

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

MCCARTHY CONSTRUCTION COMPANY

Employer,

Case Nos. 7-CA-51474
7-CA-51647

and

CEMENT MASONS LOCAL 1,
INTERNATIONAL UNION OF BRICKLAYERS
AND ALLIED CRAFTWORKERS (BAC),
AFL-CIO

Charging Party

_____/

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**RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE
LAW JUDGE'S DECISION WITH SUPPORTING BRIEF**

Respondent, McCarthy Construction Company, pursuant to Section 102.46 of the Board's Rules and Regulations, submits the following Exceptions to Administrative Law Judge Arthur J. Amchan's Decision with supporting brief.¹

1. Exception is taken to the ALJ's finding that Respondent violated Section 8(a)(5) and (1) by failing to provide in a timely fashion some information requested by the Union,

¹ The following abbreviations are sometimes used herein: Administrative Law Judge – ALJ; Administrative Law Judge's Decision – ALJD; Official Transcript – TR.

arguably relevant to collective bargaining. ALJD p. 7, lines 24-25; p. 8, lines 1-34; p. 9, lines 37-38.

2. Exception is taken to the ALJ's finding that Respondent violated Section 8(a)(5) and (1) by failing and refusing to meet with the Union at reasonable times for the purpose of collective bargaining. ALJD p. 8, lines 36-49; p. 9, lines 1-33, 40-41.

3. Exception is taken to the ALJ's recommended remedy extending the certification year for at least one year under *Mar Jac Poultry Company*, 136 NLRB 785 (1962) and his recommended order requiring bargaining to take place not less than 24 hours per month in sessions of between four and six hours. ALJD p. 10, lines 5-17.

BRIEF IN SUPPORT OF EXCEPTIONS

I. STATEMENT OF THE CASE

In this case, the ALJ held that Respondent violated the Act by failing to provide certain information to the Union in a timely fashion and by failing and refusing to meet with the Union at reasonable times for collective bargaining. The ALJ's proposed remedy and recommended order extended the Union's certification year until at least 1 year after Respondent begins, or resumes bargaining in good faith, and requires Respondent to bargain with the Union no less than 24 hours per month, in sessions of between four and six hours, or upon another schedule mutually agreed to by the parties.

II. SUMMARY OF ARGUMENT

The ALJ erred by concluding that Respondent failed to provide some requested information in a timely fashion. In this case, the amount of information requested by the Union necessarily required Respondent and its counsel to take a reasonable amount of time to obtain, review and produce the documents. Additionally, the circumstances surrounding Respondent's

operation at the time, including the fact that its bookkeeper (and keeper of the records) had recently been fired for embezzling funds from Respondent and that Respondent relied on a third-party payroll service to obtain information requested by the Union, establish legitimate reasons for the very short delay in responding to the Union's requests. Lastly, the Union was not prejudiced in any way since the information was produced and available for bargaining.

The ALJ also erred by concluding that Respondent failed to bargain in good faith by rescheduling a few bargaining sessions. Respondent met frequently with the Union at the bargaining table, produced voluminous documentation and other pertinent information, exchanged substantive contract proposals and maintained open lines of communication throughout bargaining (which is still taking place). The ALJ failed to understand that substantive communications took place away from the bargaining table, and ignored the fact that the Union itself admitted that it has not bargained with any sense of urgency. The ALJ also erred by admitting and relying upon evidence of alleged violative conduct by Respondent that was explicitly dismissed from the Union's unfair labor practice charges and was not alleged in the General Counsel's Complaint.

Lastly, the ALJ erred by imposing a completely unreasonable remedy that extends the Union's certification year for a period that far exceeds the time frame during which the Respondent allegedly failed to meet and bargain in good faith. Additionally, the ALJ's remedy unjustifiably requires Respondent to bargain with the Union for no less than 24 hours per month. Even if no bargaining sessions had been rescheduled by Respondent, the parties have never come anywhere close to meeting that frequently for this eight-person unit.

III. STATEMENT OF FACTS

Respondent McCarthy Construction Company is a contractor specializing in concrete for the building and construction industry. Respondent specializes in foundations, machine pits, industrial building floors, parking lots and exposed aggregate finishes.

The Cement Masons Local 1, International Union of Bricklayers and Allied Craftworkers (BAC), AFL-CIO ("Union") was certified on March 26, 2008, as the Section 9(a) exclusive collective bargaining representative for all employees working on building and construction projects employed by Respondent. ALJD pp. 1-2.

A. Bargaining Prior to Respondent's Hiring Legal Counsel.

The parties had scheduled their first bargaining session on April 9, 2008.² Respondent's owner, Mike McCarthy, was unavailable for that meeting, however. The Union was informed to speak with McCarthy to reschedule. TR 23. Respondent was not represented by an attorney at that time. The parties met on April 15, 2008 for their first bargaining session, at which time McCarthy was given copies of the Union's pattern contracts by the Union's representatives. TR 23-24. The next meeting was scheduled for April 29, 2008, but the Union failed or refused to provide copies of alternative contracts by that time. The Union offered no explanation then or at the hearing for not providing the requested contracts by the next-scheduled meeting. Therefore, McCarthy postponed the meeting. TR 24.

