JD–50–12
Seymour, IN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SILGAN PLASTICS CORPORATION

and

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

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

Kimberly R. Sorg-Graves, Esq.,
for the General Counsel.
Raymond M. Deeny, Esq.
(Sherman& Howard, LLC)
Colorado Springs, Colorado,
for the Respondent.
Richard Swanson, Esq., and
Robert A. Hicks, Esq.
(Macy, Swanson & Allman)
Indianapolis, Indiana,
for the Charging Party.

DECISION

Statement of the Case

PAUL BOGAS, Administrative Law Judge. This case was tried in Indianapolis, Indiana, on April 18, 19, and 20, 2012. The United Steelworkers, AFL-CIO-CLC, Local Union 822 a/w United Steelworkers, AFL-CIO-CLC (the Charging Party or the Union) filed charges on June 3, August 22, September 24 and November 9, 2011, and on January 18 and February 22, 2012. The Union amended three of those charges on August 30, 2011, November 7, 2011, and March 14, 2012. The Director of Region 25 of the National Labor Relations Board (the Board or the NLRB) issued the complaint on September 28, 2011, the first consolidated complaint on November 29, 2011, the second consolidated complaint on February 14, 2012, and the final consolidated complaint (the complaint) on March 28, 2012. The complaint alleges that Silgan Plastics Corporation (the Respondent or the Company) violated Section (a)(5) and (1) of the National Labor Relations Act (the Act) by: failing to respond to Union information requests in a timely fashion; failing and refusing to process grievances and bargain over disciplinary actions against bargaining unit employees; bypassing the Union and dealing directly with unit employees regarding grievances concerning discipline; unilaterally implementing and enforcing

a policy relating to leave for the death of an employee's family member; unilaterally implementing changes to employees' health benefits plans; and unilaterally announcing and implementing a requirement that employees wear reflective safety vests. The Respondent filed a timely answer in which it denied that it had committed any of the alleged violations.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following findings of fact and conclusions of law.

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, manufactures plastic packaging at its facility in Seymour, Indiana, where it annually purchases and receives goods valued in excess of $50,000 directly from points outside the State of Indiana, and annually sells and ships goods valued in excess of $50,000 directly to points outside the State of Indiana. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background Facts

The Respondent – Silgan Plastics – is a manufacturer of plastic containers. It is a subsidiary of Silgan Holdings, whose other subsidiaries include Silgan Containers, the largest food can manufacturer in the United States. The Respondent has multiple facilities, including the one in Seymour, Indiana, (the Seymour facility) that is involved in this proceeding. A bargaining unit of production and maintenance employees at the Seymour facility has had a collective bargaining representative since at least 1989.[1] From March 1, 1989 until February 28, 2011, the facility operated under successive collective bargaining agreements without any lapse between those agreements. The most recent collective bargaining agreement (the contract or CBA) was effective by its terms from December 3, 2004 until February 28, 2011, and expired without a new contract being reached. At the time of the alleged violations in this case, the parties had reached a number of tentative agreements on contract provisions, but had still not completed a new contract. The Paper, Allied-Industrial, Chemical and Energy Workers International Union (PACE) was the bargaining representative when the 2004 to 2011 contract was negotiated. Shortly after that contract was signed, PACE merged with the United Steelworkers.[2] The United Steelworkers and its Local Union 822, have represented the

[1] The bargaining unit consists of: "All production and maintenance employees of the Company at its O'Brien Street plant in Seymour, Indiana, including all quality control employees, and janitorial employees, but excluding all office clerical employees, professional employees, guards, foremen and all other supervisors as defined in the national Labor Relations Act and by the National Labor Relations Board Case No. 25-RD-871, dated 4/5/85."

[2] There were errors in the printing of the 2004-2011 contract, and by the time the contract was re-printed with the errors corrected, PACE had merged with the United Steelworkers. That merger is reflected in the corrected version of the contract, which identifies the bargaining

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bargaining unit since the time of the merger. At the time of trial there were approximately 175 employees in the Seymour facility bargaining unit.

During the period leading up to the alleged violations in this case, some key personnel exited the scene. In February 2010, the United Steelworker's long-time staff representative for Silgan Plastics retired, and was replaced by Chris Bolte. Similarly, the official who had bargained the last contract for the Respondent retired, and David Rubardt stepped in as the Respondent's lead negotiator. Rubardt, an experienced labor negotiator, was not an official of Silgan Plastics, but rather was the Human Resources Director of Silgan Containers. Certain other persons involved in labor relations for the Union and the Respondent have remained the same. William Coffman, a unit employee at the Seymour facility, has been vice-president of the union local for approximately 8 years. Deanna Lawyer has been the Respondent's regional human resources manager since 2009 and for approximately 10 years prior to that she was its human resources coordinator.

B. CBA Expires; Respondent Discontinues Dues Check-off and Arbitration Process; Bolte Identifies Himself as the Union "Point Person"

Starting on February 14, 2011, the parties held negotiations for a successor contract, but the February 28, 2011 expiration date passed without the parties reaching a new agreement. At a meeting in early March 2011, the Respondent informed the Union that, in light of the expiration of the contract, the Respondent would no longer follow the contract provisions requiring it to deduct Union dues from employees' paychecks and arbitrate unresolved grievances. The expired contract's grievance-arbitration provisions provide for a three-step grievance process followed by arbitration if the grievance steps do not result in a settlement.[3]

In a letter dated March 5, 2011, Bolte communicated with plant manager Jim Stajkowski regarding the meeting discussed immediately above. Bolte referenced the Respondent's decision to cease deducting union dues and arbitrating grievances, and then stated:

> [T]he Employer is advised to not make any changes to the present terms and conditions of employment. If the Employer seeks any changes to the present terms and conditions of employment, the Union is demanding advance notice of such proposed change in order to allow the Union to represent its members. Regarding Article XXII [a management rights provision in the expired contract[4]], the Union will utilize the NLRA, (if necessary), should it become necessary due to

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representative as "United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local No. 7-822, AFL-CIO."

[3] Arbitration, as opposed to grievance processing, "is characterized by the parties' consensual surrender to an entity with the authority to issue a final and binding decision." *Indiana & Michigan Electric Co.*, 284 NLRB 53, 54 (1987).

[4] The management rights provision in the expired contract provides, in relevant part, that: "Except as limited by this Agreement, the Company shall have complete control over the operation of its business, the management of the plant, and the direction of its working forces, including but not limited to the right to . . . discipline, suspend, or discharge employees for proper cause . . . and make and enforce shop rules for the orderly conduct of the plant operation and the safety of the employees."

> any future actions by the Employer as it relates to changes in terms and conditions of employment.

Bolte also identified himself in the letter as the Union contact for certain matters. He stated that if the Respondent wished to make any additional changes to the bargaining unit's terms and conditions of employment, those proposed changes "should be submitted to me for processing." Bolte's letter also said to contact him regarding anything else raised by the correspondence. Bolte testified that the United Steel Workers made him the "point person" for the bargaining unit because the local union officials were accustomed to working with a contract in place, and "it's a lot different not having a CBA in place and working under the terms and conditions of an expired contact." Rubardt answered Bolte in a March 8 letter that, inter alia, stated that the Respondent had acted lawfully. Bolte responded by email on March 8, reiterating that "all further communications and notices shall be provided to me on behalf of the International Union."

On April 21, 2011, the Respondent gave the Union what it characterized as its last, best and final offer for a 3-year contract. During the first week of May 2011, the Union membership voted to reject that offer.

C. Respondent's Actions Regarding Wagner, Duncan, Hudson, and Coe

A number of the allegations in this case revolve around the Respondent's handling of leave requests and discipline for unit employees Erik Wagner, Lisa Duncan, Oliver Marshall Hudson, and Jonathon Coe. On May 13 or 14, 2011, Wagner's brother died. Wagner was at work on May 14, and Coffman contacted Lawyer (regional human resources manager) that day to ask "if there wasn't some way we could get [Wagner] out of the factory due to the loss of his brother." Coffman was hoping that Wagner would be permitted to leave the plant without losing pay and without being charged with an "occurrence" – i.e., an attendance violation. At the time, Wagner was at risk for serious attendance-based disciplinary action. The expired contract has a provision regarding leave that employees are permitted to take if they attend the funeral of an immediate family member.[5] The record indicates that Wagner's family told the Respondent that the deceased's body was being donated to science and for this reason there would be no funeral service. Lawyer responded that Wagner was not entitled to funeral leave under the contract because there was not going to be a funeral. Coffman asked if Wagner could have

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[5] That provision states:

> **Section 1.** If there is a death in the immediate family of an employee, he may be excused from work and, if he has completed his probationary period, he will be paid at his regular straight-time rate for the excused time, under the following conditions:
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> 1. He notifies his supervisor of the death in advance of his absence.
> 2. He actually attends the funeral.
> 3. Pay is limited to the necessary time lost from the regular schedule but not to exceed three consecutive days for 8 hour employees and two consecutive days for 12 hour employees, and, except under unusual circumstances, not to extend beyond the day after the funeral.
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> **Section 2.** The term "immediate family" means: spouse, mother, father, children (including adopted or step-children), brother, sister, grandmother, grandfather, mother-in-law, father-in-law, son-in-law, daughter-in-law, grandchildren, half-brother, half-sister, stepmother and stepfather.

Joint Exhibit (J Exh.) 1 at Page 21 (Article XIII).

"some vacation time or . . . something." Shortly thereafter, Lawyer called back and told Coffman that the Respondent would waive the usual 24-hour notice requirement for vacation leave and allow Wagner to take vacation leave for the rest of May 14 and for the following day. Coffman agreed. The practice between the parties had been that Coffman was permitted to work out accommodations such as this with the Respondent. Lawyer testified that she had not previously been presented with a situation, like Wagner's, in which an employee was seeking funeral leave, but there was no funeral home involved.

Also on May 14, the chief union steward – Diane Kreutzjans – filed a grievance regarding the treatment of Wagner. The grievance stated that Wagner discussed his brother's death with his supervisor, but that human resources had refused to allow Wagner to have May 14 and 15 off with pay and without incurring an attendance violation. Coffman did not know about this grievance when he had the conversations discussed above with Lawyer, and the record does not show whether the grievance had been filed at the time of those conversations.

On May 16, two days after the grievance was filed, Stajkowski and Lawyer contacted Coffman to discuss Wagner's situation. They told Coffman that if Wagner showed that he had attended a memorial service of some kind, the Respondent would reinstate his vacation time and allow him to use funeral leave instead. Coffman considered that to be an acceptable resolution of the grievance, but he did not agree to it because he did not know whether he had authority to do so. Later that day, Coffman discussed the matter with Bolte. Coffman told Bolte that he had reached an "arrangement" with the Respondent on May 14 regarding vacation leave for Wagner, but that the funeral leave grievance had not been resolved. Bolte responded that Coffman did not have authority to settle the Wagner grievance.[6]

On May 17, Bolte made a written request that the Respondent provide information about the Wagner grievance. That same day, Stajkowki and Lawyer had a conversation with Coffman and Kreutzjans and/or Glen Carney (local union president). The management officials expressed bewilderment at the Union's request for information regarding Wagner, stating that, in their view, the matter had been settled. The Union representatives informed management that they no longer had authority to settle grievances and that Bolte was handling the Wagner grievance. Prior to this time, a number of officials of the local Union had authority to file and resolve grievances. Those officials included Carney, Coffman, Kreutzjans, Myra Hartley (local Union secretary), and Mark Malone (crew steward).

As is discussed more fully below, on May 17 Bolte informed the Respondent that the Union wished to bargain over the Respondent's decision regarding Wagner's leave request. Bolte testified that he could have filed a step-2 grievance about this matter, but chose not to pursue that course. Transcript at Page (Tr.) 311. He explained that since the Respondent had cancelled the arbitration portion of the grievance procedure when the labor contract expired, he felt that the only viable path for resolution was through the collective bargaining process rather than through the grievance process. Id. There was no evidence that the Respondent ever

[6] The expired contract does not include an agreement that individuals in particular positions will have responsibility for the grievance procedure, or any particular step in that procedure. Rather the portions of the expired contract that relate to grievance processing reference action by the "Union" or the "representative of the Union." Under such circumstances the Union is free to decide who will serve as its representative in the grievance procedure. *Wellington Industries, Inc.*, 358 NLRB No. 90 (2012); *Victoria Packing Corp.*, 332 NLRB 597 (2000); *Long Island Jewish Medical Center*, 296 NLRB 51, 71 (1989); *Prudential Insurance Co.*, 124 NLRB 1390, 1395 (1959).

stated that it would no longer follow the pre-arbitration parts of the grievance-arbitration process and Rubardt specifically denied that he personally had made any such statement to the Union.

Regarding Lisa Duncan, the evidence shows that she was a bargaining unit employee who missed work on June 12, 2011. On June 13, Duncan submitted medical documentation reporting that she had been seen at a medical clinic and was able to return to work "with no restrictions." On June 13 or June 14, an employee in the Respondent's human resources department contacted the medical clinic and formed a belief that Duncan's medical documentation had been falsified. The Respondent suspended Duncan effective June 14. On June 15, after discussing the matter with Duncan, and after contacting the medical clinic a second time, the Respondent reached the conclusion that staff of the medical clinic had provided the documentation to Duncan, but that no member of the staff had written "return with no restrictions" on the documentation. By letter dated June 24, Lawyer notified Duncan that she had until July 1 to substantiate that the medical documentation had, "in its entirety," been issued by the medical clinic. Duncan did not submit the required substantiation and, by letter dated July 11, 2011, Lawyer informed Duncan that her employment was terminated pursuant to Company rules regarding falsification of records. The Union did not grieve Duncan's termination. In a contract offer that the Union made on July 26, 2011, the Union proposed that Duncan be reinstated with back pay and benefits. The Union apparently also made a later, informal, proposal that Duncan be reinstated without back pay.

