UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SILGAN PLASTICS CORPORATION

Cases: 25-CA-031870
25-CA-063058
25-CA-065281
and **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 CHARGING PARTY'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS AND BRIEF IN SUPPORT OF THE EXCEPTIONS

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I. STATEMENT OF THE CASE[1]

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 its Reply.

II. ARGUMENTS AND AUTHORITIES

The Charging Party completely disregards the evidence in its Answering Brief. The Exceptions and this Reply show that the ALJ's Decision must be reversed.

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

The Union erroneously contends that Silgan Plastics unilaterally changed the health care benefits and that this change was illegal because: 1) the management functions article in the CBA did not survive the expiration of the CBA; 2) Respondent did not show that a past practice existed; 3) the Union did not engage in dilatory tactics privileging Respondent to implement changes; 4) public policy favored finding no past practice existed; and 5) no exceptions applied to privilege Respondent to make the changes. (U, at 27, 34).

The Union erroneously contends that Respondent relied on the management functions article instead of the established past practice. (U, at 27, 24; J Ex. 1, at 25). In Capital Ford, the

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[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.

Board held that a parties' 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).

The established past practice privileged Respondent to implement changes without bargaining. (R Exceptions, at 20-32). The Union concedes that the legal precedent cited by Respondent in its Exceptions supports Respondent's position that it was privileged to make the changes. (U, at 35). The Union, however, speciously contends that because the cases cited in Respondent's brief predate the decisions in the E.I. Du Pont cases,[2] the cases cited are no longer applicable. (U, at 32, 35). At no point has the Board overruled either this precedent or holding. Indeed, in E.I. Du Pont De Nemours, Louisville Works, the Board noted that the dissent's views would cause a departure from Board precedent, thus showing the Board's adherence to its precedent. E.I. Du Pont De Nemours, Louisville Works, 355 NLRB at *3. Moreover, The E.I. Du Pont cases were decided based in part on the Board's approval of the holdings in the Courier Journal cases,[3] which predate Beverly Health & Rehab. Serv., Inc., 346 NLRB 1319, 1319 n. 5 (2006). In Beverly Health & Rehab. Serv., Inc., the Board held that it is the parties' past practice "without regard to whether the management-rights clause survived," that privileges the employer to make unilateral changes. Id.

[2] E.I. Du Pont De Nemours, Louisville Works, 355 NLRB No. 176 (Aug. 27, 2010); E.I. Du Pont De Nemours and Co., 355 NLRB No. 177 (Aug. 27, 2010) (collectively, "E.I. Du Pont cases").

[3] Courier-Journal, 342 NLRB 1093 (2004); Courier-Journal, 342 NLRB 1148 (2004) (Collectively, "Courier-Journal cases").

The Union's contention is also belied by the Union's arguments, made by the same counsel in National Gypsum Co., 25-CA-31898, 2012 WL 311354, at *3 (NLRB Div. of Judges, Sept. 7, 2012). There the Union argued that the "dynamic status quo" applied because it was the past practice even though there had been no hiatus between the parties. Id. The employer was required by the CBA to pay a percentage of the costs of the health and welfare benefits during the contract's duration. Id. After the contract expired, the employer refused to pay an increased amount. The employer contended that the status quo required it to pay the benefits at the level it had been paying at the time the contract expired. Id. at *6. The ALJ found, however, that the status quo was dynamic and that the employer had to pay the increased amount. Id. at *7.

Silgan Plastics maintained the dynamic status quo by maintaining the past practice, 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). The parties' past practice comported with Board precedent. In Saint-Gobain Abrasives, Inc., the Board held that the employer was privileged to implement changes to its employees' healthcare benefits because it was an annually occurring event, which is exactly Respondent's case. Saint-Gobain Abrasives, Inc., 343 NLRB, 542, 542 (2004).

The Union also ignores circuit court opinions, which held 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" that privileges the employer to continue making unilateral changes. 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).

The Union also fallaciously contends that it did not engage in dilatory tactics to avoid bargaining and "continued to modify its own proposal." (U, at 36). However, the Union, contradicts itself. The Union asserts that it did not know that changes would be made and thus could not bargain. Changes were made every year, nothing changed in 2011 or 2012. (U, at 36). Will Coffman, who was a member of the negotiations committee, confirmed that the 2011 open enrollment process was the same process that had been followed in prior years. (Tr. 142: 4-15). Moreover, the Union did not make a single proposal after April 21, 2011. (R Exceptions, at 40-41). The Union did not provide any examples of how the Union "continued to modify" its proposals because there were no modifications. Instead, the Union contended that it offered "supposals," on December 22, 2011. (R Exceptions, at 38; U, at 36-37). Yet, the Union's Staff Representative, Chris Bolte, testified that the supposals were not proposals but a way to "feel[ ] the other party out." (Tr. 252: 19-22). The supposals also had nothing to do with the health care benefits in spite of the request to meet to discuss the benefits on December 22.[4]

The Union additionally contends that public policy compels a finding that Respondent did not have a past practice because to do otherwise, would "discourage" the Union from granting concessions during the contract's term. (U, at 39). However, the Union could certainly have bargained for a change in language precluding a dynamic status quo. They failed to do so. Rather, the Union contends that Respondent could also bargain for language allowing it to make the "proposed unilateral changes." (U, at 40). It did. (Tr. 355: 17-25; Tr. 356: 1-4; Tr. 359: 18-

[4] 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).

