

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

In the Matter of:

C2G LTD. CO.,

Respondent Employer,

and

**GENERAL TEAMSTERS LOCAL 959,
STATE OF ALASKA, AFFILIATED
WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,**

Charging Party Union,

Cases 19-CA-163444
19-CA-169910

**C2G'S REPLY TO GENERAL COUNSEL'S ANSWERING BRIEF
TO C2G'S EXCEPTION TO THE ALJ'S DECISION**

Respectfully submitted,

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The response by Counsel for the General Counsel (“GC”) to the exceptions brief filed by C2G Ltd (“C2G”) only further illustrates why the Board should not accept the ALJ’s recommended decision.

GC’s brief does not effectively refute (much less even address in some instances) the principal arguments raised by C2G. At the same time, GC’s brief doubles down on positions by the ALJ that are not supported by the record or applicable law, doubles down on misinterpretation of the CBA and the offer letters, makes statements lacking support in the record,¹ and supports the ALJ by picking and choosing only those terms of the offer letter that support their theory while disregarding those that don’t. GC’s brief reveals the essential truths behind their case, which are claims that:

- The ALJ and not an arbitrator gets to interpret the CBA even after GC deferred hearing the ULP case until after the arbitrators heard the grievances and interpreted the CBA. According to GC, the Board should always favor an ALJ’s interpretation of a CBA over that of an Arbitrator – a principle at odds with the purposes of the Act and the strong federal policy favoring arbitration – and the ALJ always should be the one who interprets the CBA.
- C2G is being faulted for actually trying to comply with clear and unambiguous language in the CBA. This was a new contract with new language and a new employee classification with a new employer that was negotiated with the Union. C2G was not attempting to change the language of Section 18.02 of the CBA with bargaining – it was trying to **follow** the CBA. In contrast, the ALJ is requiring C2G to disregard that CBA language and enabling the Union to obtain via ULP litigation terms contract terms that it did not obtain at the bargaining table. This is the case even though in 2016, before the 2018 hearing in this case, the Union and C2G bargained over and negotiated a new CBA that made **no** change to the language on vacation accrual for employees who were not classified as part-time seasonal employees despite knowing C2G’s position on this issue.
- According to GC, C2G should be bound by an innocent and unknowing error in calculating payroll for a limited period of time even though the Union Business Agent testified and admitted that any error in favor of either party to the CBA should be corrected to conform to what the CBA required. Thus, the ALJ ruled in a manner inconsistent with how the Union said the CBA should be followed. (JX-2, TR 232:17-21).

¹ The most blatant of these is the repeated assertion there was a “three year practice” of accruing vacation in year one of employment (see discussion below). In addition, for example: (a) there are multiple assertions that C2G gave “repeated assurances” (or “routinely assured” that the offer letters were form letters and could be disregarded, when there is no such evidence of repeated assurance, (b) that 18.02 applies to full-time employees when in fact it applies to all employees (including part-time employees) who are not classified as part-time seasonal employees, (c) the offer letters did not say employees were “Full time / Part-time;” they stated that all positions were part-time but that the hours worked could vary, (d) there was no concrete evidence any employees relied on anything Huggins said, much less even spoke to her before this issue arose, or relied on the pay stubs, (e) the offer letters provided to new hires post-2012 were not identical to those provided to initial hires.

- The “objective reasonable person” test for the offer letters in GC’s view means whatever GC considers reasonable even where the GC presented **no** evidence as to what the employees in question actually believed.

These assertions should be rejected for the reasons below and in C2G’s exceptions brief.

A. THE BOARD SHOULD DEFER TO ARBITRATOR AHEARN’S DETERMINATION AS TO THE MEANING OF SECTION 18.02.

A fundamental argument of GC is that the ALJ is entitled to interpret the CBA to the exclusion of any interpretation by the Arbitrator made on the same record as GC presented. This claim is wrong for multiple reasons.

First, the Ahearn Award should not be treated as a nullity merely because C2G failed to waive certain limitation defenses. Answering Brief at 8. GC’s position is that waiver (or lack thereof) of limitations periods is the alpha and omega of the analysis as to whether the Board should defer to an arbitration award. As a matter of Board and Supreme Court policy, this is wrong. Indeed, as explained below, it is contrary to the Region’s own actions in this case.

