

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 07**

J.G. KERN ENTERPRISES, INC

Respondent,

and

LOCAL 288, INTERNATIONAL UNION,
UNITED AUTOMOBILE, AEROSPACE
AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW),
AFL-CIO

Charging Party

Cases No. 07-CA-231802
07-CA-245744
07-CA-252759

**RESPONDENT J.G. KERN ENTERPRISES'
EXCEPTIONS TO THE ADMINISTRATIVE
LAW JUDGE'S DECISION**

October 23, 2020

Submitted By
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Respondent, J.G. Kern Enterprises (Kern or Respondent), respectfully submits the following exceptions to the October 6, 2020 Decision issued by Administrative Law Judge (ALJ) Paul Bogas. The Respondent submits these exceptions pursuant to 29 C.F.R. § 102.46. Respondent's Exceptions and Brief in Support are timely filed.

EXCEPTIONS TO THE ALJ'S FINDINGS OR CONCLUSIONS

1. Exception is taken to the ALJ's finding that Respondent failed to bargain in good faith and violated section 8(a)(5) and (1) of the Act during the period from October 15, 2018, to January 9, 2019. (ALJD 14: 7-10)
2. Exception is taken to the ALJ's finding that Respondent violated Section 8(a)(5) and (1) of the Act since April 10, 2019, when it stated that it would not consider any proposal on union-administered benefits. (ALJD 14: 40-41)
3. Exception is taken to the ALJ's finding that Respondent violated Section 8(a)(5) and (1) of the Act since April 17 and July 9, 2019, when it refused to provide the Union with multiple types of requested cost information regarding the existing benefit plans for bargaining unit employees. (ALJD 16: 44-46)
4. Exception is taken to the ALJ's conclusion that the disaffection petition was tainted by Respondent's multiple, unremedied, unfair labor practices and thus Respondent could not lawfully rely on that petition to withdraw recognition and violated Section 8(a)(5) and (1) by doing so.

BRIEF IN SUPPORT OF OBJECTIONS

1. Introduction

On October 3, 2018, after a representation election, the Board certified the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (Charging Party) as the bargaining representative of a unit composed of production and maintenance employees at the Respondent's automotive parts manufacturing facility in Sterling Heights, Michigan.

On November 27, 2018, the Charging Party filed an Unfair Labor Practice (ULP) alleging the Respondent violated Section 8(a)(5) of the National Labor Relations Act (Act) (07-CA-231802). On February 21, 2019, General Counsel issued a Complaint and Notice of Hearing for this ULP. On March 28, 2019, Respondent filed a timely Answer to the Complaint.

On July 29, 2019, the Charging Party filed another ULP alleging Respondent violated Section 8(a)(5) of the Act (07-CA-245744). On October 8, 2019, the General Counsel issued a Consolidated Complaint, consolidating 07-CA-2318 and 07-CA-245744. On October 22, 2019, Respondent filed a timely Answer to the Consolidated Complaint.

On December 3, 2019, the Charging Party filed the third ULP alleging Respondent violated Section 8(a)(5) of the Act (07-CA-252759). On May 8, 2020, the General Counsel filed an Amended Consolidated Complaint, consolidating all three ULP in this matter. On May 19, 2020, the Respondent filed a timely Answer to the Amended Consolidated Complaint. On June 22, 2020, the General Counsel issued another Amended Consolidated Complaint, to which the Respondent filed a timely Answer to the Amended Consolidated Complaint on July 3, 2020.

A Hearing was held before Administrative Law Judge Paul Bogas on August 3, 2020 by way of a Zoom meeting and ALJ Bogas issued the Decision on October 6, 2020, for which these exceptions are filed.

