect (JD: 16, 3-5)[2].

2. Respondent Announces Health Benefit Changes Without Giving the Union Notice

At the end of October or the beginning of November 2011, Respondent posted a notice to employees announcing the 2012 Open Enrollment that stated: "Effective January 1, 2012, changes to be announced during the scheduled open enrollment meetings." (GC Exh 26) (JD: 16, 19-29). During these open enrollment employee shift meetings, Lawyer announced to employees that changes would be made to the health insurance premiums and benefits (TR 74-75). The employees were given a 2012 Open Enrollment Guide (GC Exh. 18) (JD: 16, 21-23). Lawyer went through a PowerPoint presentation which outlined changes to the program including the elimination of online and telephone health coaches, nurse line, and future moms program (GC Exh. 17, page 3; TR 77-78) (JD: 16, 30-34). Also eliminated was the opportunity to earn incentive points by using the health coach. The incentive points earned employees money that was used to pay their out-of-pocket health expenses (TR 77-78) (JD 16, 34-35. Employees were told that the list of medical treatments for which pre-certification was required would change and that they should check the new list (TR 75-76).

The employees were also informed that their premiums would increase (TR 81; GC Exhs. 18 page 9, 19 page 3, and 20) (JD: 16, 35-36). The premium increases which had occurred during the term of the CBA were not predetermined percentage increases each year.

[2] The first sentence on page 16, lines 1-3 of the Administrative Law Judge's decision contains a typographical error. The word "now" should read "not". There was no hiatus periods between contracts since at least March 1, 1989 (JD: 2, 28-30).

For example, between 2007 and 2010 there were no changes in premiums but there were premium changes in 2006 and 2011 (GC Exh. 21) (JD: 15, 25-30). The premium changes in 2012 varied by what type of plan the employee selected and ranged in the amount from $2.00 to $2.50 per weekly pay period.

Lawyer admitted that Respondent did not give the Union notice or opportunity to bargain before announcing the changes to the health insurance benefits and premiums to employees (TR 74) (JD: 16, 37-39). Coffman first learned of these changes during the employee shift meeting that he attended and shortly thereafter contacted Bolte (TR 133). Also shortly after the meeting, Coffman requested a copy of the PowerPoint presentation from Lawyer (TR 133). Lawyer initially stated that she would get Coffman a copy but a couple days later told him that she would not give him a copy because she had received correspondence from Bolte that she did not like (TR 134) (JD: 16, 26-29).

3. The Union Attempted to Bargain Despite Respondent's Fait Accompli Announcement

On November 9, 2011, Bolte wrote a letter to David Rubardt requesting to "bargain regarding the Employer's decision and effects of the decision to unilaterally implement and/or change insurance benefits and costs to the bargaining unit employees." Bolte requested to be contacted immediately (Jt Exh. 16) (JD: 17, 5-10). Rubardt offered Bolte a few dates on which Bolte was not available. Rubardt had about a two week period where he was unavailable when Bolte was available. Ultimately, the parties did not meet until December 22, 2011, when both parties and the Federal Mediator could be present (TR 251) (JD: 17, 11-12).

During the December 22, 2011 bargaining session, the parties met through a Federal Mediator and did not engage in face-to-face negotiations. Bolte first requested a copy of the 2012 Open Enrollment PowerPoint presentation through the Mediator. Rubardt emailed a copy to Bolte and later provided him with a hard copy. Bolte reviewed the PowerPoint document with the Bargaining Committee and then made two "supposals"[3] to Respondent through the Mediator. In each of these proposals, the Union was willing to disregard the NLRB charges being litigated in these cases including any unilateral change to the health insurance benefits and premiums in exchange for movement in contract negotiations (TR 252; R Exh. 47) (JD: 17, 11-25). Both times the Mediator reported back that Respondent was sticking with its last, best, and final contract offer that it had made at the end of April 2011 (TR 253). Bolte indicated to the Mediator that the Union would have to consider the information that it had received and would get back to Respondent (TR 253). Rubardt requested to meet face-to-face with the Union about things that were occurring at the plant. Bolte agreed as long as Rubardt was not requesting to deal with the NLRB charges. When Bolte met with Rubardt he immediately started talking about the NLRB charges. Bolte told him that he was not prepared to discuss the charges and when Rubardt again started talking about them Bolte ended the meeting (TR 253) (JD: 17, 11-25). The charge alleging the unilateral changes to the health benefits and premiums had not been filed at that time (GC Exh. 1(v)).

After the negotiations ended, Bolte sent Rubardt an email stating that the Union was still reviewing the proposed changes and advising Rubardt to not make any unilateral changes. Rubardt responded by email to Bolte and, in part, quoted portions of CBA Article

[3] A "supposal" is a proposal that if one party does something what would the other party be willing to do. It is a way of feeling out the other side's position on an issue.