22). The language in the expired CBA and the language in Respondent's last, best and final offer ("LBF offer") allowed Respondent to make such changes. (J Ex. 1, at 22; Tr. 355: 13-16). But the language in the LBF offer did not change the parties' past practice, which remained the dynamic status quo. The policy behind bargaining in good faith is frustrated by the Union's position. Respondent remains at the mercy of the Union, who has no incentive to bargain, because to do so would result in increased benefit costs to its members.

Furthermore, Respondent demonstrated conclusively the exigent circumstances warranting its adherence to its practice. Respondent was allowed to implement the health benefit changes because of the existing past practice and because doing so was a discrete annual event, requiring immediate action. (U, at 42-43). In Nabors Alaska Drilling, Inc., the Board affirmed the ALJ's dismissal of a case where the employer unilaterally implemented annual open enrollment because "the health insurance review was an annually occurring event, and thus, bargaining over the changes in health insurance could not wait an impasse in overall negotiations." Nabors Alaska Drilling, Inc., 341 NLRB 610, 613 (2004). Absent the changes put in effect in January 2012, the bargaining unit would have been left without any benefits and Respondent would have irreparably altered the past practice and the status quo.

B. The Evidence Unequivocally Shows that the Parties Were at Impasse.

The Union contends that no impasse was reached because Silgan Plastics did not state that the parties were at impasse, and because the Union remained willing to make "further compromises." (U, at 30, 31, 41). 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 not one single proposal. (R Exceptions, 25-27). The evidence also showed that on July 26, 2011 the parties met and as the meeting was

ending, the 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. (R Exceptions, at 36).

The existence of impasse does not require one party to declare an impasse. The Union cites to no authority to support its contention that such announcement was required. (U, at 41-42). There is no such authority. 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). Notably, the evidence at the hearing shows that the mediator recognized that the parties were at impasse. The Union ignores this evidence.

The Union, instead, unconvincingly contends that it continued to make "significant changes" to its counter proposals. (U, at 41). As stated above, although the parties continued to meet until December 22, no such changes were made after April 21, 2011. Merely stating 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).

The Union contends that on December 22, 2011, Bolte requested the PowerPoint that had been shown to the employees and forwarded it to headquarters, implying that the Union was still willing to bargain. (U, at 41). Yet, Bolte admitted that the plan documents, which he already had in his possession, contained all the information he needed for bargaining purposes. (Tr. 295: 23-25; Tr. 297: 1-23). No proposals were made. As noted, the Union only made "supposals," none of which were related to health benefits. (U, at 42; Tr. 252: 19-22; R. Ex. 47). After the

December 22 meeting, the Union refused to meet. The health benefits plan was a critical and time-sensitive issue causing a complete breakdown of the negotiations and sustaining an overall impasse. 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 on all of the bargaining issues . . . .").

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

The Union erroneously contends that Silgan Plastics could not require the use of reflective vests because the Health and Safety Committee ("Committee") did not recommend the wearing of vests; the management functions article was no longer in effect; and because Respondent could require the use of "oppressive equipment." (U, at 45-47). The Plant Safety, Security and Administrative Regulations Policy ("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). The policy provides a non-exhaustive list of the equipment that may be required, as is evident from the "such as" and "etc." language. (R Ex. 43).

Despite Respondent's Exceptions and the enabling language in the Policy, the Union misrepresents Respondent's position to be that it implemented a "new policy." (U, at 46). Respondent has never asserted that it implemented a new policy. (U, at 46). The Policy has been in existence since 2000 and has never been bargained. (R Ex. 43). Respondent also did not contend that the management functions article in the CBA granted it the power to enforce the Policy. (U, at 46). Respondent enforced its safety policy that exists beyond the contract terms. Moreover, Respondent would be in violation of its health obligations if it were to stop enforcing its rules related to conduct and safety because the Union has refused to bargain a successor CBA.

Equally as erroneous is the Union's reading of the role of the Health and Safety Committee, as described in the CBA. (U, at 46, 48). The committee "shall submit to the Company, with a copy to the Union, such recommendations as it may consider proper regarding matters within its jurisdiction." (J Ex. 1, at 24). Nowhere does the CBA state that the Policy can only be changed through the Committee's recommendation.

