

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

SILGAN PLASTICS CORPORATION,
Respondent/Employer,
and

Case 25-CA-031870
Case 25-CA-063058
Case 25-CA-065281
Case 25-CA-068529
Case 25-CA-072644
Case 25-CA-074946

UNITED STEELWORKERS, AFL-CIO-CLC,
LOCAL UNION 822, a/w UNITED STEELWORKERS,
AFL-CIO-CLC,

Petitioner/Charging Party.

**PETITIONER/CHARGING PARTY'S ANSWERING BRIEF
TO RESPONDENT/CHARGED PARTY
SILGAN PLASTICS CORPORATION'S EXCEPTIONS**

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I. INTRODUCTION

Petitioner/Charging Party, Local 822 ("Local Union") of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial, and Service Workers International Union, AFL-CIO-CLC ("USW") (collectively, "Union"), submits its Answering Brief to Respondent/Charged Party Silgan Plastic Corporation's ("Silgan" or "Company") Exceptions to Administrative Law Judge ("ALJ") Paul Bogas' Decision.

II. ARGUMENT

A. The ALJ Did Not Err in Concluding Silgan Violated the Act by Not Timely Providing the Union the Information it Requested on May 29, 2011

The ALJ concluded that the Company violated Section 8(a)(1) and (5) of the Act by refusing to provide the Union information it requested on May 29, 2011 regarding bargaining unit employee Eric Wagner until October 5, 2011. The ALJ concluded that the Union was entitled to the information it requested and that the Company failed to provide this information in

a timely fashion. (ALJ's Decision, p. 20, lines 28-31). In its Exceptions brief, the Company argues that its delay in providing the requested information was excused by the Union's bad faith in requesting this information. (Co.'s Exceptions Brief, p. 6-9). It also claims that the Union did not need the requested information and that it timely responded to these requests. (*Id.* at p. 11-20). Each of the Company's claims is unfounded and without merit.

1. The May 29, 2011 Eric Wagner Information Request

The Company denied Wagner funeral leave in May 2011 after his brother died. (Tr. 42-43, 124). There was no plan for a funeral for Wagner's brother because his body was being donated to science. (*Id.*). The Company never faced a situation like this before. (Tr. 44-45, G.C. 31). It took the position that he had to attend a funeral service and bring in documentation of the service to receive funeral leave under the expired 2004-2011 collective bargaining agreement ("2004-2011 CBA" or "CBA"). (Tr. 44). The Union filed a grievance after Wagner was denied funeral leave. (G.C. Ex. 8).

The Company attempted to settle the grievance through Local Union Officer Will Coffman; however, Coffman later advised the Company that he was not authorized to settle this matter. (Tr. 126-127). After the CBA expired on February 28, 2011, USW Representative Chris Bolte had advised the Company in March 5, 2011 correspondence that: "[a]ny future proposed changes by the Employer should be submitted to me for processing." (Jt. Ex. 2).

On May 17, 2011, Bolte sent the Company an information request in which he requested information relating to the Wagner grievance and the Company's application of its funeral policy with respect to Wagner. (Tr. 47-48, 228-229; Jt. Ex. 4). Bolte requested information regarding the Company's provision of funeral pay and benefits as it related to Wagner. (Jt. Ex. 4). He asked for information that would show when the Company had previously paid these funeral

benefits in the past, as well as, the circumstances under which the benefits had been paid. (*Id.*). The requested information also would show whether any employees similarly situated to Wagner had previously received funeral benefits. (*Id.*). Bolte requested to bargain over the matter. (*Id.*).

In May 19, 2011 correspondence, the Company's Human Resources Manager Deanna Lawyer asserted that the matter had been settled by mutual agreement between the Company's management team and Local Union Officer Coffman. (Jt. Ex. 5). On May 20, 2011, through correspondence to Lawyer, Bolte reiterated his request, reminded Lawyer of the Union's bargaining request and advised her that the Union did not consider the matter resolved. (Jt. Ex. 6). On May 27 and 30, 2011, Lawyer advised Bolte that the Company considered the grievance to be "resolved to everyone's satisfaction" and that there was "no need to go further." (Jt. Exs. 7, 9). She stated that nothing in the request was relevant to the grievance. (*Id.*).

On August 11, 2011, Company attorney Ray Deeny wrote Bolte. (Jt. Ex. 13). Deeny invited Bolte to contact him regarding the request, but stated that it appeared the grievance was moot. (*Id.*). He asked Bolte to direct communication to him for processing of the requests. (*Id.*). The Company did not provide the information until October 5, 2011. (Jt. Ex. 15).

2. The ALJ Properly Concluded that the Company Violated the Act by Not Timely Responding to the Wagner Information Request

It is well-settled that good-faith bargaining encompasses a party's right to relevant information for use in the collective bargaining process. *S.L. Allen & Co.*, 1 NLRB 714, 728-729 (1936). A collective bargaining representative is entitled to information relevant and necessary to carrying out its statutory duties and responsibilities. *See, e.g. NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 151-152 (U.S. 1956). An employer's refusal to supply information is as much a violation of the duty to bargain as a failure to meet and confer in good faith with the union. *Curtiss-Wright Corp.*, 145 NLRB 152 (1963). An employer can violate the Act by failing to

make a diligent effort to obtain or to provide information reasonably promptly. *NLRB v. John S. Swift Co.*, 277 F.2d 641, 645 (7th Cir. 1960). An employer's "unreasonable delay in furnishing . . . information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all." *Amersig Graphics, Inc.*, 334 NLRB 880, 885 (2001). The Board has found that a delay of several months is inconsistent with good faith and a Section 8(a)(5) violation. *Colonial Press*, 204 NLRB 852, 861 (1973) (violation where union requested information on August 17 and again on August 21 and information was not provided until October 11); *Bundy Corp.*, 292 NLRB 671, 671-672 (1989) (violation where union requested information on October 2nd and company did not respond until mid-December).

In deciding the validity of an information request, the Board looks to "whether the requested information is relevant, and if relevant, whether it is sufficiently important or needed to invoke a statutory obligation of the other party to produce it." *Columbus Prods. Co.*, 259 NLRB 220, 220 fn.1 (1981). Valid needs include the negotiation of mandatory bargaining subjects and policing a collective bargaining agreement. *See NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-438 (U.S. 1967). A liberal discovery-type standard is used to see whether information is relevant to policing the contract. *Id.* at 437.

The ALJ concluded that the Company failed to timely provide the information by not producing it until four and a half months after it was requested. (ALJ's Decision p. 20, lines 27-29). The ALJ properly found that the information requested concerned the circumstances of Wagner's leave request and the Company's response to that request, as well as, the Company's treatment of similarly situated employees in the past. (*Id.* at p. 20, lines 28-33). Consistent with Board precedent, the ALJ concluded that the requested information would assist the Union in its decisions regarding the grievance/arbitration process and its policing of the Company's

adherence to the status quo under the expired contract. (*Id.* at p. 20, lines 32-37). Applying applicable Board precedent, he determined that the information was relevant to the Union's May 16th bargaining proposal to grant funeral leave to Wagner if he attended a funeral service. (*Id.*)

3. The Company's Exceptions Are Without Merit

The Company argues the Union's bad faith in submitting the Wagner information request excused its failure to timely provide the requested information. (Co.'s Exceptions Brief, p. 7-9). The only specific example it cites is its unfounded and unsupported claim that the grievance was already settled at the local level. (*Id.*). To support its erroneous claim, the Company relies on one isolated quote in which the ALJ found that "management officials expressed bewilderment at the Union's request for information regarding Wagner, stating that, in their view, the matter had been settled." (Co.'s Exceptions Brief, p. 9; ALJ's Decision, p. 5, lines 26-28). The Company ignores the context of this finding and the abundant record evidence which establishes that the grievance was not settled when the Union submitted its information request.

The ALJ properly found that the record evidence showed that the grievance was not settled on May 14, 2011. As the ALJ found, even though Local Union officer Coffman had a conversation with Company HR Director Lawyer on May 14th which led the Company to let Wagner use vacation time to leave the facility without incurring an attendance violation, this did not constitute a settlement of the grievance. (ALJ's Decision, p. 20, lines 40-42, p. 21, lines 1-3). Another Local Union Official filed the grievance. (*Id.*; Tr. 46, 53, 125, 128; G.C. Ex. 8). Coffman testified that, when he was notified that Wagner was on the floor crying, he called Lawyer to see if Wagner could leave the factory due to the loss of his brother, including by using vacation time. (Tr. 124). Coffman was not then aware of the grievance. (ALJ's Decision, p. 21,

lines 4-5). The ALJ logically reasoned that the grievance, which related to funeral leave and not vacation leave, may not have even been filed before Coffman met Lawyer. (*Id.*).

Company officials approached Coffman on May 16th - *after* the grievance had allegedly been settled - and offered a proposal under which Wagner could obtain funeral leave. (*Id.* at p. 21, lines 5-11). Unlike the previous conversation in which Lawyer and Coffman simply discussed finding a way for Wagner to leave the floor, the May 16th discussion did relate to the grievance. During the May 16th meeting, the Company officials indicated that they had never experienced a situation like Wagner's before and were not sure they had handled it properly. (Tr. 126). Coffman testified that he told the Company officials that he did not have the authority to settle the grievance. (Tr. 126-128). He advised these officials in the meeting on May 16th and a subsequent meeting on May 17, 2011 that he needed to discuss this grievance with Bolte. (Tr. 207). Coffman also told the other Local Union Officers that he needed to contact Bolte before settling the grievance. (Tr. 127). Bolte later confirmed to Coffman that he did not have the authority to settle the grievance. (*Id.*).

Coffman's testimony is consistent with Bolte's March 5, 2011 correspondence in which he expressed to the Company, in no uncertain terms, that all potential changes to the contract needed to be directed to him. (Jt. Ex. 2). In addition, Bolte's May 17 and May 20, 2011 information requests expressly stated that he did not consider the grievance to be resolved. (Jt. Exs. 4, 6). The Company even recognizes in its brief that the Union took the position in Bolte's correspondence that the grievance was not resolved on May 17th and May 20th. (Co.'s Exceptions Brief, p. 7-8). These facts support refute the Company's erroneous claims that the grievance was settled and that the Union did not need for this information.