Oliver Marshall Hudson is a bargaining unit employee who, like Wagner, was denied funeral leave by the Respondent. The record shows that, on July 1, 2011, Hudson told a supervisor that he was leaving work after learning of the death of his father. Hudson supplied the Respondent with a newspaper clipping of his father's obituary, but did not provide anything showing that he attended a funeral service. The record suggests that the Respondent had been told that there would not be a funeral service because the body was being cremated. The Respondent informed Hudson that, under those circumstances, he did not qualify for funeral leave and would be charged with an attendance violation for his absence. On July 8, Kreutzjans filed a grievance complaining that this action by the Respondent "did not recognize the union agreement with Silgan." In a memorandum dated August 5, 2011, Lawyer informed Kreutzjans that the Hudson grievance was denied, but that "bereavement pay" would be issued if Hudson submitted documentation that he attended a funeral. Respondent's Exhibit 28 at Page 5. The Union did not file an appeal to the second step of the grievance process. Hudson did not provide the requested documentation and the Respondent charged him with an attendance violation for the day he was absent. In its July 26, 2011, contract offer, the Union proposed that Respondent make Hudson whole by expunging the attendance violation and providing him with holiday and funeral pay.

Jonathon Coe is a bargaining unit employee who, on July 24, 2011, fell asleep in a break area during a scheduled work break and returned to his duties 10 minutes late. The Respondent has a rule against on-the-job sleeping and shortly after Coe returned late from his break, the Respondent suspended him. Coe told the Respondent that "everyone else" sleeps on the job, and that he did not think the suspension was fair. He declined to sign the typed disciplinary paperwork that the Respondent presented to him.[7] On July 25, Coe called Lawyer to discuss his suspension. Then, on July 27, an individual from the Respondent's human resources department called Coe and told him to report to the facility that night. Coe came to

[7] The body of the July 24 paperwork stated: "As a result of sleeping on the picnic table, I Jon Coe, understand that I will be suspended until further investigation."

the facility and met with Earlene Shultz – a manager or supervisor. Coe did not have a union representative at this meeting, the Respondent did not offer him union representation, and Coe was unaware of any right to request union representation.[8] Shultz asked Coe if he knew that what he had done was "wrong" and Coe answered "yes." Then Shultz gave Coe a typed document to sign. The document stated that Coe had violated the Respondent's rule regarding "Sleeping on the job, and/or unauthorized absence from assigned work location." However, it also provided that Coe was to be reinstated effective July 27 because the "break period extension was within a fairly reasonable amount of time." The document warned that "[a]ny further violations of Administrative Regulations may result in disciplinary action up to and including discharge." At the meeting, Coe and Shultz both signed the document. The document also includes a signature line for a "Union Representative," but that line was left blank. Coe testified that at this meeting the Respondent had simply advised him of the disciplinary action it was taking and had not attempted to bargain with him over the appropriate level of discipline. The Union did not file a grievance regarding Coe's suspension or make any proposal to the Respondent to change the rule about sleeping on-the-job.

D. Union Requests for Information and Bargaining Regarding Wagner, Duncan, Hudson, and Coe.

Bolte made information requests regarding Wagner, Duncan, Hudson and Coe, seeking information that Bolte testified the Union needed in order to ascertain whether the Respondent's actions were consistent with its practices and interpretations under the expired contract and to determine whether to pursue matters through the grievance process or bargaining. Tr. 261-262, Tr.273-276. With respect to Wagner, Bolte's May 17, 2011, letter to Stajkowski requested information about: other employees who had received money or benefits under the funeral pay provision in the expired contract, the proof that had been provided to the Respondent, the types of services the other employees had attended, and the names of the individuals who made the decisions to grant the benefits. The letter also sought information about any instances in which the Respondent had granted funeral leave without requiring documentation.[9] Bolte testified that

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[8] I credit Coe's testimony that he was not offered Union representation over Lawyer's testimony that he was offered, but declined, such representation. Tr. 67, Tr. 108. Lawyer was not present at the meeting, and so her testimony on this point is, at best, hearsay, and is outweighed by Coe's first hand account. In addition, while my credibility determination regarding Coe's testimony is made independently of the fact that he is a current employee, I nevertheless note that crediting him is consistent with the Board's view that the testimony of a current employee that is adverse to his employer is "given at considerable risk of economic reprisal, including loss of employment ... and for this reason not likely to be false." *Shop-Rite Supermarket*, 231 NLRB 500, 505 fn. 22 (1977). See also *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069 fn. 2 (2004), enfd. 174 Fed. Appx. 631 (2d Cir. 2006) and *Flexsteel Industries*, 316 NLRB 745 (1995), enfd. 83 F.3d 419 (5th Cir. 1996) (Table).

[9] Bolte's May 17 letter states in relevant part:

> 1. Please provide a copy of any notes, memos, internal documentation, reports, payroll records, or any other type information, whether in written form or any other form, verifying the name of any employee that was paid any money and/or received any benefit in conjunction with the expired Article XIII [Funeral Pay provision], for the period of December 3, 2004 through the present.
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> 2. Please provide a copy of any notes, memos, internal documentation, reports, payroll records, or any other type information, whether in written form of any other form, verifying the amount of money paid and the amount of hours paid to any employee

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Wagner's situation was unusual in that his brother's body was being donated to science and there would be no funeral service. The Union, Bolte testified, wanted to determine if there was a past practice for dealing with such circumstances. In addition to requesting information, Bolte's May 17 letter states that "The Union is requesting to bargain regarding the Employer's decision regarding Eric (sic) Wagner. I am offering May 25 or 26, 2011, beginning at 5:00 P.M. on either date." He asked the Respondent to provide him with alternative dates if necessary.

A flurry of back-and-forth correspondence regarding the Wagner situation and other matters ensued between Bolte and the Respondent. On May 19, 2011, Lawyer responded to Bolte's May 17 letter. Lawyer stated that the Respondent "considers [the Wagner] matter closed" because "[i]n keeping with past practice, Silgan's Management team and the Local Union #822 committee officer had a discussion and reached a mutual agreement to resolve the issue." The letter set forth what Lawyer said were the terms of that agreement – i.e., Wagner would receive vacation pay and no occurrence for his absences on May 14 and 15, and if he provided documentation that he attended a memorial service for his brother, the Respondent would reinstate his vacation days and apply "bereavement pay" instead.

Bolte answered Lawyer in a letter dated May 20, 2011. He stated that the Union's position was "that Silgan had violated the National Labor Relations Act" by meeting with Coffman regarding the Wagner matter and warned that "the Union w[ould] take the appropriate

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identified in number 1 above, as well as the day(s) absent from work in conjunction with any death.

3. Please provide a copy of any notes, memos, internal documentation, reports, payroll records, or any other type information, whether in written form of any other form, verifying what notice any employee identified in number 1 above provided to the supervisor of the death in advance of the employee's absence. Included but not limited to in this request is a copy of any type notification provided by said employee and/or any form filled out by any employee in conjunction with said death.

4. Please provide a copy of any notes, memos, internal documentation, reports, payroll records, or any other type of information, whether in written form of any other form, verifying what type service any employee identified in number 1 above attended in conjunction with any death that said employee notified their supervisor of in advance of any absence. Included but not limited to in this request is a copy of any written documentation provided by said employee and/or any form filled out by any employee in conjunction with the attendance of a funeral, service, family gathering, or any other type reason accepted by the Employer to verify said employee attended a funeral in accordance with the expired Article XIII. Include what type service was held and any information the Employer has available in its file to prove such service.

5. In accordance with request number 4 above, providing the Employer did not require any such proof, please provide a copy of any notes, memos, internal documentation, reports, payroll records, or any other type information, verifying how the Employer determined that the employee was eligible for pay and or benefits in accordance with Article XIII.

6. In accordance with request number 5 above, please provide a copy of any notes, memos, internal documentation, reports, payroll records, or any other type information, verify the name of the employee in which no documentation was required, the reason no documentation was required, and the name of the individual(s) that made the decision to pay said employee and allow for benefits without any such documentation.

7. Please provide the name(s) of any employee(s) that made any decision(s) regarding any of the subject matters contained in request number 1 - 6.

action" regarding this. Bolte asserted that he, rather than any official of the union local, was the union contact for this and other issues arising at the Seymour facility. He stated that "the Union w[ould] file charges with the National Labor Relations Board" in the event that the Respondent "refuse[d] to provide the Union with the requested information and refuse[d] to bargain over [the Wagner] matter. Bolte asserted that his March 5 letter – which stated that "any future proposed changes by the Employer should be submitted to me for processing" – had put the Employer on notice that communications, including about the subsequently arising Wagner matter, should be made to Bolte and not to the union local. Bolte also stated that, contrary to the Employer's view, the Wagner matter had not been resolved and the pending grievance on the subject "belong[ed] to the USW International Union." The May 20 letter repeated the May 17 information request.

On May 31, Lawyer responded to Bolte's May 20 letter. She took the position that the Respondent had followed its customary practice to resolve the Wagner grievance and that an agreement had been reached to "everyone's satisfaction." She stated that that Bolte could not unilaterally change the customary practice under which the Respondent had resolved grievances through discussions with officials of the local union committee. In light of that, she stated, "there is no need to go further" regarding the resolved grievance and Bolte's information request was not relevant to any grievance. Lawyer also stated that the information requested "would lead one to believe that you are preparing to make a proposal to amend either the grievance procedure itself, or perhaps the Funeral Leave article beyond our TA'd [tentatively agreed] language." She stated that the Respondent was making no such proposals.[10]

On May 31, Bolte responded to Lawyer. He stated that the Union was not making any proposal to amend the grievance procedure or the Funeral Leave provision beyond the language to which the parties had tentatively agreed. He stated that the Wagner grievance had not been resolved, that Lawyer's contrary view could not "be further from the truth or reality," and that the Union would be filing NLRB charges regarding the Union's failure to bargain over the Wagner matter and provide the requested information.

On June 3, 2011, Bolte filed an unfair labor practices (ULP) charge with the NLRB on behalf of the Union, in which he alleged, inter alia, that the Respondent had violated the Act by: failing to provide information; failing to recognize or bargain with the Union; dealing directly with Wagner regarding the grievance; and imposing a settlement regarding the Wagner matter. During the first 2 months after Bolte filed the ULP charge, there was little contact between the Respondent and the Union regarding the Wagner matter.

On July 26, 2011, the Union bargaining committee requested Bolte's assistance with the Duncan, Hudson, and Coe, matters. Bolte reacted on July 29 by sending three separate information request letters – one for each of those employees – to Stajkowksi, the plant manager for the Seymour facility. The request that Bolte made regarding Duncan sought information about any employees disciplined for the same reasons as Duncan, the complete disciplinary records for Duncan and the other employees, and all information used to discipline Duncan and the other employees.[11] Bolte's letter also stated that "The Union is requesting to

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[10] During negotiations for a new contract the parties had reached a tentative agreement regarding the funeral leave provision. Under the tentatively agreed language, the provision would remain the same except that it replaced language requiring that the funeral leave be taken on consecutive days, with new language requiring that the funeral leave be used on consecutive scheduled work days.

[11] Bolte's July 29, 2011, letter regarding Duncan stated:

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bargain regarding the Employer's decision to terminate Lisa Duncan." The letter regarding Hudson requested information about other employees who had received money or benefits under the funeral pay provision in the expired contract including the amounts paid to them, the proof they had provided to the Respondent, the type of service they attended, and the names of the individuals who made the decisions to grant the benefits. This request also sought information about occasions when the Respondent had granted funeral leave without requiring documentation.[12] The letter stated that "The Union is requesting to bargain regarding the

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1. Please provide a copy of any notes, memos, internal documentation, reports, payroll records, or any other type information, whether in written form or any other form, verifying the name of any employee that received discipline for the same reason as Lisa Duncan, for the period of December 3, 2004 through the present.

2. Please provide a copy of any notes, memos, internal documentation, reports, payroll records, or any other type information, whether in written form or any other form, verifying both the discipline issued to Lisa Duncan as well as the discipline issued to any employee as requested in number 1 above.

3. Please provide a copy of any notes, memos, internal documentation, reports, payroll records, or any other type information, whether in written form of any other form, verifying the discipline record of Lisa Duncan and for all employees that are referenced in number 1 and number 2 above. I am requesting including but not limited to the entire discipline record for any employee who was charged with the same offense including a copy of the discipline form and the discipline taken towards the employees.

4. Please provide a copy of any notes, memos, internal documentation, reports, payroll records, or any other type information, verifying any investigatory notes, memos, or any other information utilized to terminate Lisa Duncan.

5. Please provide a copy of any notes, memos, internal documentation, reports payroll records, or any other type information, verifying any investigatory notes, memos, or any other information utilized to discipline any employees as referenced in numbers 1, 2, or 3 above.

