

**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**

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**RESPONDENT SILGAN PLASTICS CORPORATIONS' BRIEF IN SUPPORT OF  
EXCEPTIONS**

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## I. STATEMENT OF THE CASE<sup>1</sup>

This matter was heard before Administrative Law Judge Paul Bogas (“ALJ Bogas”) on April 18, 19 and 20, 2012 at the Minton-Capehart Federal Building, Room 238, 575 N. Pennsylvania Street, Indianapolis, Indiana. Among other things, the General Counsel (“GC”) and United Steelworkers, Local Union 822 (“Charging Party” or “Union”) contended that Silgan Plastics (“Silgan Plastics” or “Respondent”) violated the National Labor Relations Act (“Act”) by: 1) failing to timely provide information concerning four employees; 2) offering annual open enrollment and making annual company-wide changes to health care benefits; and 3) exercising its Plant Safety, Security and Administrative Regulations Policy (“Policy”) to require the use of reflective vests under limited and specific circumstances.

The ALJ’s Decision and Recommended Order (“Decision”) must be reversed because ALJ Bogas declined to conduct an orderly review of the record and did not render a decision on the merits of the allegations. The Union engaged in bad faith bargaining and dilatory tactics, which ALJ Bogas endorsed by misreading the explicit language of the documentary evidence; refusing to allow Silgan Plastics to introduce evidence crucial to its defense, while using the lack of this evidence to find violations; glossing over evidence that did not support the GC’s and Union’s contentions while refusing to address Respondent’s arguments; and using an inapplicable public policy rationale to support his Decision.

Specifically, ALJ Bogas improperly prevented Respondent from introducing evidence concerning the Union’s bad faith in making information requests. ALJ Bogas decided prior to the conclusion of the GC’s case in chief that the Union had valid reasons for requesting the

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<sup>1</sup> 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; and “ALJD \_\_\_:\_\_\_” to indicate the page and line numbers of the Decision of the Administrative Law Judge.

information. (ALJD 15: 32-47). Despite ALJ Bogas' persistent refusal to allow the introduction of this evidence, ALJ Bogas then proceeded to make his decision by noting that Respondent had failed to establish the Union's bad faith. (ALJD 21: 32-47). By doing so, ALJ Bogas grossly hindered Silgan Plastics' ability to present its defense and cross examine on the Union's and the GC's baseless arguments.

Notwithstanding ALJ Bogas' refusal to allow Respondent to introduce relevant bad faith evidence, the evidence does not support ALJ Bogas' conclusion that the Union needed the information requested. The Union made four separate requests for information: a May 17, 2011<sup>2</sup> request concerning employee Eric Wagner's ("Wagner") request and denial of bereavement leave; and three requests made on July 29 concerning Jonathon Coe's ("Coe") suspension for taking an overextended break, employee Lisa Duncan's ("Duncan") termination for falsifying medical records, and employee Oliver Marshall Hudson's ("Hudson") request and denial of bereavement leave. (J. Ex. 4; J. Ex. 10; J. Ex. 11; J. Ex. 12).

The evidence unmistakably shows that the four requests were not necessary for grievance processing or for bargaining with Silgan Plastics. The information was not necessary for grievance processing because a grievance had already been filed and settled concerning the subject matter of Wagner's information request. (Tr. 158: 13-25). Similarly, the information request concerning Duncan was made after the time had expired to file grievances under the expired collective bargaining agreement ("CBA"). (J. Ex. 1, at 6). Although the Union filed a grievance on behalf of Hudson, the Union did not appeal it to Step 2 of the Union's and Silgan Plastic's (collectively, "Parties") grievance process under their CBA. (ALJD 6: 26-30).

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<sup>2</sup> All dates are "2011" unless otherwise indicated.

Moreover, the evidence shows that despite Silgan Plastics' attempts to communicate with Union Staff Representative Chris Bolte ("Bolte"), Bolte refused to communicate with Respondent to clarify the requests, to meet to discuss the requests, or to review Respondent's entire files. (Tr. 371: 19-25). The information requested was provided on October 5. (J. Ex. 15). The Union did nothing with the information, confirming the Union's bad faith. The Union did not ask to meet with Silgan Plastics to discuss the information, did not file grievances on behalf of these employees and did not request to bargain concerning the subject matter of the information requests. (Tr. 370: 5-23; Tr. 371: 1-7). The Union instead continued to pursue its NLRB charges (the charges of this instant case). This course of conduct unmistakably demonstrates the Union's bad faith tactics. By failing to acknowledge this bad faith conduct and finding violations against Respondent, ALJ Bogas unlawfully endorsed the Union's unlawful tactics.

ALJ Bogas also erroneously found that the Respondent could not continue its annual practice of offering open enrollment to its employees company-wide. (ALJD 35: 24-25). The CBA between the Parties states that the benefit plans will be subject to any changes that are made to all "participating employees, including foremen and office employees. . ." (J. Ex. 1, at 22). Every year all of Respondent's employees, irrespective of whether they are represented by a union, are offered open enrollment. (J. Ex. 1, at 22). During open enrollment, employees are informed of changes to the plans and changes to their co-pays; the plans and co-pays changing slightly from year to year. (Tr. 373: 3-15; Tr. 375: 1-3; J. Ex. 1, at 22). The open enrollment takes place each January 1. (Tr. 373: 3-10).

Despite this established practice, ALJ Bogas found that Silgan Plastics could not continue to use its practice. Instead, ALJ Bogas' findings irreparably altered the status quo, carving out

the bargaining unit, providing the unit with its own plan, and freezing the benefits until a new contract is agreed to by the Parties. (ALJD 17: 41-47; ALJD 35: 5-8).

Established Supreme Court precedent, National Labor Relations Board (“Board”) law and public policy considerations dictate that the ALJ’s decision be reversed. It is established Supreme Court law that the Board cannot dictate the terms of the Parties’ CBA, as ALJ Bogas is trying to do in the instant case by requiring Respondent to create a different benefit plan for the Seymour bargaining unit employees. See, e.g., NLRB v. Am. Nat’l Ins. Co., 343 U.S. 395, 404 (1952). Moreover, the Board has held that during a hiatus period, it is the past practice and not the management rights clause in the expired contract that privileges the employer to continue its practice. See, e.g., Beverly Health & Rehab. Serv., Inc., 346 NLRB 1319, 1319 n. 5 (2006). Additionally, there is no need to show a hiatus period under which the employer previously continued its past practice. See, e.g., Nabors Alaska Drilling, Inc., 341 NLRB 610, 613 (2004). Public policy also dictates finding that Respondent was privileged to continue its past practice. To find otherwise, will continue to discourage the Union from bargaining because the health benefit plans offered in 2011 will continue to be frozen irrespective of the current health care benefit costs.

ALJ Bogas also erroneously found that the Respondent was not entitled to require the use of reflective vests as part of its Plant Safety, Security and Administrative Regulations Policy (“Policy”), notwithstanding that the Policy was last revised in 2000, is still in existence, contains a provision allowing the Employer to require the use of safety equipment and provides a non-exclusive list of examples of safety equipment. (R Ex. 43). Not only does a common reading of the Policy make clear that other safety equipment may be required, but it also demonstrates that

the reflective vest requirement was not a material, substantial or significant change. The ALJ's decision with respect to these issues must be reversed.

## **II. QUESTIONS PRESENTED**

- A. Whether ALJ Bogas erred in finding that Silgan Plastics violated the Act by providing the information requested by the Union on October 5.
  - i. Whether ALJ Bogas erred in failing to allow Respondent to introduce evidence concerning the Union's bad faith requests. (Exceptions 8, 24, 25).
  - ii. Whether the Union's conduct excused Silgan Plastic's performance. (Exceptions 1, 2, 5, 8, 22, 23).
  - iii. Whether the Union had legitimate reasons for requesting the information. (Exceptions 1, 2, 3, 4, 5, 6, 7, 19, 20, 21, 29, 30, 34, 35).
  - iv. Whether providing the information on October 5 constituted an unreasonable delay? (Exceptions 3, 4, 6, 7, 19, 20, 21, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37).
  
- B. Whether ALJ Bogas erred in failing to find that the Respondent's past practice privileged Respondent to implement company-wide changes to the health benefit plan.
  - i. Whether Respondent's past practice falls within the exception carved out by Board precedent. (Exceptions 9, 42, 43, 44, 45, 46, 53).
  - ii. Whether the Union's dilatory tactics privileged respondent to implement its past practice. (Exceptions 10, 11, 51).
  - iii. Whether public policy compels a finding that Respondent was privileged to implement its past practice. (Exception 47).
  
- C. Whether ALJ Bogas erred in concluding that the Parties had not reached impasse.
  - i. Whether ALJ Bogas' decision to disregard and discredit the Respondent's evidence concerning impasse was impermissible. (Exceptions 13, 14, 15, 16, 38, 48, 49).
  - ii. Whether the evidence shows that impasse was reached. (Exceptions 12, 49, 50, 51, 52).
  
- D. Whether Respondent violated Section 8(a)(5) and 8(a)(1) by including the use of reflective vests to its non-exclusive list of safety equipment required under Respondent's Plant Safety, Security and Administrative Policy ("Policy").

- i. Whether the ALJ erroneously failed to find that the Policy permits Respondent to require the use of special safety equipment. (Exceptions 18, 39, 41, 42).
- ii. Whether the safety vest requirement was material, substantial or significant. (Exceptions 17, 40, 42).

### **III. ARGUMENTS AND AUTHORITIES**

#### **A. ALJ Bogas Erred in Finding that Silgan Plastics Violated the Act by Providing the Information the Union Requested on October 5, 2011.**

ALJ Bogas concluded, with no legal or factual bases, that Respondent violated Section 8(a)(1) and 8(a)(5) of the Act by failing to provide information requested in a timely manner related to employees Wagner, Hudson, Coe, and Duncan. ALJ Bogas erred by failing to allow Respondent to introduce evidence concerning the Union's bad faith, while holding the lack of bad faith evidence against Respondent. (ALJD: 15: 30-47).

