

**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-068529
25-CA-072644
25-CA-074946
JD-50-12**

**LOCAL UNION 822, a/w UNITED STEEL
WORKERS, AFL-CIO-CLC**

**RESPONDENT SILGAN PLASTICS CORPORATION'S REPLY BRIEF TO THE
ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S
EXCEPTIONS AND BRIEF IN SUPPORT OF THE EXCEPTIONS**

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I. STATEMENT OF THE CASE¹

Silgan Plastics (“Silgan Plastics,” or “Respondent”) on November 5, 2012, filed Exceptions and a Brief in Support of its Exceptions (together, “Exceptions”) to Administrative Law Judge (“ALJ”) Paul Bogas’ Decision and Recommended Order (“Decision”) dated September 20, 2012. Both the Acting General Counsel (“GC”) and the United Steelworkers, Local Union 822 (“Charging Party” or “Union”) filed Answering Briefs to Respondent’s Exceptions on November 23, 2012. Pursuant to the National Labor Relations Board’s (“NLRB” or “Board”) Rules and Regulations, Section 102.46(h), Respondent files this Reply.

II. ARGUMENTS AND AUTHORITIES

The GC ignored relevant evidence, assumed facts not in evidence, addressed facts not relevant to the Exceptions, and disregarded Board law to oppose Respondent’s Exceptions. This Reply in addition to the Exceptions shows that the ALJ’s Decision must be reversed.

A. **The GC Misrepresented the Relevant Facts.**

Respondent cannot address all of the GC’s misrepresentations in its recitation of the facts. Given the page limitations imposed, the following provides salient facts to demonstrate the GC’s attempts to misrepresent the record.

The GC erroneously contends that Chief Union Steward, Dianna Kreutzjans filed a grievance “to secure bereavement leave for Wagner [Eric Wagner, employee] instead of having to use vacation time.” (GC, at 5). Nowhere in the grievance does it state anything about vacation time: “HR refuses to pay him + let him have today + tomorrow off w [sic] no

¹ Citations in this Brief will be as follows: “Tr. ___:___” to indicate the hearing transcript’s page and line numbers; “J Ex. ___” to indicate a Joint Exhibit; “R Ex. ___” to indicate Respondent’s Exhibits; “GC Ex. ___” to indicate an Exhibit of the General Counsel; “ALJD ___:___” to indicate the page and line numbers of the Decision of the Administrative Law Judge; “GC, at ___” to indicate the GC’s Answering Brief; “U, at ___” to indicate the Union’s Answering Brief, and “R Exceptions, at ___” to indicate Respondent’s Brief in Support of its Exceptions.

occurrence. Shameful.” (GC Ex. 8). Kreutzjans also did not testify. Thus, the GC’s contention is without evidentiary support and a mischievous attempt to convince the Board that this grievance was filed after Union Vice President and Steward Will Coffman settled the same. (Tr. 158: 13-20).

Contrary to the GC’s contention, the grievance filed on behalf of employee Oliver Marshall Hudson could not have been resolved when Union Staff Representative, Chris Bolte, submitted a proposal during the negotiations. (GC, at 9). The grievance was denied and not appealed to the next step during the five days allowed under the CBA. (R Exceptions, at 14; J Ex. 1, at 4; GC Ex. 9; R Ex. 28). The GC also erroneously contends that the March 5, 2011 letter written by Bolte states that Bolte needed to be informed of any terminations, and thus, the Union was not put on notice of employee Lisa Duncan’s termination. (GC, at 10; J Ex. 2). Ironically, it was the Local Union that informed Bolte of Duncan’s discharge. (GC, at 11; U, at 20). No grievance was filed within the five days allowed under the CBA and thus, no grievance could be filed in regards to Duncan’s termination. (J Ex. 1, at 4; J Ex. 15, at 195-201).

The GC also attempts to reargue that Respondent engaged in direct dealing with employee Jonathon Coe, even though this allegation was dismissed by the ALJ and no exceptions were filed by either the GC or the Charging Party. (GC, at 11; ALJD: 27-28). The GC also contends that no Union representative was present or consulted as it relates to Coe’s discipline. (GC, at 12). As noted by the ALJ, the GC never alleged a Weingarten² violation, and the evidence showed that there was no violation. (ALJD 27: 38-47).

² NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1974).

B. Silgan Plastics' Past Practice Privileged Respondent to Implement Changes to its Company-Wide Benefits Plan.

The GC erroneously contends that Respondent's changes to the healthcare benefits in 2012 constituted unlawful unilateral changes because: 1) the management function article in the CBA did not survive the expiration of the CBA; and 2) Respondent did not show that a past practice existed. (GC, at 12-16).