The parties were scheduled to meet on May 13, 2008, but by that time it was clear to McCarthy that he needed to obtain legal counsel. He advised the Union that the meeting would be postponed while he interviewed law firms. TR 25. On June 27, 2008, Respondent retained Dennis Devaney to represent it with respect to bargaining. GC-3. Devaney has practiced labor

² All dates referenced herein are in 2008, unless otherwise noted. All trial exhibits are referenced as GC-__, CP-__, or ER-__.

law for 33 years, including sitting as a Member of the NLRB from 1988 to 1994. TR 146-147. He primarily represents management clients, but also represents labor organizations. He has extensive experience in collective bargaining. *Id.*

B. Bargaining and Information Exchanges After Respondent Hired Legal Counsel.

Devaney characterized the relationship between the parties as cordial and professional, and explained that substantial bargaining occurred away from the bargaining table. TR 150. The Union did not refute this characterization. While substantive bargaining proposals have been exchanged, Devaney testified that the parties “haven’t had a lot of movement frankly because the union has come in, and they began with Mr. McCarthy and said, here's our pattern contract, sign it. And, you know, there's been some minor iterations from that, you know. We'll drop the most favored nations clause. We'll add it back in. You know, but essentially, the pattern contract is still on the table from their side of the bargaining table.” TR 152.

On June 17, 2008, the Union had offered proposed dates for bargaining, and requested information including payroll records, employment records and other documents related to employees and their wages and benefits. GC-2.

Subsequent to his retention by McCarthy on June 27, 2008, Devaney spoke with Union agent, Paul Dunford, with respect to scheduling bargaining and confirmed his conversation in a letter. GC-3. In this letter, Devaney proposed bargaining on July 16th, or in the alternative July 17th or 18th, and that additional dates be scheduled at the first bargaining session. *Id.* By email dated July 2, 2008, Devaney confirmed with the Union’s attorney, John Canzano, a July 17th bargaining meeting at Respondent’s offices. ER-5.

Although the next meeting between the parties was scheduled for July 17, 2008, the Union canceled the session. TR 26; ER-6. On July 7th, the Union proposed July 29th, 21st or

August 1st for the next session. Devaney advised that he was out of town and that he would touch base with Respondent to select a date. ER-6. He further advised that he thought there would be no problem meeting at the Union's offices. *Id.* On July 14, Devaney, via his secretary while he was in New York, emailed Canzano to confirm a July 31, 2008 session at the Union's offices at 10:30 a.m. ER-7. On July 30, Canzano moved the start time from 10:30 a.m. to 11 a.m. ER-8.

The parties met on July 31, 2008, at which time Devaney advised the Union that he had CD-ROMs with requested information that he needed to review. TR 27. Devaney had expected to see Canzano at the meeting, but Canzano's law partner, Sam McKnight, was there in his place. Devaney gave McKnight the employer's counter-proposal at the meeting. Devaney explained what happened next:

A. . . . I gave it to Mr. McKnight, and, you know, he basically took it and left and said the meeting was over. So, you know, that bargaining session probably lasted less than fifteen minutes.

Q. Did Mr. McKnight ask any questions about your proposal?

A. Not really. I mean, he looked at it, and he kind of read through, and essentially ended the meeting and said they'd be back.

TR 156.

By letter dated August 8, 2008, which was hand-delivered to the Union, Devaney provided CD-ROM copies of Respondent's first and second quarter payroll records responsive to the Union's June 17, 2008 request. GC-4. The CD-ROM discs were produced in accordance with an agreement reached between the Union and Respondent. TR 65. In the letter, Devaney advised that if the Union had any questions, "please have your counsel contact me directly." *Id.*

Almost two weeks later, Chuck Kukawka of the Union faxed a letter to Devaney (on August 20, 2008). GC-5. He stated that Devaney provided two CD-ROM disks to him on August 8, 2008, but that he was unable to open or access the files and that “eventually our attorneys were able to access the files on the discs.” *Id.* Kukawka did not, however, contact Devaney in the meantime to seek assistance, and Devaney never refused any request for assistance with the discs. TR 66. Kukawka further complained that the discs did not contain all the information the Union requested. Dunford testified that the reason it took the Union almost two weeks to respond to Devaney concerning the discs was that they had trouble accessing the files and that it took the Union some time to review all the information. TR 67.

Two days later, by letter hand-delivered to the Union, Devaney responded to Kukawka’s August 20, 2008 letter. GC-6. Devaney stated that the August 20, 2008 letter was, at best, disappointing, and that if the Union were having trouble opening the documents on the discs, he would have been happy to be of assistance had the Union contacted his office. *Id.* Addressing the additional information raised in the August 20, 2008 letter, Devaney advised that he had requested Respondent to provide such additional information, but that the company was under no obligation to create records that do not already exist in the ordinary course of business. He enclosed the additional materials gathered by Respondent with his August 22, 2008 letter. Lastly, he advised that he would be out of town on business from August 29, 2008 to September 8, 2008, and requested the Union to suggest additional bargaining dates starting the week of September 15, 2008. *Id.*

It was not until September 10, 2008 that the Union proposed bargaining dates. GC-7. Thus, there was an approximately six-week break between the July 31, 2008 session and the Union’s next proposal of dates. Dunford was asked about this, and responded as follows:

Q. Okay, so there's no urgency, at least on the part of the union, in getting back to the table at this time, right?

A. We were reviewing the documents.

TR 69.

Devaney responded to the Union's proposal of dates by letter dated September 15, 2008, selecting September 26, 2008 as the next bargaining session. GC-8. Prior to that bargaining session, by email dated September 16, 2008, Denise McCarthy forwarded additional information requested by the Union for bargaining purposes. GC-9.

