

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

**DAYCON PRODUCTS COMPANY, INC's. EXCEPTIONS TO THE DECISION AND
RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE**

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Daycon Products Company (“Employer” or “Respondent” or “Company”), by its attorneys, Epstein Becker & Green, P.C., pursuant to Section 102.46 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, excepts to the February 15, 2011 Decision and Recommended Order of Administrative Law Judge Joel P. Biblowitz (“ALJ”) in Case No. 05-CA-35687, et al (“ALJD”) and to rulings made during the hearing as set forth in the transcript of the hearing (Transcript referenced “Tr _”). The grounds for each exception are set forth herein and in the Employer’s Brief In Support of Exceptions to the Decision and Recommended Order of the Administrative Law Judge which is annexed hereto and hereby incorporated by reference thereto.

1. Daycon excepts to the ALJ’s finding that the subcontracting of the repair work in question violated Section 8(a)(5) of the Act on the grounds that the law does not support the ALJD. ALJD 14. Daycon further excepts to the finding that the subcontracting was a mandatory subject of bargaining. ALJD 14. The reasons for the subcontracting were not amenable to collective bargaining, and did not involve labor costs, economic issues or some other reason that could be overcome through collective bargaining.

2. Daycon excepts to the ALJ failure to consider that the Union had waived collective bargaining either by failing to propose a change in the broad contractual language which obviously permits such subcontracting. See Our Lady of Lourdes Health Care Center, 306 NLRB 337, 339-340 (1992).

3. The Employer excepts to the ALJ’s finding that Doug Webber (“Webber”), the Union’s Business Agent, was unaware of any prior situation where the Employer subcontracted repair work, on the grounds that Webber testified he was aware of the

possibility that the Company may have subcontracted such work, and that he didn't know whether it had subcontracted repair work. ALJD 14. (Tr. 231-233)

4. The Employer excepts to the ALJ's finding that the repair work in question had always been performed by the company's employees on the grounds that this finding is not supported by facts in the record. ALJD 14.

5. The Employer excepts to the ALJ's failure to consider the fact that for over twenty years the Company had a frequently-exercised contractual right to subcontract work as relevant to whether the subcontracting at issue was permitted, as such evidence renders the ALJ's finding that the Company illegally subcontracted work erroneous. ALJD 14 Moreover, the contract allowed for subcontracting, regardless of the reason, and with no distinction on the type of work. (GC 2)

6. Daycon excepts to the ALJ's crediting of Moore's testimony that Marlboro Mower had not insisted on repairing the snow throwers, as not truly relevant under a proper legal analysis, and on the basis of the record evidence. ALJD 14. (Tr. 804)

7. Daycon excepts to the ALJs decision failing to consider that Daycon had a clear contractual right to subcontract work when regular full-time employees were working, or during a period of peak demand, or consistent with past practice. (GC 2, p. 4) (Tr. 368, 379) (Tr. 654-55)

8. Daycon excepts to the ALJ's finding that its implementation of its last bargaining offer violated Section 8(a)(1)(5) of the Act on the grounds that the law and evidence in the Record do not support the ALJD. ALJD 16.

9. Daycon excepts to the ALJD's omission of the fact that Webber's bargaining notes equated the Company's "best offer" to the Company's last proposal, on the grounds that this fact is clearly relevant to the validity of the impasse. See (GC 23 at 3)

10. Daycon excepts to the ALJD's omission of the fact that on February 18 the Union viewed negotiations as "stalled," on the grounds that this fact is clearly relevant to the validity of the impasse. See (GC 41) (Webber noting "negotiations had stalled over the major proposals by both parties.")