6. Please provide a copy of any notes, memos, internal documentation, reports, payroll records, or any other type information, verifying any/all other data utilized and/or considered in order to make the determination to terminate Lisa Duncan.

[12] Bolte's July 29, 2011, letter regarding Hudson stated:

1. Please provide a copy of any notes, memos, internal documentation, reports, payroll records, or any other type information, whether in written form or any other form, verifying the name of any employee that was paid any money and/or received any benefit in conjunction with the expired Article XIII [Funeral Leave], for the period of December 3, 2004 through the present.

2. Please provide a copy of any notes, memos, internal documentation, reports, payroll records, or any other type information, whether in written form of any other form, verifying the amount of money paid and the amount of hours paid to any employee identified in number 1 above, as well as the day(s) absent from work in conjunction with any death.

3. Please provide a copy of any notes, memos, internal documentation, reports, payroll records, or any other type information, whether in written form of any other form, verifying what notice any employee identified in number 1 above provided to the supervisor of the death in advance of the employee's absence. Included but not limited to in this request is a copy of any type notification provided by said employee and/or any form filled out by any employee in conjunction with said death.

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Employer's decision regarding Oliver Marshall Hudson." The request that Bolte made about Coe sought information and records regarding any employees who were disciplined for the same reasons as Coe, copies of the complete disciplinary records for Coe and the other employees, and all information used to discipline Coe and the other employees.[13] The letter

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4. Please provide a copy of any notes, memos, internal documentation, reports, payroll records, or any other type information, whether in written form of any other form, verifying what type service any employee identified in number 1 above attended in conjunction with any death that said employee notified their supervisor of in advance of any absence. Included but not limited to in this request is a copy of any written documentation provided by said employee and/or and form filled out by any employee in conjunction with the attendance of a funeral, service, family gathering, or any other type reason accepted by the Employer to verify said employee attended a funeral in accordance with the expired Article XIII. Include what type service was held and any information the Employer has available in its file to prove such service.

5. In accordance with request number 4 above, providing the Employer did not require any such proof, please provide a copy of any notes, memos, internal documentation, reports, payroll records, or any other type information, verifying how the Employer determined that the employee was eligible for pay and or benefits in accordance with Article XIII.

6. In accordance with request number 5 above, please provide a copy of any notes, memos, internal documentation, reports, payroll records, or any other type information, verify the name of the employee in which no documentation was required, the reason no documentation was required, and the name of the individual(s) that made the decision to pay said employee and allow for benefits without any such documentation.

7. Please provide the name(s) of any employees(s) that made any decision(s) regarding any of the subject matters contained in request number 1-6.

[13] Bolte's July 29, 2011, letter regarding Coe stated:

1. Please provide a copy of any notes, memos, internal documentation, reports, payroll records, or any other type information, whether in written form or any other form, verifying the name of any employee that received discipline for the same reasons as Jonathan Coe, for the period of December 3, 2004 through the present.

2. Please provide a copy of any notes, memos, internal documentation, reports, payroll records, or any other type information, whether in written form or any other form, verifying both the discipline issued to Jonathan Coe as well as the discipline issued to any employee as requested in number 1 above.

3. Please provide a copy of any notes, memos, internal documentation, reports, payroll records, or any other type information, whether in written form or any other form, verifying the discipline record of Jonathan Coe and for all employees that are referenced in number 1 and number 2 above. I am requesting including but not limited to the entire discipline record for any employee who was charged with the same offense including a copy of the discipline form and the discipline taken towards the employee.

4. Please provide a copy of any notes, memos, internal documentation, reports, payroll records, or any other type information, verifying any investigatory notes, memos, or any other information utilized to discipline Jonathan Coe.

5. Please provide a copy of any notes, memos, internal documentation, reports, payroll records, or any other type information, verifying any investigatory notes, memos, or any other information utilized to discipline any employees as referenced in numbers 1, 2, or 3 above.

also stated that "The Union is requesting to bargain regarding the Employer's decision to issue discipline to Jonathan Coe."[14]

On August 11, 2011, Raymond Deeny – outside legal counsel for the Respondent[15] – communicated with Bolte by letter over issues relating to Wagner, Duncan, Hudson and Coe. Deeny stated that "it would be appreciated if you would direct further communications to me for processing regarding the above matters." On the subject of Wagner, Deeny stated:

> We are somewhat confused about your request for information concerning Mr. Wagner because you seem to be confusing a failed grievance settlement with an alleged modification of the Collective Bargaining Agreement. The Company has not made any changes to the funeral leave provisions of the Agreement, either through proposed settlement, which you aborted, or through its interpretations of the Agreement. If you wish to have further discussions about outstanding information that you need to continue to process a grievance on behalf of Mr. Wagner, please contact me and we can discuss the parameters of what documents should be retrieved by my client. It appears, however, that the grievance is moot at this point.

In addition, Deeny stated that to the extent the Wagner grievance made a claim that bargaining was required over the Respondent's interpretation of the funeral pay provision of the expired contract, the claim in the grievance was rejected since the Respondent was under no obligation to bargain its interpretations of the contract. With respect to the paragraphs requesting "internal memoranda, notes and other documentation of other employees who have been disciplined," Deeny stated that the requests were irrelevant because the other employees are not covered by any pending grievance and, at any rate, "employee statements taken . . . regarding investigations are protected from production."

In the portion of the August 11 letter that relates to Hudson, Deeny took the position that "the Company is under no obligation to bargain its decisions concerning its interpretations of the Collective Bargaining Agreement, including the funeral pay and benefits provisions of the Agreement." He opined that the Union's requests were "in the nature of discovery requests, for which the expired Agreement does not provide." He also described the requests as "overbroad and likely irrelevant." With respect to Coe, the August 11 letter stated that Deeny was "unaware of any grievance" and that "[n]onetheless the company is under no obligation 'to bargain regarding the Employer's decision to issue discipline to Jonathan Coe.'" Nevertheless, Deeny stated, "If you are intending to make a settlement proposal regarding his suspension, please feel free to do so." Deeny also asserted that the information requests regarding Coe were "overbroad, burdensome and seemingly irrelevant." Similary, with respect to Duncan, Deeny took the position that "the Company is under no obligation" "to bargain regarding [its] decision to terminate Lisa Duncan," but nevertheless stated that "If you are intending to make a proposal regarding a settlement of Ms. Duncan's claims, feel free to do so." Deeny also stated that the information requests regarding her were "overbroad and burdensome."

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[14] The collective bargaining agreement provides that the Union has 15 working days – with working days described as Monday through Friday – in which to file a grievance. The July 29 information requests were filed within the grievance filing period for Duncan, who was terminated on July 11, and for Coe, who was suspended on July 24 and reinstated on July 26. Timely grievances were filed with respect to Wagner and Hudson.

[15] Attorney Deeny is also the Respondent's trial counsel in the instant proceeding.

Deeny closed the August 11 letter by stating that, despite the Respondent's positions regarding the information requests, he was inviting Bolte to contact him to discuss accommodations regarding the information requests and that he would "strive to work with [Bolte] to provide information to assist [Bolte] in processing any or all of the 'grievances.'"[16]

Bolte responded to Deeny that same day by email. He stated that the Wagner "matter is presently before the NLRB and the Union will await the Board's decision regarding this matter and the Union's charges." The Union also planned, Bolte said, to file charges so that the NLRB could "determine what is and what is not a mandatory subject of bargaining" with respect to Hudson, Coe, and Duncan. Bolted stated that when he returned to the office he would contact Deeny "to discuss the Union's information requests regarding the three (3) matters other than Wagner." Bolte made a further response to Deeny, in a letter dated August 27, 2011. At that time, he stated again that the Union would await the Board's actions regarding the Wagner charge. Bolte stated that he was willing to discuss the information requests regarding Hudson, Coe and Duncan with Deeny. He stated that he would not discuss settlement of the disputes concerning discipline of Coe and Duncan until he received the requested information regarding those matters. Bolte stated that he had left Deeny a voicemail message on August 22, but had not heard back, and he asked Deeny to contact him. Absent such contact, Bolte stated, he would "pursue these matters through the NLRB."

Bolte filed three ULP charges on behalf of the Union during the period following the August 11 exchange with Deeny. Those ULP charges – filed on August 22, August 30, and September 24 – alleged that the Respondent had failed and refused to provide the Union with necessary information and had refused to bargain over grievances and with the Union in general.

On September 22, 2011, Rubardt asked to meet with Bolte to "see if we can reach an accommodation on the amount and relevance of information requested or even resolve the issues themselves" relating to Wagner, Hudson, Coe, and Duncan. He offered to meet at the Seymour plant, or somewhere else in Seymour, and suggested four dates in late September and early October. That same day, Bolte responded to Rubardt by email. Bolte stated: "Be advised that the [Union] received notification from your Counsel that further communication should be directed to him. That is what the [Union] has done and has honored your Counsel's request." On September 23, Rubardt answered Bolte by email, stating:

> I recognize that [attorney] Deeny has been our representative in dealing with the Board on these charges and there has been one direct communication between you that I am aware of. Inasmuch as I remain the Company's chief

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[16] Rubardt testified that the Respondent's position regarding grievances was: "We were willing to discuss the situations surrounding those three cases, but we did not want to do them as part of the collective bargaining process. We were willing to discuss them as grievances and not as proposals, and that was not acceptable to the Union." Tr. 392. He also testified that, in the past, he had been involved in discussing grievances with the Union in an effort to reach settlement, but he denied that this constituted "bargaining with the Union over how to settle that grievance." Tr. 398. Rubardt stated that, in his view, settlement of a grievances is a permissive, not a mandatory, subject of bargaining. Tr. 366. Similarly, Lawyer testified that in the grievance process she had never negotiated with the Union committee over what level of discipline the Respondent would issue. Tr. 425-426.

> spokesman with respect to negotiations and have been assisting the Plant's management in their interface with you and the Committee, I am reaching out in an effort to resolve the issues raised in your letters.
>
> Mr. Deeny has asked you to stop addressing these communications to the Plant and was requesting to meet in order to address your information requests. Mr. Deeny's role is to work directly with the [Regional Office of the NLRB] with respect to the charges filed, and he and I are in agreement with respect to my outreach to you in an effort to resolve these matters.
>
> I would appreciate knowing if you can meet with me on the dates I proposed.

Bolte did not respond to Rubardt's September 23 communication.

The Region issued the first of the complaints in this case on September 28, 2011. Two days later, on September 30, Rubardt contacted Bolte by email and indicated that the Respondent was now gathering the information requested by the Union regarding Wagner, Duncan, Hudson, and Coe. Rubardt asked that Bolte meet with him to review the information provided to make sure that it was adequate. That same day, Bolte declined this request to meet, stating simply: "Please see my previous email. It was self explanatory."[17]

On October 5, 2011, Rubardt supplied approximately 211 pages of documents to Bolte in response to the information requests regarding Wagner, Hudson, Coe, and Duncan. The General Counsel and the Union state that what the Respondent produced on October 5 fully satisfied the four information requests. The complaint alleges that the Respondent violated the Act by failing to provide that information in a timely manner, not that the production was inadequate.

On December 22, 2011, the Union and the Respondent met to discuss, inter alia, a new labor contract. Among those present for the Union were Bolte, Carney, and Coffman, and for the Company, were Rubardt, Lawyer, and Mike Rajecki (the new plant manager). A federal mediator was also present. The Union's representatives and the Respondent's representatives began by caucusing separately and using the mediator to communicate with the other party. During this session the Union, through the mediator, made an informal "supposal" in which it described certain concessions the Union might make, including possible terms for resolving the matter involving Duncan. The Respondent answered that it was not willing to accept any of the "supposal" terms and was not making any changes to its last, best and final offer. Rubardt requested that the mediator ask Bolte to meet face-to-face to discuss "who do we communicate

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[17] As of September 30, attorney Deeny had not directly communicated with Bolte to confirm Rubardt's representation that Deeny approved of Bolte communicating with Rubardt to resolve the information requests and grievances. At trial, Bolte testified that he would have met with Rubardt if Deeny had confirmed Rubardt's representation, Tr. 249, but there is no record evidence that Bolte sought such confirmation from Deeny or had any specific reason to doubt Rubardt's representation.

Rubardt testified that his understanding was that the Union should address: issues regarding particular unit employees to Lawyer; issues regarding bargaining proposals to Rubardt; and issues regarding dealings with the NLRB over ULP charges to Deeny. However, the record does not show that the Respondent ever communicated these expectations to the Union, except to the limited extent that they are suggested by the communications discussed in this decision.

with at this plant, what's going on with these grievances." The mediator approached Bolte and asked whether he would meet directly with Rubardt regarding "some plant issues." Bolte agreed on condition that the parties would not "go into all the NLRB matters," which he was "not prepared" to discuss. When the two sides got together to meet, Rubardt first raised plant issues, but then referenced the matters that were pending before the NLRB. Bolte expressed his understanding that "we were just going to deal with the plant issues." When Rubardt continued to reference the matters pending with the NLRB, Bolte ended the meeting. The total negotiating session had lasted about half a day, but the portion when the Union and the Respondent met face to face lasted only a few minutes.[18]

E. Changes to Health Insurance

The labor contract that expired on February 28, 2011, provides that unit employees are eligible for participation in the Respondent's Medical Expense Plan. Joint Exhibit 1, Article XV Section A. This is the Respondent's only health insurance plan and it is self-insured, with the terms designed by the Respondent's corporate benefits department. The contract, in addition to making the Plan available, also provides that the benefits for unit employees "shall be subject to any changes or revisions that are made generally effective throughout [the Company] for other participating employees, including foremen and office employees at Seymour, during the term of this contract." Id. at Section F. The contract provides 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" the grievance and arbitration procedure under the contract. Id. at Section G. Prior to the most recent contract, the parties entered into at least four successive bargaining agreements – starting with the contract that went into effect on March 1, 1989 – and all of these contracts included the same provisions regarding changes to health benefits.