A bargaining session was held on September 26, 2008, at which time the parties discussed benefits issues. TR 31. The parties selected October 6, 2008 and October 21, 2008, as the next bargaining sessions. Following that meeting, Respondent provided information to the Union, which Devaney described as follows:

I had provided an awful lot of information to the union, and it's my recollection that at that point, Mr. Canzano also suggested that there were some holes from their perspective in some of the data that was submitted, and they wanted some more stuff.

TR 159.

C. Bargaining During the Period Alleged In General Counsel's Complaint.³

Respondent had to postpone the October 6, 2008 session, because Denise McCarthy's children were sick. TR 31. Devaney explained the circumstances behind this postponement, as follows:

Well actually, I called Mr. Canzano. I apologized for the late notice, but I had gotten a call from Denise McCarthy. She's a mother of two young boys, and she said to me I can't, I've got an issue at home, and I'm not going to be able to get to

³ The General Counsel's Amended Complaint alleged that "Since about October 6, 2008, Respondent has canceled bargaining sessions without just cause and without offering alternative dates to the Charging Union." Complaint, ¶ 11.

the bargaining session. And so, I called. I apologized for the late notice. And I said, you know, can we move this. And, by the way, I mean, yesterday General Counsel and actually Mr. Canzano, you know, were constantly using the word cancelled with respect to bargaining sessions. And I, in my view, and I feel very strongly on this, we postponed and we rescheduled some bargaining sessions, but we were not cancelling bargaining sessions. We had things that came up, personal issues which related to off-the-table issues with respect to being ready for this bargaining. And so I think that's a total mischaracterization of the record.

TR 157-158.

The parties met on October 21, 2008, as scheduled. At that session, the parties continued discussing benefits issues, and the Union made a verbal request for additional information. TR 32. The information sought included certified payroll documents, which have been provided, and documents pertaining to Kensington Construction Company, such as payroll records and documents concerning “who was running it” and “who was in control of it.” TR 32-33.

The Union said only that it “needed the information for negotiations.” *Id.* On cross examination, Dunford again clearly testified that he recalled nothing else concerning why the information was needed. TR 73-74.⁴ Denise McCarthy, Vice President of Operations, explained to the Union that Kensington was no longer in business. TR 139. At the session, the Union also provided a counter to Respondent’s contract proposal (which was itself a counter). Respondent had explained that the Union’s pattern agreement is not workable for this kind of company, but the Union offered the same pattern agreement again only this time the Union removed a “most favored nation” clause that would have been beneficial to Respondent. TR 164. Devaney took the proposal under advisement. *Id.*

⁴ Much later in the hearing, and in response to leading questions that were objected to by Respondent’s counsel and sustained, Dunford attempted to argue that the information request was explained by the Union’s attorney. TR 118-119. Respondent submits that this testimony is inherently unreliable considering how it was elicited, and thus should not be considered as credible testimony.

On October 22, 2008 Devaney emailed Canzano, suggesting that the next meeting take place on October 27, 2008. ER-1. He explained that “in light of the additional information you requested yesterday and the background you provided on Kensington, I think it may be more productive for us to allow me to gather the additional information you requested and do some due diligence on the earlier fund litigation before we meet again.” *Id.* Dunford very reluctantly conceded that “things like getting a handle on information relevant to the bargaining might have an impact on when bargaining sessions take place.” TR 70-71. For example, Dunford testified as follows:

Q. . . . if Mr. Devaney rescheduled a date, needed time to review information relevant to the bargaining unit, that would not be inconsistent with what your union itself has done, at least during the period of time between July and September of 2008, correct?

A. I guess not.

Id. In fact, Dunford admitted that the Union did not complain at the time of the October 22, 2008 email about Respondent allegedly dragging its feet or unjustifiably delaying the bargaining. TR 75.

As an aside, the “fund litigation” referenced by Devaney in his October 22, 2008 email was a 2004 lawsuit brought by the Union’s benefits funds against Respondent and Kensington Construction in U.S. District Court, Eastern District of Michigan, Case No. 04-cv-74006-DT. In that case, Judge Rosen issued an Opinion and Order Denying Plaintiffs’ Motion for Summary Judgment, dated March 24, 2006. ER-4. In that case, the Union’s funds alleged that Respondent and Kensington were alter egos. The federal court ruled that:

McCarthy Construction and Kensington have different ownership, different business purposes, different officers, different phone numbers, different officers, and different management – and they do different work. The two companies maintain separate bank accounts, separate insurance policies, and do not share

common equipment. Further, there is no evidence of intermingling of funds or assets. ER-4, p. 6.⁵

Also on October 22, 2008, the Union emailed Devaney insurance plan summaries for his review in connection with bargaining. ER-2. As the Union's email indicates, it sent pension information to Devaney for his review by next day air. *Id.* In short, in mid-October, there were several emails exchanged between the parties sharing information and discussing bargaining topics. TR 77-78.

