UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Drivers, Chauffeurs, and Helpers, Local Union No. 639, a/w International Brotherhood of Teamsters	:::	
	:::	Case Nos.: 5-CA-35687
	:::	5-CA-35738
Charging Party,	:::	5-CA-35965
	:::	5-CA-35994
- and -	:::	
Daycon Products Company, Inc.	:::	
Respondent.		

DAYCON PRODUCTS COMPANY, INC'S REPLY BRIEF IN FURTHER SUPPORT OF ITS EXCEPTIONS TO THE DECISION AND RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE

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When both the ALJ and the GC all but ignore two key pieces of evidence introduced by the GC, you know the case is weak. And that is the situation here – in his Decision, the ALJ entirely glosses over both GC 39 and GC 41, while the GC in its Brief blatantly misquotes the crucial line, misrepresenting to this Board that the document says the opposite of what it actually says. If the strength of one's case is suggested by how well one can explain inconvenient evidence, this misrepresentation suggests the GC's case should be on life support. Likewise, one wonders how the ALJ could completely ignore the two key pieces of evidence introduced by the GC. The reality is that the documents – GC 39 and GC 41 - represent the twin icebergs on which the ALJ's decision founders. This Reply will respond to the assertions advanced by the GC, and further demonstrate that (1) the parties were at impasse on April 22, (2) the strike was unrelated to the implementation, and (3) the ALJ erred in excluding relevant and probative evidence.

I. IMPASSE

As noted in the initial Brief, the ALJ's finding that the parties were not at impasse is premised on the ridiculous notion that "the Respondent foreclosed any further movement in negotiations" by leaving the April 22 meeting between the Parties. (ALJD 16:21-23) This statement refutes itself – for there is no reason in law or fact that the Union could not have modified its position, before or after the meeting.[1] While the GC repeatedly alleges that the Union was somehow magically prevented from making its promised movement, the assertions are nothing more than mere conclusory statements, contradicted by the inescapable fact that

[1] No support is offered, for none exists, for the belief that simply by leaving a meeting, a party has forever "foreclosed any further movement in negotiations." Indeed, if that were true, then the Union would have been guilty of this offense when it walked out of the prior formal negotiation session. (Tr. 472) However, as noted in the initial Brief, even the declaration of impasse does not foreclose further bargaining – if the Union truly had further movement to make, the fact that it failed to do so in the face of the Company's declaration of impasse establishes that the impasse was valid. See *infra*. Importantly, the Company did not implement its wage increase until the day following the Union's refusal to provide some indication of movement after the Company had declared impasse.

when the Company declared impasse, rather than make the movement it was supposedly ready, willing and eager to make, the Union instead made clear that it was not moving an inch off its desire to have all employees reach top rate within a defined period of time.

In its effort to prop up the ALJ's finding that the parties were not at impasse, the GC attempts to show that both parties were willing to make movement. To demonstrate the Union's supposed willingness to make movement on April 22, the GC asserts that although it was "prepared … to bargain all day," it "never got that opportunity." (GC Brief 27) In addition, the GC states that the Union "was in the process of making proposals and had additional modifications it was waiting to offer Respondent upon their return to bargaining," but Respondent "snuck out and declared impasse, thus aborting the negotiations and preventing further movement."[2] (GC Brief 29-30) Apparently unaware that its jumbled statements contradict one another, the GC declares that the Union "held its modified proposals in hand," but was also "robbed … of the opportunity to modify its proposals, which it stood ready to do." (GC Brief 30)

Each of these statements suggest that the Company had the power to prevent the Union from modifying its own proposals – as if the Company had somehow cast a spell or curse that bound the Union's tongue and pen, and stopped the Union from communicating that it intended to actually make movement. To the contrary, the record shows that on April 22 the Union remained "wedded" to the concept of progression to top rate. (Tr. 155, 636) Carrying the