ALJ Bogas also erred by finding that the Union needed the requested information to perform its duties of filing grievances and to determine the status quo. (ALJD 20-25). ALJ Bogas erred by imposing an irrebuttable presumption that the length of time it took to produce the evidence, alone, showed an undue delay rather than focusing on whether the alleged delay impeded or inhibited the Union from performing its functions as a result of the alleged delay. (ALJD 20-25).

#### **1. The Union's Bad Faith Reasons for Requesting the Information were Evident Notwithstanding ALJ Bogas' Refusal to Allow Respondent to Introduce this Evidence.**

At trial, despite Respondent's timely filed subpoenas, ALJ Bogas did not allow Respondent to obtain the documents concerning the Union's offensive bargaining strategy and training. (Tr. 219-221). Likewise, ALJ Bogas did not allow Respondent to question the Union's and GC's witnesses concerning bad faith bargaining. (Tr. 187-198). ALJ Bogas improperly failed to allow Respondent to question the Union and to introduce relevant evidence necessary to

its defense because ALJ Bogas made a determination, prior to Respondent's case in chief and prior to the conclusion of the GC's case in chief, that the Union had a valid reason for its requests. ALJ Bogas' decision demonstrates his error:

At the trial, the Respondent asserted that an inquiry into certain matters . . . was relevant because it might show that the Union was filing information requests to harass the Respondent or prevent impasse. I did not permit those inquiries in part because they gave every indication of being a fishing expedition into arguably privileged internal Union materials, . . . , but also because, under Board law, if the evidence shows that even one reason for an information request is justified, the Respondent is required to produce the information regardless of whether the Union also has an ulterior motive for the request. [emphasis provided].

(ALJD 15: 31-43). ALJ Bogas' predetermined and biased decision deprived Respondent of a full opportunity to introduce relevant evidence in violation of the NLRB's Statement of Procedures, Sec. 101.20(c).<sup>3</sup> ALJ Bogas, however, did not only refuse to allow the introduction of this specific evidence, but used the lack of bad faith bargaining evidence in determining that Respondent had a duty to provide the requested information because ALJ Bogas concluded that the Respondent's evidence concerning the Union's bad faith was "wholly unpersuasive." (ALJD 21: 38-40).

## **2. The Union's Bad Faith Tactics Excused Silgan Plastics' Performance.**

ALJ Bogas also failed to consider the Union's unlawful bargaining tactics, which were responsible for any alleged delay in providing the information requested. These tactics alone, show the Union's bad faith. Three days after Wagner's grievance had been resolved, Bolte sent Respondent the request for information. (J. Ex. 4). Silgan Plastics' Regional Human Resources Manager Deanna Lawyer responded two days later, on May 19, informing Bolte that "[i]n keeping with past practice, Silgan Management team and the Local Union #822 committee

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<sup>3</sup> Sec. 101.20(c) states in relevant part that the primary interest in the hearing is "to ensure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case. The parties are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions."

officer had a discussion and reached a mutual agreement to resolve the issue pertaining to Erik Wagner.” (J. Ex. 5). Bolte responded on May 20 reiterating his information request, stating that USW did not consider the grievance resolved, and that the Union was not seeking to make any bargaining proposals for collective bargaining purposes. (Tr. 233: 12-20; Tr. 234: 2-14; J. Ex. 6). Union Vice President and Steward Will Coffman and Lawyer had already settled Wagner’s grievance, and therefore there appeared to be no need for the information. (J. Ex. 5; J. Ex. 7; J. Ex. 9). Given the confusion in regards to the request, Raymond M. Deeny (“Deeny”), Silgan Plastic’s attorney, contacted Bolte on May 24, requesting to communicate with Bolte about the information requests. (Tr. 414: 21-25; Tr. 415: 1-5). In addition, Lawyer sent Bolte another letter on May 27, expressing confusion as to why the information was needed when the grievance had been resolved and no bargaining proposals had been made. (J. Ex. 7). Respondent had a right to seek clarification and express its concerns to the Union. Land-O-Sun Dairies, 345 NLRB 1222, 1223-24 (2005). In Land-O-Sun Dairies, the Board held that when requests for information are unclear, the employer has an obligation to communicate its concerns to the union and cannot simply ignore the requests. Id. In that case, the employer contended that it was “stunned” by the union’s request but failed to request clarification or communicate with the union. Id.

Rather than offering a clear explanation, however, Bolte sent Lawyer correspondence that was offensive, insulting, and did nothing to clarify the confusion. (J. Ex. 8). Bolte responded to Lawyer’s May 27 letter by stating that he had no interest in communicating with Lawyer because “it appears that you did not understand it then, and I have no belief that repeating it would lead to your understanding at this time.” (J. Ex. 8). Bolte also stated that he would pursue NLRB charges as he deemed it best to deal with the NLRB than with Respondent. (J. Ex. 8). Lawyer

responded to Bolte's letter on that same day but Bolte did not respond. (Tr. 54: 14-19; Tr. 55: 7-9; Tr. 236: 3-8; J. Ex. 9). Only two weeks after Bolte started communicating with the Silgan Plastics and one day after his last correspondence with Lawyer, Bolte filed his NLRB charge. (Tr. 363: 7-15; Ex 1(a))<sup>4</sup>. Although ALJ Bogas found that "management officials expressed bewilderment at the Unions' request for information regarding Wagner, stating that, in their view, the matter had been settled," ALJ Bogas failed to find that this confusion and failure on the Union's part to communicate, lead to the delay. (ALJD 5: 26-28).

ALJ Bogas also failed to analyze Bolte's course of bad faith conduct after the three information requests were filed on July 29. Indeed, Bolte's ignored Respondent's attempts to accommodate his requests and filed charges instead of attempting to obtain the information he contended he needed. (J. Ex. 10; J. Ex. 11; J. Ex. 12; GC Ex. 12; Tr. 371: 19-25). Deeny attempted to address his information requests by responding to Bolte's requests on August 11 and attempted to arrange meetings with Bolte. (J. Ex. 13). That same day, Bolte responded by stating that he would be out of state and would provide a response when he returned. (GC Ex. 11). Yet, during his time out of state and prior to responding to Deeny or to Respondent's representatives, Bolte filed an NLRB charge concerning the July 29 information requests. (Tr. 245: 25; Tr. 246: 1-7; Ex. 1(c)). Bolte never accepted to meet with Deeny or with any of Silgan Plastics' representatives.

During the same time that Deeny was attempting to contact Bolte, Director of Human Resources David Rubardt ("Rubardt") was also attempting to contact Bolte and offered Bolte a complete review of the Respondent's files at the Seymour facility. (Tr. 247: 14-25; Tr. 248: 1-5; 363: 22-23; Tr. 409: 12-15; GC Ex. 12). In NLRB v. Tex-Tan, the Court denied enforcement of

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<sup>4</sup>The charge was amended on August 29. (Ex. 1(e)).

the Board's Order in part because it found that the employer made an "unqualified offer to the Union for its representatives to see and copy any of its records and obtain whatever other information it desired." NLRB v. Tex-Tan 318 F.2d 472, 477 (5th Cir. 1963). The Court found that given that the union was offered the opportunity to view the documents, the employer did not also need produce the documents. Id.

Despite Rubardt's efforts, Bolte dodged the invitation by sending Rubardt an email stating that "the USW received notification from your Counsel that further communication should be directed to him. That is what the USW has done and has honored your Counsel's request." (Tr. 248: 1-11; GC Ex. 12, at 1). This disingenuous proposition demonstrates Bolte's capacity to avoid bargaining. Rubardt once again tried to communicate with Bolte on September 23, by replying to the email and explaining, "Mr. Deeny's role is to work directly with the Region with respect to the charges filed, and he and I are in agreement with respect to my outreach to you in an effort to resolve these matters." (GC Ex. 12). Bolte responded to these invitations by filing another charge on September 24, concerning the same three July 29 requests for information. (Ex. 1(g)).

Thus, from May to October, Respondent attempted to meet with Bolte, to communicate with Bolte, to request clarification and to invite Bolte to review the files. Bolte refused to meet with Respondent and his written communications were facetious and unresponsive. In cases where the Union's failure to communicate causes a delay, the Board has held that the employer has not violated the Act. See, e.g., Dallas & Mavis Forwarding Co., 291 NLRB 980, 982 (1988) (The Board held that a seven-month delay in providing the requested information was not an undue delay because the employer had concerns, including confidentiality concerns, about providing the information. As a result of these concerns, the employer engaged in

communications with the union. The Board noted that the delay was in part caused by the Union's inability to state exactly what it wanted.). Bolte's bad faith was obvious and his unwillingness to bargain in good faith and his willingness to frustrate bargaining were palpable.

**3. The Union's Alleged Reasons for Requesting the Information were Not Supported by the Evidence.**

The Union did not need or use the requested information for processing grievances or for monitoring the status quo. In Acme Indus. Co., the Supreme Court held that an employer has a duty to provide information if the information is relevant. NLRB v. Acme Indus. Co., 385 U.S. 432, 435-436 (1967). Information is relevant if it is "needed by the bargaining representative for the proper performance of its duties." Id. The Union did not need the information for performing its duties, but ALJ Bogas ignored Bolte's obvious and illegal campaign and rubber stamped the "relevance" of this illegal Bolte plot.

