Crete Cold Storage, LLC *and* United Food and Commercial Workers International Union, AFL–CIO, CLC, Local No. 271. Case 17–CA–24469

December 9, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On August 17, 2009, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Crete Cold Storage, LLC, Crete, Nebraska, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. December 9, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Susan A. Wade-Wilhoit, Esq. for the General Counsel.
Matthew Brick and *Douglas Fulton, Esqs. (Brick Gentry P.C.),* of West DeMoines, Iowa, for the Respondent.
Lauren M. Fletcher, Esq. (Blake & Uhlig, P.A.), of Kansas City, Kansas, for the Charging Party.

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[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Narricot Industries, L.P. v. NLRB*,___F.3d___, 2009 WL 4016113 (4th Cir. Nov. 20, 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. granted ___S.Ct.___, 2009 WL 1468482 (U.S. Nov. 2, 2009); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377).

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge found that the Respondent violated Sec. 8(a)(5) and (1) by withdrawing recognition from the Union and by failing or refusing to furnish the Union with information requested by it on January 13 and 28, 2009. We agree, and we find no merit in the Respondent's exceptions, as discussed below.

The Respondent argues that the judge erred in failing to find that the Union lacked the support of a majority of unit employees based on the fact that only one employee in the unit authorized dues checkoff. This argument fails to recognize, however, that the Board's determination of "majority support" turns on whether a majority of unit employees wish to be represented by a particular union, not on whether a majority choose to become members of that union or choose to authorize the checkoff of union dues. See *Trans-Lux Midwest Corp*., 335 NLRB 230, 232 (2001), enfd. mem. 53 Fed.Appx. 571 (D.C. Cir. 2002); *T.L.C. St. Petersburg, Inc*., 307 NLRB 605, 605 (1992), enfd. 985 F.2d 579 (11th Cir. 1993).

Similarly, the Respondent argues that the judge erred in failing to adequately consider additional evidence that purportedly established a decrease in union membership. Again, the Respondent confuses the issue of union membership with the issue of majority support for a union. See, e.g., *Narricot Industries*, 353 NLRB No. 82, slip op. at 2 (2009) (finding that evidence of decreased union membership does not provide "objective proof of a union's loss of majority support").

Finally, the Respondent argues that it found itself in a "no win" situation: withdraw recognition, and risk 8(a)(5) charges, or continue recognition of the Union and risk 8(a)(2) charges. Under *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 726, 727 (2001), however, an employer with a "good-faith reasonable uncertainty" of continued majority status can petition for an RM election rather than withdraw recognition immediately. This action creates a "safe harbor"; the Board will not find that an employer that meets the "good-faith reasonable uncertainty" standard is in violation of Sec. 8(a)(2) by failing to withdraw recognition while an RM petition is pending.

[3] The judge entered an affirmative bargaining order and found that, under *Caterair International*, 322 NLRB 64 (1996), such an order was the traditional remedy for an 8(a)(5) refusal-to-bargain violation. Member Schaumber does not agree with the view expressed in *Caterair*. He agrees with the United States Court of Appeals for the District of Columbia Circuit that a case-by-case analysis is required to determine if the remedy is appropriate. *Saginaw Control & Engineering,* 339 NLRB 541, 546 fn. 6 (2003). He recognizes, however, that the view expressed in *Caterair* represents extant Board law. *Flying Foods*, 345 NLRB 101, 109 fn. 23 (2005), enfd. 471 F.3d 178 (D.C. Cir 2006). He further agrees with the judge's analysis that an affirmative bargaining order is warranted on the particular facts of this case.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. This case was tried in Lincoln, Nebraska, on June 24, 2009. The charge was filed on April 1, 2009, and an amended charge was filed on May 15, 2009. The complaint issued on May 29, 2009, alleges that Crete Cold Storage, L.L.C. (Crete or Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act), by on or about April 1, 2009, withdrawing recognition of United Food and Commercial Workers International Union, AFL–CIO, CLC, Local No. 271 (Charging Party or Union) as the exclusive collective-bargaining representative of the unit,[1] and by failing and refusing to furnish the Union with the information requested by it (a) on January 13, 2009, namely the current seniority list of all bargaining unit employees, and (b) on January 28, 2009, by letter which is set forth as an attachment to the complaint, and which will be more fully described below. The complaint alleges that the information requested by the Union is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the uit. Respondent denies violating the Act as alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by General Counsel, with the Charging Party joining, and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Iowa limited liability company or business entity owned by Omaha Industries, Incorporated with an office and place of business in Crete, Nebraska, has been engaged in the business of operating a refrigerated warehouse and storage facility where, during the 12-month period ending April 30, 2009, purchased and received goods valued in excess of $50,000 directly from points outside the State of Nebraska. 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 the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The General Counsel and counsel for Respondent entered into the following stipulation:

1. Attorney Matthew Brick is an agent of Respondent within the meaning of Section 2(13) of the Act.

2. Nebraska is a "Right to Work" State as codified in Neb. Const. art. XV, sec. 13 (1946) which states:

> Labor organizations; no denial of employment; closed shop not permitted. No person shall be denied employment because of membership in or affiliation with, or resignation or expulsion from a labor organization or because of refusal to join or affiliate with a labor organization; nor shall any individual or corporation or association of any kind enter into any contract, written or oral, to exclude persons from employment because of membership in or nonmembership in a labor organization.