Rather than addressing Respondent's arguments and record citations, the GC erroneously contends that Respondent relied on the management functions article instead of the parties' established past practice. (GC, at 28-30). This contention was never raised by Respondent. In Capital Ford, the Board held that the past practice continues even after the expiration of the CBA because the practice is not dependent on the management rights clause. Capital Ford, 343 NLRB 1058, 1058 n. 3 (2004). This is exactly the rationale adopted by the Sixth Circuit, which held that "it is the actual past practice . . . under the management-rights clause of the CBA and not the existence of the management-rights clause itself, that allows the employer's past practice of unilateral change to survive the termination of the contract." Beverly Health and Rehab. Serv., Inc. v. NLRB, 297 F.3d 468, 481 (6th Cir. 2002). It is this past practice that required Silgan Plastics to continue the dynamic status quo.

Silgan Plastics established that a past practice existed between the parties, which has been to evaluate the benefit costs on an annual basis, offer all of its employees at all of its locations the same health and welfare benefit plans, and use its open enrollment period to inform its employees of the changes to the benefits and co-pays. (R Exceptions, at 20-25). This past practice required Respondent to continue its dynamic status quo until a new CBA was agreed to by the parties. (GC, at 30). The GC completely disregards compelling authority on this point.

The GC relies instead on an argument that a “hiatus” is required to establish a past practice; an argument expressly rejected by controlling authority. (GC, at 31; U, at 35). In Nabors Alaska Drilling, the Board affirmed the ALJ’s dismissal of a charge where the employer, who bargained with the union for an initial contract, unilaterally implemented annual open enrollment. Nabors Alaska Drilling, Inc., 341 NLRB 610, 613 (2004). According to the GC, Nabors Alaska Drilling is inapposite because the employer bargained with the Union for its first contract. (GC, at 32). However, this distinction is precisely the reason why the GC’s contentions fail. (ALJD: 30-35; GC, at 32). No hiatus period is required to establish a practice. Given that the employer bargained its first contract, the employer could not prove a hiatus period between the parties. Id. at 613. The Board accepted the employer’s practice and held that the employer had to continue the practice as the status quo. Id. at 613.

The GC completely ignores the other Board precedent, providing no rationale to the Board for this deviation from precedent. The GC ignores Beverly Health & Rehab. Serv., Inc., in which the Board held that “without regard to whether the management-rights clause survived, the [employer] would be privileged to have made the unilateral changes at issue if [its] conduct was consistent with a pattern of frequent exercise of its right to make unilateral changes during the term of the contract.” Beverly Health & Rehab. Serv., Inc., 346 NLRB 1319, 1319 n. 5 (2006). Here, every year Silgan unilaterally changed benefits and costs sharing for all employees at all of its locations as it always has. Similarly, the GC also completely disregards Saint-Gobain Abrasives, Inc., where the Board held that the employer was privileged to implement changes to its employees’ health care benefits because it was an annually occurring event, which is precisely Respondent’s case. Saint-Gobain Abrasives, Inc., 343 NLRB, 542, 542 (2004).

The GC also ignores appellate opinions that have admonished the Board to express its reason for deviation from precedent and hold specifically that “it is the actual past practice of unilateral activity under the management-rights clause of the CBA and not the existence of the management-rights clause itself, that allows the employer’s past practice of unilateral change to survive the termination of the contract.” Beverly Health and Rehab. Serv., Inc. v. NLRB, 297 F.3d 468, 481 (6th Cir. 2002); see also, E.I. Du Pont De Nemours and Co., 682 F.3d 65, 68-70 (D.C. Cir. 2012) (noting that under Board precedent, the past practice exists irrespective of whether the parties can establish a hiatus period).

Rather than addressing this Board precedent, the GC erroneously contends that Respondent could have announced open enrollment, but could not make the employees’ changes in January 2012. (GC, at 31). This contention flies directly in the face of Comau, Inc., which recognized that changes do not necessarily go into effect on the same day that they are implemented. Comau, Inc. v. NLRB, 671 F.3d 1232, 1239-40 (D.C. Cir. 2012).

Finally, the GC contends that Respondent could have carved out a special plan for the bargaining unit, which was what the Union wanted. (GC, at 31). As addressed in its Exceptions, what Respondent could have done is not what Respondent had to do to maintain the dynamic status quo. (R Exceptions, 29-31). Freezing the benefits indefinitely for the bargaining unit does not maintain the status quo where the past practice had been that the bargaining unit employees received the same benefits at the same costs provided to all of Silgan Plastics’ employees. (Tr. 401: 5-8). The GC fails to provide any legal support to compel Respondent to deviate from the status quo.