The parties met for bargaining again on October 27, 2008. Devaney advised the Union that he was still reviewing the information request concerning Kensington. TR 34. By this time, the parties had exchanged contract proposals a "few times." *Id.*

The next bargaining session, scheduled for November 5, 2008 was postponed by Respondent via email from Devaney to Canzano. ER-10. In that email, Devaney explained that Respondent had expanded Devaney's engagement to also cover the pending 8(a)(5) charge that Respondent had been handling by itself. Devaney was required to file Respondent's Answer to the Region's Complaint (alleging dilatory providing of information) that day. *Id.* Devaney suggested that the parties resume bargaining at the previously-scheduled November 10, 2008 session, and that Respondent would have a counter-proposal to present at the meeting. Canzano responded only that he would notify the Union that the "meeting today is cancelled. We will see you on November 10th at BAC Local 1." *Id.* Devaney denied that he postponed the November 5, 2008 session out of spite or for vindictive reasons. He explained as follows:

A. . . . I've been doing this for 33 years. I've seen plenty of unfair labor practice complaints and other things. I mean, you know, that never entered my mind. I just was thinking that alright, we've got to file this answer. It was something that we had not been involved in for them. I wasn't sure whether we'd get it out by 1:00. We did. I was happy we did, but frankly, we were going to then have to

⁵ The ALJ correctly ruled that in light of the Sixth Circuit and Board law, the Union did not have a reasonable objective basis for believing that an alter ego relationship existed between Respondent and Kensington. ALJD p. 7.

deal with this, you know, as a substantive matter. And, you know, Mr. Canzano, in the prior bargaining session, had alluded to this alter ego question. And, you know, I hadn't done all my due diligence, but I've done this long enough to know that that was something that I was going to have to pay careful attention to.

TR 170-171.

The parties met on November 10, 2008. Respondent's attorney, Jeff Wilson, attended the bargaining session instead of Devaney, because of family reasons concerning Devaney's then-pregnant wife. TR 171. Denise McCarthy could not make the meeting, either, due to personal issues. TR 188. At the meeting, Wilson provided a contract proposal and discussed information requests by the Union. TR 38-41. The Union filed a ULP charge alleging that Wilson did not have authority to bargain at the meeting, and the Region dismissed the charge. The Union appealed the dismissal, and the Office of Appeals upheld the dismissal. Nonetheless, Counsel for the General Counsel elicited testimony from the Union representative concerning the very issue that was dismissed by the General Counsel. In any event, the testimony revealed that the Union did not object to the presence of Wilson at the meeting, and that the parties discussed substantive issues. TR 79-80. Additionally, the Union requested additional information at the November 10 meeting, which Respondent provided. TR 107-108.

The parties had scheduled another session for December 4, 2008, but Devaney postponed the meeting by letter dated December 1. GC-14. Devaney explained:

A. . . . Well, in my view at least, you know, this information request was kind of becoming a moving target over the five months that we had been trying to get them information that they had requested. And by this time, I had had the opportunity to review the [federal court alter ego] decision . . . and I had read the finding that Judge Rosen has made in the fund litigation where he had concluded, as a matter of law, that McCarthy and Kensington were not alter egos. Because of that, I frankly felt that I needed more than sort of the verbal discussion because, frankly, at the table, I felt we were making progress in terms of providing information and getting information from them. But clearly, by this time, now two unfair labor practices have been charged, has been filed. We're in the process of responding to that and defending McCarthy, and so frankly, I

actually wanted to know what it was, and not just orally from Mr. Canzano what it was that he thought that the union was entitled to receive. And that's frankly why I wrote this letter. And because I really wanted a clearer view of what it is they thought was outstanding, I didn't think it would be productive to meet until I had a written response to my letter.

TR 173-174. In his December 1, 2008 letter, Devaney asked that the Union send a written listing of the information that it claimed was requested and not provided, and that pending receipt of that written information he was postponing the December 4, 2008 meeting. GC-14.

On December 3, 2008, at 5:00 p.m., Canzano faxed a letter to Devaney placing in writing some of the information he had verbally requested of Respondent. GC-15. Devaney was in Washington, D.C. when the letter arrived, and his secretary forwarded it to his iPhone. TR 175-176. Thus, by the time he received Canzano's response letter, he was out of town (and was still out of town on December 4, 2008).

The next bargaining session between the parties did not take place until March 10, 2009.⁶ Union agent Dunford testified that the Union tried to schedule bargaining sessions between December 4, 2008 and March 10, 2009. TR 44. Devaney strongly denied this allegation. TR 181. In fact, on cross examination, Dunford further compounded his allegation by claiming that Union attorney Canzano had attempted to schedule meetings to no avail by sending Devaney emails. TR 81. Neither Counsel for the General Counsel nor the Union produced any emails, however, and it became clear that Dunford was embellishing the facts to paint a false picture in support of his 8(a)(5) allegations. In this regard, on the second day of the trial, Canzano actually offered to stipulate that he sent no emails as alleged by Dunford. TR 181.

⁶ Devaney had proposed sessions for March 2, 2009 and March 10, 2009. ER-11. The Union chose only the March 10 date. ER-12. Devaney confirmed the session, and expressed his disappointment that the parties were not able to also meet on March 2nd. ER-13.

Upon cross examination, Dunford ultimately conceded that the Union had no sense of urgency in early 2009 to continue bargaining sessions. TR 84. Unfortunately, this critical admission was ignored by ALJ Amchan. Dunford's entire testimony on this subject is as follows:

Q. Okay, did you contact anyone at your attorney's office [in January 2009] and say let's get going, let's send another request, let's get these guys to the table?

A. I can't say I did that.

Q. Okay, in February of 2009, were you bothered by the fact that there weren't any bargaining sessions?

A. I'm definitely bothered by it.

Q. Okay, and did you do anything to facilitate getting the parties to the table by, for instance, inquiring of your attorney why we're not meeting?

A. I did not.

Q. Okay, in fact, there really was no urgency at this period of time getting to the bargaining table, was there?

A. Apparently not.

Id.