[2] Importantly, the GC admits that "there were no complaint allegations that either side bargained in bad faith[.]" (GC Brief 29) Bereft of a decent legal argument, the GC fixates on the idea that the Company "snuck" out of the final negotiation session which somehow prevented the Union from making further movement to its bargaining position. Indeed, the GC notes that this is a "key component of Judge Biblowitz's holding that there was no lawful impasse," and repeats this assertion no less than eight times in its Brief. (GC Brief 33) However, Respondent did no such thing – it clearly informed the mediator, brought into negotiations by the Union – that it was leaving the meeting (as had the Union from the previous meeting) and that it would "get back" to the Union. (R. 26, p. 2) ("told [Gary Eder] we'll get back to union") Consistent with this, Webber testified that Ratliff had "confirmed with Gary Eder that the employers had left." (Tr. 157) Likewise, GC 39, written by the Union, states "When **we** left the meeting earlier today, the Company said it needed to crunch the numbers in order to respond to the comments the Union made." (GC 39)(emphasis added) Notably, it doesn't say anything about the Company leaving without any notice. (Tr. 500-01)

"wedded" analogy one step further, impasse is the "speak now or forever hold your peace" moment – if the Union intended to move, it should have done so then. It did not. (GC 39)

The GC argues that Webber "proposed a five-year contract, with progression spread over five years, on April 22." (GC Brief 31) However, both the ALJ and the GC carefully avoid discussion of the most direct evidence pertaining to this issue – an admission, in writing from Webber, one week after the impasse that the Union's wage progression proposal was for three years. (GC 41) The fact that neither the ALJ nor the GC even attempt to offer an explanation for the letter's *three separate references* to a three-year proposal indicates just how damaging this evidence is. Simply put, it destroys the suggestion that the ALJ's finding was simply a "credibility resolution." While an ALJ may resolve conflicts between differing testimony of the parties; GC 41 constitutes contradictory evidence *from the same witness*.[3]

Moreover, even assuming that Webber made such a proposal, it does not indicate any movement on the key item of progression to top rate. Whether three years or five years, the Union demanded wage progression to top rate within a <u>defined</u> period, while the Company was equally committed that there would be no automatic progression to top rate. There is no middle ground between these two positions – only one party can get its way. And whether over three years or five years, the concept of catching up to an ever-increasing top rate was unacceptable to the Company. (Tr. 714, 724) (GC 40)[4]

Finally, even assuming that Webber actually advanced the five-year proposal, and that the parties were not philosophically divided over the concept of progression to top rate, it is

[3] Not only did Webber's letter contradict his testimony, he later testified that on July 13 after the bargaining committee agreed in a caucus, he "came back to the bargaining table and said that the union was proposing a five year contract **instead of three**[.]" (Tr. 351)(emphasis added) Moreover, a May 7 newspaper article attributed to the Union's President the statement that the "union members hoped to negotiate a three-year progression pay scale" (R. 18)(rejected) Ratliff read the statements attributed to him and stated he "wouldn't dispute any of it." (Tr. 507)

[4] It's like being asked whether you want pepperoni or sausage on your pizza, when you want a cheeseburger – pepperoni or sausage might each have their relative merits, but it does not change the fact that you do not want to eat pizza.

clear that the proposal (whatever it was) was rejected. Ratliff expressly agreed that the letter written by the Company on April 22 was a rejection of the Union's position. (Tr. 499)

At that point if the Union had further movement to make, it was incumbent upon the Union to do so. The Company had declared an impasse in bargaining, and announced its intention to "proceed accordingly." (R 38) Despite this fact, the Union failed to make any concrete movement whatsoever. Instead, in the key piece of evidence that the ALJ ignored and which the GC mischaracterized, the Union admitted the existence of a "bargaining logjam" and clearly indicated it was holding to its proposals. (GC 39)

In a fatal admission, the GC states that "the Union never actually conveyed to Respondent the additional areas where the Union was willing to move." (GC Brief 33) Echoing the ALJ's reasoning, the GC proclaims that

> There is an easy explanation: the Union never got that chance because Respondent snuck away from the meeting and **aborted the bargaining process by declaring impasse**.