3. [Union] . . . has at all material times been a labor organization within the meaning of Section 2(5) of the Act.

On or about February 7, 2005, the Union was certified as the exclusive collective-bargaining representative of the unit.[2] This recognition is embodied in a collective-bargaining agreement which was effective from April 1, 2006 through March 31, 2009.

Patrick Burke, who has been the chief executive officer and president of Omaha Industries since February 2007, was called by General Counsel as a 611(c) witness. He testified that Omaha Industries is a holding company which owns Crete Cold Storage; that Crete is involved in the processing and cold storage of both edible and inedible products, mainly meat; and that General Counsel's Exhibit 5 is Crete's last, best, and final offer to the Union which the Union signed, and which agreement was effective April 1, 2006 until March 31, 2009.

Brian Schwisow testified that he has been president of the involved local union since January 1, 2009; that the Union has represented Crete's employees since it was certified on February 7, 2005; that General Counsel's Exhibit 5 is the labor agreement between the Union and Crete, which had a term of April 1, 2006 to March 31, 2009; that General Counsel's Exhibit 6 is a list the Union generated showing all the past and present members of the involved bargaining unit; that one of the individuals listed, Zach Baker, was an employee of a temporary agency and should not have been included on the list of bargaining unit members; and that the Union's records show that five unit members became union members.

Schwisow testified that he introduced himself to Jessica Placek at Crete on January 12, 2009.

On January 13, 2009, Schwisow had the Union's office manager, April Guerrero, email Placek (the contact person at Crete according to the Union's records) asking her to email a current seniority list of all bargaining unit employees to her and Schwisow, General Counsel's Exhibit 7. The email exchange shows, as here pertinent, that Placek, on the same day, responded "Our current seniority list is as follows: Javier Garcia - Warehouse . . . ." Schwisow then telephoned Placek and asked for a list of all bargaining unit members, not just dues paying members. Placek told him that she would have to get with her attorney. Schwisow asked Placek for her boss's telephone number and then he telephoned Burke later that same day and left a

[1] As alleged in paragraph 5 of the complaint, the following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time warehouse, scale, quality assurance, truck wash, maintenance, lead and sanitation employees employed by the Employer at its facility located at 2220 County Road "I", Crete, Nebraska, but excluding all office clerical employees, engineers, temporary employees, managers, guards and supervisors as defined in the Act.

[2] All of the parties stipulated to GC Exhs. 3 and 4, which, respectively, are the tally of ballots (issued the day of the election, January 27, 2005, showing eight employees voted for the Union, four voted against the Union, and there were two challenged votes) and the February 7, 2005 Certification of Representative.

message.

Schwisow testified that the following week he telephoned Burke and he explained the situation to Burke who told him that he would have to get with his attorney; that he has never heard back from Burke on this issue; and that in the past the Union had received many different seniority lists from Crete and they had more than just dues paying members on them, General Counsel's Exhibit 8(a) through 8(e).

Burke testified that he received an information request from the Union for a seniority list; that he did not recall talking to Schwisow; that he did not recall a conversation with Schwisow on January 13 or 14, 2009 regarding Placek's response to Schwisow's request for a seniority list wherein she listed only Garcia, Schwisow said the response was not complete, and he told Schwisow that he would look into it; and that he did not recall the conversation but Schwisow did leave him two messages.

By letter to Crete dated January 28, 2009, General Counsel's Exhibit 9, the Union indicated as follows:

> Mr. Steve Barker
> Plant Manager
> Crete Cold Storage
>
> . . . .
>
> RE: Crete Cold Storage CBA
>
> . . . .
>
> This letter is sixty (60) days notice prior to March 31, 2009 as required in ARTICLE XXIII - TERM OF AGREEMENT of our desire to terminate the Agreement between Crete Cold Storage and this organization.
>
> The purpose of his termination notice is to commence negotiations for a new labor agreement to replace the one presently in effect.
>
> We will be in contact with you to schedule negotiations.
>
> Brian Schwisow
> President
> UFCW LOCAL 271

Also, by letter to Crete dated January 28, 2009, General Counsel's Exhibit 10, the Union indicated as follows:

> Mr. Steve Barker
> Plant Manager
> Crete Cold Storage
>
> . . . .
>
> RE: Information Request
>
> . . . .
>
> In order to properly represent the employees in our bargaining unit in upcoming contract negotiations, would you please supply me with the following information, which should be for the fifty-two (52) week period ending December 31, 2008 as it pertains to our bargaining unit.
>
> 1. Current seniority list by classification, date of hire, rate of pay (and whether an employee is part time or temporary, if any).
>
> 2. Average weekly number of employees and hours worked by job classification and wage rate.
>
> 3. Total straight time hours worked.
>
> 4. Overtime hours and total premium expense.
>
> 5. Paid sick time hours and total expense.
>
> 6. Funeral Leave hours paid and total expense.
>
> 7. Jury duty total hours paid and total expense.
>
> 8. Saturday of Sixth Day premium hours paid, if applicable and total expense.
>
> 9. Sunday or Seventy Day premium hours paid and total expense.
>
> 10. Holiday hours worked and total expense.
>
> 11. Holiday hours (paid but not worked) and total expense.
>
> 12. Night premium hours by premium rate and total expense.
>
> 13. Vacation paid, including the number of employees with 1, 2, 3, 4, or 5 weeks of vacation for all employees.
>
> 14. Any bonus given to the employees and the total expense.
>
> 15, Total annual cost of health insurance. If more than one rate/plan of coverage, the number of employees at each specific rate/plan.
>
> 16. Total annual cost of pension.
>
> 17. If appropriate, the number of hours for which call-in-pay was paid, the number of those hours worked and total call-in expense.
>
> 18. Annual mandated benefit expenses:
> Employer's Social Security _____
> Unemployment Compensation _____
> Worker's Compensation _____
>
> I would appreciate receiving this data no later than February 21, 2009 so that I may properly represent our members under the law.
>
> Brian Schwisow
> President
> UFCW LOCAL 271

Schwisow hand delivered these two January 28, 2009 letters to Placek. He testified that the Union needed the information requested in the General Counsel's Exhibit 10 to prepare for negotiations and to represent its members; and that the information requested in the General Counsel's Exhibit 10 was not supplied to the Union by Crete at that time. On cross-examination Schwisow testified that before giving this letter to Crete he had no idea who was in the involved bargaining unit; and that he did not know whether the union business agent who serviced Crete, Linda Lee, had any of the information the Union requested in General Counsel's Exhibit 10.

The General Counsel's Exhibit 11 is a letter from Respondent's attorney, Brick, to Schwisow which reads as follows:

> This letter is to acknowledge receipt of [(1)] your written notice on behalf of the . . . [Union] terminating the collective bargaining agreement . . . set to expire on March 31, 2009, [and (2)] … your Information Request dated January 28, 2009. [Crete Cold Storage]. . . is willing to meet and confer with UFCW for the purpose of negotiating a new agreement

> and we will be providing responses to your information request shortly.
>
> In addition, the purpose of this letter is to inform you that Jessica Placek, not Steve Barker, is the Plant Manager at the Crete could Storage facility . . . .[4]

Schwisow testified that he learned that Placek was the plant manager when he received this letter from Brick.

Burke testified that sometime after he received a request for information regarding upcoming negotiations he received a telephone call from Respondent's plant manager, Placek, about employee Javier Garcia; that Placek told him that an office assistant, Sandra Franco, told Placek that Garcia "wanted to get out of the union" (Tr. p.17); that he interpreted this to mean that Garcia did not want the Union to represent him anymore; that he then contacted Respondent's attorney; that at the time, January 2009, he knew that the involved collective-bargaining agreement covered five or six employees at Respondent but Garcia was the only dues paying member; that he did not know if the other employees were paying dues in some other way than dues check

off; that based on his conversation with Placek, Respondent announced its intent to withdraw recognition from the Union on February 20, 2009; that at the time that the letter was sent to the Union announcing the intent to withdraw recognition, the only evidence that he had that the Union no longer represented Respondent's employees was that Garcia wanted out of the Union and he, Burke, interpreted that to mean that he did not want the Union to represent him anymore; that was the sole evidence that he had at the time; that while Union Representative Linda Lee came to the Crete facility infrequently, he did not know if she had contact with the employees outside the facility; that neither he nor Placek had talked to any employees directly about their feelings regarding the Union; and that as of the time of the trial, Garcia was still a dues paying member of the Union.

When called by General Counsel as a 611(c) witness, Placek testified that she has been plant manager for two and one half years; that before this she was Crete's office manager for two and one half years; that in January 2009 an office clerical employee, Franco, told her that Garcia wanted out of the union, and he talked to his supervisor, Samuel Sanchez, about stopping the payment of his dues; that this is the sum of her conversation with Franco; that after here conversation with Franco, she telephoned Burke and told him what Franco had said; that she and Burke from the National Labor Relations Board the (Board), and she told Franco to give the information to Garcia; that she had a second conversation with Franco who told her that Garcia telephoned the Board but he could not get anyone to speak with because he speaks Spanish; that she reported this second conversation with Franco to Burke; that at the time of the trial herein union dues were still being deducted from Garcia's paycheck; and that the only other employee that she ever talked with about the union was Tony Sanchez in 2006 when he was in the unit and he told her that he did not want to pay union dues.