2. Background

On October 3, 2018, the Board certified the Charging Party as the bargaining representative of a unit. (Tr. GC Ex. 2). On October 8, 2018, the Charging Party reached out to the Respondent to schedule negotiations. After some communication between the Parties, Respondent and the Charging Party scheduled bargaining for November 5-7, 2018. (Tr. 17, 5-13; GC Ex. 3). On or about November 5, 2018, Sutton contacted the Charging Party to cancel the November 5-7, 2018 bargaining session. (Tr. 19, 2-12). The first bargaining session between the parties was held on January 10-11, 2019. (Tr. 22, 18 – 24). The parties met for bargaining two days a month for every month from January 2019 through October 2019, with the exception of May 2019. The months of January and February were for two (2) days at four (4) hours daily, all sessions after February 2019 were scheduled for eight (8) hours daily.

During the January 2019 and February 2019 bargaining sessions the Charging Party requested certain information pertaining to health benefits from Respondent. (Tr. 24, 3 – 6; 67, 19 – 68, 3). The Charging Party also requested health benefit information from Respondent in correspondence dated April 17, 2019 and July 9, 2019. (Tr. 24, 9 – 17). The Respondent provided all requested information to the Charging Party with the lone exception of the actual employer cost of the health benefits.

In an email date April 2, 2019, from Sutton to the Charging Party, Sutton wrote that the Respondent would not be providing the employer cost of the health benefits and that

“In light of as much, there seems no need for you to put further effort into working up a proposal for union provided benefits. We will stick with the present plan.” However, despite Sutton’s email of April 2, 2019, the Parties continued to negotiate the health benefits at all subsequent bargaining sessions. (Tr. 57,17-20; 75, 7-17)

The Parties were scheduled to bargain on November 25-26, 2019. On November 22, 2019, the Respondent was presented a petition signed by over eighty percent (80%) of the bargaining unit indicating that “We the undersigned no longer wish to be represented by UAW local 228 for any purposes.” (Tr. 88, 7 – 18). Upon arrival to the November 25, 2019 bargaining session, Respondent’s counsel presented a letter to the Charging Party notifying the Charging Party that the Respondent was withdrawing recognition from the Union based on an employee petition showing that a majority of employees no longer wished to be represented by the Union. (Tr. 32, 1 – 14; GC Ex. 15). The Parties have not met to bargain since. (Tr. 34, 24 – 35, 1).

3. Respondent failed to bargain in good faith and violated section 8(a)(5) and (1) of the Act during the period from October 15, 2018, to January 9, 2019. (EXCEPTION 1).

The ALJ’s findings ignore the written evidence that on December 12, 2018 Respondent offered to meet with the Charging Party in December 2018. However, the Charging Party did not accept the Respondent’s offer and agreed to meeting on January 10, 2019. (Tr. 22, 18-24; 66, 13-18). The ALJ asserts that the delay was such that it was done to frustrate the negotiation process. However, the evidence shows only one (1) bargaining session was canceled by the Respondent, that of November 5-7, 2018. It would appear the ALJ prefers the contested testimony of a union officer who claims that

he had written proof of another cancellation in November 2018 but conveniently lost the information just prior to the Hearing. The union officer further testified that he never provided such written evidence to the NLRB attorney investigating the matter but provided numerous other written evidence. (Tr. 23, 2 – 11; 37, 15 – 39, 7).

The General Counsel asserts, and the ALJ agreed, Respondent failed and refused to meet with Local 228 from October 15, 2018, until January 9, 2019. This finding ignores the written evidence of Respondent's offer to meet in December 2018. The ALJ further asserts Respondent seeks to avoid its obligation to meet with the Charging Party by using the "busy negotiator" defense. The Respondent at no point raised such a defense because as noted above it, canceled only one (1) bargaining session, November 5-7, 2018, and offered to meet in December 2018. The testimony established that Sutton became unavailable following the Charging Party's cancellation of the May 2019 bargaining session. As a result, the Respondent brought in a new bargaining representative to handle the June 2019 negotiations. (Tr. 73, 14 – 25).