Prior to February 28, 2011, the Respondent had repeatedly made unilateral changes to the health benefits plan, and applied those changes corporate-wide, including to the unit employees, without protest from the Union. The Respondent notified employees about these changes in about November of each year during an open enrollment period and implemented the changes effective the following January 1. In 2008, 2010, and 2011, the Respondent

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[18] At the trial, the Respondent asserted that an inquiry into certain matters – including Union strategy manuals and materials for its organizers – was relevant because it might show that the Union was filing information requests to harass the Respondent or prevent impasse. I did not permit those inquiries in part because they gave every indication of being a fishing expedition into arguably privileged internal Union materials, see, e.g., *Berbiglia, Inc.*, 233 NLRB 1476, 1495 (1977) ("requiring the Union to open its files to Respondent" would interfere impermissibly with the parties' ability "to formulate their positions and devise their strategies without fear of exposure") but also because, under Board law, if the evidence shows that even one reason for an information request is justified, the Respondent is required to produce the information regardless of whether the Union also has an ulterior motive for the request. *Land Rover Redwood City*, 330 NLRB 331, 331-332 fn.3 (1999); *Country 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. See *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 is not warranted.); *Island Creek Coal Co.*, supra (same).

increased premiums for certain types of coverage, and these same increases were applied to the unit employees without any bargaining with, or protest by, the Union over the increases. The record does now show that the Respondent ever unilaterally modified the health benefits of unit employees during a hiatus period between two contracts, or during any other period when the management rights provision regarding health benefits was not in effect.

During negotiations for a successor to the contract that expired on February 28, 2011, the Union proposed switching the unit employees from the Respondent's health plan to the United Steelworker's health and welfare plan. The Respondent considered, but rejected, that proposal and by April 20 the Union had abandoned it and proposed, instead, that the Respondent continue to offer the current health plan, but agree (1) to limits on premium increases and (2) to leave benefit levels unchanged during the contract term. This continued to be the Union's formal proposal on health benefits throughout the relevant time period. On April 21, 2011 – after approximately 11 scheduled negotiating dates[19] – the Respondent made its "last, best and final offer" and in that offer it proposed to re-enact the same health insurance provisions without change – meaning that the Respondent would continue to offer employees the same health benefits, subject to the provision allowing the employer to make unilateral changes to those benefits. In May 2011, the bargaining unit voted to reject the Respondent's last, best and final offer. The Respondent did not subsequently modify that offer.

In 2011, the Respondent's corporate benefits department decided to make changes to coming years' health benefits for both non-unit employees and unit employees. In late October or early November 2011, the Respondent circulated a flier to the unit employees stating that the Respondent would announce changes to the employees' health benefits during the upcoming open enrollment meetings and that these changes would be effective on January 1, 2012. In early November 2011, the Respondent held an open enrollment meeting during which it told the unit employees what changes it would be making to their health benefits effective January 1. At that meeting the Respondent gave a power point presentation describing the changes. Immediately after the meeting, Coffman requested that Lawyer provide him with a copy of the power point presentation. Lawyer agreed, but three days later she changed her position and stated that she would not provide a copy of the presentation.

The health benefit changes that the Respondent announced during the November meeting included the following: modifications to the list of health procedures that require pre-certification; elimination of an on-line health advice tool for employees; discontinuation of "health coach" consultations; elimination of a 24-hour nurse line; elimination of an on-line and call-in service for pregnancy-related questions; and modification of a program under which the Respondent made payments to employees who engaged in designated healthy behaviors. The Respondent also increased the amount that employees paid in medical insurance premiums.

The Respondent did not inform the Union of the health benefit changes, or provide an opportunity to bargain over those changes, prior to circulating the flier and announcing the changes to unit employees at the November meeting. According to Rubardt, the Respondent

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[19] The record indicates that the parties held contract negotiations on February 14 to 16, February 21 to 24, April 18 to 21, July 26, and December 22, 2011. The Respondent did not make its economic proposals until sometime during the April 18 to 21 sessions. A federal mediator participated at the July 26 and December 22 sessions. During negotiations, the parties reached a number of tentative agreements regarding provisions for a successor contract.

believed that bargaining was not necessary because the Company was maintaining the status quo that existed under the expired contract by conforming the unit employees' health benefits and costs to those the Respondent was offering corporate-wide.[20]

Bolte, in a November 9 letter to Rubardt, demanded that the Respondent bargain with the Union regarding the changes to health insurance benefits and costs that the Respondent had announced to employees at the open enrollment meeting. Bolte took the position that the changes the Respondent had announced altered the terms and conditions of employment and therefore the Respondent had an obligation to bargain. He warned the Respondent not to take any further steps towards unilateral implementation of the changes and stated "that all matters such as this were to be directed to me."

The Respondent and the Union met on December 22 to discuss, inter alia, the issues relating to employees' health benefits. Among those present were Bolte, Carney, Coffman, Rubardt, Lawyer, and Rajecki, as well as a federal mediator. At the start of the meeting, Bolte asked Rubardt to provide the Union with a copy of the power point presentation that the Respondent had made to unit employees at the November meeting. Rubardt provided the Union with both a hard copy and an electronic copy of the presentation. At this point, the parties were not meeting face-to-face, but rather caucusing separately and communicating through the mediator. The Union presented an informal "supposal" for the Respondent's consideration. The "supposal" terms were not something that the Union was actually proposing, but rather hypothetical concessions presented in an effort to feel out how the Respondent would react if the Union did propose them. The Respondent rejected all of the supposal terms and stated that it was making no changes to the last, best and final offer it presented in April. As discussed above, Bolte had a brief face-to-face meeting with Rubardt and Rajecki. Bolte ended the session when Rubardt referenced the pending ULP charges, something that Bolte believed the parties had agreed would be off-limits for the face-to-face meeting.

Later on December 22, Rubardt and Bolte had an email exchange about the health benefits. Rubardt stated that the Respondent's "2012 program" complied with the terms of the expired contract which permitted the Respondent to make changes to unit employees' health benefits without bargaining. Bolte responded that the provisions cited by Rubardt did not permit the Respondent to make changes to unit employees' health care benefit and that if the Respondent made changes the Union would file ULP charges. During the time period relevant to the allegations in the complaint, the parties had no further discussions or negotiations about health benefits.

On January 1, 2012, the Respondent implemented the health benefit changes and premium increases discussed above for the bargaining unit employee at the Seymour facility as well as for employees corporate-wide. There is no dispute that these changes were made without the agreement of the Union. In addition, the parties agree that prior to implementing the changes the Respondent did not declare impasse or assert that it was making any of the

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[20] Rubardt testified that, if the Respondent had chosen to do so, it could have kept the benefit levels and premiums of the unit employees unchanged by carving out a plan for just the unit employees. Tr.405-406. However, he opined that creating a separate plan for the unit employees would have increased the plan's costs "exponentially." Id. He also testified that, in the alternative, the Respondent could have chosen to keep the unit employees' premiums at the same level by leaving the unit employees in the corporate-wide plan but subsidizing the unit employees' premiums. Tr. 406-407.

changes due to an impasse.[21] Indeed the Respondent's negotiators never used the word impasse during the negotiations. Rather, Rubardt testified that, in his view, the changes could be made without negotiating because the Respondent was maintaining the "status quo . . . condition that had been in place on February 28th, which was we were able to make annual changes that applied to every other facility in the company."

F. New Reflective Vest Requirement

The expired contract provides that the Health and Safety Committee "shall meet each month for the purpose of discussing matters pertaining to health and safety." The January 2012 meeting of the Health and Safety Committee was attended by: Lawyer and other representatives of the Respondent; Myra Hartley, a representative of the local union; and approximately 12 hourly employees who volunteered to be on the committee. Lawyer told the committee that the Respondent had decided to implement a reflective vest requirement.[22] Hartley did not make any comments at the meeting and did not request to meet and confer about the Respondent's decision. Prior to announcing the reflective vest requirement at this meeting, the Respondent did not give the Union notice or an opportunity to bargain. The expired contract provides that the safety "committee shall submit to the company, with a copy to the Union, such recommendations as it may consider proper regarding matters within its jurisdiction." The committee did not make any such recommendation regarding the reflective vest requirement.

Also in January 2012, Rajecki (plant manager) held a monthly shift meeting that was attended by all the hourly employees, salaried employees, and management officials who were present on the shift. The Respondent told the employees that "starting March 1st if [the employees] were in the warehouse or in a truck lot, [they] would wear reflective vests." The shift meeting was held after the safety committee meeting, but the record does not show whether it was held immediately afterwards or some days or weeks later. At any rate, the shift meeting was the first time that Coffman, the vice-president of the local union, heard about the new

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[21] Rubardt testified that as the July 26 contract negotiation session was ending, the federal mediator opined, "It seems to me that you guys are at impasse." This is hearsay testimony that does not fall within any exception to the hearsay rule. *Granite Construction Co.*, 330 NLRB 205, 210-211 fn. 1 (1999) (testimony regarding what a Federal mediator told the employer's representatives in the course of bargaining is subject to hearsay objection if offered for the truth of the matter stated). Moreover, it is not clear whether Rubardt is claiming that the Union negotiators had an opportunity to hear, and respond to, this statement. At any rate, the same mediator subsequently met with the parties again on December 22 and Bolte testified, without contradiction, that neither the mediator nor either party stated that negotiations were at impasse at that time. Tr. 250, 326.

[22] At some points during her testimony, Lawyer suggested that at the November safety meeting the Respondent was not presenting the reflective vest requirement as something that it had already decided to impose. However, based on my consideration of the totality of Lawyer's testimony, and the record, as a whole, I find that at the November safety meeting Lawyer told employees that the Respondent had already made a decision to implement the reflective vest requirement. I note, in particular, the portion of Lawyer's testimony where she stated that "I said we were doing it corporate-wide as a result of the incident [at the Respondent's facility] in Langhorn, and it was advised by the [Occupational Safety and Health Administration] representative." Tr. 436. She also stated, "I told the committee that we were going to implement." Tr. 437.

reflective vest requirement. The Respondent implemented the requirement effective March 1, 2012. Prior to that time, the Respondent had not required employees at any of its facilities to wear reflective vests. The Respondent provided each employee with his or her first vest, but told employees that the Company would charge six dollars for replacement vests. The Respondent also stated that it would post signs at all entrances to the warehouse to remind employees of the vest requirement.

Between the time of the Respondent's January announcement of the reflective vest requirement and the March 1 effective date of that requirement, the Union did not make a request to bargain about the requirement and made no proposal on the subject of the vests. The Union does not oppose the use of the vests, but Bolte testified that the Respondent still should have bargained over the requirement, and in particular over such matters as whether employees would have to pay for the vests themselves and how violations of the requirement would be disciplined.

The record evidence is vague regarding whether the Respondent has taken safety measures in the past without giving the Union notice and an opportunity to bargain. Coffman testified that when he was the Union representative on the Seymour facility's safety committee prior to 2011, the safety committee would be "convened" to "meet and discuss" new safety measures. The record also shows that the Respondent has placed certain markings on the warehouse floor and pillars in order to help employees avoid accidents. Coffman testified that these markings have not been bargained over, but the evidence does not show whether the markings were created or modified at a time when Coffman was at the Seymour facility. Nor does the record show whether employees may be disciplined for violations relating exclusively to those markings.

Since April 2000, the Silgan facility has had administrative regulations in effect which state that "Operating machinery or equipment or performing any duty that requires the use of special safety equipment (such as face shields, ear protection, gloves etc.) without using that safety equipment is prohibited." These administrative regulations make no mention of reflective vests, but do identify circumstances in which employees are required to use safety glasses, hearing protection, hair nets, beard nets, shirts with sleeves, shoes and socks, and guard mechanisms on machinery. The record does not show any instances prior to January 2012 in which the Respondent announced "special safety equipment" requirements without bargaining with the Union over those requirements. The administrative regulations state that violations of the safety rules "may result in discipline, up to and including discharge." The expired labor contract includes a management rights provision which states that the Respondent has authority to "make and enforce shop rules for the orderly conduct of the plant operation and the safety of the employees."

G. Complaint Allegations

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) by: failing to provide information to the Union in a timely manner in response to information requests made by the Union on about May 17, May 20, and July 29, 2011; failing to process grievances and bargain collectively about disciplinary actions issued to bargaining unit employees; dealing directly with bargaining unit employees by soliciting employees to settle their grievances concerning discipline; on about May 14, 2011, unilaterally implementing an employee leave policy relating to the death of an employee's immediate family member where there will be no funeral home service and enforcing that policy on May 14 and July 1, 2011; on about January 1, 2012, unilaterally implementing changes to employees' health benefit plans; on about January

30, 2012, unilaterally announcing a new reflective vest policy for employees, and on March 1, 2012, unilaterally implementing that policy.