In response to questions of Respondent's attorney, Placek testified that in January 2009 she had a conversation with hourly employee Franco, who is an Hispanic export clerk who bi-lingual; that she told Franco that Franco and Garcia would have to talk to Lee; that she did not believe that she ever saw Garcia speaking with Lee; that she gave Franco the Board's website and possibly a telephone number for the Board to give to Garcia; that she was not sure whether she gave Franco the telephone number of the Board but it was whatever Respondent's attorney Matthew Brick gave Respondent; that she did not believe that she gave any instructions to Franco about what she could or could not do; and that Len Johnson was the union steward at the plant but he left Respondent a couple of years ago and no one took his place.

Also in response to questions of Respondent's attorney, Placek testified that Schwisow is the current Union president; that she spoke with Schwisow once, namely in the first part of 2009 when he came by her office to give her a letter; that the letter may have requested information, and she forwarded it on; that union representative Lee, came to the plant once a month or every other month for 5 years; that a couple of years ago Lee was intermingling with the temporary staffing agency employees and they complained; that she asked Lee to meet the employees in one room where everybody who wanted to see her could go to the room to see her; that at the time Donna McDonald was president of the Union; that she discussed the matter with McDonald because there were safety concerns with a non-employee being in the plant; that subsequently McDonald would telephone her when Lee was coming to the plant and she would put up the same sign on all of the doors, except for the date, to notify the employees about Lee's visits[4]that she asked supervisor Samuel Sanchez, who was in charge of all of facility at the time, to make sure that everybody knew so they would go to the break room but they would not go; that she told Jelinek and Nigg when Lee was going to be at the Crete facility; that it would have been Samuel Sanchez's responsibility to tell Garcia since Sanchez speaks Spanish; that when Lee was in the break room the employees in the bargaining unit went outside; that Samuel Sanchez relayed bargaining unit complaints to her about how do they get rid of it, how do they decertify, what do they need to do[5]; and that she did not take any action on hearing these things because she had been instructed very clearly that she was not to be involved in that, "[a]nd I need by job . . . ." (Tr. P. 53.)

On redirect Placek testified that she did not recall talking with Schwisow on January 12, 2009, and then again on January

[3] The letter is erroneously dated February 3, 2008, and while the letter is addressed to Schwisow, it opens with "Dear Mr. Neilon."

[4] The sign reads as follows:
Linda Lee (Union Rep)
will be here today
Thursday (Feb. 19th)
at noon.
She will be meeting
in the front break
room if you would like to meet with her
on your lunch break.

[5] Respondent's attorney indicated that this was not offered for the truth of the matter asserted.

28, 2009; that she recalled Schwisow coming to Crete's facility with a gentleman from Washington on January 12, 2009, after he was elected union president; that she did not recall another time when Schwisow came to Crete's facility; that she did not know how many times employees complained to Samuel Sanchez, and she did not know the names of the employees who allegedly complained; that Samuel Sanchez did not report to her the names of any unit members who had complained about the Union; and that the complaints occurred over the course of years; and that she did not recall telling Burke about what Samuel Sanchez told her prior to the withdrawal of recognition.

When called by General Counsel as a 611(c) witness, Samuel Sanchez testified that in the beginning of 2009 he was approached by Garcia who asked him to assist in talking with Lee; that he told Lee on Garcia's behalf that Garcia wanted to get out of the Union because they were taking too much money; that Lee told Garcia to look for the Union's address on the union bulletin board; that he never told anyone in management about his assistance to Garcia in his attempt to get out of the Union; that he never discussed getting out of the union with any other employee other than Garcia; that the only employee that he ever had a conversation with about the Union or about getting out of the Union was Garcia; that no employee ever told him that they were not a member of the Union; and that Garcia never told him that he resigned from the Union.

In response to questions of Respondent's attorney, Samuel Sanchez, testified that he is a friend of Garcia; that Garcia does not speak English; that Garcia came to him and asked him to ask Lee for him how to get out of the Union; that when he asked Lee the question she directed Garcia to a union poster with a telephone number on it; that Lee came to Crete's facility once a month or once every 2 months; that he never saw any employees talking with Lee at Respondent's facility, except for the time he accompanied Garcia to speak with Lee; that 3 days before Lee would come to Crete's facility Respondent would put up some signs in English and Spanish on the doors and the windows to let the employees know Lee was coming to Respondent's facility; and that, as a supervisor, he is not allowed to talk with the employees about the Union.

On redirect Samuel Sanchez testified that he did not have indications from employees that they did not want to be members of the Union; that Garcia told him that he wanted to get out of the Union because they were taking too much of his money, and this is what he told Lee[6]; and that when he spoke with Lee on behalf of Garcia, Lee told him to tell Garcia to write a letter asking to get out of the Union.