As to policy, “the Board has *considerable discretion* to respect an arbitration award and to decline to exercise its authority over the alleged unfair labor practice if to do so will serve the fundamental aims of the Act.” *Casey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 271 (1964) *quoting International Harvester Co.*, 138 NLRB 923, 925-26 (1962) (emphasis added); *CertainTeed Corp.*, 2013 WL 772784*2 (Feb. 28, 2013) *quoting Wonder Bread*, 343 NLRB 55 (2004) (same). A fundamental aim of Section 8(a)(5) is to enter into collective bargaining agreements. *Consolidated Edison v. NLRB*, 305 U.S. 197, 236 (1938) (“The Act contemplates the making of contracts with labor organizations. That is the *manifest* objective in providing for collective bargaining.”) (emphasis added). While disputes will arise as to the meaning of collective bargaining agreements, the principal method of resolving these disputes is *via arbitration*. *Carey*, 375 U.S. at 265 (“The underlying objective of the national labor laws is . . . to help give substance to such

agreements through the arbitration process.”) (emphasis added).² Honoring arbitration awards serves the Act’s goal of preserving the industrial peace. *International Harvester Co.*, 138 NLRB at 925-26 (“The Act . . . is primarily designed to promote industrial peace and stability Experience has demonstrated that collective bargaining agreements that provide for final and *binding* arbitration of grievances . . . contribute significantly to the attainment of this statutory objective.”) (emphasis added). This discretion should be exercised here where the Arbitrator interpreted the contract, including whether any past practice existed to overcome clear and unambiguous language in the CBA, on evidence presented by GC.

The ALJ’s decision and GC’s Brief disregard all these policy reasons favoring deferral. Here, a two-fold dispute arose between C2G and the Union: (1) first, should certain part-time employees accrue vacation under Section 18.01 (C2G’s position) or Section 18.02 (the Union’s position) of the CBA? (JX-4) Arbitrator Ahearn ruled in favor of the Union on this issue. (*Id.*). While unhappy with the decision, C2G complied with that Award. (Bd. TR 783:20; JX-1, Stipulated Facts); (2) second, when do employees covered by Section 18.02 begin to accrue vacation? Based upon the clear and unambiguous contract language, Arbitrator Ahearn found not until after they had been employed for a year. (JX-4, p. 22). Unlike C2G, neither the Union nor GC are willing to live with that ruling. Instead, they asked ALJ Laws for a “re-do.” This despite the fact that the courts and arbitrators are the principal sources of a CBA’s meaning, *Litton Fin. Div. v. NLRB*, 501 U.S. 190, 202-03 (1991).

It will hardly promote the industrial peace if employers are stuck with the “sour” of arbitration (here, treating certain employees as covered by Section 18.02) while allowing unions another roll of the dice before the ALJ to escape the part of the Award they dislike (here, the meaning of Section 18.02). Unfortunately, the ALJ gave the Union and GC their re-do. Contrary to GC’s argument, the ALJ engaged in her own freestanding analysis of what the CBA meant. The ALJ made an independent determination of

² The paramount role an arbitrator plays in the resolution of employment disputes is not some relic of the past. The Supreme Court just concluded that the nation’s commitment to arbitration overruled supposed policies found in Section 8(a)(1) of the Act. *Epic Sys. v. Lewis*; 138 S.Ct. 1612 (2018).

what the CBA meant; concluding Section 18.02 was ambiguous (in contrast to the Ahearn award) and then using this ambiguity to apply “past practice” to reach a different result. (ALJ’s Decision, page 10, lines 13-19). This is directly contrary to the analysis of Arbitrator Ahearn. Again, the Supreme Court’s position is that the courts and arbitrators are the primary sources for what a CBA means – not an ALJ. *Litton, supra*. The parties bargained for Arbitrator Ahearn’s interpretation of the CBA – not the ALJ’s.³ Notably, the Arbitrator in fact found no past practice existed that would overcome the clear and unambiguous language of the CBA, and therefore did in fact consider past practice in ruling. (JX-4, page 23).

The ALJ’s action is directly contrary to the Board’s position on the importance of arbitration. It is the “final and binding *arbitration* of grievances” that provides for “industrial peace and stability.” *International Harvester*, 138 NLRB at 925-26 (emphasis added). There is nothing in *International Harvester* that suggests ignoring an arbitration award will promote industrial peace. Certainly the ALJ’s decision to interpret the CBA *de novo* is contrary to the Supreme Court’s dictate that “substance” to CBAs be given through “the arbitration process.” *Carey*, 375 U.S. at 265.