The ALJ ruled that Respondent's alleged "lackadaisical attitude" toward bargaining resulted in the lack of bargaining sessions from December to March 10, 2009. ALJD p. 9. The General Counsel had asserted that the Union's December 3 letter, which contained a generalized reference, almost in passing, to the Union looking forward to receiving proposed bargaining dates provided a foundation for this allegation. Concerning this roughly three-month hiatus in bargaining, Devaney provided the following context:

A. . . . I recollect that part of [Canzano's December 3] letter, but, you know, we were already in December, the holidays were coming. I had a very heavy trial schedule in January. I had arbitrations, and I had some other things for other clients, and so, no, the only thing I got was that one line about, you know, do you have any other dates. I had no calls. I had no e-mails. I didn't, you know, we

didn't hear anything from them. And frankly, from my perspective, both for the union and for McCarthy, I mean, this is a really small unit. This is eight people in this unit. And, you know, there's a lot of money being spent on both sides, including today. And so, I didn't have any great sense that there was some great urgency from the other side that we needed to get back to the table.

And also, as you know, the Region had gone to complaint. Originally, there was supposed to be a hearing in December, then it was postponed, and it was going to be in February. Then apparently there's an e-mail, I don't know if it's in the record, but Mr. Czubaj said that, you know, they had tried to get it scheduled earlier. This was a January 22nd e-mail to Mr. Canzano, and it was saying that the Judge in his division wasn't available until March 18th. So, you know, that's sort of the backdrop to this.

TR 182-183 (emphasis added).

Administrative Law Judge Arthur Amchan presided over a two-day trial in Detroit, Michigan, on March 18-19, 2009. The ALJ issued his Decision on May 27, 2009.

IV. LAW AND ARGUMENT

A. Respondent Did Not Violate The Act By Allegedly Providing Information In A Dilatory Manner.

The ALJ ruled that Respondent unreasonably delayed its responses to the Union's June 17, 2008 information request. The ALJ based his finding on the "impreciseness" of the reasons provided by Respondent for the time taken to respond fully to the Union's information requests. ALJD p. 8. In fact, the totality of the evidence does not support this conclusion and demonstrably refutes it.

The Union requested, by letter dated June 17, 2008, payroll records and many other documents regarding "notice of layoffs, date of hire, rate of pay, benefits and hours of work for all employees working on construction and building projects from January 1, 2008 to the present." GC-2. The Union was well aware that Respondent's payroll was processed by a third party payroll service, and that it had recently been the target of embezzlement by its bookkeeper and scheduler. While it is conceded that the information requested by the Union was provided in

segments over a few months, Respondent's witnesses provided ample justification for McCarthy's need to gather and review such information.

In determining whether an employer has unlawfully delayed responding to an information request, the Board considers the totality of the circumstances surrounding the incident. "Indeed, it is well established that the duty to furnish requested information cannot be defined in terms of a *per se* rule. What is required is a reasonable good-faith effort to respond to the request as promptly as circumstances allow." *West Penn Power Co.*, 339 NLRB 585, 587 (2003) (internal quotation marks omitted) (emphasis added), *citing Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993).

In this case, the amount of information requested by the Union necessarily required Respondent and its counsel to take some time to obtain, review and produce the documents. Moreover, the Union's information requests were a moving target which the Union supplemented with additional requests at times. Contrary to the ALJ's finding of an imprecise or vague explanation, Devaney explained in detail Respondent's position on allegations of dilatory production of information:

A. With respect to the payroll records, which was sort of a central component of what they wanted, a large portion of that was not in the control of my client because they had used an outside payroll service. In addition, as you know and actually as the other side knows well too, the former bookkeeper scheduler for Mr. McCarthy had embezzled funds from the company. And so, there was a major problem with some of their records because of the activities that had been taken by this former employee.

* * *

Q. Okay, did you ever apprise the union of the fact that the third party payroll service was – that there were any problems in getting documents from the third party payroll service?

A. Yes, we absolutely brought that to their attention on numerous occasions at the table.

Q. Okay, did you ever withhold information that was in your possession that had been requested for any reason regarding tactics or bargaining strategy?

A. Not with respect to tactics or with respect to bargaining, but in light of the unfair labor practices that had been filed, it was our position legally that they weren't entitled to the bidding information as to what jobs were being bid. It was also our position that, frankly, they weren't entitled to any information to this alleged alter ego, that that was not in our control, and as a matter of law, that they, you know, they were not entitled to that. You know, and as was discussed yesterday, the Region as well as Appeals affirmed our position with respect to the bidding information and other aspects.

Q. Okay. And with respect to the information that you did provide to the union, did you withhold any of that for any period of time for tactics or strategy?

A. No.

TR 177-179.

Thus, under the circumstances, Respondent submits that it did not fail to timely furnish information. Respondent and its counsel turned over CD-ROM discs with information shortly after receiving them from a third party, and after taking the appropriate time to review the information prior to production. The Union itself took two weeks to review the CD-ROM discs before responding to Devaney with its alleged concerns about the discs themselves and the information provided. The Union admitted further that the six-week hiatus between the July 31st bargaining session and when the Union proposed additional dates was due to "reviewing documents." The additional information provided by Denise McCarthy by email dated September 16, 2008 was not untimely. She was relatively new to the company – she is the daughter of the owner, but only recently had started working after Respondent had to fire Pat Smalley for embezzlement. As the information produced in the email demonstrates (GC-9), Denise McCarthy also produced substantial information about current jobs engaged in by McCarthy. Thus, the employee information in that email was not produced in a vacuum, but was part of a larger and evolving information request from the Union. While the ALJ acknowledged

that he was required to consider all the facts and determine whether information was provided “as promptly as circumstances allow,” he ignored the abundant evidence provided by Respondent to explain the brief delays beyond its control.