C. The Record Evidence Shows that the Parties Were at Impasse.

The GC erroneously contends that there was “insufficient evidence” to support that the parties were at impasse. (GC, at 32). To the contrary, the record evidence demonstrates that the parties were at impasse. The GC’s arguments are not supported by applicable precedent.

The evidence unequivocally showed that after April 21, 2011, the parties’ proposals did not change; that on that date, Respondent provided the Union with its LBF offer; and that after this date, the Union made no proposals. (R Exceptions, at 40-41). The evidence also shows that on July 26, 2011 the parties met and, as the meeting was ending, the FMCS mediator stated to the parties “[i]t seems to me you guys are at impasse.” (Tr. 365: 10-11). The parties did not meet again until December 22, 2011 because Bolte did not commit to meet prior to that date. On December, 22, the parties met but the Union made no proposals. While Bolte made “supposals,” Bolte testified that the supposals were not proposals; rather, he was “just feeling the other party out.” (Tr. 252: 19-22). Moreover, the supposals had nothing to do with the health care benefits.³ Thus, it is undisputed that in regards to the health care benefits, the parties were at impasse. After the December 22 meeting, the Union refused to meet. The health benefits plan was a time-sensitive critical issue, which needed to be addressed to provide coverage for the bargaining unit. CalMat Co., 331 NLRB 1084, 1097 (2000) (holding that “[a] single issue . . . may be of such overriding importance that it justifies an overall finding of impasse . . .”).

The GC fails to acknowledge the employer’s evidence that the mediator stated to the parties that they had reached impasse. Instead, the GC contends that Respondent did not declare

³ The supposals related to seven distinct issues: 1) double time pay; 2) vacation shutdown language; 3) changes to the terms of a disability offer; 4) amount of signing bonus upon ratification; 5) reinstatement of Duncan; 6) withdrawal of the Union’s request for an “Agency Shop;” and 7) Union’s requests that the NLRB charges be withdrawn in exchange for the six “supposals.” (R Ex. 47).

an impasse. (GC, at 17, 33). The GC did not cite to Board authority to support its contention that such declaration was required. There is no such requirement. Even the Union's refusal to admit that the parties were at impasse is irrelevant given that the Union failed to make a single proposal after April 21, 2011. "Absent conduct demonstrating a willingness to compromise further, a bald statement of disagreement by one party to the negotiations is insufficient to defeat impasse." Truserv Corp. v. NLRB, 254 F.3d 1105, 1117 (D.C. Cir. 2001). Moreover, as stated above, Respondent had no duty to use the words "impasse," when dealing with the Union. The facts establish that the parties were at a deadlock and that the mediator made such an observation.

The GC also falsely represents that the Union continued to make "significant changes" to its counter proposals. The GC fails to identify these changes because no changes were made after April 21, 2011. (GC, at 34). As addressed above, after April 21, 2011 the Union made proposals once during the December 22, 2011 meeting. These proposals were neither proposals, which could have been accepted, nor were they related to the health benefits. (R Exceptions, at 38). The Union's mere statements that it was willing to negotiate without making any proposals is insufficient to defeat impasse. Civic Motors Inns, 300 NLRB 773, 775 (1990) (holding that the union's statements that it wanted to continue to bargain without making any proposals did not defeat impasse).

D. The Respondent's Policy Allowed it to Require Employees to Wear Reflective Vests.

The GC did not respond to any of Respondent's exceptions and analysis in support of the Exceptions. Instead, the GC simply cited to Toledo Blade Co., 343 NLRB 385 (2004) to claim that the creation of a "new policy" constitutes a change which must be bargained between the parties. (GC, at 36). This case has no applicability to this record. In particular, the GC does not dispute that the parties had a Plant Safety, Security and Administrative Regulations Policy

("Policy") or that the Policy did not apply. Rather, the GC completely ignores the Policy and, contrary to all the evidence, contends that Silgan Plastics implemented a "new policy." (GC, at 36). The Policy is not "new"; rather, it has been in existence since April 2000 and has never been bargained between the parties. (R Ex. 43).

The GC ignores that the Policy includes a non-exclusive list of safety equipment. The Policy states in relevant part that "operating machinery or equipment or performing any duty that requires the use of special safety equipment (such as face shields, ear protection, gloves, etc.) without using that safety equipment is prohibited." (R Ex. 43). This Policy provides examples of the equipment that may be required but does not limit the equipment to that enumerated in the Policy, as is evident from the "such as" and "etc." language. (R Ex. 43). It is this existing Policy that allowed Respondent to require the use of reflective vests as safety equipment.