Second, GC’s position that the arbitration was some sort of meaningless exhibition because C2G would not waive certain limitations periods, is directly contrary to the Region’s own action. This case was originally slated to be tried in September 2016. (GC-1, Order Consolidating Cases, Consolidated Complaint, Notice of Hearing). The hearing was postponed **unilaterally** by the Region in September 2016. (*Id.*, Order Postponing Hearing Indefinitely). This was done although neither the Union nor C2G sought a postponement. This was done even after GC knew C2G was not waiving limitations defenses. Even GC concedes the purpose of the postponement was to allow the arbitration process to play out. (GC’s

³ The ALJ committed three errors in one. First, the ALJ should have accepted Arbitrator Ahearn’s interpretation of the CBA. Second, because the language is clear, under Board law past practice should not have been consulted. (C2G’s Brief in Support of Exceptions at pages 19-20). Third, the underlying analysis failed to take into account the differences in language between Section 18.01 and Section 18.02. (*Id.*) No doubt this is why the Supreme Court has determined courts and arbitrators have primary authority when it comes to CBA interpretation. *Litton, supra*. If the United States Supreme Court will not substitute its interpretation of a CBA for that of an arbitrator, *W.R. Grace and Co. v. Local Union 759*, 461 U.S. 757, 764 (1985), the ALJ certainly should not be allowed to substitute the ALJ’s judgment for that of an Arbitrator.

Answering Brief at 8). Why postpone a hearing to allow for two arbitrations to proceed, if the employer's known refusal to waive timeliness was a deal breaker as to their binding nature?⁴ A Section 8(a)(5) violation should not be upheld on a contractual analysis different than what Arbitrator Ahearn concluded. Rather, this entire case should be viewed through the prism of what Arbitrators Ahearn and Snider said the CBA means. If a reviewing Court would pay no deference to the Board's interpretation of a CBA (*NLRB v. U.S. Postal Service*, 8 F.3d 832, 837 (D.C. Cir. 1993)), there certainly is no reason for the Board to accept the ALJ's determination.

B. ANY FINDING THAT A PAST PRACTICE EXISTS REGARDING VACATION ACCRUAL SHOULD BE REJECTED.

GC urges that the arbitrations make no difference because the ALJ found that, independent of the CBA, a past practice of accruing vacation during the first year of employment existed. (Decision, page 10, lines 21-25). Based, in part, upon this finding, the ALJ concluded GC met the burden of proving a Section 8(a)(5) violation. (*Id.*, page 11, lines 11-14). This finding must be rejected.

As stated above, the contract has been decisively interpreted by Arbitrator Ahearn to mean *exactly* the opposite. (JX-4) It is not conducive to industrial peace to have a *written* CBA that provides one thing and an *unwritten* past practice that provides the exact opposite on the very same topic, particularly where, as here, there was no knowing decision to disregard the CBA language and the Union agreed errors should be corrected to conform to the CBA. While the Arbitrator did not directly apply Board law in reaching his decision, he did find, on the same record relied upon by GC, no evidence of a past practice sufficient to overcome Section 18.02's clear and unambiguous language. (JX-4 at page 23).

Second, no past practice was established. Any mistake on the employees' pay stub was through the innocent error of a payroll clerk, Carol Huggins. She had no authority to alter the clear and

⁴ GC does not contend that, except for the timeliness issue, there is any irregularity or other reason not to defer to the Arbitrators. Certainly the arbitrators heard the same evidence as GC's case – the transcripts and exhibits from the arbitration hearings. Indeed, GC relies totally on the record in the two arbitration for its case.

unambiguous terms of the CBA. She had no knowledge the individuals even were part-time employees as she had no access to the offer letters. She had no control over payroll decisions. GC implies this should not matter as an unscrupulous employer might try and game the system, but there are multiple problems with that argument. After all there was no allegation, evidence or finding that Huggins' error was anything but an unknowing and innocent mistake. Processing payroll is not the same as making payroll decisions – which she had no authority to do. On basically the same record as before the ALJ, Arbitrator Snider found the errors to be innocent and Copeland quickly acted to fix the issue upon learning of it. (JX-7, page 8, Item F). Indeed, the ALJ credited Copeland's testimony that he truly believed he hired post-2012 people as part-timers and that crediting them under Section 18.02 was a mistake. Decision, at 13, lines 16-24, and fn. 23.

Significantly, GC never claimed that Huggins was either an agent or supervisor of the employer in its pleadings. The Board has been loath to find liability under the Act for the actions of a person not found to be an agent or supervisor. *Abby Island Park Manor*, 267 NLRB 163, 170 (1983). While GC spends a great deal of time in the Brief arguing Huggins is a Section 2(13) agent (but does not argue she was a 2(11) supervisor), that is too little and too late. The time for asserting agency status is in the Complaint – not the Answering Brief. If GC wished to litigate something (or C2G to admit something), it should have been included in the Complaint. *Champion Int'l Corp.*, 339 NLRB 672, 673 (2000); *Hughes-Avicom Int'l*, 322 NLRB 1064, 1065 (1997); *Factor Sales, Inc.*, 347 NLRB 747, 748 n.7 (2006), *Springfield Day Nursing*, 362 NLRB No. 30 (2015).