Even if it could be established that Respondent failed to timely furnish potentially relevant information requested by a union, it will not be found in violation of Section 8(a)(5) and (1) of the Act if there is a valid reason why it did not timely furnish the information. *Detroit Newspaper Agency*, 317 NLRB 1071 (1995). In this case, for all the reasons set forth above, there are valid reasons for the timing of Respondent’s information production. Again, these reasons were erroneously ignored by the ALJ.

B. Respondent Did Not Violate The Act By Allegedly Canceling Bargaining Sessions In Bad Faith.

The ALJ found an 8(a)(5) violation based on a strikingly slim analysis. ALJD pp. 8-9. While purporting to consider the “totality of Respondent’s conduct” the ALJ reached the generalized conclusion that Respondent gave bargaining a very low priority and took a very lackadaisical attitude toward its obligations. ALJD p. 9. The ALJ seemed motivated mostly by the postponement of two bargaining sessions and the December 2008 to March 2009 hiatus in bargaining. *Id.* The cursory nature of the ALJ’s legal analysis of the lengthy bargaining record, both at and away from the table, however, speaks for itself. It is clear that the ALJ did not consider the totality of the circumstances.

Respondent met frequently with the Union at the bargaining table, produced voluminous documentation and other pertinent information, exchanged substantive contract proposals and maintained open lines of communication throughout the period that the General Counsel identifies in the Amended Complaint (October 6, 2008 to the present). Collective bargaining between the parties has proceeded at a reasonable pace and does not fit the *post hoc*

mischaracterization of the bargaining history offered by the General Counsel and the Union at trial, and apparently adopted by the ALJ. Devaney described the pace of bargaining, especially during the winter months, as follows:

A. I think both parties recognize that this is important to comply and bargaining good faith. On the other hand, and the reality of this is, we're talking about a very small unit, both for the union and for the company, and, you know, there's been many, you know, information exchanged.

* * *

Q. To your knowledge, during the fall and winter now, late fall, winter, how much work is actually going on at McCarthy while the, you know, that acts as a backdrop to these negotiation sessions and these communications?

A. Well, I think I alluded to this earlier. I mean, essentially, they're a predominately seasonal employer. They pour concrete and do, you know, things related to that. Obviously, the Michigan winters are tough. The economy here is terrible. I mean, for a good portion of the time that this case has been pending, McCarthy hasn't had any business.

TR 212-213.

Section 8(d) of the Act defines the duty to bargain collectively as “the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment ... but such obligation does not compel either party to agree to a proposal or require the making of a concession.” *Public Service Co. of Oklahoma*, 334 NLRB 487 (2001).

The Board has long stated that it looks at the totality of a party's conduct to determine whether it has bargained in good faith under the Act. *See NLRB v. Katz*, 369 U.S. 736 (1962). In other words, a party's good faith is viewed, not by specific, individual actions, but by the “totality of conduct.” *NLRB v. Arkansas Rice Growers Ass'n*, 400 F.2d 565 (8th Cir. 1968).

Importantly, this “totality of conduct” examination requires the Board to consider the party’s conduct “both at and away from the bargaining table.” *Public Service Co. of Oklahoma*, *supra*. The Board has repeatedly recognized as lawful, good faith bargaining of parties who have demonstrated a willingness to confer on a regular basis. *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984)). According to the Board, bad faith conduct includes:

... delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, and arbitrary scheduling of meetings.

Atlanta Hilton & Tower, 271 NLRB at 1603 (internal citation omitted).

The ALJ’s relied upon two isolated instances of meeting postponements by Respondent, despite compelling evidence of good faith bargaining by Respondent both at and away from the table. The concept of “good faith bargaining” has never been measured simply by the number of times the parties sit down at the table in a given period of time. *See, e.g., 88 Transit Lines*, 300 NLRB 177 (1990) (failure to meet more frequently, when evaluated under totality of respondent’s conduct, not a violation of 8(a)(5)); *Gulf States Mfg.*, 287 NLRB 26, 38 (1987) (“in the last analysis what either party preferred as meeting times is not the measure of the statutory reasonableness but rather only a factor to be considered...”). Likewise, an employer is not guilty of bad faith in violation of 8(a)(5) because it postpones a few bargaining sessions. *See Teamsters Local 705*, 2003 WL 1832121 (N.L.R.B.G.C.) (canceled meetings are not evidence of refusal to bargain or refusal to meet at reasonable times where there is justification for the cancellations).

Even assuming the ALJ would be justified in deciding this particular allegation by the number of times the parties met versus the number of meetings postponed by Respondent, that calculation would not support an 8(a)(5) finding. From the time Devaney was retained by

Respondent as its lead negotiator in late June,⁷ the parties have met at the table six times,^{8 9} the Union postponed one meeting¹⁰ and pushed back another, and Respondent postponed four meetings.¹¹ When Respondent postponed the October 6, 2008 and November 5, 2008 meetings, the parties had already scheduled additional sessions to take place shortly after those dates.¹²

In this case, there is a complete lack of indicia of bad faith on the part of Respondent. On the few occasions where Respondent postponed meetings, it provided the Union with a good faith justification for the postponement. Of course, even where Respondent attempted to move bargaining forward by sending Devaney's partner, Jeff Wilson, the Union accused Respondent of sending a representative who lacked bargaining authority – a spurious charge that was dismissed by Region 7 and the Office of Appeals. The ALJ, however, clearly erred in allowing this evidence over objection from Respondent, and further erred by basing his decision on such evidence. ALJD, p. 4. In this regard, the Union complained both that Respondent postponed meetings due to the unavailability of its lead negotiator as well as the efforts by Respondent to continue bargaining without its lead negotiator. This placed Respondent in a no-win situation insofar as the Union was intent upon filing charges regardless of the facts. The ALJ wrongly failed to reject this type of gamesmanship.