E. Respondent Provided the Information in a Timely Manner.

The GC fails to establish a basis to justify a finding that the information requested by the Union was provided in an untimely manner.⁴ Rather, the GC focused on the time elapsed after the requests were made as though a set delay constitutes a per se violation of the Act. (GC, at 23-24). That is not the case and is unsupported by this case. Director of HR David Rubardt, Regional HR Manager Deanna Lawyer, and Silgan Plastic's counsel, Raymond Deeny contacted Bolte on numerous occasions both via phone and via written correspondence, asked for clarification on the requests, and invited Bolte to visit the Respondent's facility in Seymour, Indiana to ensure that the Union received all that it needed. (Tr. 247: 14-25; Tr. 248: 1-5; Tr. 363: 22-23; Tr. 409: 12-15; 414: 21-25; Tr. 415: 1-5; J Ex. 5; J Ex. 7; J Ex. 9; GC Ex. 12). The

⁴ Respondent has briefed why the four requests were not relevant and necessary to the Union's functions and why the Union made the requests in bad faith. Respondent will not address these issues here, but refers the Board to Respondent's Exceptions. (GC, at 21-23; R Exceptions, at 6-20).

GC contends that the invitation to visit the facility was an attempt to “avoid or delay responding” but there is no evidence supporting this contention. (GC, at 26). Respondent wanted to avoid delay by allowing the Union to hand pick precisely what it was seeking. Moreover, the evidence shows that Respondent immediately acknowledged each of the information requests, requested clarification and requested to discuss with the Union within days of receiving each of the information requests. (J. Ex. 4; J. Ex. 5; J. Ex. 10; J. Ex. 11; J. Ex. 12; J. Ex. 13). Bolte responded with charges. (GC Ex. 1(a); 1(c); 1(e); 1(g); 1(h)). Respondent’s conduct also shows that it made good faith efforts to comply with the requests as expeditiously as possible, given the circumstances. This conduct is inconsistent with the GC’s contention that it was seeking to “avoid or delay responding,” and completely ignores two salient facts: Bolte acknowledged that he received everything by October 5 and did nothing with the information. (GC, at 26).⁵

The GC wrongly asserts that the cases cited by the ALJ support the erroneous finding that the information was untimely provided. (GC, at 23-24). No analysis of the cases was provided by either the ALJ or the GC. (GC, at 23-24; ALJD: 20-25). Rather, the cases according to the GC were merely cited for “general principles.” (GC, at 23-24). However, these alleged “general principles” were never explained or analyzed based on the facts of the instant case. (GC, at 23-24). These cases find an undue delay in providing requested information, in a particular context where the record facts demonstrate that the union’s role was impeded. No such context has been established here. (R Exceptions, at 16-20).

The GC also cites to cases showing undue delays ranging from six weeks to three months. (GC, at 24). Yet, there is no bright line rule as to how much time constitutes an undue delay

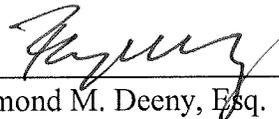
⁵ Silgan Plastics filed exceptions to the exclusion of evidence at the hearing concerning Bolte’s offensive bargaining strategy and bad faith reasons for the requests for information. (R Exceptions, at 6-11).

simply by time elapsed. In Good Life Beverage Co., the Board held that “[t]he duty to furnish information cannot be defined in terms of a per se rule.” Good Life Beverage Co., 312 NLRB 1060, 1062 n. 9 (1993). The GC failed to explain why the alleged delay in the instant case impeded or inhibited the Union from performing its functions, as was the situation in the cases cited by the GC and ALJ. (GC, at 24; ALJD: 20-25). The GC has failed to explain why Silgan Plastics’ response, which was provided October 5, 2011, after numerous attempts to meet and confer with Bolte, detrimentally affected the Union, especially when Bolte concedes he did nothing with the information. (R Exceptions, at 14). There was no undue delay given the facts of the instant case.

III. CONCLUSION

For the reasons set forth above and in Respondent’s Exceptions and Brief in Support of its Exceptions, ALJ Bogas’ Decision must be reversed. There is no basis to conclude that Silgan Plastics has violated Section 8(a)(1) and 8(a)(5) of the Act. Therefore, Silgan Plastics respectfully requests that the ALJ’s Decision be reversed.

Respectfully submitted this day 7th day of December 2012.



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CERTIFICATE OF MAILING

I hereby certify that on December 7, 2012, a true and correct copy of the foregoing Respondent Silgan Plastics Corporation's Reply Brief to the Acting General Counsel's Answering Brief to Respondent's Exceptions and Brief in Support of the Exceptions was sent in the manner indicated, addressed to the following:

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