III. Analysis and Discussion

A. Information Requests

An employer's obligation to bargain in good faith under Section 8(a)(5) of the Act, includes the obligation to furnish the employees' bargaining representative, upon request, with information relevant to and necessary for the performance of the Union's statutory duty as the employees' bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-36 (1967). Information pertaining to employees within the bargaining unit is presumptively relevant to this duty. *Caldwell Manufacturing Co.*, 346 NLRB 1159 (2006). In addition, the Board has consistently recognized that information that aids the grievance-arbitration process, including information that may help the union decide whether or not to file or proceed with a grievance is relevant. *U.S. Postal Service*, 337 NLRB 820, 822 (2002). It makes no difference whether a grievance actually has been filed by the time of an information request or whether grievance-filing is merely being contemplated. *Diversified Bank Installations, Inc*. 324 NLRB 457, 468 (1997). The Union is also entitled to information needed to investigate whether to seek bargaining over discipline that has been imposed on a represented employee, *Wackenhut Corp.*, 345 NLRB 850, 871 (2005),[23] or to police whether the treatment of the represented employees is consistent with contract terms, *Certco Distribution Center,* 346 NLRB 1214, 1215 (2006), *Diversified Bank*, supra. The employer's obligation to provide such information requires not only that it provide the information, but that it do so in a timely manner. 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); *American Signature, Inc.,* 334 NLRB 880, 885 (2001).

Wagner: The Union made an information request regarding Wagner on May 17, 2011, and repeated that request on May 20, 2011. The Respondent did not provide any of the requested information until about 4½ months later, on October 5. I conclude that the Union's request sought information to which the Union was entitled and that the Respondent failed to provide that information in a timely manner. The information requested concerns the circumstances of Wagner's leave request and the Respondent's response to that request, as well as the Respondent's past treatment of similarly situated employees. See, supra, footnote 9, and the accompanying text. Such information would assist the Union in its decisions regarding the grievance/arbitration process and its policing of the Respondent's adherence to the status quo under the expired contract. The information is also relevant to the Union's bargaining over the Respondent's May 16 proposal to grant funeral leave as long as Wagner showed that he attended a memorial service.

The Respondent argues that the Union did not need the requested information regarding Wagner's situation because the grievance had been settled on May 14. The evidence shows that, to the contrary, the grievance had not been settled. It is true that Coffman and Lawyer engaged in discussions on May 14 which led the Respondent to allow Wagner to use vacation

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[23] See also *Fresno Bee*, 337 NLRB 1161, 1187 (2002) ("Respondent has an obligation to bargain with the Union, upon request, concerning the discharges, discipline, or reinstatement of its employees.") and *Washoe Medical Center, Inc.*, 337 NLRB 202, 205 (2001) ("Employee discipline is unquestionably a mandatory subject of bargaining.").

time in order to leave the facility without incurring an attendance violation, but those conversations did not constitute a settlement of the grievance that Kreutzjans filed that same day regarding the denial of funeral leave. Indeed, Coffman was not even aware of the grievance at the time of his May 14 discussions with Lawyer. It is entirely possible that the grievance had not even been filed at the time of Coffman's and Lawyer's discussions. The conclusion that the grievance regarding the denial of funeral leave had not been resolved on May 14 is supported by the fact that, on May 16, Lawyer and Stajkowski approached Coffman with a proposal under which Wagner could obtain the funeral leave that the Respondent had denied to him on May 14. The fact that the Respondent made this proposal on May 16 indicates that even the Respondent did not view the grievance regarding Wagner's funeral leave as having been fully resolved on May 14.

Putting aside the fact that the Wagner grievance was still pending on May 17, the Union was entitled to the requested information because it would assist the Union in determining whether the Respondent was treating Wagner in a manner consistent with the status quo under the expired contract, and also help the Union to negotiate over the Respondent's treatment of Wagner and its proposal to allow Wagner to obtain funeral leave by producing evidence that he had attended a memorial service.

The Respondent, citing *Mission Foods*, 345 NLRB 788 (2005) and *Serramonte Oldsmobile, Inc.*, 318 NLRB 80 (1995), enfd. in part 86 F.2d 227 (D.C. Cir. 1996), contends that the information requests are invalid because the Union made them in bad faith to undermine bargaining. That defense is not viable here. The Board has held that if even one reason for an information request is shown to be justified, the employer is required to produce the information regardless of whether the union also has an ulterior motive for the request. *Land Rover Redwood City*, 330 NLRB at 331-332 fn.3; *Country Ford Trucks, Inc.*, 330 NLRB at 328 fn. 3 or fn. 6; *Hawkins Construction Co.*, 285 NLRB 1313, 1314 (1987) (same), enf. denied on other grounds 857 F.2d 1224 (8th Cir. 1988). In this case, as discussed above, there were multiple legitimate purposes for the Union's information request. In *Land Rover Redwood City,* supra, and *Country Ford Trucks,* supra, the Board held that where there was at least one legitimate purpose for the union's information request, an inquiry into the employer's contention that the union made the information request in bad faith was not warranted.[24]

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[24] At any rate the Respondent has not shown a basis for believing that its attempted inquiry into the Union was more than a fishing expedition. The Board has held that there is a presumption that a union information request is made in good faith, and a respondent who contends otherwise must overcome that presumption. *Mission Foods*, supra; *Hawkins Construction Co.*, supra. To counter than presumption, the Respondent relies on the fact that the Union did not file new grievances or make new relevant bargaining proposals after the Company produced the information. That evidence is wholly unpersuasive. A union's decision not to challenge the employer's actions is no less consistent with a good faith review of relevant information than would be a decision to pursue challenges to the same actions. The union is entitled to information that will assist in making a decision about which course to take, not only to information that will lead it to proceed with a challenge. See *U.S. Postal Service*, supra; *Diversified Bank Installations,* supra. Indeed, the record shows that Bolte withdrew other grievances after reviewing information that the Respondent supplied in response to Union requests, and which satisfied the Union that the Respondent's actions were consistent with past practice. Tr. 258-259. Similarly, unpersuasive is the speculation of the Respondent's counsel that the Union was making its information requests as a tactic to avoid imminent impasse. Such a motive is not suggested here because the evidence does not show that a declaration of

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The Respondent initially resisted providing the information sought by the Union in its May 17 request, but eventually relented and produced that information on October 5. I find that this production was untimely and that the Respondent therefore violated its obligations under Section 8(a)(5) and (1) to produce requested information without undue delay. See *Amersig Graphics, Inc.*, supra. The Board evaluates the reasonableness of an employer's delay in supplying information based on "the complexity and extent of the information sought, its availability and the difficulty in retrieving the information." *Samaritan Medical Center*, 319 NLRB 392, 398 (1995), citing *Postal Service*, 308 NLRB 547 (1992). I have reviewed the information that the Respondent provided on October 5, and conclude that this information could readily have been provided within a matter of days after receiving the May 17 request. The Respondent has not introduced any evidence to show that, contrary to appearances, the document production was particularly complex, voluminous, or burdensome. Indeed, in its brief the Respondent claims that the total time it required to collect and provide the information sought in all four of the Union requests at-issue in this case (i.e., regarding Wagner, Duncan, Hudson and Coe) was 30 hours. Brief of Respondent at Page 23. On September 30, two days after the Regional Director issued the initial complaint in this case, the Respondent notified the Union for the first time that it had begun collecting the information. Less than a week later, on October 5, the Respondent made a complete response to the information requests for all four individuals. This supports an inference that the Respondent, had it been so inclined, could easily have supplied the information requested regarding Wagner by some time in May or in early June. It delayed unreasonably by waiting until October 5 to provide that information. The Board has found considerably briefer delays to be unreasonable. See *Pan American Grain*, 343 NLRB 318, 343 (2004), enfd. in part, 432 F.3d 69 (1st Cir. 2005) (3-month delay unreasonable); *Bundy Corp.*, 292 NLRB 671 (1989) (delay of 2 ½-month violates the Act); *Woodland Clinic*, 331 NLRB 735, 737 (2000) (delay of 7 weeks violates the Act).

The Respondent asserts that the delay was lawful pursuant to decisions allowing an employer additional leeway when it has been seeking necessary clarification or explanation of an ambiguous request during the period of the delay. See Brief of Respondent at Pages 29-30.[25] However, that authority is beside the point because the information request regarding Wagner was not unambiguous or unclear, and did not require clarification. Indeed, once the Respondent decided to comply with the request it was able to do so fully in less than a week's time and with no clarification from the Union. The information request made regarding Wagner was a typical one given the issues involved and there is no doubt in my mind that the Respondent understood exactly what the Union was asking for and why it was asking for it. The information sought was not particularly complex, extensive, or difficult to obtain. The Respondent did not attempt to mitigate the delay by providing at least some of the information sought immediately, but rather withheld all of it. Thus, the Respondent did not have a valid basis for delaying its response to the Wagner information request by over 4 months even though it communicated with the Union while it resisted providing the information.[26]

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impasse was imminent. To the contrary, the Respondent's negotiators never suggested, either during negotiations or in the related written communications, that the parties were approaching impasse.

[25] Citing *Land-O-Sun Dairies*, 345 NLRB 1222 (2005), *Dallas & Mavis Forwarding Co.*, 291 NLRB 980 (1988), *Tree Fruits Labor Relations Comm.*, 121 NLRB 516 (1958).

[26] The Respondent also argues that the delay was reasonable because it had invited Bolte to meet with the Employer to review the files. Brief of Respondent at 30, citing *NLRB v. Tex-Tan*, 318 F.2d 472, 477 (5th Cir. 1963) (employer met its obligation under the Act by, inter alia,

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For the reasons discussed above, I find that the Respondent violated Section 8(a)(5) and (1) by failing to provide, in a timely manner, the information regarding Wagner that the Union requested on May 17, 2011, and requested again on May 20, 2011.

Duncan: The Union made its information request regarding Duncan on July 29, 2012, and the Respondent did not supply the information sought until over 2 months later on October 5, 2012. The information requested concerns the circumstances of Duncan's discharge for allegedly falsifying records, the Respondent's investigation of that alleged misconduct, and the Respondent's treatment of similarly situated employees. See, supra, footnote 11, and the accompanying text. Such information would assist the Union to make decisions regarding the grievance/arbitration process and to police whether the Respondent was adhering to the status quo under the expired contract. Therefore the Respondent had a duty to provide it. Although the Union did not file a grievance regarding Duncan's July 11, 2011 termination, the 15-workday deadline for doing so had not passed at the time the Union made the information request. *U.S. Postal Service*, 337 NLRB at 822 (information is relevant if it may help the union decide whether to file or proceed with a grievance), *Diversified Bank*, supra (when determining relevancy of information request, it makes no difference whether the grievance has actually been filed or is merely being contemplated). The information request is also relevant to the Union's effort to determine whether the Respondent was adhering to the status quo under the expired contract and also to the Union's decisions about bargaining over Duncan's termination. *Wackenhut Corp.*, 345 NLRB at 871 (union entitled to information that will assist it in bargaining over discipline received by unit employees). The evidence indicates that the Union made a bargaining proposal on July 26 that sought reinstatement of Duncan and that, subsequent to the Respondent's October response to the information request, the Union made a somewhat modified "supposal" that covered Duncan's situation.

The Respondent contends that the information request regarding Duncan is invalid because the Union made it in bad faith. For the same reasons discussed with respect to the May 17 request regarding Wagner, this contention is not viable. Since at least one reason for the information request is justified an inquiry into the Union's alleged bad faith is not warranted. *Land Rover Redwood City*, 330 NLRB at 331-332 fn.3.

I find that the Respondent did not respond to the July 29 information request regarding Duncan in a timely manner. As noted before, once the Respondent decided to provide the information sought by the Union, it took less than a week for the Respondent to gather and produce a complete response to all four information requests. I am not persuaded by the Respondent's contention that the delay was caused by the Union's failure to clarify the request given that the request was unambiguous on its face, and that Lawyer produced it, without any clarification by the Union, just days after the Regional Director issued the initial complaint. The portion of the Respondent's production that relates to Duncan's situation consists of just 17 pages. Based on the record in this case, including the extent, lack of complexity and availability of the information sought, I conclude that the Respondent, had it been so inclined, could have responded to the information request regarding Duncan within a few days of when that request was made and delayed unreasonably by waiting over 2 months before doing so. See

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making an "unqualified offer to the Union for its representatives to see and copy any of its records"). However, by the time the Respondent invited Bolte to meet, 4 months had already passed from the Union's request and the response was already untimely. The Respondent's belated offer to meet with the Union to review documents cannot absolve the Respondent of its prior unreasonable delay.

Monmouth Care Center, 354 NLRB No. 2, slip op. at 42 (2009) (6-week delay unreasonable), enfd. 672 F.3d 1085 (D.C. Cir. 2012); Woodland *Clinic*, supra (7-week delay unreasonable); *Quality Engineered Products*, 267 NLRB 593, 597-598 (1983) (8-week delay unreasonable); *International Credit Service*, 240 NLRB 715, 718-719, enfd. in relevant part 651 F.2d 1172 (6th Cir. 1981) (6-week delay unreasonable); *Local 12, International Union of Engineers*, 237 NLRB 1556, 1559 (1978) (6-week delay unreasonable).

I find that the Respondent violated Section 8(a)(5) and (1) by failing to provide, in a timely manner, the information that the Union sought in its July 29, 2011, information request regarding Duncan.