XV, Sections F and G. The email states that Respondent's "2012 program [benefit changes] complies with those terms. . . . We are maintaining the contract's terms during this interim period." (GC Exh. 20) (JD: 17, 26-34). Bolte responded by email that he had had reviewed these provisions and that they did not change the Union's position that Respondent was not permitted to make the changes at that time (GC Exh. 20) (JD: 17, 26-34). Rubardt also testified that he told Bolte that "[Respondent] believe[s] the agreement fully allows us to do what we're doing this year as we have over the past seven years." (TR 302-303).

4. No Evidence That Respondent Implemented Due to Impasse

In its Answer, Respondent contended for the first time that it had implemented the health insurance benefit and premium changes because the parties were at impasse (JD: 33, 16-20). Rubardt admitted that Respondent had never declared impasse to the Union (TR 402-03). Instead, Rubardt stated that he never informed the Union of a change in the health benefits and premiums because he "considered the status quo to be the condition that had been in place on February 28th, which was we were able to make annual change that applied to every other facility in the company." (TR 401) (JD: 18, 2-5).

The parties had met for contract negotiations in February, March, April and July (TR 354-55). The Union had initially made a proposal to change from Respondent's self insurance benefits to benefits offered by the Union. Despite the fact that the Union could save Respondent over $50,000, it rejected the Union's proposal (TR 294). The Union at the April 20, 2011 contract negotiation meeting, submitted its 12th Counter Proposal agreeing with Respondent's proposal to maintain Respondent's self insurance benefits with some modifications (R Exh. 54) (JD: 16, 5-16). The parties had negotiated only one additional time

after the April 20, 2012 meeting and the Union's proposal on health benefits was still open (TR 289). Neither party had ever declared impasse (TR 256; 402-03) (JD 33, 18-31).

E. Respondent Unilaterally Implemented a New Reflective Safety Vest Policy

Under Article XXII, Management Functions, of the expired contract, Respondent had the authority to "make and enforce shop rules for the orderly conduct of the plant operation and the safety of the employees." Over the years of operation, Respondent had issued various shop rules/safety regulations as are listed in its Plant Safety, Security and Administrative Regulations (Revised April 2000) ("Respondent's Safety Regulations"). (R. Exh. 43) (JD: 19, 24-35). Respondent's Safety Regulations explicitly state that "violations of any safety rule/policy regulations may result in discipline, up to and including discharge." Although these policies required the use of safety equipment such as safety glasses, face shields, ear protection, and gloves while operating some equipment, no employee was ever required to wear a reflective safety vest while performing any type of work at the facility prior to March 1, 2012 (TR 85) (JD: 19, 28-30).

Employees were first informed about this new safety vest policy by Lawyer during a Safety Committee Meeting in mid-January 2012 (TR 435) (JD: 18, 9-17). The Safety Committee consists of members of management, a Local Union representative, and at that time about twelve other employees who voluntarily participated in the committee. Lawyer testified that she announced at this meeting that there had been an employee run over and killed by a spotter truck at another of Respondent's facilities. Based upon an OSHA recommendation, Respondent's corporate offices had decided that a new reflective safety vest policy would be implemented at all of Respondent's facilities (TR 436-37) (JD: 18, 9-12). Lawyer testified that none of the committee members commented on the announcement of the

new policy (TR 431). There was no safety recommendation submitted by the Committee to the Union as outlined in Article XIX, Health and Safety (JD: 18, 18-19). At no time prior to this meeting was the Union informed about Respondent's decision to implement the corporate-wide safety vest policy at the Seymour facility (TR 137) (JD: 18, 15-16).

During monthly production and safety meetings with employees held over multiple days at the end of January 2012, all employees were told of Respondent's decision to implement the corporate-wide new safety vest policy starting March 1, 2012 (JD: 18, 21-27). During these meetings, employees were informed by Lawyer and Stajkowski that: all employees driving forklifts, or in the warehouse, tunnels, and yard would be required to wear the vests; employees would be provided one vest by Respondent; replacement vests would cost $6.00; visitors to these areas would be required to wear vests; and signs listing this and other policies would be posted in specific locations (TR 86, GC Exh. 28) (JD: 19, 1-6).

III. ARGUMENT

A. The Administrative Law Judge Correctly Found that Respondent Violated the Act by Failing to Provide Information in a Timely Manner.

The Administrative Law Judge was correct in his finding that the information requested by the Union was relevant to its duty as the employees' collective-bargaining representative and that Respondent unlawfully delayed in providing that information. In coming to that conclusion, the Administrative Law Judge correctly excluded Respondent's evidence alleging a course of bad faith conduct on the Union's part, found the requested information was relevant to the Union's role as the employees' collective-bargaining representative, and that Respondent unduly delayed in providing the information (JD, 20-25).