The Company cites the decision of *Land-O-Sun Dairies*, 345 NLRB 1222, 1223-25 (2005) to argue that, when a request for information is unclear, the employer has the obligation to communicate its concerns to the union and cannot ignore the requests. This case is inapplicable because there is nothing unclear about Bolte's very specific and detailed information request or his position that the grievance was not settled. (Jt. Exs. 4, 6). The ALJ properly found that the Wagner information request was typical and stated "there is no doubt in my mind that the Respondent knew exactly what the Union was asking for and why it was asking for it." (ALJ's Decision p. 22, lines 31-33). Even assuming *arguendo* that the Company was confused by the Wagner information request, that confusion could have lasted no longer than May 20th. At that time, Bolte reiterated his position that the Union did not consider the grievance to be settled and again requested the information. (Jt. Ex. 6). The Company therefore had no legitimate reason to believe that the grievance was settled after May 20th.¹

Silgan also argues that the Union was not entitled to the information to monitor status quo. (Co.'s Exceptions Brief, p. 14-15). It specifically contends that there was no status quo to monitor because Wagner's situation was "unique" since he was seeking funeral leave even though his brother's body was donated to science. (*Id.*). Although Wagner's situation did raise unique circumstances, it does not follow that the Union was not entitled to the information to process the grievance. In fact, the opposite is actually true. Because Wagner's situation was

¹The Company argues in a footnote of its brief that the ALJ's findings concerning Bolte's role in the grievance process lead to "contradictory" findings that demonstrate he was "biased." (Company's Exceptions Brief, p. 13 n. 5). The Company contends that a grievance could not have existed if Bolte did not file it. This argument is based on the Company's mistaken belief that the ALJ found that Bolte was the only Union official who could file grievances. Bolte never took the position that Local Union officials could not file grievances. He, instead, articulated the USW's position that he was the person to handle the Company's proposed changes in terms and conditions of employment. While the Union made it clear that Bolte was the individual with authority to resolve grievances, it never indicated that he had the sole power to file all grievances. Because Bolte does not work in the facility, it would have been impossible for him to file all grievances.

rather unique, the Union had even greater need for the requested information to determine whether Wagner was entitled to leave under the status quo of the expired contract.

The information the Union sought was relevant because it would help it to determine whether the Company acted in accordance with the 2004-2011 CBA by denying Wagner funeral leave. The request concerned a matter for which the parties had never previously dealt-- whether the funeral leave provision of the 2004-2011 CBA allowed for benefits to be received by an employee when the deceased's body is donated to science. The information met the broad, discovery-type standard for determining relevancy that the Board employs.² In addition, because the Union sought this information to evaluate and process a pending grievance and to police the collective bargaining agreement, the information was necessary for it to carry out its statutory responsibility. *See, e.g., Acme Indus. Co.* at 435-436 (employer required to furnish information enabling the union to make informed decisions about the processing of grievances).

Bolte testified that he requested the information to proceed with bargaining over Wagner's situation. (Tr. 47-48, 229). In Bolte's information request, he requested the following relevant information: 1) the names of employees who had been paid for the funeral benefit under Article XIII of the contract; 2) the amount paid to employees who had received the benefit so he could see how Article XIII had been implemented; 3) the notice that employees who had received the benefit had provided the Company; 4) the type of service attended so that he could investigate the Company's assertion that Wagner was not entitled to pay because his brother's body was being donated to science; 5) the proof an employee had to provide after a death so he

² The Company apparently conceded that the information the Union sought met the Board's relevancy standard. Although Lawyer expressed in her May 27th and 30th correspondence that the information the Union was seeking was not relevant, the Company never subsequently took that position. (Jt. Exs. 7, 9). It, instead, contended that the Union was not entitled to the information because the grievance was "moot." (Jt. Ex. 13). Moreover, the Company's ultimate disclosure of the information several months later also is evidence that the Company tacitly concedes the information the Union requested was relevant. (Jt. Ex. 15).

could understand how the Company determined whether the employee was eligible for leave pay; and 6) the name of any employee where no documentation had been provided to determine what the status quo was under the previous contract. (Tr. 231-232; Jt. Ex. 4).

It is not true that an employee is not entitled to benefits under a collective bargaining agreement if the relevant facts are “unprecedented.” The proper inquiry is not whether the employee’s situation has arisen before, but whether the language of the contract entitles an employee to those benefits. No bargaining parties can craft language that will address every situation that may occur in the future. Instead, parties in a collective bargaining relationship make a good faith effort to agree on language that they hope will best enable them to deal with future situations as they occur. Bolte’s information request was necessary to police the contract not only so that he could determine what the status quo was but also so that he could ensure that the Company had not provided this benefit in the past to bargaining unit employees who were either similarly situated or granted the leave under analogous circumstances. The fact that Company officials expressed to Local Union officer Coffman that they did not know if they handled this situation properly only confirms that the information was necessary. The ALJ thus properly found that the Union was entitled to the requested information because it would assist it in determining whether the Company was treating Wagner consistent with the status quo under the expired collective bargaining agreement. (ALJ’s Decision, p. 21, lines 11-14).

Even if there was no status quo for the Union to monitor, the information was still necessary for bargaining purposes. The ALJ properly found that the Company submitted a proposal regarding the Wagner matter during the May 16 and 17, 2011 meetings with Coffman by agreeing to grant him leave if he produced evidence that he attended a memorial service. (ALJ’s Decision p. 21, lines 4-10). The Company contends that it did not submit a bargaining

proposal regarding the situation during these meetings. (Co.'s Exceptions Brief, p. 13). Even if this were true, as the ALJ observed, the Union still needed the grievance to bargain over the Company's treatment of Wagner. (ALJ's Decision, p. 21, lines 11-16). Since Wagner's situation was unique and the parties could not recall encountering a similar situation previously, Bolte testified that he felt the parties might need to bargain about what was going to transpire if bodies were donated to science in the future. (Tr. 275). Bolte requested bargaining in his correspondence and offered dates to negotiate over the Wagner matter. (Tr. 232-233; Jt. Ex. 4). The Union thus undoubtedly needed the information for bargaining- irrespective of whether the grievance had merit or whether Wagner was entitled to funeral benefits.

The Company finally argues that it timely submitted the information responsive to the Wagner information request. The ALJ reviewed the evidence the Company provided to respond to the information request and he determined that the information could have been readily provided within days after the Company received the May 17th information request. (ALJ's Decision, p. 22, lines 8-10).

The Company admits that it took a total of thirty hours to compile all of the information the Union requested, including the three other information requests submitted on July 29, 2011. (*Id.* at p. 22, lines 12-15; Jt. Ex. 15, p. 1-2). The Company never contended, and there is also no evidence, that there were issues with the availability of the documents that would justify the delay. On the contrary, the record is clear that this information was already located at the Seymour, Indiana facility. (Jt. Ex. 15, p. 1-2). Moreover, Rubardt testified that he instructed Lawyer to provide the information responsive to this request after sending correspondence to Bolte on September 22, 2011. (Tr. 368-369). Thus, the requested information was compiled in less than two weeks between September 22nd and October 5th. As the ALJ observed, on

September 30, 2011, two days after the Regional Director issued the initial complaint, the Company notified the Union for the first time that it was collecting the information. (ALJ's Decision p. 22, lines 16-21). Less than a week later, the Company submitted a complete response to Wagner information request as well as three other Union information requests discussed below. (*Id.*). The ALJ properly found that this supports an inference that the Company could have responded to the information request in May or June. (*Id.*).

In evaluating the promptness of the information requested, the Board considers the complexity and extent of the information sought, its availability and the difficulty in retrieving the information. *Samaritan Med. Ctr.*, 319 NLRB 392, 398 (1995). The ALJ properly concluded that there was no evidence that the Wagner document production was particularly complex, voluminous or burdensome. (ALJ's Decision p. 22, lines 10-13). The Company has not argued much less produced any evidence to show that the document request was particularly burdensome, voluminous or complex. On the contrary, the Union tailored its request specifically to the matter at hand and also limited its request to a period after the commencement of the last contract. (Jt. Ex. 4). The Company argues that it did not ignore the Wagner information request, but it effectively did ignore the request by constantly questioning the relevance of the request, seeking clarification for a patently clear information request and refusing to provide the information. Since the Company spent a substantial amount of time arguing in correspondence of various Company officials and the Company lawyer that it was not required to provide the material it ultimately provided, its delay is further unwarranted.

The ALJ's determination that the request was not timely submitted is further supported by ample Board precedent in which delays in providing information of four months and less are found to be unreasonable. *See Comar, Inc.*, 349 NLRB 342, 354 (2007) (finding a violation of

Section 8(a)(5) and noting that the employer did not identify any cases where the Board approved a delay over four months). *Pan Am. Grain Co.*, 343 NLRB 318, 343 (2004), *enfd. in relevant part*, 432 F.3d 69 (1st Cir. 2005) (three month delay unreasonable); *Bundy Corp.*, 292 NLRB at 672 (delay of two and a half months violates the Act); *Woodland Clinic*, 331 NLRB 735, 737 (2000) (delay of seven weeks unreasonable). The Company argues that the ALJ applied a “bright-line” time rule in deciding that the Company’s delay was unreasonable. (Co.’s Exceptions Brief, p. 7-16). The ALJ did not apply such a rule. Instead, the ALJ cited cases in which the Board found that delays similar to the Company’s delay constituted undue delay under the Act. He reached this conclusion by examining the facts and circumstances of the Union’s request and the Company’s response.

B. The ALJ Did Not Err in Concluding Silgan Violated the Act by Failing to Timely Respond to the July 29, 2011 Information Requests

The ALJ concluded that the Company violated Section 8(a)(1) and (5) of the Act by failing to timely respond to the July 29, 2011 Union information requests regarding bargaining unit employees Oliver Marshall Hudson, Jonathan Coe and Lisa Duncan. (ALJ’s Decision, p. 23, lines 1-3, p. 24, lines 7-9, 24-31, p. 25, lines 1-10). The Company responded to these requests on October 5, 2011. (Jt. Ex. 15, p. 1-2). The ALJ concluded that the Union was entitled to the information it requested and that the Company failed to provide it in a timely fashion. (ALJ’s Decision p. 23, lines 10-12, 31-32, p. 24, lines 18-21, 24-30, p. 25, lines 43-46, p. 26, lines 1-7).