While the Union acknowledges that the Policy includes a non-exclusive list that merely lists examples of safety equipment, the Union erroneously contends that the Policy cannot be used to require safety vests. (U, at 47-48). The Union fails to explain why this non-exhaustive list is limited to the equipment enumerated and why the principle of ejusdem generis is inapplicable in this case. Local Union No. 710, 333 NLRB 1303, 1306 (2001) (Ejusdem generis is a rule of interpretation that establishes that general words followed by enumerations include other items of similar kind).

Finally, the Union facetiously contends that the existing Policy cannot include other un-enumerated equipment because Respondent would then be allowed to add "oppressive requirements," including "hot clothing." (U, at 48).[5] The Union's argument is speculative and not supported by the record. The Policy is not without limitations. The Policy states that safety equipment may be required for "operating machinery or equipment or performing any duty that requires the use of special safety equipment," and provides examples. (R Ex. 43). Only equipment of similar kind to the enumerated safety equipment may be required. Local Union No. 710, 333 NLRB 1303, 1306 (2001). Moreover, Respondent's safety vest requirement was not added to "oppress" employees; rather, was added at the initiation of OSHA, as the Union admits, in response to a fatal accident at one of Respondent's facilities. (U, at 44-45; Tr. 430: 24-25; Tr.

[5] Will Coffman admitted that there was nothing oppressive about it. (Tr. 86: 7-11).

436: 4-14). Finally, if the Union wanted a different Policy, it could have bargained for a change, but it has never bargained for a different policy or for a different rule related to safety equipment.

D. Respondent Provided the Requested Information in a Timely Manner.

The Union fails to explain why, given the circumstances of this case, the information requested by the Union was provided in an untimely manner.[6] Director of Human Resources David Rubardt, Regional Human Resources 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; Tr. 414: 21-25; Tr. 415: 1-5; J Ex. 5; J Ex. 7; J Ex. 9; GC Ex. 12). As the Union admits, Deeny asked "Bolte to contact him to explain what information was necessary for the response." (U, at 17). Moreover, Respondent immediately acknowledged each of the information requests, requested clarification and requested to discuss with the Union within days of receiving each request. (J. Ex. 4; J. Ex. 5; J. Ex. 10; J. Ex. 11; J. Ex. 12; J. Ex. 13). Respondent's conduct shows that it made good faith efforts to comply with the requests as expeditiously as possible.

While the Union acknowledges that there is no bright line rule governing how much time constitutes an undue delay, the Union argues that no bright line rule is irrelevant. (U, at 21).

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[6] 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. (R Exceptions, at 6-20). Here, the Union's misrepresentations must be addressed. The Union contended that Respondent acknowledged that at the time the information request was made concerning employee Oliver Marshall Hudson, a grievance was pending. Quite the contrary, while a grievance was filed on July 8, 2011, the Union failed to appeal the grievance in the five days allowed and by the time the request was made on July 29, any appeal would have been untimely. (R Exceptions, at 14; J Ex. 1, at 4; GC Ex. 9). In regards to employee Lisa Duncan, the Union contended that a grievance would have been timely filed because even though the five day-period allowed in the CBA had passed, Bolte did not learn of the discharge until July 29. It is irrelevant when Bolte learned of the discharge. (U, at 19-20). The CBA states that notice of an employee's discharge must be given to the Union, not Bolte. (J. Ex. 1, at 6). Moreover, the Union admitted that Bolte learned of the discharge from the Local Union. (U, at 20).

Instead, the Union cited two cases, which other than holding that the employer unduly delayed in providing the information, have no relevance to the facts of the instant case.[7] (U, at 21). The Union failed to explain why the alleged delay in this case impeded or inhibited the Union from performing its functions, as occurred in the cases cited by the Union and the ALJ. (ALJD: 20-24; U, at 21). The Union also failed to explain why Silgan Plastics' response, which was provided on October 5, 2011, after numerous attempts to meet and confer with Bolte, detrimentally affected the Union. Indeed, Bolte admitted he received everything requested, but he still did nothing with it.[8] There was no undue delay.

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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[7] In Bundy Corp., 292 NLRB 671, 671 (1989), the parties were going to negotiate their first CBA and the employer asked the union to provide it with their proposal prior to meeting to negotiate. The Union responded with a request for information and stated that it could not provide the proposal until it had the information. The entire information was provided more than three months later and after bargaining commenced. In Colonia Press, Inc., 204 NLRB 852, 861 (1973), the employer initially refused to provide the requested information and upon further requests, provided it but without giving any explanation for the delay.

[8] 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).

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 Charging Party's Answering Brief to Respondent's Exceptions and Brief in Support of the Exceptions in the manner indicated, addressed to the following:

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