1. The Administrative Law Judge Correctly Excluded Evidence of Bad Faith Bargaining on the Union's Behalf[4]

The Administrative Law Judge properly excluded Respondent's evidence and line of questions concerning Respondent's claim that the Union had engaged in bad faith bargaining therefore excusing its failure to provide information in a timely manner. (JD, 15; 31-47). The Administrative Law Judge afforded Respondent an opportunity to explain its position that it should be allowed to present evidence to support its claim that the Union had engaged in bad faith bargaining therefore excusing it from providing the information in a timely manner (TR 192-200). Based Respondent's assertions, the evidence already in the record, and the allegations of the charge, the Administrative Law Judge correctly found it was not an applicable defense in these cases.

The Consolidated Complaint in these cases contains various allegations of distinct violations of Section 8(a)(1) and (5) of the Act. At hearing Respondent sought to submit evidence that the Union had engaged in bad faith bargaining as an affirmative defense to all of these allegations including the alleged failure to provide information in a timely manner. For this proposition at hearing, Respondent cited *Serramonte Oldsmobile, Inc.,* 318 NLRB 80 (1995). As the Administrative Law Judge correctly ruled at hearing, this defense is inappropriate in this matter because these cases do not involve a course of conduct bad faith bargaining allegation to which this type of defense was allowed in *Serramonte* and the cases relied upon therein. What Respondent appears to be arguing in this case is that the Union somehow has unclean hands which excused Respondent from following the law. The Board has repeatedly rejected this type of argument. See *Décor Group, Inc.* 356 NLRB No. 180 (June 07, 2011)(holding that the "unclean hands" doctrine of equity does not operate against a

[4] This section of the Answering Brief responds to Respondent's arguments it made in support of its Exceptions 8, 24, and 25.

charging party because Board proceedings are not conducted for the vindication of private rights, but are brought in the public interest and to effectuate the statutory policy); *California Gas Transport*, 347 NLRB 1314, 1326 fn. 36 (2006).

2. The Administrative Law Judge Correctly Excluded Respondent's Evidence of Alleged Bad Faith Conduct by the Union in Requesting the Information[5]

The Administrative Law Judge also correctly cited Board precedent holding that if the evidence shows that even one legitimate reason for an information request exits, the Respondent is required to produce the information regardless of whether the Union also has an ulterior motive for the request. Citing, *Land Rover Redwood City*, 330 NLRB 331-332 fn. 3 (1999); *Country Ford Trucks, Inc.*, 330 NLRB 328, 328 fn.6 (or fn. 3) (1999); *Island Creek Coal Co.*, 292 NLRB 480, 489 (1989), enfd. 899 F.2d 1222 (6th Cir. 1990). Respondent claims that the Administrative Law Judge was premature in his decision to exclude evidence concerning bad faith, because he made it prior to receiving all the evidence about the information requests. By the time that the Administrative Law Judge precluded the evidence, all of the information requests and responses thereto had been admitted into the record as joint exhibits and had been testified about by Respondent's Regional Human Resources Director Deanna Lawyer. At that point in the testimony, there was sufficient evidence in the record for the Administrative Law Judge to find the information requests, which are solely confined to information concerning terms and conditions of employment of bargaining unit employees, relevant to the Union's collective bargaining duty. Even if there was not sufficient evidence at the time, as discussed more fully below, the record as a whole proves at least one legitimate

[5] This section of the Answering Brief responds to Respondent's arguments it made in support of its Exceptions 1, 2, 5, 8, 22, and 23.

reason for each of the information requests. The Board should therefore affirm the Administrative Law Judge's finding that despite any possible bad faith on the Union's part, Respondent was still required to provide the requested information in a timely manner.

3. The Administrative Law Judge Correctly Found that the Union had Legitimate Reasons as the Employees' Collective-Bargaining Representative to Request the Information[6]

The Administrative Law Judge correctly found that the information requests were relevant to the Union's role as the exclusive bargaining representative of the employees (JD, 20-25). The Act requires that an employer provide information requested by a union that represents its employees when there is a probability that the information is relevant and necessary to the union carrying out its duties as the exclusive collective-bargaining representative of the employees. *NLRB V. Acme Industrial Co.*, 385 U.S. 432, 437 (1967); *Detroit Edison Co. v. NLRB,* 440 U.S. 301, 303 (1979). If the information requested by the union deals directly with the terms and conditions of the bargaining unit, then the information is presumptively relevant. *Ohio Power Co.*, 216 NLRB 987, 991 (1975). In assessing whether requested information is relevant, the Board uses a liberal, discovery-type standard. *Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006); *Certo Food Distribution Centers*, 346 NLRB 1214, 1215 (2006). The information requested regarding each of the four employees dealt directly with the terms and conditions of bargaining unit employees' employment and was, therefore, presumptively relevant and should have been provided in a timely manner.