When called by General Counsel Garcia testified that he has worked at Crete for 4 years; that he belongs to the Union that represents Crete's employees; that about a year ago he decided that he wanted to resign from the Union; that he asked his supervisor, Samuel Sanchez, what he could do to get out of the Union; that Sanchez told him that he had to speak with Lee; that around the first of the year he spoke with Lee, using Sanchez as an interpreter; that he asked Lee what he could do to get out of the Union, and Lee told him that he had to write a letter and she pointed to the bulletin board; that at no point did he tell Lee that he wanted to get rid of the Union; and that he did not speak with anyone else about resigning from the Union.

In response to questions of Respondent's counsel, Garcia testified that he is still a member of the Union; that he does not want to be a member of the Union; that, by letter, he has asked the Union to let him out; that he sent his letter to the address on the poster; that the only thing that Samuel Sanchez did for him was translate for him during his meeting with Lee; that he talked with Franco about trying to get out of the Union; that he asked Franco to telephone the Board because when he called he just got a computer answering machine in English, and he does not speak English; that he tried to call the Union himself but an answer machine took the call and it asked him to leave a message but he cannot speak English; and that the signs announcing that Lee will be at Crete's facility are in English only and since he understands some English words, he knows when Lee is going to be at Respondent's facility.

The General Counsel's Exhibit 12 is a letter from Brick to Schwisow which, as here pertinent, reads as follows:

> Over the last several weeks, employees of Crete Cold Storage have suggested that your union has lost the support of the bargaining-unit members. Based on, *inter alia,* these suggestions and the fact that only one employee is paying dues, my client has a good-faith reasonable doubt whether a majority of its employees support the incumbent union. Therefore, unless Crete Cold Storage receives substantial evidence to the contrary, upon termination of the existing collective bargaining agreement Crete Cold Storage will withdraw recognition from the union and no longer agree to bargain. If you have any questions or comments about the contents of this letter, please let me know.

Schwisow testified that he received the General Counsel's Exhibit 12 around February 20, 2009[7]; that at the time he did not know how many employees were in the bargaining unit because Crete never gave the Union a current seniority list in response to the Union's January 13 and 28, 2009 requests; and that Garcia is a member of the Union, he was a member of the Union on April 1, 2009, and the Union has never received a letter from Garcia indicating that he wanted to withdraw his membership. On cross-examination Schwisow testified that he never responded to Brick's invitation to provide "substantial evidence" that a majority of Crete's employees support the Union.

In response to questions of Respondent's attorney, Burke, testified that he determined who was a dues paying member at Crete from Placek and Respondent's payroll department; that since he has been CEO of Omaha Industries he has "had . . . employees who don't do dues checkoff if they're in the union" (Tr. p. 20); that he does not know of other employees that directly pay their dues to the union; that to the best of his knowledge the dues payments are "always through dues check off" (Id. at 21); that he does not get notification from the Union as far as who is in the Union; that he has never talked to Brian Schwisow, who is president of the Union; that his office is in

[6] Subsequently, Samuel Sanchez testified that initially Garcia only told him that he wanted to get out of the Union.

[7] The letter is erroneously dated "February 20, 2008."

Omaha, Nebraska; that Placek is responsible for the day-to-day operations of the involved facility; that Placek told him, with respect to union activity at the involved plant in early 2009, that it was minimal at best; that Placek told him that the union representative came to the plant on an infrequent, inconsistent basis; that when he sent the letter to Respondent's attorney, Brick, indicating that Respondent intended to withdraw recognition at the end of the then current contract, he did not believe that there was any majority interest in the collective bargaining unit for union representation; that he has not spoken with Garcia, who speaks very little English, about this matter; that he does not speak Spanish; that the letter which was sent to the Union notifying it that Respondent withdrew recognition requested the Union to provide any information that would contradict Respondent's position that the Union did not have majority support; and that he did not receive anything from the Union that contradicted Respondent's position.

Placek testified that it is Respondent's position that there was only one employee in the collective-bargaining unit, Garcia, when Crete withdrew recognition from the Union; that there were three employees who were represented by the collective bargaining agreement when Crete withdrew recognition, namely Garcia, Brad Jelinek, and Rick Nigg; that Union Rpresentative Lee used to regularly come to Crete's facility; that she perceived a problem with some of Lee's visits; and that she directed that Lee visit employees in a certain area, namely the front break room.

Schwisow testified that Linda Lee was a business representative of the local union; that as of February 27, 2009 Lee no longer worked for the Union; that Lee was replaced by Rod Brejcha, who has not visited Crete's facility.

Burke testified that subsequently he received a petition in Case 17–RC–12614 which the Union filed on March 31, 2009, with the Board for a certification of representative, Respondent's Exhibit 1; that as indicated in its Motion for Joinder in Union's Petition for Election, Respondent's Exhibit 2, Respondent wanted an election; that, including office workers, Crete has about 15 employees; and that the Petition for Certification of Representative, Respondent's Exhibit 1, was withdrawn by the Union.

