

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 13**

**KIEFT BROTHERS, INC.**

**and**

**GENERAL TEAMSTERS, CHAUFFEURS,  
SALESDRIVERS AND HELPERS, LOCAL 673**

**and**

**JAIME NIEVES,**

**An Individual**

**and**

**CASES 13-CA-45023**

**13-CA-45058**

**13-CA-45062**

**13-CA-45194**

**CONSTRUCTION AND GENERAL  
LABORERS, LOCAL UNION #25**

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING  
BRIEF TO RESPONDENTS' EXCEPTIONS TO THE DECISION  
OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Counsel for the General Counsel files this Answering Brief in Response to Respondents' Exceptions to the Administrative Law Judge's Decision in this matter.<sup>1</sup>

**I. INTRODUCTION**

On July 21, 2009 Administrative Law Judge Arthur J. Amchan found that Respondent violated the Act by coercively interrogating employees regarding their union sympathies or support and threatening retaliation against them in violation of Section 8(a)(1); discriminating or retaliating against employees due to their support for a labor organization in violation of Section

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<sup>1</sup> In this brief, the Administrative Law Judge will be referred to as "the ALJ"; Kieft Brothers, Inc. will be referred to as "Kieft Brothers" or "the Employer"; General Teamsters, Chauffeurs, Salesdrivers and Helpers Local 673 will be referred to as "the Teamsters"; Construction and General Laborers, Local Union #25 will be referred to as "the Laborers"; and the National Labor Relations Board will be referred to as "the Board". With respect to the record developed in this case, citations to pages in the transcript will be designated as "Tr." followed by the page number. Respondent's Exhibits will be designated "R Ex." followed by the exhibit number. The General Counsel's exhibits will be designated as "GC Ex." followed by the exhibit number. References to the ALJ's decision will be designated "ALJD" followed by the page and, if applicable, the lines of the page.

8(a)(3); and failing and refusing to bargain in good faith with the Teamsters with regard to the wages, hours and working conditions of members of its drivers' bargaining unit and failing to respond with reasonable promptness to information requests from the Teamsters in violation of Section 8(a)(5).

Respondent filed nine exceptions to the ALJ's decision which almost entirely boil down to a disagreement with the ALJ's credibility determinations. Respondent also unsuccessfully contests the ALJ's accurate assessment of the documentary evidence which plainly shows that it failed in its burden of demonstrating that the mass layoff would not have been taken in absence of the union activities of employees. With respect to the 8(a)(5) violation that it never bargained with the Teamsters over its decision to layoff five driver employees, Respondent clings to the only argument that it could: that it did not do so because the decision to layoff was, conveniently, made prior to knowledge of union activities, it had no duty to notify the Teamsters. Respondent makes this tortured analysis based solely on the testimony of its discredited witnesses.

As shown below, each of Respondent's exceptions are without merit because the ALJ's findings of fact, credibility resolutions, and conclusions of law appropriately rely upon the evidence contained in the record and are amply supported by legal precedent. The ALJ was well within his right to make accurate credibility determinations and fairly judged Respondent's lack of critical documentary proof as insufficient to rebut the General Counsel's case. Accordingly, the ALJ's decision should be adopted by the Board.

## **II. THE CREDIBILITY DETERMINATIONS OF THE ALJ SHOULD NOT BE DISTURBED**

In its exceptions, Respondent repeatedly challenges the credibility determinations of the ALJ or his reasons for making those determinations. Namely, all exceptions attack in whole or in part the factual findings of the ALJ based on his credibility determinations even when the ALJ discredited key witnesses for Respondent, and instead credited employee testimony whenever their testimony differed. Thus, Respondent's repeated attempts to rely on the testimony of its own witnesses over that of the General Counsel's must be rejected under well-settled Board law. *Standard Drywall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 361 (3d Cir. 1951).

**A. The ALJ's credibility assessments of Larry Kieft and Chuck Rogers were supported by the clear preponderance of relevant evidence and should stand.**

In specific terms, Exceptions 4, 5, 7, 8, and 9 concern the testimony of Respondent's witnesses Larry Kieft and Chuck Rogers. The ALJ discredited Kieft numerous times in his decision. As it pertains to his conversation with employee Charles Dickerson on October 9, the ALJ assessed that Kieft's testimony was "ambiguous" (ALJD p.5, line 14) and then went on to give several examples. In its Exception 7, Respondent attempts to challenge the ALJ's finding of a violation during this conversation by claiming instead that because Kieft did not "criticize" Dickerson for attending a union rally, such is not a violation of Section 8(a)(1). This is an improper standard.