The Board has consistently held that information which aids the grievance-arbitration process, including assisting a union in the decision whether to file a grievance or to proceed

[6] This section of the Answering Brief responds to Respondent's arguments it made in support of its Exceptions 1, 2, 3, 4, 5, 6, 7, 19, 20, 21, 29, 30, 34, and 35.

with a grievance, is relevant. *U.S. Postal Service*, 332 NLRB 635 (2000); *U.S. Postal Service*, 337 NLRB 820 (2002), *NLRB v. Acme Industrial Co.*, supra. In the present case, Bolte testified the documents and information he sought in the written requests attached to the Consolidated Complaint issued on March 28, 2011, as Exhibits A through E, were either related to a grievance the Union had filed, to the investigation of an employee action over which the Union might file a grievance, and/or to an employee action for which the Union had requested to bargain/grieve. Grievances had been filed with respect to the Wagner and Hudson matters. The request for information regarding Coe was made five days after the incident and within the 15 working-day time period to file a timely grievance under the CBA (Jt Exh. 15, page 151; Jt Exh. 1, page 3; Jt. Exh. 10). If the information had been provided a grievance may have been filed concerning the Coe matter. Similarly, the request for information and to bargain concerning the discharge of Lisa Duncan made on July 29 could have been used by the Union in its attempts to bargain her discharge at the bargaining table.

Furthermore, Bolte testified that the information that he requested concerning Wagner, Hudson, Duncan and Coe was to determine: 1) the specific circumstances of each of their situations, 2) how Respondent handled their situations, 3) whether any other employees had been similarly situated, and 4) how Respondent had handled any other employees. Bolte requested this information to determine if any past practice had been established with regard to each of these situations and whether Respondent had followed past practice in these instances.

Where, as in these cases, there is no collective-bargaining agreement in effect, the issue of whether a past practice has been developed for dealing with a particular type of situation governs whether the Employer has a duty to bargain concerning changes to

employees' term or conditions of employment. Absent an employer meeting the burden of showing a past practice, an employer is not privileged to change or establish new policies which affect employees' terms or conditions of employment during a hiatus between contracts. *Beverly Health and Rehabilitation Service, Inc.*, 335 NLRB 635, 636 (2001). *Id.*; *Eugene Iovine, Inc.*328 NLRB 294 fn. 2 (1999), enfd. mem. 242 F.3d 366 (2d Cir. 2001).

The Administrative Law Judge correctly determined that the Union was entitled to the information it requested concerning Wagner and Hudson to determine whether Respondent complied with the status quo in dealing with their funeral request even though Bolte believed their situations were unique prior to making his request. Maintaining such a belief does not preclude him from verifying that information through Respondent's records before deciding what if any action to take. Therefore, the information Bolte requested was relevant to determine if Respondent had a duty to bargain concerning any new terms or conditions of employment in addition to a duty to bargain individual grievances. The Administrative Law Judge's finding that the information was relevant to the Union's determination of whether Respondent was maintaining the status quo should be upheld.

Accordingly, the Administrative Law Judge's finding that the information requests were necessary and relevant to the Union's role as the exclusive bargaining representative should be upheld.

4. The Administrative Law Judge Correctly Found That Respondent Failed to Provide the Requested Information in a Timely Manner[7]

The Administrative Law Judge correctly found that Respondent failed to provide the Union with the requested information in a timely manner and cited appropriate cases to

[7] This section of the Answering Brief responds to Respondent's arguments it made in support of its Exceptions 3, 4, 6, 7, 19, 20, 21, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, and 37.

support this finding. See *Pan American Grain*, 343 NLRB 318, 343 (2004), enfd. in part, 432 F.3d 69 (1st Cir. 2005) (3-month delay unreasonable); *Bundy Corp.*, 292 NLRB 671 (1989) (delay of 2 ½-month violates the Act); *Woodland Clinic*, 331 NLRB 735, 737 (2000) (delay of 7 weeks violates the Act). *Monmouth Care Center*, 354 NLRB No. 2, slip op. at 42 (2009), enfd. 672 F.3d 1085 (D.C. Cir. 2012) (6-week delay unreasonable); *Quality Engineered Products*, 267 NLRB 593, 597-598 (1983) (8-week delay unreasonable); *International Credit Service*, 240 NLRB 715, 718-719 (1979), enfd. in relevant part 651 F.2d 1172 (6th Cir. 1981) (6-week delay unreasonable); *Local 12, International Union of Engineers*, 237 NLRB 1556, 1559 (1978) (6-week delay unreasonable). (JD, 24-25). Respondent contends that the facts of the instant cases do not align with these cited cases, and therefore, the finding that Respondent unlawfully delayed in providing the requested information must be in error. To the contrary, the Administrative Law Judge cited these cases for general principles and properly applied those principles to the circumstances of each information request

The Administrative Law Judge correctly cited cases for general principles such as an employer must respond to an information request in a timely manner; the duty to furnish information requires a reasonable good-faith effort to respond to the request as promptly as circumstances allow; and that an unexplained delay of seven weeks in providing relevant information is a violation of the Act. *Leland Stanford Junior University*, 307 NLRB 75, 80 (1992); *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993); *Woodland Clinic*, 331 NLRB 735 (2000). The Administrative Law Judge applied those general principles to the facts in these cases to determine whether, under the circumstances, Respondent had a valid reason for the delay in providing the information.