**a. The Union did Not Need the Information for Grievance Processing or Bargaining.**

The evidence demonstrates that the information was not relevant and that the Union did not need the requested information either to process grievances or for collective bargaining purposes. ALJ Bogas found that the Union's request in response to Wagner's denial of bereavement leave was necessary to process a grievance on Wagner's behalf even though the grievance had already been settled on the same day it was filed. (ALJD: 20: 33-35; GC Ex. 8). Chief Steward Dianna Kreutzjans filed the grievance on May 14, after learning that Wagner had been denied funeral leave under the terms of the CBA. (GC Ex. 8). Silgan Plastics denied Wagner funeral leave because Wagner's brother's body was being donated to science and a funeral service was not planned. (Tr. 43: 7-10; Tr. 44: 15-18; GC Ex. 31).

Union Vice President and Steward Will Coffman testified that on May 14, he received a call from Local Secretary Myra Hartley and in response to the call, he telephoned Lawyer. (Tr. 123: 3-10; Tr. 124: 1-2). Coffman spoke to Lawyer and Lawyer explained to him that Wagner was not entitled to funeral leave because Wagner was not attending a funeral. (Tr. 124: 16-17). Coffman then “asked if there wasn’t some way we could get Eric [Wagner] out of the factory due to the loss of his brother. I asked if maybe he could have some vacation time or we could do something to get him off the shop floor.” (Tr. 124: 7-11). Coffman requested vacation leave because he knew that Wagner had 7.5 occurrences for attendance and that at eight occurrences, Wagner would get a DML which meant that any other attendance violation after the DML would result in termination. (Tr. 131: 8-13; Tr. 164: 8-11). Lawyer informed Coffman that she would see what she could do and ten minutes later called Coffman and granted Coffman the vacation time he requested on Wagner’s behalf. (Tr. 124: 21-24; Tr. 125: 3-10). Coffman and Lawyer believed the grievance had been resolved:

Q. –and she [Lawyer] told you, “Alright, if that’s what Eric wants to do, he can take his vacation time and take that day, half day and then the following day as vacation,” correct?

A. Yes sir.

Q. And you told her “okay.”

A. Yes sir.

Q. Cause it was resolved, wasn’t it?

A. In my mind, yeah.

(Tr. 158: 13-20). This was the way that grievances had always been resolved. In fact, Coffman testified that Bolte asked him to rescind the settlement of the grievance and that Coffman was

embarrassed to attempt to rescind the agreement three days after he had resolved the grievance. (Tr. 166: 6-8).

Thus, after May 14, 2012, there was no need for this information because the grievance had been resolved to everyone's satisfaction. (Tr. 158: 13-20). Despite this straight forward testimony from the Union's and GC's own witness, ALJ Bogas determined that the grievance had not been resolved because two days later, Lawyer and former Manager Jim Stajkowski "approached Coffman with a proposal under which Wagner could obtain the funeral leave that the Respondent had denied to him on May 14." [emphasis added].<sup>5</sup> (ALJD 21: 4-10). Contrary to ALJ Bogas' facetious "proposal" classification, Respondent was merely reiterating and reinforcing the terms of the CBA. The CBA states that "[i]f there is a death in the immediate family of an employee, . . . , he will be paid at his regular straight-time rate for the excused time." (J. Ex. 1, at 21). The Article further specifies that in order to receive paid leave the employee must notify "his supervisor in advance of his absence" and "actually attends the funeral." (J. Ex. 1, at 21). Thus, contrary to ALJ Bogas' finding that this meeting constituted a proposal, Respondent was simply reiterating that if Wagner in fact attended a funeral, he would receive the leave provided under the terms of the CBA. (J. Ex. 1, at 21).

ALJ Bogas also erroneously found that the Union needed the information requested concerning Duncan to determine whether to file a grievance. (ALJD 23: 10-17). Yet, contrary to

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<sup>5</sup> ALJ Bogas' biased findings and conclusions are also demonstrated by ALJ Bogas' finding that a grievance existed despite the fact that Bolte did not file the grievance. During the trial, Bolte contended and ALJ Bogas found, that Bolte was the only person who could handle any grievance-related issues and that the grievance "belong[ed] to the USW International Union" and not the Local. ALJ Bogas erroneously found that Bolte's letter dated March 5 effectively made Bolte the only person who could handle any changes to the terms and conditions of employment. (ALJD 9: 5-10; J Ex. 6). Yet, Coffman testified that he did not know that he and the Local had no authority to process grievances. (Tr. 148: 16-23). Despite this finding, ALJ Bogas found that the Local's filing of the charge was proper. This finding contradicts ALJ Bogas' findings concerning Bolte's role in the grievance process. The two contradictory findings, however, show ALJ Bogas' deference to the Union's contentions, even when the contentions are contradictory and unsupported by the evidence.

ALJ Bogas' findings, by the time the information request was made, a grievance on behalf of Duncan would have been untimely. ALJ Bogas misread the expired CBA to grant the Union 15 days to file all grievances. Article IV, Section 6 of the CBA states that the Union is allowed only seven work days to file a grievance in response to a termination. (J. Ex. 1, at 6).<sup>6</sup> In regards to Hudson's request for bereavement leave, a grievance was filed but the Union admitted that the Union did not appeal the grievance to Step 2.<sup>7</sup> (ALJD 6: 26-30). In fact, in response to these four information requests, nothing was done on behalf of the employees. No grievances were filed on behalf of Duncan and Coe<sup>8</sup> and no new grievances were filed on behalf of Wagner or Hudson. Yet, in spite of these established facts, ALJ erroneously found that the Union needed the information for grievance processing. (ALJD 21: 12-16; ALJD 23: 10-16; ALJD 24: 19-21; ALJD 24: 43-46).

**b. The Union did Not Need the Information to Monitor the Status Quo.**

ALJ Bogas concluded despite the undisputed evidence that the information requests related to Wagner's and Hudson's request and denial of bereavement leave were necessary for "policing of the Respondent's adherence to the status quo under the expired contract." (ALJD 20: 33-25). However, the evidence is undisputed that Wagner's and Hudson's requests for bereavement leave were unique situations. (ALJD 20: 35-37; ALJD 24: 19-23; ALJD 25: 25-28). Bolte admitted that both requests entailed unprecedented situations where no funeral service was held. In the case of Wagner, his brother's body was being donated to science. (GC Ex. 31).

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<sup>6</sup> Duncan was discharged on July 11 and the request for information was submitted on July 29, more than seven work days after Duncan's termination. (J. Ex. 15 at 195-201).

<sup>7</sup> The Union's failure to appeal Hudson's grievance to step 2 was one of the reasons ALJ Bogas dismissed the GC's contention that Respondent failed to process grievances. (ALJD 6: 26-30; ALJD 25: 13-31).

<sup>8</sup> Neither Coe nor the Union filed a grievance regarding Coe's suspension or reinstatement. (Tr. 166: 12-16). In fact, Bolte admitted that he never met Coe or discussed with Coe until the date of the trial in the instant case. (Tr. 236: 9-16).

Bolte testified: “Mr. Wagner had a very unique circumstance that no one from the local committee had ever come up against, and that was a body being donated to science.” (Tr. 275: 1-10). Hudson’s situation was also unique because his father was cremated and no funeral service was held. (GC Ex. 30). Bolte also admitted that Hudson’s situation was unprecedented and not encompassed in the expired CBA: “I believe that Mr. Hudson wanted something different than what the expired terms and conditions were, as well as the fact that his situation was unique within itself because it didn’t deal with a funeral home or a funeral parlor.” (Tr. 327: 12-15). Given that these two instances were unprecedented, there was no status quo to police. The status quo was, as the expired CBA states, that if an employee suffered a death in the immediate family, the employee would be excused from work if he “actually attend[ed] the funeral.” (J. Ex. 1, at 21). Thus, the failure to attend a funeral meant that Hudson and Wagner were not entitled to funeral leave under the terms of the CBA.

**4. Silgan Plastics did Not Unduly Delay in Providing the Information.**

Even assuming arguendo that the Union needed the information requested for the four individuals, the evidence does not support an undue delay. ALJ Bogas made a fatally flawed assumption that the length of time it took to provide this information constitutes an undue delay. The information in regards to Wagner was requested on May 17, while the information concerning Coe, Duncan and Hudson was requested on July 29. (J. Ex. 4; J. Ex. 10; J. Ex. 11; J. Ex. 12). After the various attempts to discuss the requests, seek clarification and meet to review the files proved to be fruitless as a result of Bolte’s bad faith tactics, the information was provided on October 5. (J. Ex. 15). Notably, the cover letter enclosing the information included another invitation for Bolte to confer with Respondent to ensure that Bolte had received all the information that the Union needed. (J. Ex. 15).

In making his decision, ALJ Bogas contended that the requests were not complex and could have been produced within a matter of days. (ALJD 22: 9-20; ALJD 23: 38-46; ALJD 24: 26-29; ALJD 25: 4-6). ALJ Bogas, however, simply provided a string citation of cases where the Board found violations of undue delay and noted only the length of time found unlawful in each case. (ALJD 22: 21-24; ALJD 24: 1-5). Yet, ALJ Bogas failed to look at the specific facts and circumstances of any of these cases to determine why the Board had found an undue delay. In one of the cases cited, it was ALJ Bogas himself who found an undue delay, an issue not addressed by the Board but nevertheless, cited for the proposition that the Board had found a violation. Pan Am. Grain Co., 343 NLRB 318 (2004). In Pan Am. Grain, the Board only reviewed the ALJ's decision concerning the employer's unilateral implementation of layoffs. 343 NLRB 318, 218 n. 1 (2004). The Board noted that it was not making any determination based on any other findings made by ALJ Bogas. Id. Despite this, ALJ Bogas cites this case to support his conclusion that "[t]he Board has found considerably briefer delays to be unreasonable." (ALJD 22: 20-22).