Hudson: As discussed above, on July 1, 2011, the Respondent denied funeral leave to Hudson for days that he missed surrounding his father's death. It also assessed Hudson with an attendance violation for his absence. Hudson provided the Respondent with an obituary, but did not produce certification from a funeral home, ostensibly because the deceased was cremated and no funeral service was held. On July 8, Kreutzjans filed a grievance regarding the Respondent's actions and, on July 29, Bolte requested information from the Respondent concerning the circumstances of Hudson's leave request, the Respondent's reaction to that request, and the Respondent's past treatment of similarly situated employees. See, supra, footnote 12, and the accompanying text. Such information was relevant and necessary to the Union's decisions regarding the grievance process and to policing the Respondent's adherence to the status quo under the expired contract. Therefore, the Respondent had a duty to provide the information. Given that a valid reason for the information request was shown I reject, for the reasons discussed with respect to Wagner, the Respondent's defense based on the Union's supposed bad faith.

I conclude that the Respondent delayed unreasonably by failing to provide the requested information for over 2 months. Given the request and the nature of the information sought (including its extent, lack of complexity and availability), and also considering that the Respondent was able to respond completely to the request within a matter of days once it decided to do so, I conclude that the Respondent unduly delayed by waiting over two months to provide the information. See *Monmouth Care Center*, supra; *Woodland Clinic*, supra; *Quality Engineered Products*, supra; *International Credit Service*, supra, *Local 12, Engineers*, supra. The Respondent has not shown a legitimate basis for the delay.

I find that the Respondent violated Section 8(a)(5) and (1) by failing to provide, in a timely manner, the information that the Union sought in its July 29, 2011, information request regarding Hudson.

Coe: On July 24, Coe fell asleep during a work break and returned back to his work station 10 minutes late. The Respondent issued a suspension to Coe for this infraction and allowed him to return to work on July 27. On July 29, Bolte requested that the Respondent provide him with information concerning the circumstances surrounding the discipline issued, the Respondent's investigation, and the Respondent's past treatment of similarly situated employees. See, supra, footnote 13. At the time that Bolte made this request, the Union had not filed a grievance regarding Coe's suspension, but the deadline for filing a grievance had not passed. The Respondent had a duty to provide this information because it was relevant and necessary to the Union's decisions 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 under the expired agreement. For the reasons discussed above, I reject the Respondent's defense based on the Union's supposed bad faith.

The Respondent provided the information sought regarding Coe, but waited over two months to do so. The information request was clear and unambiguous and the portion of the Respondent's October 5 response that related to Coe consisted of only 44 pages, the majority of which is of type that one would expect to find in Coe's personnel file. Given the limited extent, lack of complexity, and availability of the information sought, and the fact that the Respondent was able to collect the information in just a few days time once it decided to do so, I conclude that the delay of over two months was unreasonable.

I find that the Respondent violated Section 8(a)(5) and (1) by failing to provide, in a timely manner, the information that the Union sought in its July 29, 2011, information request regarding Coe.

B. Alleged Failure to Process Grievances

During a contractual hiatus employers and unions must continue to meet and confer to seek agreement in good faith as to grievances arising during that period, but that duty does not extend so far as to compel the parties to submit to arbitration any grievance that they are unable to resolve. *Indiana & Michigan Elec. Co.*, 284 NLRB 53, 56 (1987).

The General Counsel alleges that the Respondent failed to meet its obligation to process the grievances that the Union filed over the treatment of Wagner and Hudson. However, Bolte's own testimony was that he could have filed step-2 grievances, but *chose* not to pursue the grievances and instead to seek resolution through the collective bargaining process. The Respondent did not refuse to accept a step-2 or step-3 grievance regarding either situation and did not state that it would refuse to do so. Indeed, Deeny, in his August 11 letter to Bolte, while taking the position that the Respondent did not have an obligation to bargain over the Wagner and Hudson matters, did offer to "work with [Bolte] to provide information to assist [Bolte] in processing any or all of the 'grievances.'" Bolte decided to abandon the grievance process rather than test the Respondent's purported willingness to process the grievances further. Under these circumstances, I conclude that the General Counsel has not shown that the Respondent refused to process the Wagner and Hudson grievances.

The allegation that the Respondent violated Section 8(a)(5) and (1) by refusing to process grievances should be dismissed.

C. Alleged Failure to Bargain Concerning Discipline

The complaint alleges that since about May 17 the Respondent has refused to bargain collectively about disciplinary actions. The Board has affirmed that employee discipline is a mandatory subject of bargaining and that an employer "has an obligation to bargain with the Union, upon request, concerning the discharges, discipline, or reinstatement of its employees." *Fresno Bee*, 337 NLRB at 1187; see also *Washoe Medical Center, Inc.*, 337 NLRB at 205 (employee discipline is a mandatory subject of bargaining.") *N.K. Parker Transport*, 332 NLRB 547, 551 (2000) (it is unlawful for an employer to refuse to bargain with respect to termination of an employee). Where the employer has a disciplinary policy in place that limits its discretion, and applies that policy, it is not required to bargain *before* each employee is disciplined, but a union may require it to bargain after the discipline is imposed. *Pennsylvania State Corrections Officers Assn.*, 358 NLRB No. 19, slip op. at 6-7 (2012). The Respondent contends that the concurring opinion of three justices in *Fibreboard Paper Products Corp.*, 379 U.S. 203, 222 (1964) stands for the contrary proposition that "absent a grievance, the Union cannot demand to bargain over discipline." Brief of Respondent at Page 42. The Respondent's reliance on the *Fibreboard* concurrence is frivolous. First, the concurrence is expressing the view of a *minority*

of justices who wished to distance themselves from the broader view of an employer's bargaining obligations that was suggested by the Opinion of the Court. Moreover, the three concurring justices, while expressing a narrower view of what constitutes a mandatory subject, do not state that disciplinary action against unit employees was one of those subjects that should fall outside the mandatory category. In short, the Respondent's citation to the concurrence in *Fibreboard* does nothing to persuade me that I should not follow the Board precedent that employers have a statutory duty to bargain over the discipline issued to employees represented by a union.

According to the General Counsel, the Respondent refused to bargain regarding Duncan's discharge and Coe's suspension. In his July 29 letters, Bolte requested bargaining regarding the disciplinary action that the Respondent took against both of these individuals. Deeny, in his August 11, letter to Bolte, referenced the Union's requests to bargain. He told Bolte to "feel free" to "make a proposal regarding a settlement" with respect to Duncan and/or Cole, but also took the position that "the Company is under no obligation" to bargain regarding either disciplinary action. The General Counsel characterizes this as a "refusal" to bargain. I disagree with the General Counsel's characterization under the circumstances present here. The Respondent did not state that it would not bargain, but only denied that it was legally obligated to do so. Moreover, Deeny's statement that the Union should "feel free" to make a proposal regarding settlement of the Duncan and Cole matters is essentially an invitation to bargain. Bolte declined to make a proposal, responding on August 11 that he would instead file ULP charges and let the Board "determine what is and what is not a mandatory subject of bargaining." In a September 22 letter, Rubardt asked to meet with Bolte to see if the parties could resolve the information requests and the underlying issues, but Bolte declined to do so.[27] After the Respondent supplied the information sought by the Union, Bolte, on December 22, made an informal "supposal" that included possible terms for settling the Duncan matter. The Respondent rejected that supposal, but the record does not establish that the Respondent did so without giving the supposal good faith consideration. Moreover, at the same December 22 meeting, the Respondent attempted to discuss resolution of the matters pending before the Board – matters that included the Respondent's alleged failure to bargain over employee discipline – but, Bolte refused to do so and walked out of the meeting.

The record shows that the parties failed to engage in meaningful bargaining regarding the discipline issued to Duncan and Coe. However, I find that the failure is the result of the actions of both parties. The Respondent's representatives certainly muddied matters by taking the position that they were not obligated to bargain over discipline at the same time that they were offering to do so, and by giving confused signals about which representative of the Respondent the Union should approach about a resolution. At the same time, Bolte contributed substantially to the failure of bargaining over the disciplinary actions by repeatedly refusing the Respondent's bargaining overtures. Given Bolte's conduct, I conclude that the Union failed to test the Respondent's willingness to bargain in good faith over the discipline issued to Duncan and Coe, and therefore I am unable to find the absence of such willingness. *Monmouth Care Center*, 354 NLRB No. 2, slip op. at 54; *Times Publishing Co.*, 72 NLRB 676, 683 (1947).

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[27] Bolte stated that he was refusing because Deeny had said that communications should be made through him, but Bolte persisted in this refusal even after Rubardt informed him in writing that Deeny approved of Rubardt approaching Bolte to bargain directly. Bolte did not claim that he had reason to doubt Rubardt's representation, nor did he claim that he attempted to contact Deeny about it.

For the reasons discussed above, I conclude that the allegation that the Respondent violated Section 8(a)(5) and (1) by refusing to bargain regarding the discipline issued to Duncan and Coe must be dismissed.

D. Alleged Direct Dealing

As discussed above, on July 24 Coe returned to his work station 10 minutes late after falling asleep during a work break. The Respondent informed Coe that he was suspended and presented him with typed paperwork to that effect. Coe refused to sign the suspension paperwork and told the Respondent that "everyone else" sleeps on the job. On July 27, Coe met with Shultz, who presented paperwork to Coe which provided that Coe was reinstated to active duty as of that day, and which stated that Coe had violated the company regulation that prohibited "sleeping on the job, and /or unauthorized absence from assigned work location." Coe signed this paperwork. He did not request Union representation at either of these meetings. Coe testified that the Respondent did not attempt to bargain with him over the appropriate level of discipline, but simply informed him of the Company's decision.

The General Counsel alleges that Shultz's July 27 interaction with Coe constituted direct dealing and negotiating in violation of Section 8(a)(5) and (1). That allegation is not proven here. The Board has affirmed that an employer does not have to bargain before it applies an existing disciplinary policy to an individual employee, although it may be required to do so after discipline is imposed. *Pennsylvania State Corrections Officers Assn*, 358 NLRB No. 19, slip op. at 6-7. Moreover, an employer is not required to provide union representation at a meeting held for the purpose of presenting an employee with a prepared disciplinary notice. *Miceli & Oldfield, Inc.*, 357 NLRB No. 49, slip op. at 1 (2011). In this case, the Respondent met with Coe to inform him of the discipline that the Company had decided to impose based on Coe's violation of an existing Company regulation. The disciplinary documents that the Respondent presented to Coe at the meetings on July 24 and 27 were prepared by the Respondent without negotiation between Coe and management. Under the circumstances present here, the Respondent did not violate Section 8(a)(5) and (1) by dispensing discipline to Coe without first negotiating over the discipline with the Union.[28]

The General Counsel argues that the July 27 paperwork that Shultz presented to Coe "clearly responds to Coe's contention/grievance that the punishment was unfair" and thus was not merely notification of the Respondent's discipline decision. The evidence fails to bear this out. The July 27 paperwork makes no reference to Coe's July 24 statement that suspension was unfair. Nor does it contain any language indicating that the level of discipline being issued represented a compromise to settle or adjust a contention or grievance made by Coe. To the

[28] The General Counsel does not claim that the failure to include a union representative at the meetings between the Respondent and Coe constituted a violation under *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1974), which prohibits an employer from refusing an employee's request for union representation during an investigatory meeting that the employee reasonably believes could lead to discipline. At any rate, in this case Coe did not request, and the Respondent did not deny, union representation. Under those circumstances a *Weingarten* violation is not shown. See *Praxair Distribution, Inc.*, 358 NLRB No. 7, slip op. at 1 n.2 (2012) (no *Weingarten* violation absent a showing that employee requested, or that employer prohibited, representation); see also *LIR- USA Mfg. Co.*, 306 NLRB 298, 305 (1992) (no *Weingarten* rights where the meeting is not investigatory, but rather the adverse action has already been decided and the employee is only being informed).

contrary, the Respondent proceeded with the suspension even after Coe objected that it was unfair, and there is no evidence that it shortened the suspension based on Coe's objection.

I conclude that the allegation that the Respondent violated Section 8(a)(5) and (1) by engaging in direct dealing and negotiations with Coe must be dismissed.

E. Alleged Unilateral Creation of Leave Policy

The General Counsel alleges that the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing a leave policy for employees who are unable to provide the documentation required for funeral leave, and by applying that policy to Wagner and Hudson. An employer violates Section 8(a)(5) and (1) of the Act when it unilaterally changes the wages, hours, or other terms and conditions of employment of bargaining unit employees, without first providing the collective-bargaining representative with notice and a meaningful opportunity to bargain. *NLRB v. Katz,* 369 U.S. 736 (1962); *Whitesell Corp.*, 357 NLRB No. 97, slip op. at 53 (2011); *Ivy Steel & Wire, Inc.,* 346 NLRB 404, 419 (2006); *Mercy Hospital of Buffalo,* 311 NLRB 869, 873-874 (1993); *Associated Services for the Blind,* 299 NLRB 1150, 1164-1165 (1990). This obligation exists even if, as here, at the time of the change the collective-bargaining agreement between management and the union has expired and a new agreement has not been completed. *Litton Financial Printing Division v. NLRB,* 501 U.S. 190, 198 (1991); see *Whitesell Corp.*, supra. Leave policies have long been held to be among those subjects about which bargaining is mandatory. *Alcoa Inc*, 352 NLRB 1222, 1223 (2008).