11. Daycon excepts to the ALJD's omission of the fact that on March 21 the Union conveyed to employees that talks had broken down, on the grounds that this fact is clearly relevant to the validity of the impasse. See (R 5)

12. Daycon excepts to the ALJD's omission of Poole's testimony that after March 17¹ he was bewildered regarding how negotiations could move forward as a result of the Parties' deadlock over the top rate issue, as this testimony is clearly relevant to the validity of the impasse. See (Tr. 629)

13. Daycon excepts to the ALJD's finding that the Union's suggestion for a five year progression demonstrated flexibility, on the grounds that this finding is not supported by the facts in the Record. ALJD 16. (GC 39, 41)

14. Daycon excepts to the ALJD's omission of the fact that on April 29 Webber declared that three year progression remained a necessity and that the Union was "holding" to its stance, on the grounds that this fact is clearly relevant to the validity of the impasse, and significantly undermines Webber's credibility. (GC 41)

¹ Unless otherwise noted all dates herein occurred in 2010.

15. Daycon excepts to the ALJD's omission of the fact that on April 22 Webber proclaimed that progress was contingent upon the Company first altering its proposal, on the grounds that this fact is clearly relevant to the validity of the impasse. See (GC 39)

16. Daycon excepts to the ALJD's omission of the testimony from Tommy Ratliff, the Union's President, that the Union considered each portion of the Company's best offer unacceptable, on the grounds that this fact is clearly relevant to the validity of the impasse. See (Tr. 502-503)

17. Daycon excepts to the ALJD's omission of the testimony from John Gibson ("Gibson"), the Union's Secretary Treasurer, that the Union never even considered accepting the Company's proposal, "because we didn't think it was fair and reasonable," on the grounds that this fact is clearly relevant to the validity of the impasse. (Tr. 551)

18. Daycon excepts to the ALJ's failure to consider the Union's characterization of the bargaining as "bogged down" and that "workers have drawn a line" on April 22, and its threat to strike for economic reasons that same day; as well as its characterization of the bargaining "logjam" following negotiations on April 22. See (R 2) (GC 39)

19. Daycon excepts to the ALJ's failure to consider the Parties' unwillingness to alter their positions in the face of a strike at the time seven months old as relevant to the validity of the impasse, on the grounds that this omission ignored well settled law. ALJD 16.

20. Daycon excepts to the ALJ's failure to consider evidence of the Union's post-impasse unwillingness to bargain or modify their stance, on the grounds that this omission ignored well settled law and further demonstrates impasse. ALJD 16. (Tr. 502-03)(GC 39, 41)

21. Daycon excepts to the ALJ's failure to consider the events of the July 13 meeting between the Parties as relevant to the validity of the impasse, on the grounds that this omission ignored well settled law. Specifically, at this meeting the Union remained committed to the concept of progression. (Tr. 643, 646) (R 16) And whereas the Union had previously discussed "withdrawing" its rejected pension proposal, it instead chose to re-propose it. (Tr. 211)

22. Daycon excepts to the ALJ's failure to consider the contents of Ratliff's July 23 correspondence as relevant to the validity of the impasse. Specifically, this correspondence reiterated that the same mutual understanding which existed on April 22 regarding the futility of further bargaining remained in place three months later. See (GC 59)

23. Daycon excepts to the ALJ's failure to consider the Union's refusal to accept any compromise to progression as relevant to the validity of the impasse, on the grounds that this failure conflicts with well settled law governing when an impasse is reached. See (GC 23); (Tr. 269) (Progression is an "absolute"); (GC 39); (GC 41)(holding to stance on three-year progression)

24. Daycon excepts to the ALJD's omission of Webber's testimony that the "Daycon 8" matter led in "large measure" to the present case, on the grounds that this fact is clearly relevant to the validity of the impasse. See (Tr. 242) Judge Biblowitz took judicial notice of the prior opinion. (Tr. 811)

25. Daycon excepts to the ALJ's failure to consider the Union's intransigence towards a very expensive position as relevant to the validity of the impasse, on the grounds that this omission ignored well settled law governing when an impasse is reached. See (Tr. 597, 601, 627, 633)

26. Daycon excepts to the ALJ's finding that at the meetings of April 1 and April 22 the Union had modified its progression proposal, on the grounds that the facts in the record do not support this premise. ALJD 16. Specifically, Webber's letter of April 29, one week after an impasse was declared, reiterates that a three year wage progression was a necessity, and the Union was "holding" to that stance. See (GC 41)