Absent a valid defense, an employer has a duty to timely furnish requested information. See *Mary Thompson Hospital*, 296 NLRB 1245, fn 1 (1989). A party must make a reasonable good faith effort to respond to the request as promptly as the circumstances allow. *Good Life Beverage*, supra 1062 fn. 9. The Board, in evaluating the promptness of an employer's response, will consider the complexity and extent of the information sought, its availability, and the difficulty in retrieving the information. *Allegheny Power*, 339 NLRB 585, 587 (2003).

The Administrative Law Judge correctly found that Respondent offered no valid evidence on any of these factors (JD: 22, 25-37; 23, 30-41; 24, 1-5 and 24-31; 25,1-6). First, Respondent claimed that it was delayed in providing information because some of the information requests were submitted to Stajkowski when they were normally submitted to Lawyer. Since Bolte's May 17, 2011 request was responded to by Lawyer on May 19, 2011, Respondent's contention that Bolte's addressing it to Stajkowski caused the nearly five month delay is without merit. Furthermore, Respondent attempted to claim that Bolte's failure to meet with Respondent in response to Deeny's August 11 letter requesting to bargain over the information requests caused their delay. The evidence does not support this contention. Bolte responded that same day that he was going to be out of town and would respond as soon as he returned (GC Exh 11). On August 27, 2011, Bolte sent a letter responding to the issues raised in Deeny's letter about the information requests and indicated his willingness to meet and bargain if his letter did not address all of Respondent's concerns (Jt Exh. 14). It was not until September 22, 2011, that Rubardt emailed Bolte requesting that they meet September 30 or October 4, 5, or 6, 2011, to simply discuss the information requests. Bolte responded to Rubardt that he was directed by Deeny to only deal with him on these issues (Jt. Exh 12).

Despite a couple of email interchanges concerning who Bolte should properly deal with on these issues, not until November 13, 2011, did Deeny take the simple step of communicating to Bolte that he is free to deal with Rubardt (GC Exh. 24; TR 248). Since Respondent was able to adequately provide the requested documentation on October 5, 2011, Respondent's ability to provide the information was not dependent upon any further clarification by Bolte.

The evidence supports the Administrative Law Judge's finding that Respondent did not make a good faith effort to promptly provide the Union with information it requested. With regard to the Union's May 17 and May 20, 2011 requests for information concerning the denial of Eric Wagner's request for funeral leave grievance, Respondent never responded in any way to the request for information until Deeny's August 11, 2011 letter (Jt Exh. 13). Ultimately, the documents were not provided by Respondent until October 5, 2011, after the initial complaint in this matter had issued on September 28, 2011, alleging the failure to provide information as a violation of the Act (Jt Exh. 15). The result was a nearly five month delay in providing that information for the first information request. For the three information requests that were submitted on July 29, 2011, there was approximately a nine-week delay in providing the information. Respondent was able to respond in less than a week after it decided to make an effort to gather the information. Respondent contended it needed further clarification by the Union to respond to the requests which were very specific and rather routine on their faces. When Respondent did provide the information, the Union found it to be an adequate response without ever having to meet with Respondent about the requests. Clearly, as the Administrative Law Judge found, Respondent's requests for a meeting with Bolte to discuss the information requests were just an attempt to avoid or delay responding.

Thus, Respondent has not put forth any valid defense for its delay in responding to the Union's requests for information. Therefore, the Administrative Law Judge's finding that Respondent unlawfully delayed in providing information should be upheld.

B. The Administrative Law Judge Correctly Found That Respondent Unilaterally Changed Employee Health Insurance Benefits and Premiums in Violation of Section 8(a)(1) and (5) of the Act

The Administrative Law Judge correctly found that Respondent implemented changes to the employee health insurance benefits and premiums without giving the Union notice and opportunity to bargain. (JD: 30, 40-44). The evidence is undisputed that in early November 2011, Respondent announced to unit employees at shift meetings that it was implementing changes to their health insurance benefits and premiums. It is also undisputed that Respondent implemented these changes on January 1, 2012 as announced. Board precedent clearly establishes that unilateral changes to unit employee health benefits constitute a violation of Section 8(a)(1) and (5) of the Act unless the employer can establish some affirmative defense. See, *E.I. Dupont De Nemours, Louisville Works*, 355 NLRB No. 176 (Aug. 27, 2010); *Omaha World-Herald*, 357 NLRB. No. 156 (Dec. 30, 2011). As discussed below, the Administrative Law Judge correctly found that none of Respondent's affirmative defenses have merit.