(GC Brief 33)(emphasis added)

The problem with this statement is that the declaration of an impasse does not "abort the bargaining process" – instead, it provides an opportunity to advance bargaining by indicating that one party has clearly reached the end of its willingness to compromise. Castle Hill Health Care Center, 2010 WL 3797696 *49 (September 28, 2010) (an impasse does not relieve the parties from their bargaining obligations). Here, it is important to note that the last word before implementation belonged to the Union. And rather than communicate clearly where it was willing to move, the Union instead made clear that any movement must first come from the Company. (GC 39) In other words, the Union had every opportunity to "convey … additional areas where [it] was willing to move," it just elected not to. Indeed, in the interim

between the declaration of impasse and the implementation of a wage increase the next day, the Union had a full opportunity to contemplate its position, digest the letter declaring impasse, and prepare its own response (one which the GC asserts was "in hand" on April 22). (Tr. 438, 496) Despite this, the Union's response failed to communicate a single proposal which it was willing to modify, or specifically identify any area where it was willing to move. (GC 39) This failure to communicate any areas of compromise confirms the Company's estimate that the parties were at impasse. See E.I. DuPont De Nemours & Company, 268 NLRB 1075 (1984)("a finding of impasse is warranted irrespective of whether there was some movement in the parties' positions **prior to the Respondent's implementation** of its proposal")(emphasis added). Notably, only after the Union's final failure to move did the Company implement its proposals.[5]

In its fleeting mention of the Union's response to the Company's declaration of impasse following the April 22 meeting, which all parties acknowledged again ended without resolution of the wage progression concept (Tr. 496), the GC flagrantly misquotes the Union's response, leaving out two words which fundamentally change its meaning:

> Webber responded, denying the parties were at impasse. In doing so, Webber referenced his proposal from earlier that day and indicated the Union was flexible, noting that there were "numerous issues **that allowed for movement** by the Union." (GC 39).

(GC Brief 27)(emphasis added).

The GC passes this off as an alleged quote, but leaves out two inconvenient words (without ellipses indicating the omission) between "that" and "allowed" whose absence transforms its meaning – "would have." (GC 39) "Would have" is past tense; the presence of

[5] Importantly, in most circumstances it is not a ULP to merely declare impasse; rather, it is only the unilateral implementation of bargaining proposals in the absence of an impasse which violates the duty to collectively bargain. The ALJ recognized this distinction in finding that Respondent violated the Act only "by implementing its last bargaining offer on April 23," the day after its declaration of impasse. (ALJD 16:24-25) See also (ALJD 17:25-27)(finding a violation based on the unilateral implementation, not the declaration of impasse) This is consistent with the Charge (GC 1-C) and the Complaint, which alleges that the "Employer **implemented** its last bargaining offer" (GC 1-M)(emphasis added).

these words thus conveys not that there were issues "that allowed for movement," but instead that there were issues "that **would have** allowed for movement," but only "if" the Company had agreed to the Union's supposed "reasonable and rational proposal." (GC 39) Since the Company had not agreed, Webber admits the parties "could not make progress." (GC 39) In a stunning instance of the pot calling the kettle black, the GC follows up its obvious misrepresentation by stating "Respondent has attempted to contort Webber's letter, seeking to recast it as saying something other than it does." (GC Brief 27) Luckily, the letter is included in the record, and this Board can see for itself exactly what it says or does not say. (GC 39) It is notable however, that the ALJ never saw fit to explain this letter, written the very day that impasse was declared, when discussing "the contemporaneous understanding of the parties to the state of negotiations[.]" (ALJD:15-16)

In a similar situation, the D.C. Circuit reversed the Board's finding that the bargaining parties were not at impasse as not being supported by substantial evidence. TruServ Corp. v. NLRB, 254 F.3d 1105 (D.C. Cir. 2001). In TruServ, the company had declared impasse, and the union responded by denying the parties were at impasse and requesting to continue bargaining. Id. at 1116-17. The Court held that:

> Absent conduct demonstrating a willingness to compromise further, a bald statement of disagreement by one party to the negotiations is insufficient to defeat an impasse. A contrary result would render the "contemporaneous understanding" *Taft* factor meaningless.