Most significantly, no past practice was established. GC liberally peppers the Answering Brief with assertions that there was a three year past practice. That is **just, plain, wrong**. GC (like the ALJ) can only get to three years by improperly conflating two groups of employees – the initial contingent of employees hired from the company who previously was awarded the government contract (“Grandfathered Employees”) and subsequent hires. The Grandfathered Employees were hired in October 2012. Then, C2G and the Union *agreed* these employees (a) would be full-time and (b) would receive credit for time

served with the prior employer. (JX-7, page 7, second full paragraph; Bd. Tr. 70:6-20). The effect was those employees would accrue vacation under Section 18.02, rather than the newly created category of “part-time seasonal employees” and (due to the prior seniority credit) had already satisfied the one-year service condition to earning vacation under Section 18.02. *Id.* Thus, the treatment of the Grandfathered Employees is not evidence of a “past practice:” it is evidence of compliance with an agreement between C2G and the Union regarding application of Section 18.02 to the Grandfathered Employees.

The next employee hired (Mike Smith) was not hired until April 2014, more than **18 months** after the CBA took effect. (Bd. Tr. 66:19-24). This means there are roughly 18 months of a *phantom* past practice being relied upon to create the illusion of three years past practice. Huggins rectified her error of accruing vacation from date of hire in *July 2015*. (JX-3, Ex. 11; JX-5, Tr. 406:17-22; 434:23-435:6). Thus, as to Smith, the error lasted all of 15 months. Other employees had even less time than that, in one case being only a few months. That is not long enough under the facts of this case to create a past practice. If 15 months were sufficient, there would have been no reason for GC and the ALJ to, essentially, manufacture some 18 months of non-existent past practice out of whole cloth. What is conveniently disregarded is the fact this was a first time CBA with new language dealing with vacation accrual (Section 18.01) and a new class of employees for vacation and certain benefits purposes. This limited past practice was the result of an innocent error by someone (Huggins) not alleged to be a supervisor or agent.

The sole basis for this alleged past practice was simply numbers on a check stub. No one was allowed to take any vacation. In other words, this is not a case where an employee got used to receiving “X” dollars in their paycheck and suddenly it was taken away. Here, the CBA speaks clearly and unambiguously as to when vacation begins to accrue under Section 18.02 – it begins after a year’s employment. A payroll stub is not a practice. There is no reason to give union represented employees something that is directly contrary to what their designated representatives negotiated at the table, based upon what is at best a limited mistake by someone not an agent or supervisor. The point of Section 8(a)(5)

is to promote good faith bargaining – not to allow a party to avoid what it actually agreed to by seizing upon an honest mistake of limited duration by someone not alleged to be an agent or supervisor of the Employer. This is particularly true where the Union testified that errors should be corrected to conform to the contract. (JX-2, TR 232:17-21).

GC relies upon two cases for the proposition that 15 months is enough time: *Prime Health Care Services – Encino, LLC*, 364 NLRB No. 128 (2016) and *Garden Grove Hosp. Med. Ctr.*, 357 NLRB No. 63 (2011). The latter (*Garden Grove*) was extensively distinguished in C2G’s Opening Brief at pages 24-27, and this analysis will not be repeated. Certainly, nothing in that case stands for the proposition that, as a matter of law, nine months will always be enough – which seems to be what GC contends. Each case is determined based upon its own facts and the facts are different here.⁵

GC’s reliance on *Prime Healthcare* is puzzling. Even the ALJ disclaimed reliance on that case. (Decision, page 8, fn.18). The facts are inapposite and distinguishable. In *Prime Healthcare* there was no arbitration award reaching an opposite result in that case. The CBA called for certain specified step increases. (*Id.* at page 9). No one contended differently or disputed how the steps worked. *Id.* The principal issue was whether the step increases died with the contract. *Id.* at page 10. That issue is not involved here. Significantly, the seven months in that case was not the result of an innocent mistake – but was *affirmatively agreed to by the employer’s chief negotiator*. *Id.* at pages 9-10. And, the step increases had been going on previously for some four years during the contract’s lifetime.⁶

C. THE ALJ’S FINDING THAT THE OFFER LETTERS VIOLATED SECTION 8(A)(5) AND/OR SECTION 8(A)(1) SHOULD BE REJECTED.

⁵ To the extent the Board believes *Garden Grove* relevant, then it should limit and provide a remedy only to those who actually experienced Huggins’ error. See fn.4 thereof. Why people who were totally unaware of this mistake should benefit from it makes no sense where the parties *actually* bargained that Section 18.02 employees not accrue vacation until after a year. (JX-4).