1. The Administrative Law Judge Correctly Found that the Union's Arguable Waiver of the Right to Bargain Concerning Changes to Employees' Health Insurance Benefits Expired when the Collective-Bargaining Agreement Expired[8]

The Administrative Law Judge found that CBA language that arguably waives the Union's right to bargain concerning limited changes to the employees' health insurance benefits expired with the expiration of the CBA. Board precedent has established that "the waiver of a union's right to bargain does not outlive the contract that contains it, absent some evidence of the parties' intention to the contrary." *Omaha World-Herald*, supra at 3 (quoting *Ironton Publications*, 321 NLRB 1048, 1048 (1996)). The Board in *Omaha World-Herald*, found that the union's arguable waiver in the parties' expired collective bargaining agreement of its right to bargain concerning employer contributions to employees' 401(k) benefit programs expired with the expiration of the contract. As a result, the employer's modification of those benefits after the contract expired constituted an unlawful unilateral change. The Board noted that there was no evidence that the parties intended to extend this arguable contract waiver beyond the expiration of the contract.

Similarly in the instant cases, the language in Article XV, Benefits, Sections F and G arguably waives the Union's right to bargain concerning changes to unit employees' health insurance benefits during the term of the CBA. There is no evidence, however, that the parties' agreed to extend this provision of the CBA beyond the expiration of the contract (Jt Exh. 1, page 22). Article XV, Benefits, Section F of the CBA specifically limits Respondent's rights to make changes to employee benefits under that provision to "the term of this contract." Furthermore, there is no language in the CBA itself that evidences an extension of this provision and the neither party sought to extend the contract as a whole.

[8] This section of the Answering Brief responds to Respondent's arguments it made in support of its Exceptions 9, 42, 43, 44, 45, 46, 47 and 53.

Since there was no extension of that provision beyond the expiration of the CBA, Respondent was no longer privileged by the language of the CBA to make a unilateral change to the health insurance benefits or premiums.

Respondent's contention that its repeated proposals in ongoing contract negotiations to maintain the language in the expired CBA with regards to health benefits shows the parties' intention to extend this language beyond the expiration of the CBA should not be found to have merit. Even though Respondent wanted to include that language in any future contract, the Union had initially proposed an entirely different health insurance benefit program and at the time of the unilateral change still had an open proposal on the table to modify the language proposed by Respondent (TR 289). Respondent's desire to maintain this provision in a future contract does not evidence an agreement by the Union to continue this provision of the CBA beyond the expiration of the CBA. Indeed, the fact that the arguable waiver had ceased being in effect when the CBA expired is what privileged the Union to propose different provisions in contract negotiations.

It was this privilege to reenter negotiations at the cessation of a contract that the Board sought to protect by holding that such waivers do not extend beyond the expiration of the contract. *Beverly Health and Rehabilitation Services, Inc.*, 335 NLRB 635, 636-37 (2001). The Board in *Beverly Health* held that to find otherwise would "vitiate an employer's bargaining obligation whenever a contract containing a broad management-rights clause expired." *Id.* As the Board has found and the Administrative Law Judged echoed, finding otherwise would discourage collective bargaining by making unions cautious about granting such rights in a collective-bargaining agreement if doing so will grant employers the unfettered right to make unilateral changes from that point forward regardless of whether

there is a contract in place providing a benefit for the relinquishment of that right. *E.I. Dupont De Nemours, Louisville Works*, 355 NLRB No. 176, *3 (Aug. 27, 2010) (JD: 32, 9-24).

2. The Administrative Law Judge Correctly Found That Respondent Failed to Meet its Burden of Establishing a Past Practice Privileging it to Make a Unilateral Change to the Health Benefits[9]

The Administrative Law Judge correctly found that there was no evidence of a past practice that privileged Respondent to make unilateral changes to the employees' health benefits and premiums. Respondent contends that it had a past practice of making unilateral changes to the health insurance benefits and premiums and therefore was privileged to do so in January 2012. Respondent failed to meet its burden to prove such a past practice. In the *Courier-Journal* cases, 342 NLRB 1093 (2004) and 342 NLRB 1148 (2004), the Board "found that the employer's unilateral changes to employees' health care premiums during a hiatus period between contracts were lawful because the employer had established a past practice of making such changes both during periods when a contract was in effect and during hiatus periods." *E.I. Dupont*, supra at 2. In *Courier-Journal*, the parties' expired collective-bargaining agreement arguably contained a waiver of the union's right to bargain such changes during the term of the contract. In that case, the Board found that the parties had a past practice, during hiatus periods between previous contracts, of the employer continuing to make unilateral changes to employee benefits. Therefore, the Board held that the employer was privileged to do so again, based upon past practice during hiatuses between contracts,

[9] This section of the Answering Brief responds to Respondent's arguments it made in support of its Exceptions 9, 42, 43, 44, 45, 46, 47 and 53.

despite the expiration of the waiver in the expired contract of the union's right to bargain such changes. *Id*.