In response to questions of Respondent's attorney, Placek testified that Respondent has not made any changes to the terms and conditions of its employees in the bargaining unit since the contract expired in March 2009.

Analysis

Paragraphs 7 and 8 of the complaint collectively allege that since on or about January 13, 2009, the Union, by email and by multiple phone calls has requested that Respondent furnish the Union with a current seniority list of all bargaining unit employees; that since on or about January 28, 2009, the Union, by letter, has requested that Respondent furnish the Union with information which is described above; that the information sought by the Union is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit; and that at all material times herein, Respondent has failed and refused to furnish the Union with the information requested by it in violation of Section 8(a)(1) and (5) of the Act.

Respondent on brief argues that it notified the Union on February 20, 2009, of Crete's intent to "withdraw recognition from the union and no longer agree to bargain," General Counsel's Exhibit 12; that an employer has no duty to furnish information requested by a union under such circumstances, *Champion Home Builders Co.*, 350 NLRB 788 (2007); that "this charge is moot as the Employer has already provided the requested information on the date of the hearing in response to a Subpoena Duces Tecum served by the Union's attorney upon the Employer's 'Custodian of Records,'" (R. Br., p. 14); that the Union should have contacted the Employer instead of filing a charge with respect to the information requests; and that "the *Union testified that all information requested* from the Employer was within the knowledge and control of the Field Representative of the Union and could have been obtained from her. Tr. p. 106-108, 111–112" (R. Br., p. 14, with emphasis added).

Champion Home Builders Co. can be distinguished since in that case the Board found that the Respondent did not violate the Act when it withdrew recognition from the union involved there. In the instant case, Crete did violate the Act when it withdrew recognition from the Union.

Respondent's second argument set forth above certainly is not lacking in originality. The argument is so original that Respondent does not cite any precedent to support it. Whatever Respondent provided on the date of the hearing in response to a Subpoena Duces Tecum served by the Union's attorney upon the Employer was not made a matter of record. Respondent did not supply the information when it was requested. And contrary to its assertion, Respondent has not shown that it ever supplied the information that was requested. This one of Respondent's arguments has no merit. With respect to Respondent's third argument, as pointed out in note 7 on page 788 of the case Respondent does cite in support of its first argument, *Champion Home Builders Co.*, "[t]he issue is whether relevant information was not supplied. Where, as here, it was not supplied, the Union need not make a second request." In the instant proceeding even when the Union made multiple requests during the term of the first collective bargaining agreement regarding one aspect of the information sought, Respondent did not provide the necessary and relevant information. And finally, Respondent's argument on brief that "the *Union testified that all information requested* from the Employer was within the knowledge and control of the Field Representative of the Union and could have been obtained from her. Tr. p. 106-108, 111–112" (Respondent's brief, page 14, with emphasis added), is false. The following appears on page 111 of the transcript:

> Q. Do you know whether your field representative had any of the information that you requested in General Counsel's Exhibit 10?
>
> A. No, I don't.

The General Counsel on brief submits that under the Act an employer is obligated upon request to furnish the Union with information which is potentially relevant and which would be useful to the Union in discharging its statutory duties such as the representation of its bargaining unit members and contract negotiation, *NLRB v. Acme Industrial Co.*, 385 U.S. 432

(1967); that the standard for relevance is a "liberal discovery-type standard," Id.; that, with respect to the January 13, 2009 request, an employer does not satisfy its obligation to furnish information by providing only some of the information requested, *Airport Aviation Services,* 292 NLRB 823 (1989); that the January 28, 2009 request sought information concerning employees' wages, benefits, and other compensation, which information is presumptively relevant, *Industrial Welding Co.,* 175 NLRB 477 (1969); and that if Respondent claims that it was under no obligation to produce the information after its announced withdrawal of recognition, Respondent's argument is specious at best. While Respondent's expressed (its letter) future intent to withdraw recognition is dated one day before the deadline, February 21, 2009, it received from the Union for providing the information sought in the Union's January 28, 2009 letter, it is noted that in its February 20, letter Respondent indicates "[t]herefore, unless Crete Cold Storage receives substantial evidence to the contrary, *upon termination of the existing collective bargaining agreement Crete Cold Storage will withdraw recognition* from the union and no longer agree to bargain." Crete could not, under the circumstances extant here, and did not withdraw recognition on February 20, 2009. The Union's information requests were made during the term of its collective-bargaining agreement with Crete, and the information, which is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative, should have been provided during the term of that agreement. For the reasons specified above, Respondent violated the Act as collectively alleged in paragraphs 7 and 8 of the complaint.

Paragraphs 6 and 8 of the complaint collectively allege that, in violation of Section 8(a)(1) and (5) of the Act, on or about April 1, 2009, Respondent withdrew its recognition of the Union as the exclusive collective-bargaining representative of the unit.