As noted above, under the expired contract the Respondent provides funeral leave when a member of the employee's immediate family dies and the employee "actually attends the funeral." The record indicates that employees have generally established that they attended a funeral by producing certification from a funeral home. Two situations arose in 2011 regarding which the proper application of the funeral leave policy was less than perfectly clear. The first involved Wagner. His brother passed away, but he was reportedly unable to obtain certification from a funeral home because his brother's body was donated to science and no funeral home service was held. On May 14, the Respondent took the position that Wagner was not entitled to funeral leave since he was not going to be attending a funeral service but, based on discussions with the Union, the Respondent waived the normal requirements for use of vacation leave so that Wagner could leave the workplace without incurring an attendance violation or losing pay. After the Union filed a grievance regarding the leave decision, the Respondent, on May 16, supplemented its action by offering to grant Wagner funeral leave (and restore his vacation leave) if he showed that he attended a memorial service for his brother. Wagner did not produce such evidence and funeral leave was not granted. Subsequently another employee, Hudson, had a death in his immediate family. Reportedly, the deceased in that case was cremated and there was no funeral service. The Respondent did not grant Hudson funeral leave and the Union filed a grievance. The Respondent took the position that funeral pay would be issued if Hudson showed that he had attended a funeral. Hudson did not produce anything showing that he had attended a funeral ceremony and the special leave was not granted. Lawyer, in communications with the Union, referred to the special leave that Wagner and Hudson would be granted if they attended a funeral or memorial service as "bereavement leave."

I conclude that, with respect to both Wagner and Hudson, the Respondent was applying the funeral leave policy to the particular circumstances presented, not creating a new bereavement policy, or making material changes to the existing policy. The Board has held that "only changes" that are "material substantial, and significant," trigger the duty to bargain under the Act. *Bath Iron Works Corp.* 302 NLRB 898, 901 (1991). Where changes are made that

"constitute merely particularizations of, or delineations of means for carrying out, an established rule or practice" such changes do not generally rise to the level requiring bargaining. Id. The record, including the information belatedly produced in response to the Union's information requests, indicates that the Respondent was applying the existing funeral leave policy to Wagner, and that the way the Respondent did so constituted the sort of "particularization" that was necessary to carry out that established practice given specific circumstances. The funeral leave provision states that in order to qualify for such leave the employee must "actually attend[] the funeral." The Respondent's position that Wagner could comply with the requirement that he attend a funeral ceremony by attending a memorial service for the deceased, even if no funeral home was involved, is a reasonable "particularization" of the existing policy, not a material change to that policy.[29] With respect to Hudson, the record suggests that the Respondent merely applied the existing policy, which required the individual to provide evidence that he or she had attended a funeral ceremony relating to the deceased family member. It was entirely consistent with the funeral leave policy, and the Respondent's practices, to require such evidence, and to deny funeral leave to Hudson in its absence. Therefore, the Respondent neither announced a new leave policy nor applied any such policy to Wagner or Hudson.

The allegations that the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing a policy on leave for employees who were unable to provide documentation to qualify for funeral leave and by applying that policy to Wagner and Hudson must be dismissed.

F. Alleged Unilateral Creation of Reflective Vest Requirement

The General Counsel alleges that the Respondent violated Section 8(a)(5) and (1) by announcing and implementing a reflective vest requirement for employees without giving the Union notice and an opportunity to bargain. During a safety committee meeting in January 2012, the Respondent announced a new vest requirement simultaneously to Hartley, who was representing the Union, and to 12 hourly employees. The Respondent did not give the Union advance notice or opportunity to bargain before making this announcement. During subsequent shift meetings in January, the Respondent announced the new requirement to all employees who were present at the facility and stated that the requirement would be effective on March 1, 2012.

An employer's failure to comply with the new reflective vest requirement could, under the Respondent's regulations, result in discipline and therefore it is clear that the requirement was a material, substantial, and significant change about which the Respondent had a duty to give the Union advance notice and an opportunity to bargain. *Toledo Blade Co.*, 343 NLRB 385, 387-388 (2004). The Board has held 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 that change. *Roll and Hold Warehouse and Distribution Corp.*, 325 NLRB 41, 42-43 (1997), enfd. 162 F.3d 513 (1998). The Board explained that when a union learns of the change incidentally upon notification to all employees it "totally undermine[s]" the union's role because the representative loses the opportunity "to consult with unit employees to decide

[29] The word "funeral" refers to the ceremony relating to the disposition of a deceased's body, not to the burial or cremation itself. See Webster's II, New Riverside University Dictionary (1984) at page 512 (Defining "funeral" as "The ceremonies held in connection with the burial or cremation of the dead."). Thus attendance at a memorial service for Wagner's brother could reasonably be seen as meeting the requirement that the employee attend a funeral ceremony, regardless of whether Wagner was present when the body was disposed of.

whether to acquiescence in the change, oppose it, or propose modifications." Id. The unilateral announcement and implementation violates the Act regardless of whether the Union requests bargaining after the Respondent announces the change to employees. *Best Century Buffet, Inc.*, 358 NLRB No. 23, slip op. at 18 (2012); *Roll and Hold*, supra. In the instance case the Respondent undermined the Union's role and violated Section 8(a)(5) and (1) by notifying the Union about the new reflective vest requirement at the same time as it notified the bargaining unit employees, and then implementing the new requirement

The Respondent contends that the vest requirement was not a change because it fell within existing administrative regulations and because the Company is entitled to make safety rules under a management rights provision in the expired contract. Those contentions are without merit. The Respondent's administrative regulations state generally that employees must use "special safety equipment" "when operating machinery or equipment or performing any duty that requires the use" of that equipment. Those regulations identify types of safety equipment that are "required" – including, inter alia, safety glasses, hearing protection, and guard mechanisms – but reflective vests are not among those types. Moreover, the regulations have been in place in their present form since April 2000, but the Respondent did not require employees to begin wearing the reflective vests until March 2012. This suggests that, prior to March 2012, the administrative regulations did not encompass a requirement that employees wear the vests.

The Respondent's defense that it was entitled to make the change under the management rights clause in the expired collective bargaining agreement is also without merit. It is well-settled that a contractual reservation of management rights, such as the one relied upon by the Respondent here, does not survive beyond the expiration of the contract, absent evidence of a contrary intention by the parties. *Times Union, Capital Newspapers*, 356 NLRB No. 169, slip op. at 12 (2011), citing *Long Island Head Start Child Development Services*, 345 NLRB 973 (2005) and *Ironton Publications, Inc.*, 321 NLRB 1048 (1996); *Hospital San Cristobal*, 356 NLRB No. 95, slip op. at 5 (2011), citing *Clear Channel Outdoor, Inc.*, 346 NLRB 696 (2006). In this case, the parties did not extend the management rights provision beyond the expiration of the contract. To the contrary, 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 by that provision during the life of the contract.

The Respondent violated Section 8(a)(5) and (1) by unilaterally announcing a new reflective vest requirement in January 2012, and unilaterally implementing that requirement effective March 1, 2012.

G. Alleged Unilateral Changes to Health Benefits

The General Counsel alleges that the Respondent violated Section (8)(a)(5) and (1) of the Act by unilaterally implementing changes to the health benefits that the Company was providing to unit employees. In October or November 2011, the Respondent unilaterally announced multiple changes to employees' health benefits and on January 1, 2012, it unilaterally implemented those changes. As detailed more fully above, the changes included increases in employees' premiums and elimination of a number of health-related programs. The Union, in a November 9, 2011, letter to the Respondent, protested the unilateral changes.

Employees' health benefits are a mandatory subject of bargaining about which an employer has an obligation to bargain in good faith. *E.I. DuPont De Nemours, Louisville Works*, 355 NLRB No. 176 (2010), enf. denied 682 F.3d 65 (D.C. Cir. 2012); *United Hosp. Med. Ctr.*,

317 NLRB 1279, 1281 (1995). Where, as here, the parties are engaged in contract negotiations that obligation "extends beyond the mere duty to give notice and an opportunity to bargain in that it encompasses a duty to refrain from implementation at all unless and until an overall impasse has been reached in bargaining for the agreement as a whole." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. sub nom. *Master Window Cleaning v. NLRB*, 15 F.3d 1087 (9th Cir. 1994) (Table). The Respondent admits that it changed the health care benefits of unit employees without the Union's agreement or consent. On its face, this action constituted a violation of the Respondent's bargaining obligations. The Respondent argues, however, that I should not find a violation because the Company was acting consistently with its past practice and because the parties were at impasse. These defenses are discussed below.

As the Respondent points out, the Board has created an exception under which an employer may make a unilateral change if the employer establishes the existence of a "longstanding practice" that renders the change "essentially a continuation of the status quo – not a violation of Section 8(a)(5)." Brief of Respondent at Page 48, quoting, *Courier-Journal*, 342 NLRB 1093 (2004). The Respondent contends that this exception applies here. As the party asserting an affirmative defense based on "past practice," the Respondent has the burden of showing that a relevant past practice actually existed. *E.I. DuPont De Nemours, Louisville Works*, 355 NLRB No. 176, slip op. at 1; *Eugene Iovine, Inc.*, 353 NLRB 400 (2008), enfd. 371 Fed.Appx. 167 (2d Cir. 2010), reaffirmed by 356 NLRB No. 134 (2011). The Respondent claims that it has met that burden by showing that, in the past, the Company announced unilateral changes to the health benefits and premiums of unit employees during the annual open enrollment period and then implemented those changes.

The General Counsel argues that the Respondent has not met its burden of showing a relevant past practice because the prior unilateral changes to health benefits were always made during the effective period of a contractual management rights provision that expressly permitted such changes, and never when, as here, the management rights provision had expired. The General Counsel's argument has been accepted by the Board in two recent cases involving the health benefits that the E.I. DuPont Company provided to unit employees. In those cases the Board held that past practices implemented "under the authority of a contractual management-rights provision" do not justify unilateral changes made during a hiatus between contracts when the management rights provision is no longer effective. *E. I. DuPont De Nemours, Louisville Works*, supra, ; *E.I. DuPont De Nemours and Co.*, 355 NLRB No. 177 slip op. at 1 (2010), enf. denied 682 F.3d 65 (D.C. Cir. 2012); see also *Register-Guard*, 339 NLRB 353, 355-356 (2003) (prior unilateral changes, all but one of which were "implemented under a contractual provision" reserving managerial discretion, did not establish a past practice allowing unilateral changes). In both *DuPont* cases, the employer made unilateral changes to a health plan that applied to bargaining unit and non-bargaining unit employees. The employer showed a past practice of making such changes during the effective period of a contractual management rights provision that authorized the changes, but did not show that it made such changes during a hiatus period when the management rights provision was not in effect. The Board held that the employer in those cases had not shown a past practice that permitted the Respondent to continue making the unilateral changes during a hiatus period, and that the Respondent violated Section 8(a)(5) by doing so.

The Board's decisions in the *DuPont* cases are controlling given the circumstances of the instant case, and require me to reject the Respondent's "relevant past practice" defense. As in the *DuPont* cases, the Respondent in this case showed that it had made unilateral changes to health benefits while a contractual management rights provision authorizing those changes was in effect, but did not show that it had ever made such changes during a hiatus when the management rights provision was not in effect. The most recent contract expired on February

28, 2011, and the management rights provision (which had been continuously in effect under contracts since March 1989) expired along with it. *Times Union, Capital Newspapers*, supra; *Hospital San Cristobal*, supra. Since the Respondent's past practice permitting unilateral changes to health benefits was implemented "under the authority of a contractual management-rights provision," that past practice [30] does not justify the unilateral changes to health benefits that the Respondent made on January 1, 2012, at a time when the contractual authorization had ceased to be effective. *E. I. DuPont De Nemours, Louisville Works*, supra; *E.I. DuPont De Nemours and Co.*, supra; *Register-Guard*, supra.

The Respondent does not attempt to distinguish the Board's decisions in the *DuPont* cases, but rather argues that those decisions were wrongly decided and should not be followed. The Respondent has not made a persuasive argument that the Board erred,[31] but even if it had, I would be bound to follow the Board precedent on this subject since that precedent has not been reversed by either the U.S. Supreme Court or the Board itself. See *Hebert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993); *Lumber & Mill Employers Assn.*, 265 NLRB 199 fn. 2 (1982), enfd. 736 F.2d 507 (9th Cir. 1984), cert. denied 469 U.S. 934 (1984); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981). At any rate, I find the reasoning of the Board in *E.I. DuPont De Nemours, Louisville Works*, compelling. As the Board explained, "It is apparent that a union's acquiescence to unilateral changes made under the authority of a controlling management-rights clause has no bearing on whether the union would acquiesce to additional changes made after that management-rights clause expired." *E.I. DuPont De Nemours, Louisville Works*, 355 NLRB No. 176, slip op. at 2. In addition, I share the Board's concern that unions would be discouraged from ever granting special discretion to employers during a contract's term, if doing so meant that employers who exercised that contractual discretion would thereby acquire the discretion in perpetuity – even if

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30 The management rights provision itself states that it is effective "during the term of this contract" and Bolte's March 3 letter to the Respondent makes clear that, given the expiration of the contract, the Union was demanding that the Respondent bargain over any changes to unit employees' terms and conditions of employment.