In the instant cases, Respondent has presented no evidence that the parties have established a past practice of allowing Respondent to make unilateral changes to health insurance benefits during a hiatus between contracts. Indeed, no witness could recall a time when there was a hiatus between contracts. To the contrary, the parties had a practice of signing successive contracts well before the expiration of the previous contract since at least 1990 (GC Exh. 3, 4, 5, and 6; TR 115).

Respondent further claims that the Administrative Law Judge erred in failing to recognize that it had to have an open season as it does each year for employees to make changes to their health insurance elections. The Consolidated Complaint did not allege and the Administrative Law Judge did not find that Respondent violated the Act by holding an open enrollment period. It was the changes that Respondent made to the health insurance benefits and premiums that the Administration Law Judge found to be a violation. Respondent contends that it was required to make the changes to the health insurance benefits and premiums in order to have an insurance package to offer to the unit employees, because it had to offer them the same package that is available to all its employees at its various facilities (TR 399). Respondent is self-insured and admitted that it can design the benefit package in any manner it sees fit (TR 399). When questioned as to why Respondent did not carve out the unit employees and supplement their premiums and provide them with the fringe services that were removed from their insurance benefits until a contract could be negotiated, Rubardt testified that Respondent just did not want to (TR 405).

The Administrative Law Judge did not err, as Respondent contends, by failing to rely upon *Nabors Alaska Drilling, Inc.*, 341 NLRB 610 (2004) as Respondent contends. Respondent relies on *Nabors Alaska Drilling* for its contention that it was privileged to continue its practice of implementing changes to the employees' health benefit programs and premiums like it had during the term of successive collective-bargaining agreements. In *Nabors Alaska Drilling,* the parties were engaged in bargaining their initial contract. Therefore, the employer had a past practice of yearly modifications to its health benefit package that it was privileged to continue in order to maintain the status quo. The holding in *Nabors Alaska Drilling* is not applicable to the instant cases. As discussed above, no past practice outside the agreed upon CBA language, which did not survive the expiration of the CBA, has been established.

Thus, the Administrative Law Judge correctly found that Respondent has failed to meet its burden of establishing that it was privileged to make the unilateral change pursuant to past practice.

3. The Administrative Law Judged Correctly found that Respondent Failed to Meet its Burden of Establishing an Impasse in Bargaining[10]

The Administrative Law Judge appropriately rejected Respondent's claim that it was privileged to implement changes to the health insurance benefits and premiums because the parties were at impasse in bargaining with regard to at least the health insurance benefits (JD: 33, 7-42; 34, 1-48). As the Administrative Law Judge found, this argument fails because there is insufficient evidence that the parties were at impasse.

[10] This section of the Answering Brief responds to Respondent's arguments it made in support of its Exceptions 10, 11, 12, 13, 14, 15, 16, 38, 47, 48, 49, 50, 51, and 52.

"The employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain in that it encompasses a duty to refrain from implementation at all unless and until an overall impasse has been reached in bargaining for the agreement as a whole." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). See also, *Register-Guard*, 339 NLRB 353, 355-356 (2003). The determination of whether impasse has been reached is based upon the totality of the circumstances. The Board considers the following factors when determining whether or not an impasse exists: "[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of the negotiations." *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. sub. nom. *Television Artists AFTRA*, 395 F.2d 622 (D.C. Cir. 1968). The party asserting impasse as a defense to unilateral action bears the burden of proof on the issue. *North Star Steel Co.*, 305 NLRB 45 (1991), enfd. 974 F.2d 68 (8th Cir. 1992).

The Administrative Law Judge correctly found a glaring lack of evidence of a contemporaneous understanding of the parties that they were at impasse (JD: 33, 16-41). Most notable is that neither of Respondent's witnesses who were directly involved with the decision to implement the changes to the health care benefits ever testified that Respondent did so because the parties were at impasse. Prior to the submission of the answer to the Consolidated Complaint, neither of the parties had ever stated a belief that they were at impasse to the other party. Respondent never once informed the Union in any manner that it was implementing the health insurance benefits because it believed that they were at impasse (TR 250, 256). To the contrary, Respondent repeatedly said that it was implementing the

health insurance benefit and premium changes because it believed it was privileged to do so under the expired CBA. Even at hearing Rubardt testified that he had implemented the change because he believed he was maintaining the terms and conditions under the expired contract and never once testified that he did so because they were at impasse (TR 401).

Furthermore, the Administrative Law Judge correctly found that the amount of bargaining that the parties had engaged in did not evidence a likely impasse (JD: 34, 19-30). The parties had met for only 12 days for negotiations, some of which were only partial days. The parties had not reached economic proposals until about the 8th or 9th day of negotiations. Although Respondent had made a last, best and final offer in April 2011, that offer had been rejected by the unit. The Union continued to make significant changes in its counter proposals after that point such as its counter proposal dropping its request for Union sponsored health care benefits and offering to agree to a modified version of Respondent's health care benefits proposal which was still on the table at the time Respondent implemented its changes (TR 393, R Exh. 54).