The Board in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, at 717 and 725 (2001), indicated:

> After careful consideration, we have concluded that there are compelling legal and policy reasons why employers should not be allowed to withdraw recognition merely because they harbor uncertainty or even disbelief concerning unions' majority status. We therefore hold that an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees, and we overrule *Celanese* [*Corp*., 95 NLRB 664 (1951)] and its progeny insofar as they permit withdrawal on the basis of good faith doubt. Under our new standard, an employer can defeat a post-withdrawal refusal to bargain allegation if it shows, as a defense, the union's actual loss of majority status.
>
> . . . .
>
> We emphasize that an employer with objective evidence that the union has lost majority support—for example, a petition signed by a majority of the employees in the bargaining unit—withdraws recognition at its peril. If the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support *at the time the employer withdrew recognition*. If it fails to do so, it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate Section 8(a)(5). [Footnote omitted and emphasis added.]

Respondent has the burden of showing that the Union had, in fact, lost majority *support at the time the employer withdrew recognition.* Respondent has not made this showing. As noted above, an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees, and when the employer unilaterally withdraws recognition based on objective evidence it acts at its peril. At the time the Respondent withdrew recognition it knew that only one of the employees in the bargaining unit, Garcia, was having the Respondent deduct union dues from his paycheck. But as Burke conceded, he did not know *at the time the employer withdrew recognition* if the other employees in the unit were paying union dues in some way other than dues checkoff. Therefore, the fact that the dues-checkoff authorizations had declined to just Garcia is not determinative. Placek's testimony about discussions that Samuel Sanchez allegedly had with employees in the bargaining unit over the years about the Union is not credited.[8] The fact that the Union did not fill the position vacated by Johnson would not support a good faith doubt defense, which is no longer applicable with respect to a withdrawal, let alone meet Respondent's burden of showing that that the union had, in fact, lost majority support. As noted above, Burke testified that that at the time that the letter was sent to the Union announcing the intent to withdraw recognition, the only evidence that he had that the Union no longer represented a majority of Respondent's employees was that Garcia wanted out of the Union and he, Burke, interpreted that to mean that he did not want the Union to represent him anymore; that was the sole evidence that he had at the time; that while union representative Lee came to the Crete facility infrequently, Burke did not know if she had contact with the employees outside the facility; that neither he nor Placek had talked to any employees directly, including Garcia, about their feelings regarding the Union; and that as of the time of the trial herein, Garcia was still a dues paying member of the Union. None of that which was raised by

[8] Placek's testimony in this regard was not offered for the truth of the matter asserted. Respondent did not call the involved employees to corroborate Placek's testimony. Indeed, Placek testified that she did not know who they were. More to the point, however, Samuel Sanchez did not corroborate Placek with regard to her assertion. Indeed Samuel Sanchez testified just the opposite when he testified that he did not have indications from employees that they did not want to be members of the Union. In this light, Placek's testimony is not credible. Additionally, Burke did not testify that he took this into consideration in deciding to withdraw recognition. And Placek testified that she did not recall telling Burke about what Samuel Sanchez told her prior to the withdrawal of recognition. So even if it occurred, which has not been shown to be the case, it was not a consideration in the decision to withdraw recognition. An employer must show that the union had actually lost the support of the majority at the time recognition was withdrawn.

the Respondent proves by a preponderance of the evidence that, *at the time the employer withdrew recognition*, the Union had actually lost the support of the majority of the bargaining unit employees.[9] The Respondent violated the Act as collectively alleged in paragraphs 6 and 8 of the complaint.

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. By engaging in the following conduct Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) and (5) of the Act.

(a) On or about April 1, 2009, Respondent withdrew its recognition of the Union as the exclusive collective-bargaining representative of the unit.

(b) Failing and refusing to furnish the Union with the information requested by it on or about January 13, 2009 and subsequently, and on or about January 28, 2009.

4. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time warehouse, scale, quality assurance, truck wash, maintenance, lead and sanitation employees employed by the Employer at its facility located at 2220 County Road "I", Crete, Nebraska, but excluding all office clerical employees, engineers, temporary employees, managers, guards and supervisors as defined in the Act.

5. Since February 7, 2005 the Union has been the designated exclusive collective-bargaining representative of the above-described unit, the Union has been recognized as the Representative by the Respondent, and this recognition has been embodied in a collective bargaining agreement which was effective from April 1, 2006 through March 31, 2009.

6. The above-described labor practices affect commerce within the contemplation of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent Crete Cold Storage, LLC unlawfully withdrew recognition from the Union, it shall be recommended that Respondent Crete Cold Storage, LLC recognize and bargain collectively with the Union upon request, and embody any understanding reached into a signed agreement.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

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[9] As noted above, Respondent's withdrawal letter states, as here pertinent, as follows:

> Over the last several weeks, employees of Crete Cold Storage have suggested that your union has lost the support of the bargaining-unit members. Based on, *inter alia,* these suggestions and the fact that only one employee is paying dues, my client has a good-faith reasonable doubt whether a majority of its employees support the incumbent union.