Silgan argues that the ALJ erred in concluding that it violated the Act by refusing to timely respond to the Union’s July 29, 2011 information requests. It specifically contends that: 1) the Union’s alleged bad faith excused the Company’s performance; 2) the July 29th information requests were not needed to monitor the status quo; and 3) it did not unduly delay in

providing the information. (Co.'s Exceptions Brief, p. 7-20). Each of the Company's arguments is without merit and should be rejected.

1. The July 29, 2011 Information Requests

On June 14, 2011, Duncan was suspended and subsequently discharged for allegedly falsifying medical documentation. (Tr. 60-61, 237). On or around July 26, 2011, Bolte met with the Local Union negotiating committee in Seymour and was told that Duncan had been terminated. (Tr. 60-61, 236-237). The committee advised Bolte that there was a discrepancy concerning Duncan's medical situation and an issue as to the falsification of a document or release that had allowed her to return to work. (Tr. 236-237). Duncan denied falsifying her documentation. (Tr. 61). In its July 26th counter-proposal, the Union proposed that Duncan be reinstated and made whole, but the Company rejected this offer. (Tr. 130, 238; G.C. Ex. 10).

Bolte sent the Company a July 29, 2011 information request in which he requested: 1) the name of any employee disciplined for fabricating documents since the beginning of the last contract; 2) notes, memos and other documents related to the discipline issued to Duncan and other similarly situated employees; 3) the discipline record of any employee that was charged with the same offense; 4) notes and documents related to the investigation of Duncan; 5) similar information for any employee identified in the preceding information requests; and 6) any other information that the Company may have considered in terminating Duncan. (Tr. 242-243; Jt. Ex. 12). Bolte requested that the parties bargain over this matter. (Jt. Ex. 12).

Like Wagner, Hudson also had a death in the family. (Tr. 55-57). Hudson's father passed away and there was no funeral service planned. (Tr. 57). Hudson missed the last day he was supposed to work before the Fourth of July holiday. (Tr. 418-419). Hudson was denied holiday pay because the contract required that he had to attend work on the day before and after

the holiday to receive the holiday pay. (Tr. 419-420). He was also denied funeral leave. The Company assessed Hudson with an attendance violation for missing work. On July 8, 2011, the Union filed a grievance on Hudson's behalf challenging his failure to receive pay pursuant to Article XIII of the contract. (Tr. 59, 419; G.C. Ex. 9). The Company answered the grievance and responded that, if Hudson brought in documentation, he would receive holiday pay and funeral pay. (Tr. 419). During the July 26, 2011 bargaining session, the Union submitted a make-whole proposal for Hudson, but the Company did not accept that proposal. (Tr. 130, 238; G.C. Ex. 10).

Bolte sent the Company another July 29th information request for Hudson. (Tr. 239; Jt. Ex. 11). Bolte sought nearly identical information to that which he had previously sought for Wagner. (Tr. 241; Jt. Ex. 11; Jt. Ex. 4). Bolte made a request to bargain about the Hudson incident. (Tr. 241; Jt. Ex. 11). He confined his request to a period beginning after the 2004-2011 CBA went into effect, and also requested to bargain about the Hudson incident. (*Id.*).

On Sunday, July 24, 2011, Coe was disciplined for taking a break that lasted longer than twenty minutes. (Tr. 66-67, 102). Coe met with his supervisor and his supervisor advised him that he was going to be suspended. (Tr. 103-104). Coe's supervisor gave Coe a paper that was an admission of wrongdoing to sign. (Tr. 104-105; Jt. Ex. 15, p. 151). Coe refused to sign it because he did not think the punishment was fair because other employees were not punished for the same behavior. (*Id.*). No Union representative was at the meeting. (Tr. 104).

Coe was told to report to work on July 27, 2011. (Tr. 106). Coe met with Company Supervisor Earlene Shultz, who gave Coe a different paper to sign. (Tr. 106-107). It stated: "[b]ecause your break period extension was within a fairly reasonable amount of time...your employment status has been reinstated to active status on a non-precedent setting basis." (Jt. Ex. 15, p. 150). The paper provided that further violations of the Company's administrative

regulations could result in disciplinary action, up to discharge. (*Id.*). Coe signed because he knew that, if he signed, he would not get into any further trouble and would not be written up. (*Id.*; Tr. 107-108). No Union representative was at the meeting. (Tr. 67, 108). Coe was not offered Union representation and was not aware that he could have requested it. (Tr. 108).

On July 29, 2011, Bolte sent the Company an information request for Coe. (Tr. 239; Jt. Ex. 10). Bolte requested: 1) the name of any employee disciplined for sleeping past a break beginning December 3, 2004; 2) discipline records of Coe and any employee who had received similar discipline after the last contract went into effect; 3) the discipline record of Coe and other employees who had been disciplined; 4) investigatory notes or memos dealing with the discipline he understood was being issued to Coe; and 5) investigatory information for any employee who may have been identified in response to the previous requests. (Tr. 239-240; Jt. Ex. 10). Bolte sought these records because he wanted to see what the past practice was at the Silgan facility. (Tr. 239-240). He also was trying to determine the status quo for these types of incidents. (*Id.*). Bolte requested to bargain about the Company's decision to discipline Coe. (Tr. 240; Jt. Ex. 10).

2. The ALJ Properly Concludes that the Company Did Not Timely Respond to the Union's July 29th Information Requests

The ALJ found that the Duncan information request concerned the circumstances of her discharge for allegedly falsifying records, the Company's investigation of this incident and its treatment of similarly situated employees. (ALJ's Decision p. 23, lines 7-9). He properly concluded that the Company had a duty to provide the information because it would assist the Union to make decisions regarding the grievance/arbitration process and to police whether the Company was adhering to the status quo under the expired contract. (*Id.* at p. 23, lines 10-12).

The ALJ found that Hudson was denied funeral leave and Hudson was assessed an attendance violation. (ALJ's Decision p. 24, lines 11-13). He also found that Hudson provided

the Company with an obituary, but did not produce certification, ostensibly because the deceased was cremated and no funeral service was held. (*Id.* at p. 24, lines 12-15). The ALJ found that the information request concerned the circumstances of Hudson's leave request, the Company's reaction to that request and the Company's past treatment of similarly situated employees. (*Id.* at p. 24, lines 16-18). The ALJ properly concluded that it was necessary and relevant to the Union's decisions regarding the grievance process and for policing the Company's adherence to the status quo and that the Company had a duty to provide the information. (*Id.* at p. 24, lines 19-22).

The ALJ found that Coe was suspended after falling asleep during a break. (ALJ's Decision p. 24, lines 36-38). He found that Bolte requested information concerning the circumstances of the discipline, the Company's investigation and the Company's treatment of similarly situated employees. (*Id.* at p. 24, lines 38-41). Although the Union had not filed a grievance at the time it submitted the information request, the filing deadline had not passed. (*Id.* at p. 24, lines 41-43). The ALJ properly concluded that the Company had a duty to provide this information because it was relevant and necessary to the Union's decision about whether to file a grievance and/or seek bargaining over the discipline, and also to its efforts to police whether the discipline imposed was consistent with the status quo. (*Id.* at p. 24, lines 43-46).

3. The Company's Exceptions Are Without Merit

The Company contends the ALJ erred by ignoring record evidence of the Union's alleged bad faith conduct after the Union submitted the July 29th information requests. The Company specifically argues that Bolte ignored the Company's attempts to accommodate the information requests and, instead, filed unfair labor practice charges. (Co.'s Exceptions Brief, p. 9). To support its argument, the Company contends that its counsel, Ray Deeny, attempted to address the information requests in correspondence he sent on August 11, 2011. (*Id.*).

The Company's claim is unpersuasive because Deeny challenged the validity of the information requests in his correspondence. With respect to the Hudson information request, Deeny stated he had reviewed the request but indicated that the Company was under no obligation to bargain its decisions concerning interpretations of the contract, including its funeral pay and benefits pay provisions. (Jt. Ex. 13). He similarly claimed that the Company was not under a legal obligation to bargain over the Duncan or Coe situations. (*Id.*). Despite the fact that Bolte's information requests were detailed and unambiguous, Deeny asked Bolte to contact him to explain what information was necessary for the response. (Jt. Exs. 10, 11, 12 and 13). Deeny's correspondence does not support the Company's claim because the Company did not provide any information with it. Deeny's correspondence also does not establish that Union was engaged in bad faith activity that excuses the Company's failure to timely provide the information requests. Given the clarity of the Union's requests and the Company's express unwillingness to respond, the correspondence actually supports the ALJ's conclusion.

The Company also incorrectly asserts that the correspondence sent by Director of Human Resources Rubardt to Bolte establishes bad faith on the Union's part. The Company specifically contends that Rubardt offered Bolte a complete review of the Company's facility at the Seymour facility but that Bolte "dodged" the invitation. (Co.'s Exceptions Brief, p. 9-10). However, Rubardt did not send this correspondence until September 22, 2011 and he actually only offered to meet with Bolte to discuss his information requests. (G.C. Ex. 12). Deeny had previously advised Bolte in his August 11th correspondence that further communication regarding the information requests had to be directed to Deeny. (Jt. Ex. 13). Bolte advised Rubardt that the Union had received notification from the Company's counsel that further communication should be directed at him. (Tr. 248; G.C. Ex. 12). Bolte accordingly and justifiably told Rubardt the

Union was honoring the Company's request. (*Id.*). Bolte was not being "disingenuous" and ducking the Company. He was simply complying with the Company's instruction to work through Deeny, who had still provided no response to the Union's requests.

Even though the Company emphasizes the significance of the Rubardt correspondence, it cannot escape the undeniable and telling truth that the Company did not provide any information with this correspondence. As in Deeny's correspondence, Rubardt, at best, submitted overtures from the Company to meet to discuss the information requests. The Company claims that this proves that it attempted to meet and communicate with Bolte to request clarification regarding the requests. Yet, there was no need for this communication because the Union requests were unambiguous and crystal clear. Because these requests were so straightforward, the Company has no legitimate claim that the Union's alleged failure to communicate with Company officials constituted bad faith or caused its delay. On the contrary, the Company's delay was the product of the position it stated time and time again that it did not consider the requests to be relevant and that it did not believe it had to provide the information. This point is punctuated by the undisputed fact that the Company was able to compile all of the information responsive to all of the requests in a very short period of time. The Company admits that the total time it took for the Company to respond to all of the requests was thirty hours. (Jt. Ex. 15, p. 1-2). As the ALJ observed, this information was compiled quickly after the General Counsel issued the Complaint in this matter. Since it took so little time for the Company to compile all of the information the Union requested, it has no legitimate claim that any of the Union's conduct caused its delay.