Accordingly, the Administrative Law Judge's finding that the parties were not at impasse when Respondent implemented the changes to the health care benefit programs and premiums should be sustained.

C. The Administrative Law Judge Correctly Found That Respondent Unilaterally Established a Reflective Safety Vest Policy in Violation of Section 8(a)(1) and (5) of the Act

1. The Administrative Law Judge Correctly Found That the Safety Vest Policy Was Unilaterally Implemented[11]

The Administrative Law Judge correctly found that Respondent unilaterally implemented a safety vest policy on March 1, 2012. The Administrative Law Judge found that Respondent failed to give the Union notice and opportunity to bargaining before informing other employees of the implementation of the new policy (JD: 29, 20-30). Notice to employees of a change in working conditions does not constitute notice to the union. "One of the purposes of initial notice to a bargaining representative of a proposed change in terms and conditions of employment is to allow the representative to consult with unit employees to decide whether to acquiesce in the change, oppose it, or propose modifications. A union's role in that process is totally undermined when it learns of the change incidentally upon notification to all employees." *Roll and Hold Warehouse and Distribution Corp.*, 325 NLRB 41, 41-42 (1997). Any argument that a union waives its right to bargain about changes in such a circumstance fails. Once a union is presented with a fait accompli in this matter, any demand for bargaining is futile. See, *Century Restaurant and Buffet, Inc. d/b/a Best Century Buffet, Inc.*, 358 NLRB No. 23, *32 (March 27, 2012).

Respondent's announcement to the employees in the Health and Safety Committee meeting and its subsequent announcement to all employees during shift meetings that it was implementing a new corporate wide reflective safety vest policy constituted a fait accompli. At the Health and Safety Committee meeting Lawyer informed the Union

[11] This section of the Answering Brief responds to Respondent's arguments it made in support of its Exceptions 17, 18, 39, 40, 41, and 42.

representative on the Committee at the same time that she informed the twelve voluntary employee members of the committee that Respondent was implementing a corporate wide reflective safety vest policy starting March 1, 2012, because of a death that had occurred in another facility (TR 435-36). The policy was not discussed as a proposal before the Committee and no recommendation was submitted to the Union concerning the policy (TR 149). Lawyer's announcement of the corporate level decision in this manner constituted a fait accompli. The same announcement was made to all employees at the next regular shift meetings and implemented as planned on March 1, 2012. Accordingly, the Administrative Law Judge's finding that the safety vest policy was unilaterally implemented should be sustained.

2. The Administrative Law Judge Correctly Found That the Safety Vest Policy Constituted an Significant Change in Terms and Conditions of Employment[12]

The Administrative Law Judge correctly found that the implementation of the safety vest policy constituted a significant change in the employees' terms and conditions of employment. Although some employees were required to wear some safety equipment before Respondent unilaterally implemented the reflective safety vest policy, the implementation of that policy constituted a significant change to employees' terms and conditions of employment. As the Administrative Law Judge found, the Board has long held that the implementation of a new policy which is grounds for discipline constitutes a material, substantial, and significant change. See *Toledo Blade Co.*, 343 NLRB 385 (2004). Respondent's Plant Safety, Security and Administrative Regulations states that violation of

[12] This section of the Answering Brief responds to Respondent's arguments it made in support of its Exceptions 17, 18, 39, 40, 41, and 42.

any safety rule/policy regulations may result in discipline up to and including discharge (R Exh. 43). Respondent posted the new policy at the entrances to the portions of the facility in which the regulation must be followed (GC Exh. 28). It is clear under Respondent's regulations that employees could be disciplined for violation of this safety rule. Additionally, employees were provided their initial safety vest free of charge, but they will be charged $6 for any additional vests (GC Exh. 28).

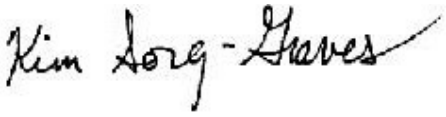
Under such circumstances the implementation of the safety vest policy constituted a substantial change to employees' terms and conditions of employment for which the Union should have been given notice and an opportunity to bargain. The Administrative Law Judge correctly found that Respondent's failure to give such notice and opportunity to bargain before announcing the new policy to employees and subsequently implementing the policy should be found to constitute a violation of Section 8(a)(1) and (5).

IV. CONCLUSION

For the foregoing reasons and based on the record as a whole, the Acting General Counsel respectfully requests that the Administrative Law Judge's findings and conclusions be affirmed and that Respondent's Exceptions 1 through 53 be denied in their entirety.

SIGNED at Indianapolis, Indiana, this 23rd day of November 2012.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION was served by electronic filing on the 23rd day of November 2012 on the following parties:

National Labor Relations Board
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I hereby certify that a copy of ACTING GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE was served by electronic mail on the 23rd day of November 2012 on the following parties:

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