⁷ The General Counsel alleged only that Respondent's conduct from October 6, which is six months prior to the charge filing, to the present constitutes an 8(a)(5) allegation. The ALJ, however, allowed and considered substantial evidence outside the 10(b) period in support of the allegation. Pursuant to Section 10(b), a violation of the NLRA cannot be found, "which is inescapably grounded in events predating the limitations period." *Machinists Local 1424 v. NLRB*, 362 U.S. 411, 422 (1960). However, events outside the 10(b) period can be used to shed light on critical events within the 10(b) period. *Id.* at 416. The crucial distinction between these principles is that the Board may not give "independent and controlling weight" to the pre-10(b) evidence. *Id.* at 417.

⁸ July 31, September 26, October 21, October 27, November 10, March 10, 2009.

⁹ Another bargaining session will be held on July 23, 2009.

¹⁰ July 17.

¹¹ October 6, October 23, November 5, December 4.

¹² In fact, Devaney proposed meeting on the previously-scheduled November 10 date in his email postponing the November 5 session. The October 6 meeting was postponed because Denise McCarthy's children were sick, and again there was already another session scheduled for October 21 when Devaney asked Canzano if "we could move" the October 6 date. TR 157.

The ALJ's decision also betrays a completely unrealistic view of the modern bargaining process. The ALJ accepted the GC's theory, which is predicated largely on the allegation that Respondent canceled or postponed bargaining sessions without justification and without proposing alternative dates. A view of the bargaining history in its entirety, however, reflects a dynamic relationship progressing not only through sit down meetings, but also through frequent communication away from the table. Devaney explained the extent to which the parties kept open lines of communication about bargaining, scheduling and information production. Importantly, the General Counsel did not call as a witness the Union's lead negotiator, John Canzano, to refute this testimony. The two Union witnesses who were called, Dunford and Kukawka, did not contradict Devaney's testimony.

Importantly, in judging whether Respondent violated the Act by its bargaining conduct, it is equally important to consider the Union's actions at and away from the table. See *Wald Mfg. v. NLRB*, 426 F.2d 1328, 1331-32 (6th Cir. 1970) (conduct of the union cannot be completely ignored when assessing the good or bad faith of the employer at bargaining sessions). In this regard, Devaney testified without contradiction from the Union that, although bargaining has proceeded at a reasonable pace, the Union itself prevented substantial progress by slavishly adhering to an almost "take it or leave it" approach to its pattern contract. Other than some minor iterations of the pattern contract, which the Union proposes to employers large and small, the Union "has come in, and they began with Mr. McCarthy and said, here's our pattern contract, sign it." TR 152. In fact, in the first session attended by Devaney, on July 31, 2008 Respondent provided a counter-proposal to the pattern contract, and the Union's counsel quickly read through it and abruptly ended the meeting. TR 156. With this kind of bargaining posture by the Union, which included the regressive proposal of removing from its pattern contract one of the

provisions that would be beneficial to Respondent (TR 164), it is not surprising that Respondent attempted to move certain issues forward away from the table.

Additionally, the facts demonstrate that the Union was not pressing to meet and bargain in the face of a dilatory employer. To the contrary, large blocks of time elapsed during bargaining where the Union itself was proceeding leisurely. The ALJ ignored the fact that the Union desired to slow things down at times (six-weeks in August-September, “no urgency” in early 2009). This evidence should have been part of the ALJ’s consideration of the overall “totality of circumstances.” Instead, the ALJ concluded that it was “most telling” that Respondent did not respond to the Union’s passing reference to “looking forward” to receiving additional bargaining dates, and erroneously concluded that Respondent was citing a “busy negotiator” reason for the hiatus in bargaining from December 2008 to March 2009. ALJD, p. 9. The Union admitted at the trial that there was no urgency during this time, however. It is fundamentally unfair and inconsistent with the statute to penalize an employer who proceeds in bargaining at a pace set by the Union, and then in hindsight claim that the pace was “dilatory.” *Inter-Mountain Dairymen, Inc.*, 157 NLRB 1590, 1604 (1966) (Section 8(d) “does not require employers to seize or maintain the initiative with respect to negotiations”). The ALJ, however, erroneously penalized Respondent in just this manner.

Furthermore, Devaney fully explained the reasons behind the instances where he postponed a couple of bargaining sessions after charges were filed by the Union, and the evidence demonstrates that Respondent needed additional time not just to respond to the allegations, but also to caucus internally to determine whether significant changes in bargaining strategy needed to be made. Board law is clear that a pending charge does not relieve a party of its duty to bargain in good faith, but accusing another party of improper or illegal conduct

certainly tends to “deter consensus.” See *Bridon Cordage*, 329 NLRB 258, 331 (1999). It is not unreasonable to expect Respondent to take some measure of time, however brief, to assess the bargaining situation. See *Suffield Academy*, 336 NLRB No. 65 (2001) (employer's failure to meet with the union for about six weeks did not constitute unlawful delay when the union's repeated information requests, unfair labor practice charges, and activities away from the table reduced time available to bargain).