There is no showing on this record that "employees [(plural)] … have suggested…." And the statement in the letter that "… my client has a good-faith reasonable doubt whether a majority of its employees support the incumbent union" is no longer the legal standard involved. On brief, notwithstanding the citation of *Levitz*, Respondent continues to argue the wrong standard. Additionally, as pointed out by the Board in *Narricot Industries*, 353 NLRB No. 82 (2009) the Board does not find a decline in union membership, an alleged vacancy in a steward position or testimony that an unspecified number of employees discussed the removal of the union, even if considered collectively, sufficient as objective proof of a union's loss of majority support.

[10] 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. For the reasons set forth in Caterair International, 322 NLRB 64, (1996), an affirmative bargaining order is warranted as a remedy for Crete Cold Storage, LLC's unlawful withdrawal of recognition from the Union. An affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." Id. at 68.

However, in, inter alia, *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F. 3d 727, 738 (D.C. Cir. 2000) the court held that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act."

I find that a balancing of the three factors warrants an affirmative bargaining order. (1) An affirmative bargaining order in this case vindicates the Sec.7 rights of the unit employees who were denied the benefits of collective bargaining by Crete Cold Storage, LLC's withdrawal of recognition and its refusal to bargain with the Union. An affirmative bargaining order does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because its duration is only temporary.

Respondent engaged in unlawful conduct which undermined the Union's opportunity to bargain effectively. Since the Union was never given a truly fair opportunity to reach an accord regarding the second collective-bargaining agreement with Crete Cold Storage, LLC, it is only by restoring the status quo ante and requiring Respondent to bargain with the Union for a reasonable period of time that the employees will be able to fairly assess for themselves the Union's effectiveness as a bargaining representative.

(2) An affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to delay bargaining in the hope of discouraging support for the Union. It also ensures that the Union will not be pressured by the Respondent's withdrawal of recognition to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order. Providing this temporary period of insulated bargaining will also afford employees a fair opportunity to assess the Union's performance in an atmosphere free of the Respondent's unlawful conduct.

(3) A cease-and-desist order, alone, would be inadequate to remedy the Respondent's withdrawal of recognition and refusal to bargain with the Union because it would allow another such challenge to the Union's

ORDER

The Respondent, Crete Cold Storage, LLC, of Crete, Nebraska, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing its recognition of the Union as the exclusive collective-bargaining representative of the unit and failing and refusing since April 1, 2009, and continuing thereafter, to recognize and bargain with the Union as the exclusive representative of the unit.

(b) Failing and refusing to furnish the Union with the necessary and relevant information the Union requested.

(c) 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, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time warehouse, scale, quality assurance, truck wash, maintenance, lead and sanitation employees employed by the Employer at its facility located at 2220 County Road "I", Crete, Nebraska, but excluding all office clerical employees, engineers, temporary employees, managers, guards and supervisors as defined in the Act.

(b) Furnish the necessary and relevant information requested by the Union on or about January 13 (and subsequently) and 28, 2009.

(c) Within 14 days after service by the Region, post, in English and Spanish, at its facility in Crete, Nebraska copies of the attached Notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 17, 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. 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 January 13, 2009.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., August 17, 2009.

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 withdraw recognition of United Food ad Commercial Workers International Union, AFL–CIO, CLC, Local No. 271 as your exclusive collective-bargaining representative and fail, and refuse to recognize and bargain with United Food ad Commercial Workers International Union, AFL–CIO, CLC, local no. 271 as your exclusive representative.

WE WILL NOT fail and refuse to furnish United Food and Commercial Workers International Union, AFL–CIO, CLC, Local No. 271 with the necessary and relevant information United Food and Commercial Workers International Union, AFL–CIO, CLC, Local No. 271 requested.

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 on request, bargain with United Food and Commercial Workers International Union, AFL–CIO, CLC, Local No. 271 as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time warehouse, scale, quality assurance, truck wash, maintenance, lead and sanitation employees employed by the Employer at its facility located at 2220 County Road "I", Crete, Nebraska, but excluding all office clerical employees, engineers, temporary employees, managers, guards and supervisors as defined in the Act.

WE WILL furnish the necessary and relevant information requested by United Food and Commercial Workers International

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majority status before the taint of the Respondent's previous unlawful withdrawal of recognition dissipated. Allowing another challenge to the Union's majority status without a reasonable period for bargaining would be particularly unfair in light of the fact that the litigation of the Union's charges took several months and, as a result, the Union needs to reestablish its representative status with unit employees. Indeed, permitting a decertification petition to be filed immediately might very well allow the Respondent to profit form its own unlawful conduct. These circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued union representation. For all the foregoing reasons, an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the violations in this case.

[11] 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."

Union, AFL–CIO, CLC, Local No. 271.

CRETE COLD STORAGE, LLC