The NLRB said, in *Northwest Psychiatric Hospital, LLC d/b/a Brooke Glen Behavioral Hospital and Brooke Glen Nurses Association, Pennsylvania Association of Staff Nurses and Allied Professionals*, Cases 04-CA-164465 and 04-CA-174166 "The cancellation of bargaining sessions is an indicia of a failure to bargain in good faith, although ordinarily much more than a single, isolated cancellation of a bargaining meeting is required before a violation is found." [emphasis added] See *Pavilion at Forrestal Nursing & Rehabilitation*, 346 NLRB 458 (2006); *Golden Eagle Sporting Co, Inc.*, 319 NLRB 64, 75-79 (1995); and *Radisson Plaza Minneapolis v. NLRB*, 987 f.2D 1376, 1382 (8TH Cir. 1993). The Board further found reliance in the case of *Dilene Answering Service, Inc.* 257 NLRB 284, 291

(1981), where the Board summarized the case in saying “the Board’s refusal to bargain finding . . . was not based solely on a single cancellation of a bargaining session; it also included findings that the employer unilaterally implemented a wage increase and engaged in “ritualistic pro forma bargaining.” In the matter presented here, the only allegation as to bad faith bargaining is the cancellation of one session. No pattern and practice of surface bargaining, nor other conduct that would support a finding of bad faith on the part of Respondent is present here.

Further support for the proposition that life events resulting in the cancellation of one bargaining session does not constitute bad faith can be found in *Meyer’s Bakeries, Inc.* 2006 WL 1358752 (NLRB Div. of Judges) (2006) where it was said “in light of the fact that there is no evidence of any other dilatory tactics or attempts to delay bargaining, it appears that Ledbetter’s cancellation of one bargaining session had a de minimus impact upon the overall bargaining and did not significantly preclude effective bargaining.

The Board affirmed the ALJ who dismissed such a complaint as this, based on a cancelled session, “in deference to the principle, de minimus no curat lex.” *International Powder Metallurgy Co.*, 134 NLRB 1605 (1961) The Judge stated that under the circumstances, neither a finding of a violation or a remedial bargaining order would serve any purpose.

Furthermore, the testimony established that on May 23, 2019 the Charging Party refused to meet with Respondent for the purposes of bargaining. (Tr. 71, 7-17). Despite that, the ALJ determined that the Charging Party meeting with the Respondent briefly prior to the start of the May 23, 2019 bargaining session, which the Charging Party then canceled, and the parties briefly meeting on May 24, 2019 constituted bargaining. (Tr.

71,18 – 72,2; 72, 23 – 73,6; 81,12-22). The ALJ's finding appears to simply give him reason to find the Respondent cancelation of one (1) bargaining session a violation of the Act but not the Charging Party's cancelation of a bargaining session.

4. Respondent violated Section 8(a)(5) and (1) of the Act since April 10, 2019, when it stated that it would not consider any proposal on union-administered benefits. (EXCEPTION 2).

The ALJ's finding ignores evidence that the Respondent provided insurance information to the Charging Party for the purposes of the Charging Party formulating a proposal on health insurance after April 10, 2019. The ALJ further ignores evidence that the parties met and negotiated over health benefits after April 10, 2019. (Tr. 57,17-20; 75, 7-17).

While Respondent acknowledges the written statement made on April 10, 2019, it is clear that the Respondent did not prevent or ignore any proposals put forth by the Charging Party. The ALJ asserts that the Respondent violated the Act because it foreclosed negotiation on the subject before Local 228 even had an opportunity to make a proposal, however it is clear that the issue of health benefits were not foreclosed and continued to move forward during the negotiations.

The ALJ relies on *E.I. Dupont de Nemours & Co.*, 304 NLRB 792, 792 fn. 1 (1991) ("What we find unlawful in the Respondent's conduct was its adamant insistence **throughout the entire course of negotiations** that its site service operator and technical assistant proposals were not part of the overall contract negotiations, and, therefore, had to be bargained about totally separately not only from each other but from all the other collective bargaining agreement proposals. We find this evinced fragmented bargaining

in contravention of the Respondents duty to bargain in good faith.” [emphasis added]. As noted in footnote 1 of *E.I. Dupont de Nemours & Co.*, the conduct the employer in that case was “throughout the entire course of negotiations”, whereas in the present case it was a onetime statement and was not supported by any future actions of the Respondent.