TruServ, 254 F.3d at 1117. In language directly applicable to the instant case, and to the Union's supposed "flexibility," the Court further noted that:

> [B]are assertions of flexibility on open issues and its generalized promises of new proposals do not clearly establish any change, much less a substantial change, in that party's negotiation position. This confirms the impasse declared by the Company.

Id. at 1117 (brackets omitted).

In another similar case, the Board reversed an ALJ's determination that the bargaining parties were not at impasse, based on the union's supposed willingness to be "flexible" and to make "new" proposals, conveyed in correspondence sent by the union after the company's declaration of impasse. Civic Motor Inns, 300 NLRB 774 (1990). In that case, in which the primary issue between the parties was subcontracting, the Board found that:

> [T]he record as a whole indicates that the Union continued to oppose the concept of unlimited subcontracting and that it failed to give sufficient indication of changed circumstances to suggest that future bargaining might be fruitful. Even though possibly not reflective of its true intent, **the clear message from the union's correspondence to the Respondent was that nothing else that might happen in negotiations could persuade the Union to move from this strong opposition** and break the deadlock on the subcontracting issue.

Civic Motor Inns, 300 NLRB 774, 776 (1990)(emphasis added). See also Serramonte Oldsmobile, Inc. v. NLRB, 86 F.3d 227, 233 (D.C. Cir. 1996)(same).[6]

Having failed to demonstrate any flexibility on the Union's side, the GC also attempts to distort the record to show that the Company was not at the end of its bargaining rope, asserting that its suggestion of a "contract rate" means there "was no ideological divide between the parties, only a financial one." (GC Brief 26) Leaving aside the GC's blithe characterization of the dispute as "merely financial," this depiction of the "contract rate" proposal is demonstrably incorrect.

[6] The ALJ's holding turns on the assumption that "If the Respondent had returned to the meeting and informed and notified the Union that it was rejecting the five year proposal because it was too expensive, the Union might have proposed an alternative plan for progression." (ALJD 16:19-21) As in the Serramonte decision, in which the ALJ relied on assumptions and speculation regarding the parties bargaining intent, this finding "offer[s] about as much as a handful of air." Serramonte Oldsmobile, Inc. v. NLRB, 86 F.3d at 233.

Perhaps the best evidence to establish that the Parties' dispute was grounded in differing ideologies is the phrase "artificial substandard rate" - the title both the Union and the ALJ adopted - to describe the Company's contract rate suggestion. (ALJD 16) (Tr. 292) Although this label places a derogatory tilt on the Company's idea, it accurately captures why an impasse was reached. The defining characteristic of the contract rate idea is that employees will **NOT** advance automatically to the existing (and ever-increasing) top rate. (Tr. 480-82, 664-65) Directly contradicting the testimony that establishes the opposite, the GC asserts that "The 'contract rate' concept embraces the notion that those in progression need to reach the top rate during a finite period." (GC Brief 26) Plainly, this is not the case – if it were, presumably the Union would have accepted it. The Union did not accept it because it failed to accomplish the Union's primary objective – progression to top rate. (GC 41 p. 1)("the Union has informed Daycon on numerous occasions about the necessity for catch-up progressions in the terms of any new Contract.")