The Company also argues that the Union did not need the information it requested for grievance processing or bargaining. With respect to the Hudson information request, the Company again erroneously claims that the Union did not need the information to monitor the

status quo because Hudson's situation was unique. As with Wagner, the information request was necessary to police the contract not only so Bolte could determine what the status quo was but also so that he could ensure that the Company had not provided this benefit in the past in similar or analogous situations. As indicated above, unprecedented situations occur frequently in collective bargaining relationships. The relevant inquiry was whether Hudson was entitled to leave under the language of the contract and not whether or not his situation was "unique" or "unprecedented." The request was proper because it was aimed at collecting information that would allow the Union to ascertain whether Hudson was entitled or arguably entitled to funeral leave. The Union would have been derelict in its duties if it had not sought the requested information to investigate the Hudson matter (and the Wagner matter) to police the contract.

The Company argues that the Union did not need the July 29th information requests for grievance handling, yet it acknowledges that there was a grievance filed for Hudson pending at the time the Union submitted the request. (Co.'s Exceptions Brief, p. 13-14). Although the Union ultimately decided not to appeal the Hudson grievance, it still needed the information to evaluate and process the grievance. It also needed the information for the bargaining proposal it submitted on behalf of Hudson and the Company's proposal to pay Hudson if he provided proof that he attended a service. As such, the information it requested was both relevant and necessary to carry out its statutory duties.

The Company argues that the Union did not need the information requested concerning Duncan to determine whether to file a grievance. The Company asserts that, under Article IV, Section 6 of the 2004-2011 CBA, the Union is allowed seven work days to file a grievance in response to a termination and that time had elapsed. (Co.'s Exceptions Brief, p. 13-14). However, Section 6 provides that the Company agrees to notify the Union in writing within three

work days following the discharge of any employee. (Jt. Ex. 1, pg. 6). Because Bolte learned of Duncan's discharge through the Local Union just prior to submitting his request, the Union had an argument that the grievance was timely based on the manner in which the Union learned that Duncan had been terminated. Additionally, even if the deadlines were not met, although it may have ultimately had to argue that the grievance was procedurally arbitrable, it was not foreclosed from filing a grievance. Moreover, although the Union did not file a grievance for Duncan, it submitted a proposal on her behalf and needed the information for that proposal.

Coe was disciplined just before the information requests were sent. Even though no grievance had been filed on behalf of Coe at the time of the request, the Union could have filed a grievance if it had received the response in a timely manner. Because the Company did not provide the requested information for Coe until after the time limits of the grievance procedure had expired, the Company definitely impeded the Union's ability to file a grievance for Coe.

The Company's general argument that "nothing was done on behalf of the employees" in connection with the information requests should be rejected. (Co.'s Exceptions Brief, p. 14). The relevant inquiry is not what the Union ultimately does with respect to the information requests. Rather, as the ALJ found, the appropriate focus is whether the information is relevant and necessary. The Company's attempt to contort the analysis to justify its delay should be rejected. Because the ALJ properly found that the information requested was both relevant and necessary, there is no need for the Board to analyze what the Union ultimately did with it. Such an analysis is irrelevant and conflicts with the applicable Board law cited above and by the ALJ.

The Company's arguments that its October 5th response to the July 29th information requests did not constitute undue delay are not supported by the record or case law. The Company recognizes that the ALJ concluded that the information requests were not complex,

overly burdensome or ambiguous but does not offer any evidence to challenge or refute the ALJ's conclusion. It also did not submit any such evidence establishing that the document requests were particularly burdensome, voluminous or complex. (ALJ's Decision p. 22, lines 10-13). The Board considers the complexity and extent of the information sought, its availability and the difficulty in retrieving the information. *Samaritan Med. Ctr.* at 392. The Company's failure to argue this point demonstrates that its delay cannot be justified by the nature of the requests. In addition, the failure to argue this point constitutes recognition that it did not need clarification of these requests because they were not complex, overly burdensome or ambiguous.

The Company attempts to pull the Board's attention from the relevant inquiry by arguing that the ALJ simply found a violation based on the time it took for it to provide its response. The Company's assertion is both unfounded and untrue. The Company argues that there is no "bright line rule" governing the period of time that constitutes undue delay. (Co.'s Exceptions Brief, p. 16). This point is true but irrelevant. The ALJ never ruled that there is such a bright line rule, and he certainly did not rest his decision on that proposition. Although he cited several cases in which the Board found unfair labor practices when information was not provided in a given period of time, he did so to show that the Board has found unfair labor practices where the employers' delay was similar to Silgan's delay. It is undisputed that it took the Company approximately 30 hours to compile responses to all of the requests the Union submitted. As the ALJ properly found, the Company notified the Union for the first time on September 30, 2011 that it had begun collecting the information. (ALJ's Decision p. 22, lines 15-22). This notice occurred just two days after the Regional Director issued the initial Complaint in this case. (*Id.*). The ALJ properly concluded that it took less than a week for the Company to provide a response to all four information requests once it decided to do so.

Rather than simply focusing on a “bright-line” standard, the ALJ’s decision is proper because he looked at the facts and circumstances of this dispute and decided the delay was unjustified, in part, because it took so little time for the Company to provide its response. The Company does not directly address this aspect of the ALJ’s decision. The Company’s response was clearly unduly delayed since the Union requests were unambiguous, the requests were not overly broad, complex or burdensome and the Company provided its response without receiving the clarification it previously contended was necessary. The length of time it took for the Company to respond to the Union’s July 29th information requests is certainly relevant to ascertaining whether it unduly delayed in providing the information.

The Company asserts that its delay was justified because the Union did not need the information for bargaining. This assertion is simply false. Bolte requested to bargain about all of these matters in each of the information requests. The Union submitted make-whole proposals regarding Duncan and Hudson in the July 26th session. The information was also needed to police the collective bargaining agreement and to make decisions regarding the grievance/arbitration process. *See Postal Service*, 337 NLRB 820, 822 (2002) (information is relevant if it may help the union decide whether to file or proceed with the grievance); *W-L Molding Co.*, 272 NLRB 1239, 1240 (1984) (when determining relevancy of information request, it makes no difference whether the grievance has been actually filed or is merely being contemplated); *Wackenhut Corp.*, 345 NLRB 850, 871 (2005) (union entitled to information that will assist it in bargaining over discipline received by unit employees).

The Company contends that the Union did not bargain over these issues during the December 22nd session. Actually, the Union subsequently submitted a “supposal” in bargaining that covered Duncan’s situation. (Tr. p. 325). Yet, even if it had not bargained over these

matters during the December 22nd session, this point is of no import. For one, the Company recognizes that the purpose of the December 22nd session was to bargain over health care benefits, an issue unrelated to the information requests. (Co.'s Exceptions Brief, p. 18). More importantly, the parties' negotiations on December 22nd are not relevant to whether the Union was impeded from bargaining between the time the requests were submitted and when the Company provided its response. The ALJ found that the Company prohibited the Union from bargaining between July 29th and October 5th by not providing a response during this period. What took place during the December 22nd session is irrelevant to determine whether the Union was precluded from bargaining between July 29th and October 5th.

The Company contends that it did not ignore the Union information requests or fail to communicate its reasons for delay with the Union. The Company effectively did ignore the requests by arguing over the necessity of the requests, indicating that it would not provide a response at all or not provide a complete response and not providing the requested information. The requests were unambiguous and patently clear. It took relatively little time to compile the all of the information, including the Wagner information which overlapped with the requested Hudson information. When it communicated with the Union about its information requests, the Company wrangled with the Union and took the position that the Union was not entitled to the information it sought. The Company was, thus, not advising the Union that there was a delay due to an issue with respect to retrieving the documents or submitting them to the Union. The reason for the delay was the Company's unlawful refusal to provide information.

C. The ALJ Did Not Improperly Preclude the Company from Introducing Evidence Regarding the Union's Alleged Bad Faith

The Company argues that the ALJ erred by preventing it from introducing evidence concerning the Union's bad faith. (Co.'s Exceptions Brief, p. 6). The Company specifically

asserts that the ALJ did not allow the Company to obtain documents concerning what it contended was the Union's offensive bargaining strategy. (*Id.*). It also claims that it was precluded from questioning the Union and General Counsel's witnesses concerning bad faith bargaining. (*Id.*). The Company's claims are without merit.

The Company was not entitled to subpoena the information it sought or question witnesses regarding the Union's alleged bad faith because the General Counsel's Complaint related to a series of discrete events involving alleged Company unfair labor practices. It did not relate even tangentially to the parties' course of bargaining. The Company's request to subpoena the information it sought and question witnesses about the Union's alleged bad faith constituted nothing more than a fishing expedition on an unrelated and irrelevant matter not before the ALJ.

In *Millsboro Nursing & Rehab. Ctr.*, 327 NLRB 879 (1999), the Board reaffirmed the principle that the Board will quash a broad subpoena for production of records that constitutes a mere "fishing expedition" and there must be some basis in the hearing record that establishes that the records may contain relevant evidence. *See also, Allen Press, Inc.*, 212 NLRB 580, 580 (1986) (subpoena was "irrelevant and immaterial to any germane issues"); *Berbiglia, Inc.*, 233 NLRB 1476, 1495 (1977) (subpoena revoked because requiring the Union to open its files would be inconsistent with and subversive to the very essence of bargaining and the quasi-fiduciary relationship between a union and its members). The ALJ properly relied on *Berbiglia* to justify his decision to prevent the Company from subpoenaing the material it sought, which included Union strategy materials and materials for its organizers. Rejecting the Company's argument that Union submitted its information requests to harass the Company or prevent impasse, the ALJ correctly determined that the inquiries gave every indication of being a fishing expedition into arguably privileged internal materials. (ALJ's Decision, p. 15, lines 31-41). The ample record

evidence outlined above regarding the Union's multiple needs for the requested information further establishes that the ALJ's conclusion was proper.