⁶ In that case, the people were actually receiving the increase on every pay check, whereas no one ever took vacation per Huggins mistake. And, of course, the step increases were not something the negotiator simply gave to the employees by mistake or otherwise.

The ALJ found that C2G must destroy their offer letters and that their usage violates Section 8(a)(5) and/or independently, Section 8(a)(1). Yet this is directly contrary to ALJ Snider's Award finding the letters (and their offer of part-time employment) to be consistent with the CBA. JX-2, pages 2, 17-20. There is no dispute that (a) the letter is consistent with that used by contractors in the industry; (b) the current letter is similar to one used in 2012 by C2G; and (c) the Union has been aware of the content of the current offer letter since 2014. (Bd. TR 65:17-23; JX-5, TR 222:18-223; JX-2, TR 252:19-255; 11, 257:1-4; JX-3, TR 254:17-23, TR 255:3-7, TR 258:2-10; JX-7, page 10). If there is a past practice in this case – it is the use of the current offer letter. It can hardly be that past practices that hurt the employer are somehow binding (no matter what Arbitrator Ahearn says) but past practices that hurt the Union are to be ignored – (regardless of what Arbitrator Snider says). Under the contract coverage analysis, the offer letters are privileged by Arbitrator Snider's decision as to what the CBA means. *Department of Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992); *Enloe Med. Ctr. v. NLRB*, 433 F.3d 834 (2005). Alternatively, a clear and unmistakable waiver can be found by a consideration of contract language and past practice. *American Diamond Tool, Inc.*, 306 NLRB 570 (1992). Use of the offer letters is privileged by the contract language (Arbitrator Snider's Award) and past practice (unprotested usage since 2012, and certainly since 2014).

GC (and the ALJ) offer no cogent reason why the offer letters would suddenly “coerce” employees in violation of Section 8(a)(1). Arguing that application of the offer letters is the issue does not make an objectively reasonable letter unreasonable. Yes, Copeland took the position that various employees were either hired or bid into seasonal part-time positions. But that is simply a dispute over what **status** certain people were hired or bid into. That would hardly cause a reasonable employee to lose faith in their union or fear exercising their Section 7 rights. Indeed, there was no evidence presented by any of the employees who received those letters that they interpreted them in the manner GC interprets them, or that they in any way were coerced or intimidated into believing the employer could disregard the CBA. The offer letter itself

says it is an offer and not a contract, the offer letter/guidelines say the CBA controls, and the offer letter says the provisions at issue are expressly subject to compliance with law.⁷ (JX-3, UX-31).

Similarly, the direct dealing finding of establishing terms and conditions of employment makes no sense. The letters were sent to applicants or persons bidding on new positions. The contract gives C2G the right to hire seasonal employees. Per Arbitrator Snider, it also gives C2G the right to hire part-time employees and to create part-time positions. (JX-7, pages 2, 10-12, 17-19). C2G simply thought it had hired people into (or people had bid into) seasonal part-time positions. Arbitrator Ahearn decided they had not. But a dispute over status, which is arbitrated, and where the award is complied with, is hardly direct dealing or establishing terms and conditions of employment. It is simply a dispute over what terms apply – a matter now fully resolved. C2G never stated “Section 18.02 means X” because of something in the letters. It relied solely upon an analysis of the CBA’s language. (JX-4, p. 22) Likewise, it did not refuse to arbitrate or comply with Arbitrator Ahearn’s Award by pointing to the letters. Instead, it arbitrated and complied. It allowed “substance” to be given to the CBA via the “arbitration process.” *Carey*, 375 U.S. at 265. The Board should require the Union, GC and the ALJ to do likewise.

Conclusion

For all the stated reasons, C2G’s exceptions should be granted and the ALJ’s decision modified accordingly.

⁷ What is significant is that Copeland agreed to arbitrate the issue and followed the arbitration awards. No reasonable employee is going to read the offer letters as negating the existence of a CBA – when, in fact, C2G proceeds to arbitration per that CBA. Instead, a reasonable employee will conclude that while disputes are inevitable, C2G will honor its commitment to resolve them per arbitration. A reasonable employee is not going to see that compliance and somehow conclude that C2G might claim the offer letter gives it carte blanche to do what it wants, as the ALJ seemed to believe.

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CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2018, the foregoing Reply Brief of C2G LTD Co. has been served, as indicated, simultaneously upon the following via electronic mail and the National Labor Relations Board Online Portal:

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