In any event, Devaney never conveyed a message to the Union that Respondent would no longer bargain in retaliation for the Union's charge filing. The ALJ nevertheless concluded that there was “no compelling reason” for Respondent to postpone the November 5, 2008 and December 4, 2008 meetings. In light of Devaney's uncontradicted testimony explaining the basis for these postponements, the ALJ erred by concluding that Devaney's explanation was not sufficient to explain that the postponements were not made in bad faith.

When the facts are viewed in their entirety and consideration is duly given to the totality of circumstances, it is clear that Respondent has not failed or refused to bargain in good faith. To the contrary, the evidence shows that Respondent has approached negotiations with a good faith desire to reach a fair agreement, and has moved negotiations forward. The ALJ's superficial basis for finding an 8(a)(5) violation, therefore, is clearly erroneous.

C. The ALJ's Remedy Is Inappropriate and Unreasonable Under The Circumstances.

The ALJ erred by imposing an unreasonable remedy that extends the Union's certification year for a period that far exceeds the time that Respondent allegedly failed to meet and bargain in good faith. ALJD, p. 10. Additionally, the ALJ's remedy unreasonably requires Respondent to bargain with the Union for no less than 24 hours per month. Even if no bargaining sessions had been postponed by Respondent, the parties never came anywhere close

to meeting that frequently for this eight-person unit.

The ALJ extended the Union's certification year for "at least 1 year" under *Mar-Jac Poultry*. This implicitly presumes that Respondent's alleged misconduct wasted a full year, which neither the General Counsel alleged nor the ALJ found. A *Mar-Jac Poultry* extension is supposed to equal the time of delay, with the aim being to insure "at least one year of actual bargaining." Thus, if Respondent for example bargained with the Union for 6 months and "wasted" six months of the union's certification year, then the extension should only be for six months, not for a year.

For example, in *Mercy, Inc. d/b/a American Medical Response*, 346 NLRB No. 88 (April 26, 2006), the Board shortened an administrative law judge's extension of a certification year by adding only 3 months rather than the judge-directed 12 months to the period, holding there was no evidence that more than 2 months of the certification year bargaining period was wasted by employer misconduct.

"The Board does not routinely extend the certification year a full 12 months as a standard remedy for any violation of the Act during the initial certification year. Instead, the record must support the need for an extension and the appropriate length of the extension. Accordingly, in determining the length of such extensions, the Board considers the nature of the violations; the number, extent, and dates of the collective-bargaining sessions; the impact of the unfair labor practices on the bargaining process; and the conduct of the union during negotiations." *Id.*, citing *Northwest Graphics, Inc.*, 342 NLRB 1288, 1289 (2004); *Metta Electric*, 338 NLRB 1059, 1065 (2003), *enfd. in relevant part* 360 F.3d 904, 912-913 (8th Cir. 2004).

In fashioning an appropriate *Mar-Jac* extension remedy, the Board's task is to provide "a reasonable period of time" for bargaining "without unduly saddling the employees with a

bargaining representative that they may no longer wish to have represent them.” *Wells Fargo Armored Services Corp.*, 322 NLRB 616, 617 (1996).

In this case, the ALJ’s conclusion that Respondent failed to meet with the Union at reasonable times is essentially based on two postponements and an alleged “two and a half month failure to respond” to the Union’s December 3, 2008 request for bargaining dates. The General Counsel, of course, alleged only a six-month period of unlawful refusal to meet and bargain in good faith. Thus, even assuming the ALJ’s conclusions were correct, Respondent’s isolated postponement of meetings and its alleged failure to provide dates in December and January would amount to no more than three months of alleged “wasted” time. Therefore, even if a Mar-Jac remedy were appropriate, which in this case it is not, the most the ALJ should have extended the certification year was three months.

Additionally, without any basis in fact or law, the ALJ imposed a highly unreasonable bargaining schedule. By the Union’s own admissions, bargaining for this eight-person unit has proceeded with no sense of urgency. The parties have never met or even attempted to meet for 24 hours per month. The ALJ’s bargaining schedule is unsupported by the record evidence and should not be imposed. The Union has never sought to meet and bargain as frequently as the ALJ’s imposed schedule, and there is no valid reason to artificially accelerate the parties’ bargaining schedule for such a small bargaining unit that does not even perform work in the winter months. If a bargaining order is imposed, which Respondent believes would exceed the Board’s statutory authority based on the facts in this case, a standard requirement to meet and bargain in good faith is all that would be appropriate.

V. BOARD JURISDICTION

McCarthy's legal position with respect to the Board's ability to decide these exceptions with only two sitting Members follows the legal conclusions adopted by the U.S. Court of Appeals for the D.C. Circuit in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, ___ F.3d ___, No. 08-1214, 2009 U.S. app. LEXIS 9419 (D.C. Cir. May 1, 2009).¹³

VI. CONCLUSION

For the reasons set forth above, including controlling Board precedent and the record evidence taken as a whole, the Board should reject the ALJ's findings of fact, conclusions of law, and recommended Remedy and Order with respect to the issues specifically listed in Respondent's Exceptions.

Respectfully submitted,

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Dated: July 15, 2009

ECF CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2009, I electronically filed the foregoing *Exceptions with Supporting Brief* with the Executive Secretary of the National Labor Relations Board using the ECF system. I hereby further certify that I have also served via e-mail Richard Czubaj, Counsel for General Counsel, and John Canzano, Counsel for Charging Party.

/s/ Jeffrey D. Wilson

Jeffrey D. Wilson

STROBL & SHARP, P.C.

¹³ Counsels for McCarthy already have a challenge to a two member Board Decision pending in the D.C. Circuit in another case.