The ALJ's ruling on the admissibility of this evidence is further supported by additional cases he cited which establish that, if the evidence shows that even one reason for the information request is justified, the Company is required to produce the information regardless of whether the Union has an ulterior motive for the request. *Land Rover Redwood City*, 330 NLRB 331, 331-332 fn.3 (1999); *County Ford Trucks, Inc.*, 330 NLRB 328, 328 fn. 6 (or fn. 3) (1999); *Island Creek Coal Co.*, 292 NLRB 480, 489 (1989), *enfd.* 899 F.2d 1222 (6th Cir. 1990). If such a reason is established, the information request is valid and an inquiry into the Union's supposed bad faith is not warranted. *Land Rover Redwood City*, *supra* (Board holds that since the information sought was relevant for purposes of collective bargaining, an inquiry into the Union's supposed bad faith was not warranted); *Island Creek Coal Co.*, *supra* (same).

The Company argues that the ALJ made a "pre-determined" and "biased" decision that deprived the Company of a full opportunity to introduce relevant evidence. (Co.'s Exceptions Brief, p. 7). In fact, the ALJ did not immediately rule on the Company's motion to seek (and introduce) evidence of the Union's purported bad faith. (Tr. 217-222). Rather, the ALJ heard evidence before ruling on the Company's motion to seek (and introduce) this evidence and gave the Company multiple opportunities to argue the relevancy of this material. (*Id.*).

Additionally, given the ample record evidence cited above which establishes that the Union had at least one valid reason for seeking the information, the Company's argument ultimately is of no import. The Company was not harmed by the ALJ's ruling because, even if it had been able to prove that the Union had an improper bad faith reason for seeking the information, the Union was nonetheless entitled to the requested information pursuant to

established precedent. Moreover, given the lengths the Company goes to in order to cite evidence it contends establishes the Union's bad faith, the argument that the Company was somehow prejudiced by the ALJ's decision on the admissibility of evidence strains credulity. The Company clearly has had the opportunity to make its bad faith argument. In so doing, Company has tacitly conceded that it was not precluded from presenting its case, including with respect to the purported bad faith of the Union. Its contention that it was deprived a full opportunity to introduce relevant evidence is both disingenuous and illogical and should therefore be rejected.

D. The ALJ Did Not Err in Concluding that the Company Violated the Act by Unilaterally Implementing Changes to Its Health Insurance Plan

The Company contends that the ALJ erred by concluding that the Company violated the Act by unilaterally changing employees health insurance benefits. (Co.'s Exceptions Brief, p. 20-39). The Company claims that it did not unilaterally change benefits but, instead, operated pursuant to an established past practice that allowed it to make annual changes. (*Id.* at p. 20-25, 28-32). It contends that its changes were justified for public policy reasons. (*Id.*). It further asserts that the Union's alleged dilatory tactics allowed the Company to implement changes to its health benefit plans. (*Id.* at p. 25-28). It finally maintains that it was privileged to implement changes to the health benefit plans because the parties had reached impasse. (*Id.* at p. 28-32). Each of the Company's claims is without merit and should be rejected.

1. Background

It is undisputed that the Company unilaterally changed bargaining unit employees' health insurance benefits. It announced changes to the health insurance benefits during the open enrollment period in the fall of 2011. (Tr. 73-74; G.C. Ex. 26). These changes, which became effective January 1, 2012, included the discontinuance of several programs previously offered, as well as, increases to employee insurance premiums. (Tr. 76-77, 133; G.C. Ex. 17).

Article XV of the 2004-2011 CBA, Benefit Plans provides in relevant part:

A. Employees hired before March 1, 1976 are eligible for the following benefit plans: Amoco Chemical Retirement Plan, Savings Plan, Group Life Insurance Plan, and Comprehensive Medical Expense Plan.

B. Employees hired after March 1, 1976 are eligible for: Amoco Container Retirement Plan, Savings Plan, Group Life Insurance Plan, and Medical Expense Plan immediately upon qualifying under the term of these plans.

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

G. It is understood and agreed that the Company's benefit plans and policies shall not be the subject of negotiations under the terms of this contract, nor shall any part or provision of such plans and policies be the subject of Article IV, "Grievance and Arbitration Procedure."

(Jt. Ex. 1, p. 22) (portions omitted).

Article XV, Section F expressly permits the Company to make changes to its benefit plans and policies, including its health insurance benefit plan and policy. (*Id.*). However, Section F also expressly and unambiguously provides that the Company can only make such changes "during the term of the contract." (*Id.*). Thus, while the Company could modify bargaining unit employee health insurance during the term of the 2004-2011 CBA, these benefits could not be modified after the expiration of the contract. Article XV, Section G similarly provides that the Union cannot negotiate the Company's benefit plans and policies or grieve such benefit plans and policies under the terms of the 2004-2011 CBA. (*Id.*). Yet, the language also makes it clear that Union could negotiate plan benefits, including health insurance benefits, *after* the expiration of the agreement.

The 2004-2011 CBA expired on February 28, 2011. (Jt. Ex. 1, p. 26). The Company unilaterally modified the health insurance benefits after the expiration of the contract without

bargaining to impasse. When the Company made its changes, the management rights provision of the 2004-2011 CBA had expired. Bolte had previously advised that any changes to employees' terms and conditions should be submitted to Bolte. (Jt. Ex. 1, p. 25; Jt. Ex. 2).

2. The ALJ Properly Concluded that the Company Violated the Act by Unilaterally Implementing Changes to Its Health Benefit Plan

An employer's unilateral change in a mandatory subject of bargaining during collective-bargaining negotiations violates Section 8(a)(5) of the Act. *NLRB v. Katz*, 369 U.S. 736 (US 1962). Healthcare insurance benefits are a mandatory subject of collective bargaining that an employer may not alter without bargaining to mutual agreement or to an overall good-faith impasse. *Mid-Continent Concrete*, 336 NLRB 258 (2001); *United Hosp. Med. Ctr.*, 317 NLRB 1279, 1281 (1995). The obligation to bargain over changes to employee healthcare insurance continues during negotiations following the expiration of a collective bargaining agreement. *See, e.g., Beverly Health & Rehab. Servs.*, 335 NLRB 635 (2001). During contract negotiations, the employer's obligation to bargain extends beyond the duty to give notice and opportunity to bargain. It encompasses a duty to refrain from implementation at all until an overall impasse has been reached in bargaining for the agreement as a whole. *Bottom Line Enters.*, 302 NLRB 373, 374 (1991), *enfd. sub nom. Master Window Cleaning v. NLRB*, 15 F.3d 1087 (9th Cir. 1994).

The ALJ found that the Company violated the Act by unilaterally implementing health insurance benefit changes, including increased premiums and discontinuation of benefits. (ALJ's Decision p. 35, lines 5-8). The ALJ properly found that the Company unilaterally announced multiple changes to the health insurance benefits in October or November 2011 and unilaterally implemented those changes on January 1, 2012. (ALJ's Decision p. 30, lines 40-44). As the ALJ properly found, the Company admits it changed the health care benefits of unit employees without the Union's agreement or consent. (ALJ's Decision p. 31, lines 6-10). The Company,

instead, argued that: 1) it acted consistently with its past practice; and 2) the parties were at impasse. The ALJ properly rejected each of the Company's arguments.

The ALJ found that the Company did not carry its burden of establishing the affirmative defense that its changes were a continuation of the status quo pursuant to longstanding past practice. The Company did not show that it made changes in the past during a hiatus period when the management rights clause was not in effect. Rather, the Company only established a past practice of making such changes **during** the effective period of a contractual management rights provision that authorized the changes. (ALJ's Decision p. 32, lines 3-8). Citing the Board's decisions of *E.I. DuPont De Nemours, Louisville Works*, 355 NLRB 1084 (2010), *enf. denied* 682 F.3d 65 (D.C. Cir. 2012) and *E.I. DuPont De Nemours and Co.*, 355 NLRB 1096 (2010), the ALJ concluded that the Company violated the Act because its past practice permitting unilateral changes to the health benefits was previously implemented under the authority of a contractual management rights-provision. (ALJ's Decision p. 31, lines 47-48, p. 32, lines 1-3). The unilateral changes made on January 1, 2012 were improper because they were made at a time when the contractual authorization had ceased to be effective. (ALJ's Decision p. 32, lines 3-8).

The ALJ also properly rejected the Company's argument that it was empowered to unilaterally institute the health insurance benefits because the parties were at impasse. The Board has defined bargaining impasse as the situation where good faith negotiations have exhausted the prospects of concluding an agreement. *Royal Motor Sales*, 329 NLRB 760, 761-762 (1999). Impasse is, thus, the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile. *AMF Bowling Co.*, 314 NLRB 969, 978 (1994). Both parties must believe they are at the end of their bargaining rope. *Id.* The evidence must establish that both parties believed no fruitful negotiations were possible, or that both parties

were unwilling to compromise further. *Monmouth Care Ctr. v. NLRB*, 672 F.3d 1085, 1088-1091 (DC Cir. 2012). A pre-impasse unilateral change is unlawful even when the Company has a good faith, albeit mistaken, belief that the union has not been negotiating in good faith. *Stone Boat Yard v. NLRB*, 715 F.2d 441, 444 (9th Cir. 1983). Impasse is not lightly inferred, and the burden of proving impasse rests with the party making the contention. *Monmouth Care Ctr.*, at 1089. See also, *Newcor Bay City Div. of Newcor*, 345 NLRB 1229 (2005) and *Northwest Graphics, Inc.*, 343 NLRB 84, 91 (2004). The employer's obligation to refrain from such changes survives the expiration of the contract, and failure to meet that obligation is a violation of the Act. *Newcor Bay City* at 1237. Moreover, an impasse occurring after the unilateral implementation of employer's bargaining proposals is irrelevant. *Northwest Graphics* at 91.