By reviewing the other cases cited by ALJ Bogas, it is clear that undue delay is not a time based presumption. There is no bright line rule as to how long constitutes an undue delay 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 fn. 9 (1993). What is required is a reasonable good-faith effort to respond to the request as promptly as circumstances allow." Id. Rather, the facts and circumstances must be analyzed to determine whether the failure to provide the information at an earlier date impeded the Union's ability to represent its members or diminished the usefulness of the information, thus constituting an "undue" delay. Id.

The cases that ALJ Bogas cites show that the Board has found violations where the employer delays in providing information which inhibits the union's ability to use the information for bargaining. For example, in Woodland Clinic, the Board found undue delay where the union and the employer were in the process of bargaining for a successor contract and the employer waited seven weeks to provide the information. Woodland Clinic, 331 NLRB 735, 736-737 (2000). The information was provided one day before the employer declared impasse. Id. The Board held that "[t]his sequence of events severely diminished the usefulness to the Union." Thus, in Woodland Clinic, it was not the seven week delay that the Board found unlawful, but the fact that by the time the information was provided, it was no longer useful to the union for bargaining purposes because the employer declared impasse one day after providing the information. Id. Similarly, in Bundy Corp., the newly certified union requested information related to the employees' job classifications, pay rates and other benefits and explained to the employer that it needed the information before their first bargaining meeting. Bundy Corp., 292 NLRB 671, 672 (1989). The employer did not provide the information until after the parties commenced bargaining. Id. The Board held that "Respondent's delay in furnishing the Union with the requested information impeded the Union's preparations for the upcoming negotiations with the Respondent, . . . , and in general interfered with the Union's ability to represent the unit employees, in an informed and effective manner from the outset of bargaining." Id.

Unlike the cases cited by ALJ Bogas where, *inter alia*, the parties were commencing contract negotiations and expressed a need for the information prior to bargaining, here the information was not required for bargaining. Bolte specifically stated that he was not interested in bargaining the provisions of the expired contract related to the subject matter of Coe's,

Duncan's, Hudson's and Wagner's information requests.<sup>9</sup> Bolte's correspondence to Respondent shows that the Union had no interest in bargaining: "[t]he Union is not preparing to make a proposal amending the grievance procedure nor the Funeral leave." (J. Ex. 8). In fact, Bolte testified that the Union did not make any proposals concerning any of the issues related to the information requests. (Tr. 266: 10-18). Moreover, the Union has persistently refused to meet to bargain. After the July 29 information requests were made, the Union agreed to meet only once on December 22. (J. Ex. 16). The purpose of this meeting was to bargain over the health care benefits, an issue unrelated to the information requests concerning Coe, Duncan, Hudson and Wagner. (Tr. 378: 23-25; Tr. 379: 1-4; J. Ex. 16). Thus, the Union's ability to bargain during the negotiations was not impeded or hindered by not receiving the requested information at an earlier time.

Similarly, providing the information requested until October 5 also did not hinder or impede the Union's ability to process grievances. Bolte admitted that the Union did not file grievances on behalf of Coe and Duncan and Coffman testified that the Union did not appeal to Step 2 the grievances filed on behalf of Wagner and Hudson. (Tr. 159: 4-10; J. Ex. 14). Given that the Union was not adversely affected by receiving the information until October 5, no undue delay can be sustained.

ALJ Bogas also cited to cases where the Board found a violation because the employer ignored the information requests or failed to communicate with the union as to the reasons for the delay. For example, in Monmouth Care Ctr., 354 NLRB 1 (2009), 356 NLRB No. 29 (Board Op. II), *enfd.*, 672 F.3d 1085 (D.C. Cir. 2012), the Board found a six-week delay a violation where the employer did not acknowledge the information request and provided no explanation for the

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<sup>9</sup> ALJ Bogas' decision also did not find that the information requested was necessary for the negotiations for a successor contract. (ALJD 20-25).

delay. The Board also found a six-week delay a violation in Int'l Credit Serv., because the employer had bargained with the union for a new contract, agreed to the terms, refused to execute the contract and then wanted to renegotiate after the union's members had ratified the agreement, which resulted in the employees going on strike. The employer gave no reason for failing to provide the information earlier. Int'l Credit Serv., 240 NLRB 715, 718-719 (1979). In Quality Engineered Prod. Co., the Board found a violation where the parties were about to commence bargaining, the union informed the employer that it needed the requested information prior to commencing bargaining sessions, and the employer failed to provide the information prior to bargaining. Id. The employer gave no explanation for failing to provide the information prior to commencing the bargaining sessions. Quality Engineered Prod. Co., 267 NLRB 593, 597-598 (1983).

Contrary to the cases ALJ Bogas cited, here respondent did not ignore the information requests or fail to communicate with the Union concerning the information requests. Silgan Plastics corresponded with the Union concerning the information requests via letter on May 19, May 27, May 31, August 11, and September 30. (J. Ex. 5; J. Ex. 7; J. Ex. 9; J. Ex. 13; GC Ex. 13). In addition, Deeny also called Bolte and attempted to meet with him. Rubardt also attempted to contact Bolte, but Bolte refused to communicate. (Tr. 247: 14-25; Tr. 248: 1-5; Tr. 363: 22-23; Tr. 409: 12-15; GC Ex. 12).

Thus, in regards to Wagner, Silgan Plastics did not unduly delay because although the information was requested on May 17 and provided until October 5, the Union was not prohibited from performing its grievance processing functions. In fact, the Union filed and settled Wagner's grievance. (Tr. 158: 13-25). Moreover, Respondent did not ignore the information request but immediately contacted Bolte. However, Bolte chose to be unresponsive,

determined it was a “waste of [his] time” to deal with Respondent and preferred to let the NLRB handle it. (J. Ex. 8).

Similarly, in regards to Coe’s, Duncan’s and Hudson’s requests filed on July 29 and provided on October 5, there was no undue delay. The Union filed a grievance for Hudson and chose not to file grievances for Coe and Duncan. Receiving the information until October 5 did not inhibit the Union’s ability to file grievances. Moreover, like in Wagner’s case, Respondent tried to contact Bolte on numerous occasions but Bolte did not avail himself of the opportunity to meet with Respondent, review the files, or to clarify his requests to expedite Respondent’s search for the documents.

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

**1. Silgan Plastics’ Past Practice Falls Within Board Precedent.**

ALJ Bogas observed that Silgan Plastics’ past practice of offering annual open enrollment to all company employees, irrespective of whether they are union members, is not a past practice that could be maintained while the Parties negotiate a successor contract. (ALJD 31: 23-30). ALJ Bogas erroneously concluded that Silgan Plastics’ practice is insufficient because it was a practice established under the Parties’ management right’s clause and because Silgan Plastics’ established practice was not maintained during a hiatus period. ALJ Bogas’ recommended decision must be reversed as it is not supported by Board precedent. (ALJD: 30-35).

Silgan Plastics has an established practice under its CBA language. The CBA states:

These benefit plans and policies shall be subject to any changes or revisions that are made generally effective throughout Amoco Container Company<sup>10</sup> for other participating employees, including foremen and office employees at Seymour, during the term of this contract.

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<sup>10</sup> Amoco Container Co. was the prior employer. (GC Ex. 3).

(J. Ex. 1, at 22). Silgan Plastics contends quite simply that since at least 1989, it has offered all of its employees the same health and welfare benefit plan and used its open enrollment period to inform of the changes to the benefits and co-pays for the upcoming year to allow all employees to select their benefits. (ALJD 2: 28-32). Each year, the same benefits are offered to all employees, irrespective of their union membership status. As Rubardt testified, “I considered the status quo to be the condition that had been in place on February 28<sup>th</sup>, which was we were able to make annual changes that applied to every other facility in the company.” (Tr. 401: 5-8). It is this existing practice that privileged Silgan Plastics to continue its practice until the Union bargains for a successor contract. As was articulated in Beverly Health & Rehabilitation Services:

[I]f an employer has frequently engaged in a pattern of unilateral change under the management-rights clause during the terms of the CBA, then such a pattern of unilateral change become a ‘term and condition of employment,’ and that a similar unilateral change after the termination of the CBA is permissible to maintain the status quo. Thus, 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. [emphasis added].

Beverly Health and Rehab. Serv., Inc. v. NLRB, 297 F.3d 468, 481 (2002); see also, Capital Ford, 343 NLRB 1058, 1058 n. 3 (2004) (The Board held that a parties’ past practice continues even after the expiration of the contract because the practice is not dependent on the management rights clause. The Board determined that the employer was privileged to continue the past practice of offering productivity bonuses, because [t]he Respondent’s reliance on its predecessor’s past practice is not dependent on the continued existence of the predecessor’s collective bargaining agreement.” Rather, it was based on the practice.). Accordingly, it is Silgan Plastic’s longstanding practice of applying the health and welfare changes to all employees and offering annual open enrollment to employees for the new year, that privileges

Silgan Plastics to continue to provide these benefits until the Union and the Respondent bargain a new or different plan. Otherwise, these employees would be without benefits, which would definitely alter the status quo.

ALJ Bogas also erroneously concluded that Silgan Plastics cannot continue its past practice because no hiatus period has existed between the Parties. (ALJD 31: 43-45; 32: 1-23). According to the Supreme Court and this Board, the existence of a hiatus is not a precondition to establishing an existing past practice. In Katz, the Supreme Court held that merit increases and other changes which the employer implemented without bargaining with the union constituted a violation because the practice was not in line with “[its] long-standing practice” and the changes did not amount to a “mere continuation of the status quo.” NLRB v. Katz, 369 U.S. 736, 746 (1962). No analysis was made concerning whether a hiatus period privileged the implementation because the only determination needed was whether there was an established past practice. Id. ALJ Bogas completely failed to acknowledge the holding in Katz and apply it to Silgan Plastics to conclude that Silgan Plastic’s past practice constitutes the status quo that must be continued.