Next, the GC seeks to establish that the Company still had room to negotiate, stating that the Company never used the phrase "last best and final." (GC Brief 26 n. 41, and 34 n. 48) However, it is clear that the Union understood the Company's proposal as its last proposal; its own bargaining notes characterize it that way. (GC 23 at 3)("received last offer")[7]

The GC's final effort is devoted to asserting that the Company's best offer was "below its own economic target." (GC Brief 26 n. 41) Once again, this is not true. As the GC admits, numbers higher than the proposed 3% increase were only under consideration "if performance-based compensation was used." Id. As the Union refused to even consider

[7] Moreover, the Union's ULP specifically alleges that "The Employer has committed an unfair labor practice by implementing its **purported 'last, best and final' offer** before the parties had reached a good-faith impasse in negotiations.") (GC 1-C)(emphasis added). Likewise, the Complaint alleges the Employer implemented its **last** bargaining offer (GC 1-M) (emphasis added).

performance-based pay, the approximate 3% increases proposed by the Company were right at its projected target. (Tr. 613)

II. STRIKE

Both the GC and the Charging Party's briefs demonstrate that none of the employees were consulted on the decision to strike following the implementation of the wage increase. (GC Brief)(CP Brief 14-15) Indeed, as the Charging Party's brief makes clear, there is no testimony of record that a single employee actually had a choice whether to strike – instead, the decision to strike was made and implemented without their input, employees were merely told when they arrived on April 26 that they were already on strike. In this case, the Union's after-the-fact assurances that the Company had "violated the labor practices" did not allow for the employees to make a before-the-fact choice. Instead, they were simply told they were on strike, handed a sign, and sent to picket. This cannot satisfy GC's burden to show causation. See Tufts Brothers 235 NLRB 808, 810 (1978); and Pirelli Cable Corp. v. NLRB, 141 F.3d 503, 517 (4th Cir. 1998)("the Board and court must be wary of self-serving rhetoric of sophisticated union officials and members inconsistent with the true factual context."). For the reasons stated in the initial Brief, the GC failed to meet its burden of showing there was a causal relationship between the implementation and the strike. Accordingly, the strike cannot be deemed an unfair labor practice strike.

III. EVIDENCE

In a footnote, the GC asserts that the ALJ did not err in rejecting certain exhibits, citing to the judge's duty "to regulate the course of trials." (GC Brief 39 n. 52) However, the ALJ Bench Book to which the GC cites states clearly that "The judge's authority to expedite trials … must not be exercised to the extent that it limits either party in the full development of

its case." Bench Book, Sec. 2-300.[8] As the GC has brought forth no reason otherwise, it is clear that the exhibits were relevant and thus improperly excluded.[9]

IV. CONCLUSION[10]

Clearly, the essential ingredient to avoiding impasse is an expressed willingness to modify one's position. Here, the Union at best has shown a willingness to continue to meet. But when it came to actual compromise, the Union was all hat and no cattle. As shown by this case, there is a huge difference between willingness to bargain, and willingness to compromise. The Union's supposed hidden or undeclared (Tr. 209) intended movement cannot defeat the fact that it never conveyed to the Company any objective indication that it was willing to modify its positions. See AMF Bowling, Co., Inc. v. NLRB, 63 F.3d 1293, 1301 (4th Cir. 1995). Accordingly, the Company was not required to engage in fruitless reasonable marathon sessions.

For all the reasons stated herein, and those set forth at the Hearing and in the initial Brief, the Complaint should be dismissed in its entirety.

Respectfully submitted,

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[8] Additionally, Section 13-102, also cited by the GC, states clearly that "[i]deally, the judge will receive evidence that is competent, relevant, and material[.]" Id. at Sec. 13-102.

[9] At the very least, Ratliff's admissions that he read the quotes in (R 18) and would not dispute any of it should be considered in both the causation of the strike and the supposed five-year wage proposal. (Tr. 507)

[10] The GC also asserts that the ALJ "found the violation" of a "refusal to rescind" the unilateral changes. (GC Brief 35) However, Judge Biblowitz made no such finding, or any mention at all of this ULP. (ALJD) Moreover, the GC failed to file any cross-exceptions, so the matter may not be considered further. See NLRB Rules & Regulations, 102.46(g).

CERTIFICATE OF SERVICE

I hereby certify that on the date shown below, copies of the foregoing **REPLY BRIEF IN FURTHER SUPPORT OF EXCEPTIONS TO THE DECISION AND RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE** were electronically filed and served by email upon the following:

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