5. Respondent violated Section 8(a)(5) and (1) of the Act since April 17 and July 9, 2019, when it refused to provide the Union with multiple types of requested cost information regarding the existing benefit plans for bargaining unit employees.

The ALJ’s finding asserts that the Respondent refused to provide “multiple types of requested cost information”, despite the clear evidence that the Respondent only refused to provide the Charging Party with the specific cost of health benefit to the employer. The evidence showed that the respondent provided the Benefit Plan Document (Tr. 39, 23 - 40, 1; 51, 20-23; 84, 5-22), the out of pocket cost to the employees (Tr. 70, 9-17; 85, 4-18) and the specific benefit plan selected by the employees (Tr. 87, 4-15). Materials that the Charging Party could have used to put together a benefits proposal as if the Respondent did not previously offer its employees health benefits.

In *Coca-Cola Bottling Co. of Chicago*, 311 NLRB 424, 425 (1993) the Board ruled that whether an employer is required to supply information is “determined on a case-by-case basis,” and “depends on a determination of whether the requested information is relevant and, if so, sufficiently important or needed to invoke a statutory obligation on the part of the other party to produce it.” In the present case, the Charging Party had the opportunity to present a health care proposal using calculations as if the employees had no prior health coverage. The Charging Party was given the existing benefits description, the out

of pocket cost to the employees and a census of which benefit each employee selected. The Charging Party was not prevented from putting forth any such proposal.

The ALJ took a flat line approach in that Union requests for information regarding bargaining unit employees' terms and conditions of employment are "presumptively relevant" and such information must be provided upon request. However, the Board noted in *West Penn Power Co.*, 339 NLRB 585, 587 (2003) that "[T]he duty to furnish requested information cannot be defined in terms of a per se rule." The ALJ failed to take into consideration as to whether the information was needed to perform the statutory obligations of the Charging Party.

6. Disaffection petition was tainted by the Respondent's multiple, unremedied, unfair labor practices and thus Respondent could not lawfully rely on that petition to withdraw recognition and violated Section 8(a)(5) and (1) by doing so.

The ALJ's determination that the Respondent could not legally withdraw recognition simply because there were unresolved unfair labor practices is at odds with the recent decision of the Board in *Johnson Control Inc.*, 368 NLRB No. 20 (2019). The Board held that the employer must have a good faith belief that the union no longer enjoys the majority support of the bargaining unit, and that there be no outstanding unfair labor practice charges that were the direct cause of the union losing support. While the issue before the Board in *Johnson Control Inc.* involved parties that had an existing collective bargaining agreement that was set to expire. The ALJ relies on that distinction to ignore the intent of Johnson Control Inc. whereby allowing an employer with a good faith belief

that the union no longer enjoys the majority support of the bargaining unit to respect the wishes of the bargaining unit and withdraw recognition.

The ALJ further bargaining order despite that lack of majority support from the bargaining unit. In *Conair Corp. N.L.R.B.*, 721 F.2d 1355 (C.A.D.C., 1983) the Court held that "Congress has not empowered the Board to issue a bargaining order absent a concrete manifestation of majority employee assent to union representation; we therefore decline to enforce the NLRB's bargaining order." It is unchallenged by the General Counsel or the Charging Party that the Charging Party continues to maintain a concrete manifestation of majority employee assent to union representation. As such a bargaining order should be dismissed.

CONCLUSION

As a result of the foregoing, the Respondent requests that the Board dismiss ULP's 07-CA-321802; 07-CA-245744; and 07-CA-252759.

Dated: October 23, 2020

Respectfully submitted,

J.G. KERN ENTERPRISES, INC.



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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2020, Respondent J.G. Kern Enterprises' Exceptions to the Administrative Law Judge's Decision was electronically filed and served upon the following parties:

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Dated: October 23, 2020



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