Moreover, in Capital Ford, the Board held that “the mere fact that the past practice was developed under a now-expired contract does not gainsay the existence of the past practice.” Capital Ford, 343 NLRB 1058, n.3 (2004). In Capital Ford, there was no hiatus period to refer to because the employer was a Burns successor, in the process of bargaining its first contract.<sup>11</sup> Id. Although there was no hiatus period, the employer was able to continue with the past practice of the predecessor employer because it was the status quo. Id. Thus, again, it is the past practice, alone, that determines whether an employer can continue its past practice during negotiations for a new contract.

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<sup>11</sup> NLRB v. Burns Security Services, 406 U.S. 272 (1972).

In Beverly Health & Rehabilitation Services, Inc., the Board completely rejected Bogas' analysis. Beverly Health & Rehab. Serv., Inc., 346 NLRB 1319 (2006). The Board specifically 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).

Additionally, the Board has held that annually occurring events constitute a past practice that privileges the employer to continue the past practice. In Nabors Alaska Drilling, Inc., 341 NLRB 610, 613 (2004), the Board affirmed the ALJ's dismissal of a charge where the employer, who was bargaining with the union for an initial collective bargaining agreement, unilaterally implemented annual open enrollment. The Board held:

It is not disputed that the health insurance review was an annually occurring event, and thus, bargaining over the changes in health insurance could not await an impasse in overall negotiations. Further, the Respondent was not declining to bargain over the health insurance changes, including the changes to copayment contributions. Rather, the Respondent expressed its willingness to discuss the subject, and stated, "if the Union had any questions or wished to bargain, the Union should promptly contact Respondent."

Nabors Alaska Drilling, Inc., 341 NLRB 610, 613 (2004). Thus, like in Nabors Alaska Drilling, Inc., Silgan Plastics had to follow through with its annual open enrollment because it could not wait until the Union agreed to meet to bargain. Otherwise, the employees would have been left with no health benefits for the 2012 year. But Respondent continued to invite the Union to bargain and agreed to meet on December 22, the only date proposed by Bolte.

In Saint-Gobain Abrasives, Inc., the facts were virtually identical to the instant case. Saint-Gobain Abrasives, Inc., 343 NLRB 542, 542 (2004). The Board found no violation where

the employer implemented changes to its employees' health care benefits because it was an annually occurring event. Id. The Board held that the:

record shows that the Respondent [employer] had an annual process of reviewing and adjusting its health insurance programs. Accordingly, the Respondent was not obligated to refrain from implementing its proposed changes until an impasse was reached in bargaining for a collective-bargaining agreement as a whole.

Saint-Gobain Abrasives, Inc., 343 NLRB 542, 542 (2004); see also, Stone Container Corp., 313 NLRB 336, 336 (1993) (The Board found no violation where the employer had a past practice of annually reviewing employees for wage increases, awarded wage increases at its own discretion, and decided not to grant wage increases while the union and the employer bargained over its initial collective bargaining agreement. The Board found that the employer had a past practice of determining at its own discretion whether to award or not award wage increases.).

ALJ Bogas has struggled with this concept over and over. See, e.g., Courier-Journal, 342 NLRB 1093, 1094 (2004) (The Board overturned ALJ Bogas recommended decision. The Board held that the employer did not violate the Act by unilaterally implementing open enrollment, because the established past practice privileged the employer to continue its practice.). Yet, ALJ Bogas disregards the above precedent and contends that the E.I. Du Pont opinions are controlling. 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). The U.S. Court of Appeals for the D.C. Circuit, however, refused to enforce the Board's decision. E.I. Du Pont De Nemours and Co., 682 F.3d 65 (D.C. Cir. 2012). Like Silgan Plastics' contention, the Court held that the Board's opinion in E.I. Du Pont is contrary to the Board's precedent: "the Board did not so much as cite *Capital Ford* or *Beverly Health & Rehabilitation Services, Inc.*, 346 N.L.R.B.

1319 (2006).” E.I. Du Pont De Nemours and Co., 682 F.3d 65, 69-70 (D.C. Cir. 2012). Silgan Plastics did not violate the Act by continuing the existing past practice. As the Court also found:

Under the Board’s precedent, therefore, [the employer’s] making annual changes to [the plan] became a term and condition of employment the Company could lawfully continue during the annual enrollment period, irrespective of whether negotiations for successor contracts were then on-going.

Id. at 68-69. No reason has been articulated to deviate from the Board’s precedent and thus, Judge Bogas’ Decision must be overturned.

**2. The Union’s Dilatory Tactics Also Allowed Respondent to Implement Changes to its Health Benefit Plan.**

ALJ Bogas erroneously ignored Bolte’s bad faith bargaining scheme and dilatory tactics used to avoid reaching an agreement, which privileged the Respondent to implement its health benefits plan. ALJ Bogas ignored Bolte’s refusal to meet with Respondent to engage in productive bargaining. Similarly, ALJ Bogas ignored Respondent’s efforts to meet with Bolte and bargain over the health care benefits. Instead, ALJ Bogas excused Bolte’s bad faith bargaining by finding that because both Rubardt and Bolte were new to the Seymour facility’ bargaining table:

It is understandable that Rubardt and Bolte would each have to spend some time feeling out the other side, and that negotiations might take somewhat longer and be more contentious than they had been in the past. Those difficulties, however, are not the equivalent of an overall impasse and should not be mistaken for one.

(ALJD 34: 32-37). This excuse for Bolte’s unlawful tactics is absurd.

The evidence unmistakably shows that Bolte had no intention to bargain over the health care benefits and reach a new agreement. The Parties commenced bargaining on February 14, 2011. (Tr. 350: 24-25; Tr. 351: 1-3). The Parties met three days the first week, adjourned for the week, and then met again from Monday through Thursday of the following week. (Tr. 354: 10-

15; Tr. 355: 1). Silgan Plastics gave the Union its last, best and final offer on April 21. (Tr. 355: 13-16). During the first or second week of May, the bargaining unit voted on the last, best and final offer and voted to decline it. (Tr. 360: 5-8). Bolte did not request to meet after the vote and the Parties did not meet again until July 26. (Tr. 360: 9-11). The Union's position did not change in its July 26 proposal in which it kept to its same proposal it had made in April. (GC Ex. 10). Rubardt testified as the July 26 meeting was "breaking," mediator Bowling stated to the Parties "[i]t seems to me you guys are at impasse." (Tr. 365: 10-11). After the July 26 meeting, no further bargaining meetings were held until Bolte sent a letter dated November 9 requesting to meet and bargain over the health benefits because of the open enrollment. (J. Ex. 16).

Although Rubardt contacted Bolte offering to meet in November or early December, Bolte did not commit to any of these dates, instead agreeing defiantly not to meet until December 22. (Tr. 250: 16-25; Tr. 251: 1-18; Tr. 378: 23-25; Tr. 379: 1-4). Bolte knew that open enrollment would take effect on January 1, 2012, as it had in all prior years, and that the holidays would interfere with any additional meetings from December 22 through January 1. Yet, Bolte failed to make himself available at an earlier date, showing his lack of intent to bargain over this issue. Like in Jefferson Smurfit Corp., where the Board found that the employer was privileged to implement its final offer because of the union's delayed meetings, failure to address key employer proposals and last-minute requests for information were made to stall bargaining, Silgan Plastics was privileged to implement open enrollment. Jefferson Smurfit Corp., 311 NLRB 41, 41 (1993). Bolte delayed meeting until December 22 and refused to let the Union's committee meet with the Respondent. Bolte ended the meeting only after a few minutes of meeting with Rubardt. (ALJD: 17: 18-25; Tr. 253: 11-25). No effort was made on his part to bargain with the Respondent. After December 22, the Union made no requests to meet, to

discuss the health benefits, made no proposals for a different plan, and made no additional requests for information. However, on January 18, 2012, eighteen days after the employees' elections for open enrollment went into effect, the Union filed another charge consistent with his scheme to let the NLRB handle it. (Ex. 1(v)). From December 22 to the date of the trial, the parties did not meet again to bargain or discuss health benefits or to continue to negotiate a new contract.

Also demonstrating the Union's bad faith and dilatory tactics is Bolte's request for a copy of the PowerPoint that had been presented to the employees concerning the upcoming open enrollment for health benefits. Bolte contended that he could not bargain without it. (Tr. 379: 5-14; Tr. 252: 12-17; GC Ex. 17; GC Ex. 20). Yet, Bolte admitted that the plan documents, which he already had in his possession, contained all the information he needed for bargaining purposes. (Tr. 290: 18-20; Tr. 295: 23-25; Tr. 296: 1-2; Tr. 297: 1-23). In Serramonte Oldsmobile Inc., the Board held that the Union had frustrated negotiations between the parties by the union's business agent's assertion that it "could not prepare any contract proposals inasmuch as he had no knowledge of what was transpiring in the negotiations." Serramonte Oldsmobile, 318 NLRB 80, 100 (1995), *enfd. in part*, 86 F.3d 277 (D.C. Cir. 1996). The Board found that this request for information along with other tactics of "avoidance and delay" including making untimely requests to bargain, and failure to prepare CBA proposals, showed the Union's bad faith bargaining. Id. Despite these obvious delaying tactics, Rubardt immediately provided Bolte with two copies of the PowerPoint: an electronic and hard copy. (ALJD: 17: 13-17). In spite of the urgency of meeting to discuss the health care benefits and the fast response to Bolte's allegedly needed information, no negotiations took place. Bolte did not let his committee meet with the Respondent's committee. Instead, Bolte met with the Silgan Plastics' representatives for

“minutes” and canceled the negotiations contending that Rubardt attempted to talk about the NLRB charges related to this case. (ALJD: 17: 18-25; Tr. 253: 11-25).