The ALJ properly found that the Company's impasse argument gave "every indication of being an after-the-fact invention of trial counsel for the Company." (ALJ's Decision, p. 33, lines 16-18). The Company's representatives did not declare impasse prior to implementing the health benefit changes nor did they state that they would be implementing some or all of the proposals in their final offer pursuant to impasse. (*Id.*, p. 33, lines 21-22). No Company representative testified that the parties were at impasse or that the health insurance changes were instituted before impasse. (*Id.*). No correspondence indicated that the parties were at impasse. The ALJ found that the Company did not warn the Union that the parties were approaching impasse, did not declare that impasse had been reached and did not state that it was implementing any part of its pre-impasse proposal. (*Id.* p. 33, lines 39-41, p. 34, lines 1-5). See *Essex Valley Visiting Nurses Ass'n.*, 343 NLRB 817, 841 (2004) (neither party stated that the parties had reached impasse so that there could be no finding that there was a "contemporaneous understanding of the parties that an impasse had been reached"); *Union Nacional de Trabajadores*, 219 NLRB

862, 875 (1975) (no impasse where “no one suggested at the time that an impasse existed”). The ALJ also properly found that the Company did not cite any cases where an overall impasse justifying unilateral changes was found in similar circumstances. (*Id.*, p. 34, lines 3-5).

The ALJ properly found that the Union had not expressed or demonstrated an unwillingness to make further compromises. (*Id.* at p. 34, lines 6-14). He properly concluded that the parties could not have been at impasse because the Union was still willing to consider changes to its position in an effort to find a path to agreement. The ALJ also found that the parties were not at impasse based on the parties’ length of bargaining and bargaining history. *Taft Broad. Co.*, 163 NLRB 475, 478 (1967) (the length of negotiations and the history of bargaining are factors considering in determining whether an impasse exists). The ALJ found that the parties had only negotiated on thirteen days and on many of those occasions only met for a portion of the day. (ALJ’s Decision p. 34, lines 6-14). During this time, the parties reached a number of tentative agreements for a new contract. (*Id.* at p. 34, lines 25-26).

Even if the parties were at impasse, the ALJ concluded that the Company still violated the Act because it was only permitted to make changes “reasonably comprehended” by its pre-impasse offers. *See generally: NLRB v. Katz*, 369 US 736; *Plainville Ready Mix Concrete Co.*, 309 NLRB 581, 585-587 (1992), *enfd.* 44 F.3d 1320 (6th Cir. 1995), *cert. denied*, 516 U.S. 974 (1995). As the ALJ found, the Company simply announced the changes to the health insurance benefits. (ALJ’s Decision p. 34, lines 43-48, p. 35, line 1). The Company never made a proposal that included the changes to health insurance benefits that it implemented on January 1, 2012. (*Id.*, p. 35, lines 5-8). It did not include any changes to health insurance benefits premiums in its “last, best and final” contract. (*Id.*, p. 34, lines 45-46).

3. The Company's Exceptions Are Without Merit

a. Past Practice Did Not Permit Silgan to Make the Changes

The Company argues that its unilateral changes were proper because it established a past practice of offering all of its employees the same health and welfare benefit plan. (Co.'s Exceptions Brief, p. 21). It contends that it used its open enrollment period to inform the changes to the benefits and co-pays and allow the employees to select their benefits. (*Id.*). Silgan argues that its "long-standing practice" of applying the health and welfare changes to all employees and offering open enrollment to employees privileged it to continue to provide these benefits until the Union and the Company bargained a new plan. (*Id.* at p. 21-22). The Company contends that otherwise these employees would have been without benefits. (*Id.*).

In support of its erroneous position, the Company essentially glosses over the *E.I. DuPont De Nemours* decisions upon which the ALJ relied. The Company does not attempt to distinguish the central holdings in the cases the ALJ relied upon in his decision and, instead, cites several other decisions that pre-date the *E.I. DuPont De Nemours* decisions. As the ALJ properly concluded, these decisions support the ALJ's conclusion that the Company violated the Act by implementing unilateral changes to bargaining unit employees' health insurance benefits after the 2004-2011 CBA had expired and there was no valid management rights clause in effect.

In *E.I. DuPont De Nemours (Louisville Works)*, the employer and the union negotiated the inclusion of the employer's health insurance plan into their contract. 355 NLRB at 1084. The plan included a reservation of right that gave the employer the right to modify health insurance benefits annually. *Id.* During the terms of the contracts, the employer made unilateral changes to the health insurance plan pursuant to its reservation of right without union objection. *Id.* While the parties were negotiating a successor agreement, the employer continued to make

annual changes after the expiration of the contract. *Id.* The union objected and requested to bargain over the changes, but the employer refused to negotiate these changes. *Id.* The employer argued that its unilateral actions were lawful because they were consistent with past practice under the authority of the *Courier-Journal* cases, 342 NLRB 1093 (2004) and 342 NLRB 1148 (2004). *Id.* In *E.I. DuPont De Nemours*, the Board found that the employer did not carry its burden of establishing this affirmative defense and distinguished the *Courier-Journal* cases. *Id.*

In the *Courier-Journal* cases, a Board majority had previously found that the employer's unilateral changes to employees' health care premiums during a hiatus period between contracts were lawful because the employer had established a past practice of making such changes both during periods when a contract was in effect and during hiatus periods. The Board concluded that the regularly occurring changes to employees' health insurance program over a period of ten years, and the union's acquiescence to such changes, created an established term and condition of employment and that such unilateral changes were a continuance of the status quo. 342 NLRB at 1093-94. The employer was therefore not required to bargain with the union, and its unilateral implementation of the changes did not violate Section 8(a)(5). *Id.*

In contrast, in *E.I. DuPont De Nemours*, the Board found that the asserted past practice was limited to instances when a contract, which included the reservation of right language, was in effect. 355 NLRB at 1084. Therefore, the union's previous acquiescence to these changes had no bearing on whether the union acquiesced to additional changes made after the expiration of the management rights clause. *Id.* It noted that the extension of the reasoning in the *Courier-Journal* cases would conflict with settled law that a management-rights clause does not survive the expiration of the contract, absent a clear and unmistakable expression of the parties' intent to the contrary, and does not constitute a term and condition of employment following contract

expiration. *Id.* at 1085. *See, e.g., Beverly Health*, 335 NLRB at 636-637; *Ironton Publ'ns.*, 321 NLRB 1048, 1048 (1996) (clause relating to merit pay increases); *Blue Circle Cement Co.*, 319 NLRB 954, 954 (1995) (clause relating to vacation period and shift-starting time), *enfd. in part mem.* 106 F.3d 413 (10th Cir. 1997). The Board in *E.I. DuPont De Nemours* applied these principles to the plan document that was incorporated in the contract and found that a holding allowing for such unbridled discretion of management would discourage, rather than promote, collective bargaining, and, in particular, make unions wary of granting any discretion to management during the contract's term. 355 NLRB at 1085.

The ALJ properly relied on the Board's holding in *E.I. DuPont De Nemours*. Contrary to the assertion of the Company, there was no past practice pursuant to which it had implemented these changes during a contract hiatus period. The Company had only previously instituted changes to health insurance benefits through the open enrollment period during the term of a contract when a valid management rights clause was also in effect. In this case, it is undisputed that the contract had expired and that there was no valid management rights clause in effect. The Company was not empowered to make the changes it made because the Company had never made these changes during a hiatus period and, unlike in the past, there was no valid management rights clause that permitted it to make these changes.

The Company does not attempt to argue that the Union clearly and unmistakably waived its right to negotiate these changes. The record certainly does not support such a finding. As indicated above, there is no evidence that the Union acquiesced in the right of the Company to make these changes after the expiration of the contract by agreeing to extend the management rights clause beyond the expiration of the agreement. On the contrary, the management rights clause, under which the Company had operated in the past in making these changes, expired

upon the expiration of the 2004-2011 CBA. Bolte made it very clear after that contract that any proposed Company changes to bargaining unit employees' terms and conditions of employment be raised to him. As such, the Company has no credible claim that the management rights clause extended beyond the term of the 2004-2011 CBA. Moreover, the language of the health insurance provision itself makes it clear that the Union never waived the right for the Company to make the changes it made after the expiration of the 2004-2011 CBA. Article XV, Benefit Plans, provides: These benefit plans and policies shall be subject to any changes or revisions that are made generally effective throughout Amoco Container Company for other participating employees, including foreman and office employees at Seymour, during the term of the contract. (Jt. Ex. 1, p. 22). Thus, while the Company had the right to make the changes in the past under the 2004-2009 CBA, it could only make those changes while the contract was in effect.

The Company argues that the D.C. Circuit refused to enforce *E.I. Du Pont De Nemours (Louisville Works)*. *E.I. DuPont De Nemours and Co.*, 682 F.3d 65, 66 (D.C. Cir. 2012). However, the D.C. Circuit refused enforcement because it found that the Board had departed from cases the Company relies on to support its argument without giving a reasoned justification. *Id.* In so doing, the D.C. Circuit recognized that the Board had previously held that unilateral changes made pursuant to a past practice developed under an expired management-rights clause were unlawful. *Id.* at 70, citing *Beverly Health*, 335 NLRB at 635-637; *Guard Publ'g Co.* 339 NLRB, 353, 355-356 (2003). Because the Board had taken a different position in the cases the Company relies on - *Capital Ford*, 343 NLRB 1058, 1058 n.3 (2004) and *Beverly Health & Rehab Servs.*, 346 NLRB 1319 (2006) - which were decided prior to *E.I. Du Pont De Nemours*, the D.C. Circuit remanded the matter to the Board. It ordered the Board to conform to precedent in *Capital Ford* and the 2006 iteration of *Beverly Health* or explain its return to the rule it

followed in its earlier decisions in which that unilateral changes made pursuant to a past practice developed under an expired management-rights clause were unlawful. 682 F.3d at 70. Although the D.C. Circuit denied enforcement, it did not outright reject the Board's reasoning in that case. Rather, its decision requests that the Board clarify its reasoning because of its view that Board precedent was in conflict.

b. The Union's Alleged Bad Faith Bargaining and Dilatory Tactics Do Not Excuse the Unilateral Changes

The Company claims that the Union's bad faith bargaining and dilatory tactics permitted it to make the unilateral changes to the health insurance benefits plan. (Co.'s Exceptions Brief, p. 25-28). Yet, the General Counsel did not allege that the Union engaged in bad faith bargaining or did not issue a complaint against the Union for bad faith bargaining. The Union's alleged bad faith bargaining is thus not even relevant. Because there is no evidence that the Union committed an unfair labor practice by bad faith bargaining, the Company's attempt to alter the posture of this proceeding to shield itself from liability for unilaterally instituting changes to the health insurance plan should be rejected.