27. Daycon excepts to the ALJ's finding that the Union was optimistic about the bargaining prospects after the April 1 meeting, on the grounds that the facts in the record do not support this conclusion. Specifically, prior to the April 22 meeting, the session after the April 1 meeting, the Union filed a ULP against the Company (ALJD 1), and Gibson testified that after April 6 the Union was "disappointed" and "upset." (Tr. 548) Thereafter, the Union proclaimed negotiations were bogged down, and stated that it had drawn a line, and that its members might walk off the job if there was no movement soon. See (R. 2)

28. Daycon excepts to the ALJ's failure to consider the undisputed fact that on April 22 immediately before the parties caucused for the last time, Webber affirmed the Union was "wedded to progression" to top rate as relevant to the validity of the impasse, as such evidence is clearly pertinent to the contemporaneous understanding of the Parties on April 22. See (Tr. 155); (R 26 at 2)

29. Daycon excepts to the ALJD's omission of testimony from Gibson acknowledging that a five year progression simply calculates to a higher top rate at the end of the progression period, as such testimony is demonstrative of the ALJ's failure to grasp the genesis of the Parties' dispute. See (Tr. 542-546)(Tr. 781-82)

30. Daycon excepts to the ALJD's omission of the fact that from February 18 through April 22 neither side altered its position on the issue of progression, as such evidence is clearly pertinent to the validity of the impasse. See (Tr. 637-639)

31. Daycon excepts to the ALJD's omission of Ratliff's acknowledgment that the Company on April 22 supplied a response to the Union, as this evidence is irreconcilable with the ALJ's finding that the Company foreclosed further negotiations. (Tr. 499)

32. Daycon excepts to the ALJ's finding that had Respondent "returned to the [April 22] meeting and notified the Union that it was rejecting the five year proposal because it was too expensive, the Union might have proposed an alternative plan for progression", on the grounds that it rests entirely on speculation, and that the facts in the Record confirm that the Union never offered a five year proposal at the April 22 meeting, and further, the facts in the Record wholly undermine such fanciful conjecture. See G.C. 41 (April 29 correspondence from Webber proclaiming Union was holding to a stance of a three year progression)

33. Daycon excepts to the ALJ's characterization of the wage progression topic as a "very important " issue, on the grounds that both Webber and Gibson acknowledged that the topic was the most important topic, or the primary issue to the Parties' negotiations. Compare ALJD 4 to (Tr. 222) (Webber testifying progression was "most important" issue in negotiations) and to (Tr. 533) (Gibson testifying that catch-up "was the focus of our negotiations) and to (Tr. 237)(Judge Biblowitz overruling objection, stating "That's what [Webber] testified to.")

34. Daycon excepts to the ALJ's finding that on April 22 after the Union confirmed it was still wedded to progression, that Krupin said "the company was going down the

hall to crunch numbers,” on the grounds that this finding is not supported by the facts in the record. ALJD 9, 16; (Tr. 500) (Tr. 719)

35. Daycon excepts to the ALJD’s omissions of testimony from Webber that the mediator contacted him on April 6 to set up a meeting, and of testimony from Poole that the mediator contacted Webber upon the Company’s direction, as such evidence wholly undermines Webber’s testimony that the Company never contacted the Union after the April 1 meeting. (Tr. 634); (Res. 36 at 2) (April 5 e-mail informing Webber of dates on which the FMCS was available to house negotiations)

36. Daycon excepts to the ALJ’s characterization of the wage progression issue as “partially responsible” for the slow progress of negotiations, on the grounds that the facts in the Record clearly show wage progression was the sole reason negotiations broke down. ALJD 16. (Tr. 539) (R 2, 4, 5, 6, 8, 9, 13, 15, 16, 19)

37. Daycon excepts to the ALJ’s finding that on April 22 the Union showed movement and flexibility, on the grounds that this finding is not supported by the facts in the record. ALJD 16. (GC 39) (GC 41) (Tr. 351)

38. Daycon excepts to the ALJ’s finding that on April 22 the Union offered a five year progression, on the grounds that this finding is not supported by the facts in the record. ALJD 16; See (Tr. 285) (Webber testified that at the April 1 meeting the Union never made any concrete proposal to move off of the three year progression); See (GC 41) (Union holding to a three year progression) (Tr. 351) On April 29 Webber proclaimed the Union was “holding” to the stance of a three year progression. See (GC 41)