Contrary to ALJ Bogas’ unsupported conclusions, Respondent was privileged to move forward with implementing its health benefits plan. Jefferson Smurfit Corp., 311 NLRB 41, 41(1993) (The Board held that the employer was privileged to implement its final offer because the union engaged in bad faith bargaining by delaying meetings, failing to address key employer proposals and making last-minute requests for information.); Serramonte Oldsmobile, 318 NLRB 80, 91 (1995), enfd. in part, 86 F.3d 277 (D.C. Cir. 1996) (The Board held that the union’s dilatory tactics were unlawful efforts to delay bargaining); AAA Motor Lines, Inc., 215 NLRB 793, 794 (1974) (The Board held that the employer was privileged to implement benefit changes because the union had refused to meet and failure to implement these changes would have result in the automatic termination of the benefits for all its employees. The Board found that “[h]aving refused to meet and bargain with the Respondent right up to the date the contract terminated, the Union placed the Respondent in the position of having to take immediate action to avoid losses of certain benefits to its employees”). Despite these straight forward facts, ALJ Bogas’ has given his seal of approval to Bolte’s obvious bad faith and dilatory and unlawful tactics. Bolte does not come to the Board with clean hands and it was error for ALJ Bogas to ignore these tactics, especially in disregard of controlling authority.

**3. Public Policy Compels Finding that the Parties’ Past Practice Required Silgan Plastics to Implement its Health Benefits Plan.**

Judge Bogas concluded that “unions would be discouraged from ever granting special discretion to employers during a contract’s term, if doing so meant that employers who exercised that contractual discretion would thereby acquire the discretion in perpetuity – even if the

contractual grant of discretion expired and the parties did not agree to renew it in subsequent contracts.” (ALJD 32: 20-25; ALJD 33: 1-2). ALJ Bogas’ alleged concern fails to acknowledge that at the expiration of the contract, the parties must engage in bargaining. Any “special discretion” can be rescinded or changed by modifying the language in the new contract.

Unlike the Union who can choose to bargain new terms when the prior contract expires, Judge Bogas’ decision puts the Respondent at the mercy of the Union. The Union has no incentive to bargain and finalize a new contract when halting negotiations results in providing the Union’s members with benefits that no longer exist at the detriment of the Employer who has to bear the additional costs.

Unlike ALJ Bogas’ naive and unsupported concerns, Respondent’s public policy concerns are real and illustrated in the instant case. The Parties in the instant case commenced negotiation in February 2011 and almost two years later, the Parties continue to operate without a new contract. (Tr. 350: 24-25; Tr. 351: 1). Moreover, there is no incentive for the Union to finalize an agreement given that to remain with an expired contract, entails a reversion to lower costs and cheaper health benefit plans which no longer exists. (Tr. 407: 1-7). The GC and the Union’s counsel admitted that this is precisely what they are seeking. Richard J. Swanson, the Union’s counsel, asked Rubardt as follows: “what the Union wants was for the benefits to stay exactly the same, not to retain the dynamic status quo . . . .” (Tr. 405: 9-17). Mr. Swanson continued to question Rubardt concerning the Union’s interest:

Apart from the possibility of leaving the bargaining unit employees at Seymour in their own healthcare plan, you could have, if you wanted, chosen to have them stay part of a bigger, larger company plan, and subsidized the premiums, the premium increases of the bargaining unit employees at Seymour, couldn’t you?

(Tr. 407: 1-7). The GC also made the same clear: “The terms and conditions of those employees was their healthcare benefit premiums at the level they were in 2011, and they would need to stay that again in 2012.” (Tr. 377: 6-9). Rubardt testified that to carve out the Seymour employees and place them in their own plan would have substantially increased costs for Silgan Plastics and provided examples as to why the plan would increase:

Well, the general medical trend, the size of population of lives that is included in that to spread the risk. The smaller the group, the more the possibility will be that there will be a catastrophic or a large claim that will essentially have to be spread over a fewer number of individuals and lives. Plan design that would - - the deductibles, the higher they are, the more the cost is mitigated for the company, the lower more it grows, etc.

(Tr. 411: 23-25; Tr. 412: 1-5).

This request to cater to the Union fails to consider that the status quo, even when dynamic or discretionary, must be maintained during bargaining. “The Board has consistently applied *Katz* to prohibit an employer from unilaterally changing an existing term and condition of employment during bargaining, regardless of whether the change involved a continuance or discontinuance of the existing term.” Daily News of Los Angeles, 315 NLRB 1236, 1237 (1994) (citing to NLRB v. Katz, 369 U.S. 736 (1962)). Daily News had an established past practice of granting merit based raises which were awarded in discretionary amounts. Id. After the Union was certified, the employer continued the program for the non-unionized employees but not for the unionized employees. Id. The Board found this change constituted a violation as the status quo was not maintained. Id.

Silgan Plastics has a past practice of holding open enrollment for its bargaining and non-bargaining employees at all its facilities. During open enrollment, changes to the costs and levels of coverage are announced to the employees. (Tr. 373: 11-15). Rather than continue this

practice, ALJ Bogas' Decision compels Silgan Plastics to ignore its practice, to carve out a plan for the Union's members and provide it with benefits it had in 2011, even though these were not the benefits these employees had the prior year and the benefits that all other employees at all of Silgan Plastics currently have. (ALJD 17: 40-47). But there is also no legal basis for "freezing" these benefits and, in fact, his request would violate Supreme Court and Board law. As the D.C. Circuit stated, "[t]he purpose of prohibiting unilateral changes is not advanced by freezing in place the terms of employment when doing so disrupts the established practice for making changes." E.I. Du Pont De Nemours and Co., 682 F.3d 65 (D.C. Cir. 2012). Moreover, to do as ALJ Bogas Decision states would merit a violation under Katz and Daily News of Los Angeles.

Instead of following Board precedent, ALJ Bogas is unlawfully dictating what Respondent will have to offer employees while the Union fails to bargain. The Supreme Court has held that the Board has no authority to dictate the terms of a collective bargaining agreement. NLRB v. Am. Nat'l Ins. Co., 343 U.S. 395, 404 (1952). In Am. Nat'l Ins. Co., the Supreme Court rejected the Board's holding that an employer could not bargain for a management functions clause. Id. at 409. In doing so, the Supreme Court held that Section 8(d) of the Act makes clear that "the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreement." Id. at 404; see also, NLRB v. Katz, 369 U.S. 736, 747 (1962) (The U.S. Supreme Court held that the Board cannot pass judgment on the legitimacy of any proposal. Rather, the Board's only authority is to "order the cessation of behavior which is, in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion, or which reflects a cast of mind against reaching agreement.").

Similarly, in J.I. Case Co. v. NLRB, the Supreme Court held that collective bargaining is a process between the employer and the union which results in an agreement between the two parties. J.I. Case Co. v. NLRB, 321 U.S. 332, 334-335 (1944). The Supreme Court specifically discussed that no third party, including the government, can dictate the terms of the collectively bargained agreement; see also, NLRA, 29 U.S.C. §158(d) (“For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . .”). Given the established Supreme Court law and the statutory language of the Act, ALJ Bogas has no authority to tell the Parties that they must deviate from the status quo and freeze health care benefits.

**C. Silgan Plastics Was Privileged to Implement the Annual Open Enrollment Changes Because the Parties Reached Impasse.**

ALJ Bogas failed to find an impasse because he erred by disregarding and discrediting the Respondent’s evidence, by engaging in an attack of Respondent’s counsel and by failing to follow Board law.

**1. ALJ Bogas’ Decision to Disregard and Discredit Silgan Plastics’ Evidence was Erroneous, Inappropriate, and Unfounded.**

ALJ Bogas improperly and with no legal or factual basis disregarded Respondent’s evidence concerning the Parties’ impasse. Rather than analyzing the evidence, ALJ Bogas engaged in an attack against Respondent’s counsel claiming that Respondent’s counsel “muddied matters” and stating: “I note at the outset that the notion that the parties were at impasse when the Respondent made the changes in health benefits gives every indication of being an after-the-

fact invention of trial counsel for the Company.” (ALJD 33: 17-20; ALJD 26: 32-34).<sup>12</sup> With this misguided and biased view, ALJ Bogas proceeded to ignore and discredit Respondent’s evidence in contradiction of Board law and established rules of evidence.

ALJ Bogas gave no credence to Rubardt’s testimony concerning the mediator’s observation that the Parties had reached impasse. Specifically, Rubardt testified that as the July 26 meeting was “breaking,” mediator Bowling stated to the Parties “[i]t seems to me you guys are at impasse.” (Tr. 365: 10-11). ALJ Bogas ruled that this statement is “hearsay testimony” and cited to Granite Constr. Co. for the proposition that “testimony regarding what a Federal mediator told the employer’s representatives in the course of bargaining is subject to hearsay objection if offered for the truth of the matter stated.” Granite Constr. Co., 330 NLRB 205, 210-211, n. 1 (1999). Remarkably, ALJ Bogas failed to note that Granite Constr. Co. makes explicitly clear that there are exceptions that allow a mediator’s statements to serve as evidence, including the present sense impression or excited utterance exceptions. Id. (The Board found that the evidence was hearsay and that no exception applied because the mediator made statements to the employer’s agent about events that transpired days earlier.). This is also explained in the NLRB Division of Judges Bench Book, which cites to the same. NLRB Division of Judges Bench Book § 13-264 (August, 2010) (“Note also that testimony regarding what a Federal mediator told the respondent’s agents “in the course of bargaining” is subject to a hearsay objection if offered for the truth, but not if offered for the fact of what was said.”); see also, Id. at §13-204 (“Hearsay is also admissible under familiar exceptions set forth in FRE 803 and 804.”). In fact, ALJ Bogas recognized the “present memory recorded” exception under

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<sup>12</sup> Contrary to ALJ Bogas’ contention, Respondent raised as a defense that Respondent was “privileged to implement any alleged changes to the health plan,” which encompasses Respondent’s impasse argument. (ALJD 33: 44-50; Ex. 1 (qq)).

grounds that apply here, where a statement was made “close in time to the events.” (Tr. 384: 15-22).