Even if the Company's argument is considered, it should be rejected because the Union did not engage in unlawful tactics. The Company specifically contends that the ALJ's finding that the negotiations took longer and were more contentious than they had been in the past because Rubardt and Bolte were new to the bargaining table is "absurd." (Co.'s Exceptions Brief, p. 25). However, this finding is reasonable because Bolte and Rubardt were new to negotiations. Similarly, the Company's contention that the Union had no intention of bargaining the health insurance issue is erroneous. As the ALJ noted in his decision, after the Company's last offer was rejected by the membership, the Union continued to modify its own proposal. (ALJ's Decision, p. 34, lines 6-13). In fact, on December 22, 2011, just a week before the

Company implemented the changes to the health insurance benefits, the Union negotiators submitted an informal “supposal” that sought a response from the Company regarding several possible concessions. (*Id.*; Respondent’s Ex. 47).

Bolte did not even know that the Company intended to make the changes it ultimately made until November 2011. The issue regarding the health insurance benefits thus arose well into negotiations. Any alleged bad faith activity occurring prior to November 2011 is simply irrelevant. Prior to that point, the Union did not know what changes, if any, the Company would implement. The Company cannot credibly argue that it was empowered to make unilateral changes to health insurance benefits because the Union was engaging in bad faith activity or dilatory tactics prior to November 2011. Even if the Union was engaged in such behavior prior to that time (and it was not), such behavior had no causal link to the Company’s decision to implement health insurance benefit changes that the Union did not even know were coming.

The Union’s behavior after it was notified of the Company’s intention to change health insurance benefits also does not support a finding that Union bad faith behavior justified the Company’s changes. Once the Union was alerted of the intended changes, it immediately contacted the Company to follow up on these proposed changes and sought to bargain over the changes. On November 9, 2011, Bolte sent Rubardt a letter regarding the Company’s announced insurance plan changes. (Tr. 249-250; Jt. Ex. 16). Bolte requested to bargain regarding the Company’s decision to make the changes. (Tr. 250; Jt. Ex. 16). Bolte advised that the Union would seek relief from the Board if the Company did not follow the present terms and conditions of employment on insurance and refused to bargain this issue. (Jt. Ex. 16). The parties attempted to schedule negotiations after November 9, 2011, but were unable to reach a mutually agreeable date until December 22, 2011. (Tr. 208, 251).

During the December 22, 2011 session, Bolte requested the Power Point presentation Lawyer had used in the health insurance meetings to explain the changes the Company intended to make. (Tr. 252). This information was previously requested by the Local Union. (*Id.*). Lawyer had advised she would provide the presentation to the Local Union, but she did not provide it. (Tr. 133). She told Local Union Official Coffman that had been contacted by Bolte and she would not be providing the presentation to Coffman. She did not explain why she would not provide the presentation to him. (Tr. 134). Bolte finally received a copy of the presentation during the December 22nd session, first by e-mail then by hard copy. (Tr. 252). Bolte explained that he would be forwarding the Power Point presentation to Pittsburgh, where the USW is located, for review. (Tr. 253). The Company instituted the changes approximately ten days later before having any additional discussions with Bolte. (Tr. 256).

This evidence establishes that the Union did not engage in any dilatory or bad faith tactics that excuse the Company's unilateral changes. The Union promptly requested to bargain over the Company's proposed changes and sought the presentation in which those changes were outlined. After finally receiving those materials over a month later, it advised that it would send the material to its headquarters in Pittsburgh for review. In fact, if any party engaged in dilatory tactics, it was the Company by refusing to provide the requested presentation and then implementing the changes days later.

The Company's argument that Union dilatory tactics and bad faith behavior allowed it to implement health insurance changes is also particularly specious in light of its claim that it was acting pursuant to past practice. Even if the Company could prove evidence of Union bad faith and dilatory tactics (which it cannot), such evidence would ultimately be irrelevant. The Company contends that these changes were made consistent with its past practice of always

making these annual changes. Any motivation the Union had was, thus, irrelevant. As it had done had in earlier years when a contract was in effect, the Company intended to make these changes during the contract hiatus period without bargaining. The evidence establishes that the Company intended to make the health insurance changes without first bargaining with the Union. The Union's alleged bad faith motivation played no role in the Company's decision not to bargain. The cases it cites are distinguishable and do not shield its violation of the Act.

c. Public Policy Does Not Compel a Finding that the Company Could Institute the Health Insurance Changes

The Company argues that public policy concerns compel a finding that its decision to unilaterally change health care benefits should be excused. This claim is without merit for several reasons. First, the argument presumes that there was a past practice in place under which the Company made changes to health insurance benefits during a contract hiatus period. As noted above, these changes were previously made during the contract term pursuant to the management rights clause and not, as here, during a hiatus period. This is precisely why the *E.I. DuPont Nemours* decisions the ALJ cited are applicable and compel a finding that the Company was not permitted to engage in the action it took. The Company essentially requests the Board to reject its previous holdings in the *E.I. DuPont Nemours* decisions. As there was no applicable past practice, there are no legitimate policy concerns favoring the Company's position.

Second, contrary to the Company's argument, there is an overarching policy concern that justifies the ALJ's ruling. The ALJ's observation that unions would be discouraged from ever granting special discretion to employers during a contract term if doing so meant that employers who exercised the special discretion would thereby acquire the discretion in perpetuity is logical and reasonable. (ALJ's Decision, p. 32, lines 20-24, p. 33, lines 1-2). In fact, policy actually compels the adoption of the ALJ's reasoning.

Third, contrary to its claim, the Company is not “at the mercy” of the Union. Rubardt conceded that the Company could have designed any type of health insurance plan that it wanted because it is self-insured. It could have carved the bargaining unit employees at the Seymour facility out of its Company-wide plan and allowed them to maintain the benefits they continued to receive. (Tr. 405-407). Rubardt admitted that the Company could have carved out the employees if it wanted to, but it did not want to do that. (*Id.*). The Company’s claims that these benefits did not exist or that its changes were necessary to preserve the benefits for the bargaining unit employees are not true. In this case, it had the power and authority to comply with Board law by bargaining over the changes it made prior to implementation.

Fourth, the Company incorrectly suggests that the Union has some sort of advantage with respect to bargaining issues like changes to the health insurance benefits it could unilaterally make. It states that the Union “can choose to bargain new terms when the prior contract expires,” without recognizing that it also has the right to negotiate such changes. In fact, nothing stopped the Company from negotiating language that would have allowed it to make the proposed unilateral changes to the health insurance benefits after the expiration of the contract. In the absence of such language or a past practice not tied to the management rights clause, it cannot claim that it was entitled to make the changes it made.

Finally, the ALJ did not dictate what the Company had to offer its employees. The parties’ previous negotiations dictated what the Company had to offer. Because the contract did not confer the authority to the Company under Board law to make these changes without first bargaining, the ALJ properly found that the Company had failed to bargain in good faith. Based on the precedent outlined above, the ALJ would have dictated what benefits the employees are

eligible to receive had he veered from this precedent and allowed the Company to make changes it was not permitted to make without first bargaining.

d. The Parties Were Not at Overall Impasse

In this case, several factors militate against a finding that the parties were at an overall bargaining impasse. No party declared impasse at any point during the course of negotiations, including when the Company originally announced its changes and when those changes became effective on January 1, 2012. The Company never indicated that it was implementing any changes, including the health insurance changes, because the parties were not at impasse. (Tr. 401). This is true even though the Company had presented what it considered to be its last, best and final offer in April 2011.

In fact, the parties continued to negotiate well after this offer was presented and even after the Company announced changes to the health insurance benefits. *Huck Mfg Co.*, 254 NLRB 739, 754 (1981) (of importance in determining the existence of impasse is whether the parties continue to meet and negotiate.). The parties met for negotiations on December 22, 2011, well after the unilateral changes to the health care plan were originally announced. Moreover, the parties' use of a federal mediator reinforced the inference that negotiations were continuing. This helps establish that neither party was at the end of its negotiating rope after the Company announced the unilateral health care changes and prior to the point that they were implemented. It is also important to note that Bolte had requested the power point presentation that the Company previously used to announce these changes. (Tr. 252). Although the Union previously requested this material, it was not provided until the December 22nd session. After Bolte received this material, he forwarded the material to the USW headquarters for review. (Tr. 253).

The December bargaining session lasted for about three hours, with the Union offering “what if” proposals or “supposals” to the mediator. However, the meeting ended when Rubardt raised the NLRB matters during a meeting that Bolte contended should only focus on plant issues because he was not prepared to discuss the NLRB matters. Prior to the implementation of the health insurance benefit changes on January 1, 2012, Bolte did not have any additional conversations about health insurance benefits with the Company. (Tr. 256). The Union never commenced a strike at any point during negotiations and there is no evidence that a strike vote was taken. These facts all establish that the parties never reached an overall bargaining impasse.

Even if the parties were at an overall bargaining impasse, the Company’s action would still be a violation of the Act because, contrary to its assertion, the change to the health insurance benefits was not “reasonably comprehended” in its last proposal. (Co.’s Exceptions Brief, p. 38-39). As the ALJ observed, the Company’s last, best and final contract did not set forth any changes to health insurance benefits or premiums. (ALJ’s Decision p. 34, lines 45-47). In addition, the Company argues that its proposal was reasonably comprehended by its last proposal, but that proposal did not confer it the authority to make changes during a hiatus period. Thus, its action in unilaterally instituting the changes during a hiatus period was clearly not reasonably comprehended by its last proposal. This is further confirmed by the language in 2004-2011 CBA which provided that changes could be made to health insurance benefits during the term of the contract.

e. The Limited Exceptions that Allow For Implementation in the Absence of an Overall Bargaining Impasse Are Not Applicable

As demonstrated above, the parties were not at an overall bargaining impasse. The Company does suggest that the parties were at an impasse on the health insurance issue. (Co.’s Exceptions Brief, p. 38-39). However, even if the parties were at an impasse on this issue

(which they were not), in the absence of an overall bargaining impasse, there are only limited exceptions that allow an employer to unilaterally implement changes. These limited exceptions are found when economic exigencies or business emergencies compel an employer's prompt action. *Fire Fighters*, 304 NLRB 401, 402 (1991); *Bottom Line Enters.* 302 NLRB 374. Since neither of these exceptions are applicable, the Company's argument that the parties were at impasse on the health insurance issue is irrelevant.