31 The Respondent contends that the Board's decisions in the *DuPont* cases conflict with the prior holding in *Courier-Journal*, supra. However, the Board discussed *Courier-Journal* in both of the *DuPont* decisions, and accurately noted that the cases were distinguishable because in *Courier-Journal*, unlike in the *DuPont* cases, the employer had demonstrated a past practice of making the unilateral changes both when the contractual management rights provision was in effect *and* during hiatus periods. *E. I. DuPont De Nemours, Louisville Works*, 355 NLRB No. 176, slip op. at 1-2; *E.I. DuPont De Nemours and Co.*, 355 NLRB No. 177, slip op. at 1. The Respondent also relies on four cases in which employers were permitted to make unilateral changes based on a past practice defense even though there was no showing that the employer had ever made the changes during a hiatus when a contractual management rights provision was not in effect. See Brief of Respondent at 54, citing *Post-Tribune Co.*, 337 NLRB 1279 (2002); *Maple Grove Health Care Center*, 330 NLRB 775 (2000); *Luther Manor Nursing*, 270 NLRB 949 (1984), affd. 772 F.2d 421 (8th Cir. 1985); *House of Good Samaritan*, 268 NLRB 236 (1983). However, in each of those cases the prior practice was not implemented under the authority of a contractual management rights provision and the challenged change was not made during a hiatus after such a provision expired. Thus the holdings in those cases do not conflict in the least with the rather narrow holding in the *DuPont* cases – i.e., that an employer's past practices implemented "under the authority of a contractual management-rights provision" do not justify unilateral changes made during a hiatus between contracts when the management rights provision is no longer in effect.

the contractual grant of discretion expired and the parties did not agree to renew it in subsequent contracts. Since contractual grants of discretion are an important tool in reaching collective bargaining agreements, a policy that made their use unworkable would significantly interfere with collective bargaining. Based on the relevant Board precedent, I reject the Respondent's defense that it has shown a relevant past practice that entitled it to make unilateral changes to unit employees' health benefits on January 1, 2012.

The Respondent also attempts to defend against a finding that it violated Section 8(a)(5) and (1) by asserting that the parties had reached impasse at the time management unilaterally implemented the changes to health benefits. On this issue the Respondent has the burden of proof, *Coastal Cargo Company, Inc*., 348 NLRB 664, 668 (2006), *L.W.D., Inc.*, 342 NLRB 965 (2004), *Serramonte Oldsmobile*, 318 NLRB at 97, and must show not only that it provided notice and opportunity to bargain about a particular subject, but rather that the parties reached "'overall impasse on bargaining for the agreement as a whole.'" *Register-Guard*, 339 NLRB at 354, quoting *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995) and *Bottom Line Enterprises*, 302 NLRB at 374.

I note at the outset that the notion that the parties were at impasse when the Respondent made the changes in health benefits gives every indication of being an after-the-fact invention of trial counsel for the Company. The Respondent'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. Indeed, not one of the Respondent's representatives testified that the parties were at impasse or that the changes were implemented pursuant to impasse. Although the parties introduced dozens of letters and email communications at trial, in none of those did the Respondent ever state that negotiations were approaching impasse, much less declare that impasse had been reached. To the contrary, during negotiations prior to the unilateral changes in health benefits, the Respondent's negotiators never mentioned impasse. Rubardt, the Respondent's own lead negotiator, testified that the Company unilaterally implemented the changes because it believed doing so was consistent with past practice, Tr. 401, not because the parties had reached impasse.[32] The evidence indicating that the negotiators did not have a contemporaneous understanding that the negotiations had reached impasse weighs heavily against the claim of the Respondent's trial counsel that the parties had, in fact, reached impasse, and that impasse justified the unilateral changes. *Union Essex Valley Visiting Nurses Assn.*, 343 NLRB 817, 841 (2004) ("Most significantly, neither party stated that the parties had reached impasse at the close of the meeting, and there can be no finding that by the close of the meeting, there was a 'contemporaneous understanding of the parties' that an impasse had been reached."), quoting *CJC Holdings, Inc.*, 320 NLRB 1041, 1045 (1996); *Union Nacional de Trabajadores,* 219 NLRB 862, 870 (1975) (no impasse where, inter alia, "no one suggested at the time that an impasse existed"), enfd. 540 F.2d 1 (1st Cir. 1976), cert. denied 429 U.S. 1039 (1977); *Taft Broadcasting*, 163 NLRB 475, 478 (1967) (whether impasse exists is based on, inter alia, the contemporaneous understanding of the parties as to the state of negotiations), enfd. sub nom. *AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). This, in other words, is not the typical impasse scenario in which the employer declares impasse, often after repeatedly warning that such a declaration is imminent, and gives notice that it will be implementing some or all of its pre-

[32] Not only did the Respondent not make any claims of impasse prior to the unilateral implementation on January 1, 2012, but even the Respondent's answer to the complaint made no mention of impasse, although it listed no fewer than 16 other defenses to the complaint allegations. Exhibit 1(qq).

impasse contract proposals. Here the Respondent 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. In its brief, the Respondent does not cite any cases where an overall impasse justifying unilateral changes was found in circumstances remotely like those present here.

A finding of impasse is also not appropriate here because the Union had not expressed or demonstrated an unwillingness to make further compromises. After the Respondent's last offer was rejected by the membership of the bargaining unit, the Union continued to modify its own proposal. On December 22, 2011 – just over a week before the Respondent implemented the challenged unilateral changes – the Union negotiators made an informal "supposal" that sought a response from the Respondent regarding several possible Union concessions. It is well-established that impasse does not exist until "'Both parties . . . believe that they are at the end of their rope.'" *AMF Bowling Co.*, 314 NLRB 969, 978 (1994), enf. denied, 63 F.3d 1293 (4th Cir. 1995), quoting *PRC Recording Co.*, 280 NLRB 615, 635 (1986), enfd. 836 F.2d 289 (7th Cir. 1987); see also *Patrick & Company*, 248 NLRB 390, 393 (1980) (no impasse where, inter alia, the union did not indicate it was unwilling to make further concessions), enfd. 644 F.2d 889 (9th Cir. 1981) (Table). The parties cannot be said to have reached impasse here because the Union was still willing to consider changes to its position in an effort to find a path to agreement.

Consideration of the length of bargaining and the bargaining history do not help the Respondent to meet its burden of showing impasse. *See Taft Broadcasting Co.*, 163 NLRB at 478 (the length of negotiations and the history of bargaining are factors considered in determining whether impasse exists). At the time the Respondent unilaterally implemented the changes to health benefits, the parties had negotiated on 13 days, and on many of those occasions they met for only a portion of the day. Moreover, the Respondent did not make its economic proposals until more than half of those sessions were over. Nevertheless, the parties reached a number of tentative agreements for a new contract. That amount of bargaining has been found inadequate to support a finding of impasse in a number of prior Board decisions. See, e.g., *Castle Hill Health Care Center*, 355 NLRB No. 196, slip op. at 30 (2010) (no impasse where, inter alia, the parties held 13 bargaining sessions); *Beverly Farm Foundation, Inc.*, 144 F.3d 1048, 1052-1053 (7th Cir. 1998) (no impasse where, inter alia, the parties held 19 bargaining sessions over the course of more than a year).

I also note that although there had been several prior contracts at the Seymour facility, the 2011 negotiations were the first at which either Rubardt or Bolte – the two lead negotiators – were involved in negotiations for a contract there. It is understandable that Rubardt and Bolte would each have to spend some time feeling out the other side, and that negotiations might take somewhat longer and be more contentious than they had been in the past. Those difficulties, however, are not the equivalent of an overall impasse and should not be mistaken for one.

The contention of the Respondent's counsel that the unilateral changes were justified by the existence of impasse is without merit for another reason. It is well-established that even at impasse an employer may only implement proposals that are "reasonably comprehended" by the employer's pre-impasse offers. *Paul Mueller Co.*, 332 NLRB 312, 319 and 320 (2000); *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). During contract negotiations, the Respondent never made a proposal that included the changes to health benefits that it implemented on January 1, 2012. The Respondent's "last, best, and final" contract offer did not set forth any changes to health benefits or premiums and the Respondent never modified that contract offer to do so. Rather, in October or November 2011, the Respondent simply announced to employees, without making a prior proposal to the Union on the subject, that the Company had decided on a

number of changes to the health benefit. Thus, even if one were to assume that the parties reached an overall impasse in contract negotiations, the Respondent still violated the Act by unilaterally implementing health benefit changes that were not reasonably comprehended by its prior contract proposals.[33]

For the reasons stated above, I conclude that the Respondent violated Section 8(a)(5) on January 1, 2012, by unilaterally implementing changes to employees' health benefits plans, including by increasing premiums for the health benefits plans and by discontinuing certain health benefit programs.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(5) and (1) by failing to timely provide the information sought by the Union in: the May 17 and 20, 2011, request regarding Wagner; the July 29, 2011, request regarding Duncan; the July 29, 2011, request regarding Hudson; and the July 29, 2011, request regarding Coe.

4. The Respondent violated Section 8(a)(5) and (1) by unilaterally announcing a reflective vest requirement in January 2012, and unilaterally implementing that requirement on March 1, 2012.

5. The Respondent violated Section 8(a)(5) by, on January 1, 2012, unilaterally implementing changes to employees' health benefits plan and premiums.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. In particular, I recommend that the Respondent be ordered to, upon request by the Union, restore for bargaining unit employees the health benefit terms and premiums that existed before the January 1, 2012, unilateral changes, and to maintain those terms and premiums in effect until the parties have bargained to agreement or a valid impasse, or the Union agrees to the changes. *See Larry Geweke Ford*, 344 NLRB 628 (2005) (The standard remedy for unilaterally implemented changes in health insurance coverage is to order the restoration of the status quo ante.) In addition, I recommend that the Respondent be ordered to make whole the unit employees and former unit employees for any loss of benefits and increased expenses they suffered as a result of the Respondent's unlawful implementation of its January 1, 2012 changes to their health benefits, as set forth in *Ogle Protection Service*,

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[33] I recognize that the Respondent's contract offer included a management rights clause permitting unilateral changes to health benefits. However, not one of the Respondent's officials claimed that the Company implemented that management rights proposal after reaching impasse and prior to unilaterally changing employees' health benefits. Certainly the record evidence does not show that prior to implementing those changes the Respondent ever notified the Union that it was implementing a management rights proposal from its prior offers.

183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest computed as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). I further recommend that the Respondent be ordered to, upon request by the Union, rescind the policy that the Respondent implemented effective March 1, 2012, regarding the wearing of reflective vests. In addition, the Respondent should be required to rescind any discipline issued to unit employees pursuant to the reflective vest policy and make unit employees whole for the losses, if any, that they suffered as a result of discipline under that policy, with interest compounded daily.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[34]

Order

The Respondent, Silgan Plastics Corporation, Seymour, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to provide the Union, in a timely manner, with requested information that is relevant to the Union's duties as collective-bargaining representative.

(b) Unilaterally changing the health benefit terms or premiums of bargaining unit employees.

(c) Unilaterally announcing and/or implementing a reflective vest policy for bargaining unit employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request of the Union, restore the unit employees' health benefit terms and premiums that existed prior to the unlawful unilateral changes that were implemented on January 1, 2012, and maintain those terms and premiums in effect until the parties have bargained to a new agreement or a valid impasse, or until the Union has agreed to the changes.

(b) Make the unit employees whole by reimbursing them, with interest, for any loss of benefits and additional expenses that they suffered as a result of the unlawful unilateral changes to health benefits and premiums that were implemented on January 1, 2012, as provided in the remedy section of this decision.

[34] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) On request of the Union, rescind the reflective vest policy for unit employees that the Respondent unlawfully and unilaterally implemented on March 1, 2012.

(d) Rescind any discipline issued to unit employees pursuant to the reflective vest policy and make unit employees whole for the losses, if any, that they suffered as a result of discipline under that policy, as provided in the remedy section of this decision.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Seymour, Indiana, copies of the attached notice marked "Appendix."[35] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 17, 2011.

Dated, Washington, D.C. September 20, 2012

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PAUL BOGAS
Administrative Law Judge

35 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail to provide the United Steelworkers, AFL-CIO-CLC Local Union 822, a/w United Steelworkers, AFL-CIO-CLC (the Union) in a timely manner with requested information that is relevant to the Union's duties as collective bargaining representative.

WE WILL NOT change the health benefit terms or premiums of bargaining unit employees without meeting our duty to bargain in good faith with the Union.

WE WILL NOT announce and/or implement a reflective vest policy for bargaining unit employees without meeting our duty to bargain in good faith with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, upon request by the Union, restore for unit employees the health benefit terms and premiums that existed prior to the unlawful unilateral changes that we implemented on January 1, 2012, and maintain those terms and premiums in effect until the Union and the Company have bargained to a new agreement or a valid impasse, or until the Union has agreed to the changes.

WE WILL make unit employees whole by reimbursing them for any loss of benefits and additional expenses that they suffered as a result of the unlawful unilateral changes to health benefits and premiums that we implemented on January 1, 2012.

WE WILL, upon request by the Union, rescind the policy that we unlawfully and unilaterally implemented on March 1, 2012, requiring unit employees to wear reflective vests, rescind any discipline issued pursuant to that policy, and make whole unit employees for any losses suffered as a result of discipline under that policy.

SILGAN PLASTICS CORPORATION

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

575 North Pennsylvania Street, Federal Building, Room 238
Indianapolis, Indiana 46204-1577
Hours: 8:30 a.m. to 5 p.m.
317-226-7382.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 317-226-7413.