In the instant case, the mediator made the statement as the Parties were “breaking” from their fruitless negotiation meeting. Notably, no objection was raised by the General Counsel or the Union’s counsel to the introduction of the mediator’s statement. Rather, Counsel for the Union, Swanson, raised an anticipatory objection, which was overruled. (Tr. 380: 10-15). This objection, however, was raised after the testimony concerning the mediator’s statement had already been made.

ALJ Bogas’ baseless excuses for refusing to accept Respondent’s evidence did not stop there. ALJ Bogas also noted as part of his decision to discredit Respondent’s evidence that “it is not clear whether Rubardt is claiming that the Union negotiator subsequently had an opportunity to hear, and respond to, this [impasse] statement,” and that Rubardt did not declare impasse. (ALJD 17: 37-39; ALJD 18:1-5; ALJD 33: 15-40). Whether Bolte or any other Union representative heard the statement is irrelevant. The Union’s acknowledgement that an impasse exists is not dispositive on determining whether an impasse was reached. Impasse is reached when “good-faith” negotiations have not led to an agreement and the prospects of such agreement have been exhausted. NLRB v. Cambria Clay Prod. Co., 215 F.2d 48, 55-56 (6th Cir. 1954) (The Court refused to enforce the Board’s order that the employer violated the Act by failing to bargain with the Union. Contrary to the Board, the Court found that an impasse had been reached because a FMCS mediator had been hired by the parties, and despite good faith bargaining and willingness to continue bargaining, there was no change in the parties’ position.).

In Taft Broadcasting Co., the Board outlined some of the non-exhaustive factors to consider in determining whether an impasse exists. Taft Broadcasting Co., 163 NLRB 475, 478

(1967). Among these factors are the “bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations . . .”. Id. Notably, the admission of the parties as to whether they have reached impasse is not one of the enumerated factors. Thus, it is the specific circumstances that are dispositive in determining the existence of an impasse.

## **2. The Evidence Shows that an Impasse was Reached.**

ALJ Bogas’ findings that there was no impasse are contrary to the record evidence. ALJ Bogas disregarded three undisputed, independent bases compelling a conclusion that impasse was reached: 1) the Union’s proposal concerning health benefits did not change from its April proposal; 2) even though the Union and the Employer continued to meet, the Union made no changes to its bargaining proposals concerning health benefits; and 3) no bargaining sessions were scheduled after December 22. (Tr. 129: 17-21; Tr. 365: 2-7; GC Ex. 10).

The Parties met for two consecutive weeks. Despite Silgan Plastic’s good faith bargaining, and the assistance of mediator Bowling, an agreement could not be reached regarding several mandatory terms, including health benefits. The Union’s 12th Counter of April 20<sup>th</sup>, contained health insurance proposal No. 21, which provided:

During the course of this Agreement, the Company agrees that it will not change the benefit levels of the present insurance, including but not limited to: the health coverage, RX, dental, vision, and all other benefits. Also, the Company agrees that the present employee weekly premium deduction will not increase by more than three (3) percent (3%) in the second (2<sup>nd</sup>) year, and no more than three percent (3%) in the third year of the Agreement.

(R Ex. 54). The Employer made its last, best and final offer on April 21, which included the status quo on health benefits and, which was the exact language in the expired CBA. (Tr. 355:

13-16).<sup>13</sup> During the first or second week of May, the bargaining unit voted on the last, best and final offer and voted to decline it. (Tr. 360: 5-8). Bolte did not request to meet after the vote until July 26. (Tr. 360: 9-11). The Union's position did not change in its July 26 proposal in which it stated that it would "Hold" to its April 20<sup>th</sup> proposal. (GC Ex. 10). Thus, although the committees met on July 26, the Union did not make any proposals and the last, best and final offer did not change. (GC Ex. 10). It was during this meeting that mediator Bowling stated that "[i]t seems to me you guys are at impasse." (Tr. 365: 4-11). After the July 26 meeting, Bolte made no requests to meet until November 9. On this date, Bolte sent a letter requesting to bargain over the health care changes that were going to take effect on January 1, 2012, but did not agree to meet until December 22. (J. Ex. 16). The Parties met on December 22 and even though no one stated that the Parties were at impasse including, Bolte, Rubardt, or the mediator, the Union made no proposals, which continued the impasse.

Given these facts, Silgan Plastics was privileged to move forward with implementing the annual open enrollment changes. NLRB v. Cambria Clay Prod. Co., 215 F.2d 48, 55-56 (6th Cir. 1954) (holding that the parties had reached impasse because a FMCS mediator was hired and could not bring the parties together, and despite good faith bargaining and willingness to continue bargaining, there was no change in the parties' position). Like Cambria Clay Prod. Co., the parties had hired a mediator, but the mediator was unable to move the parties' from their April positions. While the Union did not express an unwillingness to bargain, there was a clear deadlock, which was recognized by the mediator. The Union's position in regards to health and welfare benefits had not changed since its April 20<sup>th</sup> proposal. (GC Ex. 10).

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<sup>13</sup> Notably, even though the last, best and final offer was made on April 21, Rubardt testified that the Employer's position concerning the health benefits plan did not change in the last four or five counters. (Tr. 359: 18-22).

Despite these undisputed facts, ALJ Bogas found that impasse could not have been reached because the Parties met again on December 22. (ALJD 34: 5-11). ALJ Bogas' analysis errs because: 1) the parties had an obligation to meet to bargain even though they had reached impasse; 2) Bolte and the Union did not make any additional proposals; and 3) impasse over the health care benefits put a halt to all negotiations privileging Respondent to implement its benefits plans.

Contrary to ALJ Bogas' contention, the December 22 meeting did not break the existing impasse because when an impasse is reached, the duty to bargain is not terminated. ACF Indus., LLC, 347 NLRB 1040 (2006); see also, Boeing Airplane Co., 80 NLRB 447, rev'd on other grounds, 174 F. 2d 988 (D.C. Cir. 1949). The Parties had a duty to continue to bargain with each other even though the impasse had already privileged the Respondent to implement its health benefits plan. Comau, Inc. v. NLRB, 671 F.3d 1232, 1239-40 (D.C. Cir. 2012) (The Court distinguished between date of implementation and date in which the changes become effective and held that the date of implementation is the date which is dispositive when analyzing whether an impasse privileged the employer to make changes.). In November, the Employer announced to its employees the upcoming open season. (Tr. 373: 11-15). The date of the announcement was the date of implementation, when the Employer had to move forward and implement the employees' benefits for the upcoming year because the Union did not make any changes to its proposal since April. Id. The Union did not make any proposal changes, even after the implementation date. When the Parties met in December 22, the Union made no proposals. (Tr. 252: 19-22; Tr. 380: 16-18).

Despite requesting to meet on December 22, the Union failed to make any additional proposals. H&H Pretzel Co., 831 F.2d 650, 656-657 (6th Cir. 1987) (The Court affirmed the

Board's holding that impasse was not broken by the union's request to bargain after impasse was reached because the union made no new proposals. The employer wanted to cut labor costs and the union refused to grant any economic concessions. The Court held that "while the union sought to continue talks, it did not offer a new proposal or indicate a willingness to compromise further on any specific issues."). ALJ Bogas suggests that the Union made "supposals" which defeated the impasse, but the supposals were merely "what ifs," which were not formal proposals but were "just feeling the other party out." (ALJD 34: 7-15; Tr. 252: 19-22; Tr. 380: 16-18).

Moreover, the supposals had nothing to do with the health care benefits,<sup>14</sup> which was the important issue that led the breakdown of any further negotiations between the Parties. (R Ex. 47). Laurel Bay Health & Rehab. Ctr., 353 NLRB 232, 232-233 (2008) (The Board held that impasse on a single issue can result in an overall impasse if that issue is of such importance that the issue causes a breakdown in the negotiations. In Laurel Bay, the Board held that the parties did not reach overall impasse as to the health insurance benefits because the union offered to meet again for bargaining and offered to make counter proposals and the employer failed to "test" the union's intent.); Richmond Elec. Serv., Inc., 348 NLRB 1001 (2006) (The Board reversed the ALJ's finding that the employer had unlawfully implemented its final contract proposal. The Board found that the parties had reached a deadlock on wages, which had resulted in overall impasse.). Given that an overall impasse was reached, Respondent had a right to implement the health care benefits. Unlike in Laurel Bay Health & Rehab Ctr., Respondent tested the union's alleged intent to meet to bargain on December 22. But the Union failed to make any proposals, thus showing that a complete impasse as to the health care benefits.

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<sup>14</sup> The supposals related to seven distinct issues: 1) double time pay; 2) vacation shutdown language; 3) changes to the terms of the disability offer; 4) amount of signing bonus upon ratification; 5) reinstatement of Duncan; 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).

Additionally, Judge Bogas' contention that the benefits were not "reasonably comprehended" by the Respondent's offer and therefore Respondent could not move forward and implement the health care benefits is without merit. (ALJD 34: 38-50). The last, best and final offer kept the language for the health benefits article the same as in the expired CBA. (Tr. 355: 17-25; Tr. 356: 1-4). Thus, by implementing the last, best, and final offer, as it related to the benefits plans, the bargaining unit received the same benefit plans as those of all other employees employed by Silgan Plastics at all Silgan facilities. (Tr. 75: 16-20). Coffman, who was a member of the negotiations committee, confirmed that nothing about the 2011 open enrollment process surprised him as that was the same process that had been followed in prior years. (Tr. 141: 13-16; Tr. 142: 4-15; Tr. 180: 24-25; Tr. 181: 1-5).