The business emergency exception is generally limited to extraordinary events which are an unforeseen occurrence, have a major effect and require the Company to take immediate action. *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995). Absent a dire financial emergency, even economic events such as loss of significant accounts or contracts, operating at a comparative disadvantage or supply shortages do not justify unilateral action. *Farina Corp.*, 310 NLRB 318, 321 (1993); *Hankins Lumber* at 838. The Company has not offered any evidence of a significant economic event that compelled it to implement the pre-impasse health insurance changes and does not argue that this exception applies.

In *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995), the Board observed that other economic exigencies, although not sufficiently compelling to excuse bargaining altogether, can be encompassed within the economic exigencies exception. The employer can act unilaterally if either the union waives its right to bargain or the parties reach impasse on the matter proposed to be changed. The employer will satisfy its statutory obligation by providing the union with adequate notice and an opportunity to bargain. The Board has characterized this exception as requiring a heavy burden to invoke. The exception is limited only to those exigencies in which time is of the essence and which demand prompt action. The employer must demonstrate not only that the change was compelled, but also that the exigency was "caused by external events,

was beyond the employer's control or was not reasonably foreseeable." *Id.* at 82. The Company does not specifically argue that the Union waived its right to bargain and also does not directly argue that this exception applies. Indeed, this exception does not apply because there were no external economic exigencies that permitted it to make the unilateral changes. It could have carved the bargaining unit employees out of its plan and provided them the same benefits it had previously provided. It provided no evidence that there was an economic exigency that prevented it from doing so. Moreover, to the extent that it argues that the parties were at impasse on the health insurance issue, such argument fails. Bolte only learned of the insurance issue in November 2011, and was still requesting information on this matter during the December 22nd session. The Company unilaterally implemented the matter a few days later on January 1, 2012. The parties certainly were not at impasse on this issue, which had just arisen a few weeks earlier, at that time the Company implemented the changes. The Company was therefore not entitled to implement its health care proposal under this limited exception either.

E. The ALJ Did Not Err in Concluding that the Company Violated the Act by Unilaterally Implementing a Change to Its Safety Vest Policy

1. Background

Article XIX of the 2004-2011 CBA establishes a Health and Safety Committee, which consists of two employees selected by the Union and two representatives selected by the Company. (Jt. Ex. 1, p. 24). The committee is required to meet monthly to discuss issues of health and safety. (*Id.*). It submits recommendations to the Company. (*Id.*). In the January 2012 safety meeting, Regional Human Resources Manager Lawyer told Local President Phil Hartley, who was representing the Union, and 12 other hourly employees, that it was implementing a new safety vest requirement. (ALJ's Decision, p. 29, lines 24-26; Tr. 85). The Company contended that the corporate-wide policy change was necessary due to an accident that happened in another

plant. (Tr. 136, 436). Because the Company had already decided it was implementing the new safety vest policy, the Health and Safety Committee never submitted any recommendation regarding the wearing of vests. (Tr. 209, 436-437). The policy went into effect on March 1, 2012. (ALJ's Decision p. 29, lines 28-30; Tr. 137). The Company provides one safety vest, but replacement vests cost \$6.00 and must be paid for by the employee. (G.C. 28).

2. The ALJ Properly Concludes that the Company Unilaterally Changed Its Safety Policy

Equipment and work rules related to job safety are “germane to the working environment,” are not “among those managerial decisions which lie at the core of entrepreneurial control,” and are mandatory subjects of bargaining. *AK Steel Corp.*, 324 NLRB 173, 181 (1997). The ALJ properly found that the Company did not give advance notice or an opportunity to bargain before announcing that it would change the safety vest policy. (ALJ's Decision, p. 29, lines 25-27). The ALJ properly concluded that the Company unilaterally changed its safety policy without bargaining over this mandatory subject of bargaining. The unilateral change was announced to the hourly employees by the Company in shift meetings that took place in either January. (*Id.* at p. 29, lines 23-29; Tr. 85-86, 136-137, G.C. Ex. 7). Because the failure to comply with the unilaterally changed policy could result in discipline, the ALJ concluded that the requirement was a substantial, material and significant change about which the Company had a duty to give the Union advance notice and opportunity to bargain. (ALJ's Decision, p. 29, lines 31-35). The ALJ's conclusion is supported by applicable case law and record evidence. *Toledo Blade Co.*, 343 NLRB 385, 387-388 (2004); *AK Steel Corp.*, *supra* (the issue is whether the change is of legitimate concern to the union as the representative of employees such that the union would be entitled to bargain about the matter on behalf of the employees).

3. The Company's Exceptions Are Without Merit

The Company does not argue that it did not unilaterally implement a change requiring employees to wear a safety vest without first providing notice to the Union and giving it an opportunity to bargain. The Company, instead, argues that it was allowed to unilaterally implement a policy requiring employees to wear a safety vest pursuant to its Plant Safety, Security and Administrative Regulations Policy ("Policy"). (Co.'s Exceptions Brief, p. 39-42). Contrary to the Company's assertion, the ALJ did not disregard this Policy. The Company relies on language in the Policy which states, "[O]perating 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." (*Id.* at p. 40). The Company asserts that this is not an exhaustive list and it could add the safety vest requirement and discipline for employees who failed to comply with the new requirement.

The Company's argument misses the mark. The language it relies on is included in the Policy not the 2004-2011 CBA. Prior to 2012 when it instituted the safety vest requirement, it would have enforced the Policy through its rights under the management rights clause of the relevant contracts. Like the changes to its health insurance program, the safety vest change was made during the period when the management rights clause was expired. As such, the Company was prohibited from instituting the change to the Policy without first providing notice to the Union and giving it an opportunity to bargain the change. It is undisputed that the parties did not extend the management rights provision beyond the expiration of the contract. (ALJ's Decision, p. 30, lines 28-31). As the ALJ found, Bolte's March 3, 2011 letter makes clear that the management rights provision (Article XII of the expired contract) was no longer effective and that the Union was demanding to bargain over all changes that would have been covered any the

provision during the life of the contract. (*Id.*). The Company completely ignores the language in the expired CBA regarding both the management rights clause and the safety committee in its exceptions brief. The ALJ's conclusion should be accepted because the Company did not have the right to unilaterally change the safety vest requirement in the Policy pursuant to the management rights clause of the expired CBA. The ALJ cited Board precedent that a contractual reservation of management rights, such as the one included in the parties' expired CBA, does not survive beyond the expiration of the contract absent evidence of a contrary intention evidence of contrary intention by the parties. *Times Union, Capital Newspapers*, 356 NLRB No. 169 at *2 (2011); *Ironton Publ'ns, Inc.*, 321 NLRB 1048; *Hosp. San Cristobal*, 356 NLRB No. 95, slip op. at 5 (2011), citing *Clear Channel Outdoor, Inc.*, 346 NLRB 696, 703 (2006).

Moreover, although the Company claims that the Policy encompassed the safety vest requirement because it was included in the "non-exhaustive list" of safety requirements, it is also critical that the Company does not attempt to argue that it considered the safety vest to be included in this list prior to 2012. As the ALJ properly found, even though the Policy had been in effect in its present form since 2000, the Company had never previously contended that the safety vest requirement was included in the Policy. (ALJ's Decision p. 30, lines 13-18). The ALJ properly reasoned that, prior to March 2012, the Company never considered the safety vest requirement to be included in this list of "special safety equipment" that must be worn by employees. (*Id.*). The Company's failure to consider safety vests as required prior to March 2012 further demonstrates that the vest was not included in the list of required safety equipment.

The Company directs the Board to solely focus on the words "such as," which it contends support a finding that the Policy includes a non-exhaustive list of safety equipment. However, the Policy also states that "operating machinery or equipment or performing any duty that

requires the use of special safety equipment” without using the equipment is prohibited. (Respondent’s Ex. 43) (emphasis added). Prior to March 2012 when it made its unilateral change, no machinery or equipment required the use of safety vests. This supports the ALJ’s reasoning that the safety vest was never previously a required piece of safety equipment.

The employees were also never subject to discipline for failing to wear safety vests prior to March 2012 when the Company instituted the unilateral change. This fact helps punctuate why the Company was required to bargain with the Union over the proposed change. Under the Company’s reasoning, it could add any new safety requirement and subject employees to discipline for failure to comply with these requirements. Taken to its logical extreme, the Company could add any number of extremely oppressive requirements, such as requiring multiple articles of hot clothing, or illogical requirements, such as requiring safety equipment that does not work, for perpetuity. Employees could be forced to comply with these requirements, and the Company would not have to provide the Union notice or the opportunity to bargain. Since the Company’s reasoning leads to illogical results, it should be rejected.

The Company also bypassed the joint committee on safety the parties negotiated to deal with these matters by unilaterally implementing this policy without bargaining or seeking recommendations from the committee. The ALJ properly interpreted Board precedent which establishes that an Employer violates Section 8(a)(5) and (1) when it gives a union notice of such a change at the same time that it informs employees about it, and then implements the change. *Roll and Hold Warehouse and Distrib. Corp.*, 325 NLRB 41, 42-43 (1997), *enfd.* 162 F.3d 513 (1998). When a union learns of the change incidentally upon notification to all employees it “totally undermine[s]” the union’s role “to consult with unit employees to decide whether to acquiesce in the change, oppose it, or propose modifications.” *Id.* at 42. Where, as here, the

Union never waived the right to bargain over what pieces of safety equipment are required and can subject an employee to discipline, and, in fact, bargained for a committee to address such concerns, the Company has no legitimate claim that it could unilaterally institute this change.

The Company contends that the ALJ improperly found that the vest requirement was a material, substantial or significant change. (Co.'s Exceptions Brief, p. 42-44). It cites no specific evidence that establishes the vest requirement was not a material, substantial or significant change. It, instead, rehashes its argument that there was no change at all because the Policy always included the requirement. For the reasons cited above, this argument is without merit and should be rejected. Because the policy subjected employees to discipline for violation and employees were required to cover the cost of replacement vests, the change clearly was material, substantial and significant.

III. CONCLUSION

For all the foregoing reasons, the Charging Party requests that the Board accept the findings of fact and conclusions of law of the ALJ that the Company violated the Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been duly served upon the following counsel of record by United States first-class mail, postage prepaid and e-mail this 23rd day of November, 2012:

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