39. Daycon excepts to the ALJD’s failure to consider Kendall’s notes setting forth that on April 22 the Union never made a proposal for a five year progression, on the

grounds that such evidence undermines Webber's testimony to the contrary. See (Tr. 307) (Webber admitting his notes do not portray a five year proposal was made on April 22) ; see also (Tr. 636) (R. 26) (Jodie Kendall's, the Company's Director of Human Resources, contemporaneous notes from the April 22 meeting setting forth that the Union wanted a three year progression)

40. Assuming *arguendo*, the Union modified its progression proposal to "spread it out over a four or five year period", the Employer excepts to the ALJ's finding that this "movement" signified that progress was attainable, on the grounds that the record demonstrates the that these supposed modifications failed to address the fundamental issue dividing the Parties. ALJD 16.

41. Daycon excepts to the ALJ's finding that the strike which commenced on April 26 was an unfair labor practice strike on the grounds that the record demonstrates a causal connection between the strike and the alleged illegal act does not exist. ALJD 16.

42. Daycon excepts to the ALJ's failure to consider contrary evidence to his conclusion that the strike which commenced on April 26 was an unfair labor practice strike. ALJD 16. (Tr. 206) (Tr. 339-40) (Tr. 477) (R. 2, 6, 19)

43. Daycon excepts to the ALJD's failure to consider several exhibits demonstrating that the strike was based solely on economic concerns, on the grounds that this omission in conjunction with the other facts in the record renders the ALJ's finding that the strike was an unfair labor practice strike erroneous. See (R 11, 12, 18, 19, 33, 34)

44. Daycon excepts to the ALJ's finding that the Union's July 2nd unconditional offer to return to work was indeed an unconditional offer on the grounds that the law and record do not support the ALJD. ALJD 16-17.

45. Daycon excepts to the ALJ's rejection during the hearing as irrelevant several exhibits which were directly relevant to the Union's clear understanding that negotiations were deadlocked over the top rate issue, and that the strike was in protest of an "uneven pay scale" within the bargaining unit, or in support of equal pay for equal work, and as such was not related to the alleged unlawful implementation. (R. 11, 12, 18, 21, 23, 30, 33, 34, 35) See (Tr. 333-334; 338-339; 507-508; 758-764)

46. Daycon excepts to the ALJD's failure to consider the Record as a whole, his failure to adequately explain the basis for his opinion, his failure to address certain critical arguments made by Daycon, and his failure to draw all reasonable inferences from the evidence.

47. Daycon excepts to the ALJD's failure to draw all reasonable inferences from the record evidence, and to base his findings on a preponderance of the testimony and evidence. 29 U.S.C. § 160(c). The recommended order is contrary to the preponderance of evidence. NLRB Rules and regulations, Sec. 102.48(c).

48. Daycon excepts ALJ's "Cease and Desist" Order, in its entirety, on the grounds that Daycon did not violate the Act. ALJD 18.

49. Daycon excepts to the Affirmative Action provision of the Order on the grounds there is no basis for such relief, and that certain of the relief was never requested before the ALJ (daily interest and rescission upon request). ALJD 18.

50. Daycon excepts to the ALJD's proposed order that "any changes that were made on [April 23, 2010] that improved the terms and conditions of employment of the unit employees will be rescinded only upon the request of the Union", on the grounds that the Complaint and Notice of Hearing sought an order requiring Respondent to "restore its terms and conditions of employment as they existed on April 22, 2010." As such, allowing certain terms to

remain in place subject to the Union's discretion is outside of the contours of the remedy which was originally sought in the Complaint and Notice of Hearing, and conflicts with what the law requires should the impasse be deemed invalid. ALJD 18.

EPSTEIN BECKER & GREEN, P.C.

By: /s/ Paul Rosenberg
Paul Rosenberg

Dated: March 15, 2011

Washington D.C.

CERTIFICATE OF SERVICE

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

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March 15, 2011