**D. ALJ Bogas Erroneously Concluded that the Implementation of the Safety Vest Requirement Constituted an Unlawful Unilateral Change.**

ALJ Bogas erroneously found that absent bargaining, the Employer was not privileged to implement the reflective vest requirement. (ALJD 30: 33-25). ALJ Bogas' decision completely disregarded the Silgan Plastics' long-existing Plant Safety, Security and Administrative Regulations Policy ("Policy"). (R Ex. 43). The Policy was last revised in April 2000. (R Ex. 43). Since then, Respondent has enforced this Policy as was documented during the trial as it relates to Coe's suspension for sleeping on the job, which is a violation under the Policy. (R Ex. 43; J. Ex. 15, at 150). Bolte also acknowledged that he was aware of the Policy and had made multiple proposals to the Policy during the negotiations. (Tr. 333: 7-22). Thus, the Respondent's Policy compels finding that the Silgan Plastics was privileged to make this change. Moreover, and contrary to ALJ Bogas' contention, the implementation of the vest requirement

did not constitute a material, substantial or significant change. (ALJD 30: 8-10; ALJD 30: 20-31).

**1. Silgan Plastics' Policy Permits it to Require the Use of Special Safety Equipment.**

ALJ Bogas' decision completely disregards the Employer's long-existing Policy. The relevant part of the Policy states 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." [emphasis provided] (R Ex. 43). Like face shields, ear protection, and gloves, reflective vests constitute safety equipment under this Policy. Contrary to this straight forward reading of the Policy, ALJ Bogas erroneously found that Respondent could not require the use of reflective vests because the Policy had been in place since April 2000, the reflective vests were not required until March 2012 and there was no evidence of past safety equipment being bargained for. (ALJD 19: 14-18; ALJD 30: 14-16). This reading of the Policy is counterintuitive as there would be no need to provide a non-exclusive list, if the list could not be changed or updated. If ALJ Bogas' interpretation is accepted, then the use of "such as" and "etc." would be superfluous and would have to be ignored. Additionally, nowhere in the Policy does it state that the non-exclusive list must be finalized by a certain date.

Moreover, ALJ Bogas' restrictive reading of the Policy also fails to abide by well accepted rules of interpretation. ALJ Bogas found that "[t]hose regulations [Policy] identify types of safety equipment that are "required" – including, inter alia, safety glasses, hearing protection, and guard mechanisms – but reflective vests are not among those types." This is a non-exclusive list used as an example of what constitutes special safety equipment, with the

word “such as” and “etc.” making explicitly clear that other safety equipment of similar kind may be required. Local Union No. 710, 333 NLRB 1303, 1306 (2001) (citing to Don Lee Distributor, 322 NLRB 470, 485 (1996)):

Ejusdem generis is an established rule of interpretation stating that “general words following a detailed enumeration will be confined to things of the same kind . . . as the particular matters mentioned,” 18 Willston, contracts Sec. 1968 (3d ed. 1978); Black’s Law Dictionary at page 517 (6<sup>th</sup> ed. 1990); and specific words following general ones restrict application of the general term to things that are similar to those enumerated. 2A Sutherland, Statutory Construction Sec. 47.17 (1992 rev.).

ALJ Bogas’ finding completely disregards established Board law. In Alan Ritchey, Inc., the Board held that the change in an employee’s work duties was not a violation where the written job description provided an enumerated list of essential duties and responsibilities, but the list was not all-inclusive. Alan Ritchey, Inc., 354 NLRB No. 79 at slip op. 2 (Sept. 26, 2009). Like Alan Ritchey, the list in the Policy was not all-inclusive, allowing Silgan Plastics to make changes to the safety equipment.

Reflective vests are safety equipment of the same kind as the safety equipment listed. Local Union No. 710, 333 NLRB 1303, 1306 (2001) (The Board held that “specific words following general ones [in a list] restrict application of the general term to things that are similar to those enumerated.”). ALJ Bogas found that reflective vests are not “among those types” but his unsupported and unexplained statement does not follow from the non-exclusive list of safety equipment enumerated in the Policy. (ALJD: 30 13-16). Each of the listed safety equipment corresponds to equipment that must be worn and placed in different parts of the body, are made of different materials, and are not necessarily worn at the same time. Contrary to ALJ Bogas’ findings, safety vests, just like face shields, ear protection, and gloves, are equipment that Coffman testified must be placed on the employees’ bodies and are as easy to put on and remove

when needed. (Tr. 86: 7-11). The burden of putting on reflective vests is comparable to putting on a face shield, ear protections or gloves. Coffman testified that it only takes “a second” to put on. (Tr. 86: 7-11). Moreover, although ALJ Bogas noted that all employees were given reflective vests, these vests do not need to be worn at all times and by all the employees. (ALJD: 19: 3-5). Like the enumerated safety equipment, vests must be worn only under limited circumstances including when operating forklifts or when in the area of the forklifts. (Tr. 86: 1-3).<sup>15</sup>

**2. The Reflective Vest Requirement was Not a Material, Substantial or Significant Change to Silgan Plastics’ Policy.**

ALJ Bogas mistakenly found that the reflective vest requirement constituted a “material, substantial and significant change.” (ALJD 29: 31- 35). To support this finding ALJ Bogas found that “the new reflective vest requirement could, under the Respondent’s regulation [referring to the Policy], result in discipline.” (ALJD 29: 31- 35). However, ALJ Bogas contradicted his own finding by also finding that the reflective vests requirement is not encompassed in the Policy because the reflective vests are not listed under the Policy:

The Respondent’s administrative regulations state generally that employees must use “special safety equipment” “when operating machinery or equipment or performing any duty that requires the use” of that equipment. Those regulations identify types of safety equipment that are “required” – including, inter alia, safety glasses, hearing protection, and guard mechanisms – but reflective vests are not among those types.

(ALJD 30: 10-15). Despite ALJ Bogas’ contradictory findings, the use of reflective vests falls within the Policy and does not constitute a material, substantial or significant change.

While a failure to wear the reflective vest may result in discipline, the Policy, as ALJ Bogas found, did not change. (ALJD 30: 14-20). The Policy allows the Employer to discipline

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<sup>15</sup> OSHA recommended the use of reflective vests because of a fatality at another Silgan facility. Moreover, the floors of the facility are already marked for safety purposes with forklifts. (Tr. 430: 24-25; Tr. 431: 1-2).

employees for failure to wear any safety equipment. Rust Craft Broad. of NY, Inc., 225 NLRB 327, 327 (1976) (The Board found no violation where the employer installed a time clock to replace the manual time entry because the policy of documenting employees' time "itself remained intact"). The Policy, which has remained intact since 2000, states that "violations of any safety rule/policy regulations may result in discipline, up to and including discharge." [uncapitalized]. (R Ex 43,t 1).

ALJ Bogas, however, seems to suggest that because an additional safety device has been added to the Policy, this implementation disadvantages employees who must now worry about using additional safety equipment or risk discipline. (ALJD 29: 30-33). This observation is without merit. The Policy is already in existence, is non-exclusive, and a disadvantage, alone, does not merit finding a material change. In Berkshire Nursing Home, the Board held that the mere fact that an employee is "disadvantaged" by a change is not sufficient to satisfy the test. Berkshire Nursing Home, 345 NLRB 220, 221 (2005). The change is measured by the extent to which it departs from the existing terms and conditions affecting employment. Id. The addition of reflective vests to the already existing list of safety equipment that employees need to use under certain conditions did not substantially depart from the existing terms and conditions. The vests, like the other equipment, are easy to put on and remove and must be worn only under limited circumstances. Moreover, discipline may result from failing to wear any type of safety equipment. Thus, the addition of reflective vests did not substantially change the terms and conditions of the employees' employment.

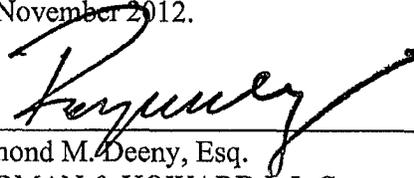
The addition of safety reflective vests to the safety equipment that employees must wear also does not constitute a significant or substantial change. UNC Nuclear Indus., 268 NLRB 841, 847 (1984) (The Board held that "there arises no obligation to bargain concerning changes

which depart in an insignificant manner from established practice while leaving the practice intact”); see also, Crittenton Hospital, 342 NLRB 686, 686 (2004) (The Board overturned the ALJ’s decision and held that a change to the dress code prohibiting employees from wearing acrylic nails was not a material change because the change was not a “significant” change to the prior dress code under which employees could not maintain long nails); Outboard Marine Corp., 307 NLRB 1333, 1338-1339 (1992), enfd. mem 9 F.3d 133 (7th Cir. 1993) (The Board found no substantial and material change where the employer implemented a “labor pool,” allowing the employer to transfer employees to numerous positions. The Board found that prior to the labor pool, the employer had an existing practice of making transfers but not to the same degree.). The implementation of the use of reflective vests is not a significant change from the already required face shields, ear protection, and gloves. This safety equipment must be placed on the employees’ bodies, are easy to wear and remove, are not worn at all times and by all employees. (Tr. 86: 7-11).

#### IV. CONCLUSION

For the reasons set forth above, 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 his Decision be reversed.

Respectfully submitted this day 8<sup>th</sup> day of November 2012.



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**CERTIFICATE OF MAILING**

I hereby certify that on November 8, 2012, a true and correct copy of the foregoing Brief of Respondent was sent in the manner indicated, postage prepaid, addressed to the following:

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