The correct standard for determining whether an employer's statements or communications with employees violate Section 8(a)(1) is an objective one, i.e., whether the statement reasonably tends to interfere with, restrain or coerce an employee in the exercise of statutory rights. *Long Island College Hospital*, 327 NLRB 944 (1999). Such statements also and "[do] not turn on the employer's motive." *American Freightways Co.*, 124 NLRB 146, 147 (1959). As the ALJ found, even a veiled threat to discharge employees for engaging in union

activities or supporting a union violates Section 8(a)(1) of the Act. *Kona 60 Minute Photo*, 277 NLRB 867, 868 (1985).

By this objective analysis, it is patently irrelevant that Dickerson did not testify that he felt coerced during his conversation with Kieft. What does matter is that the ALJ credited the testimony of Dickerson that on October 9, Larry Kieft asked Dickerson if he wanted to go out and join the rest of the “unemployed” people at the Teamsters rally which was going on near Respondent’s facility. (Tr. 87). This statement connects attendance at the union rally with unemployment and implies a threat of discharge to employees who engage in such conduct and, thus the ALJ correctly found that it was coercive to employees in the exercise of Section 7 rights. See *Kona*, 277 NLRB at 867-868. In addition, despite Respondent’s assertion to the contrary, Kieft never denied making this remark to Dickerson. As such, Respondent’s Exception 7 is without merit and the ALJ’s recommendation of a violation based on Kieft’s lack of credibility and direct denial should stand.

Relatedly, Respondent takes umbrage at the ALJ’s conclusion that Kieft called the local police on the day of the Teamster rally. (Respondent Exception 8). Respondent claims that because Kieft made the excuse that he was only doing so because a fellow tenant called him to complain, this cannot be evidence of his anti-union animus. Although it is dubious that a tenant couldn’t have called the police themselves, again Respondent mischaracterizes the record by parroting the discredited Kieft who claimed that “police did tell employees to move their cars” and from this remark surmises that this “indicates that they were blocking ingress and egress.” (Brief, pg. 16). The fact remains that Respondent could have called a witness to testify about whether or not Kieft called the police at a neighbor’s behest but they did not. If they wished to challenge the Teamsters’ testimony that the rally attendees were blocking ingress or egress, they

could have entered a police report or called their own company witness, Jim Adams, who was seen viewing the rally as well as employee activity for large portions of time. However, Respondent is left with Kieft's testimony that he was not present at the rally the entire time because he was running errands that day. (Tr. 417-418). Thus his hearsay remark regarding what police may or may not have told unidentified "employees" is of no importance. (Tr. 831). The only testimony about the entirety of the rally event came from Teamsters Business Agent Santiago Perez who testified specifically that the Teamsters were not blocking ingress and egress. (Tr. 130). From this testimony, it is clear that the ALJ's credibility determinations are supported by the preponderance of all of the relevant evidence. Thus, the testimony about how Respondent called police on more than one instance during the Teamsters' rally stands as evidence of Kieft's antiunion sentiments and Exception 8 fails. (Tr. 746).

Next, Respondent asserts that the ALJ improperly discredited Respondent's witness, Chuck Rogers about a conversation he had with employee Jaime Nieves. Again, Respondent's attempts to rely on the testimony of its own witnesses over that of the General Counsel's must be rejected under well-settled Board law. In his decision, the ALJ correctly noted that Rogers "testified in a confusing manner about a conversation with Jaime Nieves." (ALJD p. 6, line 35.) In fact, the ALJ also noted correctly that Rogers never did testify specifically about his conversation with Nieves. Instead, during Rogers' direct examination he gave general denials of ever telling an employee that they would be fired if they brought the union into the Company. (ALJD pg. 6, line 42; Tr. 375). However, despite Respondent's characterization of events in her brief, the record reflects Rogers' recollection was selective and uncertain at best. Although opportunely left out of Respondent's argument, it was only on *cross-examination* that Rogers admitted to a conversation with Nieves about the union in which Nieves asked Rogers "if that

was a threat.” (Tr. 387). It was Rogers’ selective recollection that caused the ALJ to discredit Rogers and instead credit the consistent, specific recollections of employee Jaime Nieves.<sup>2</sup> For these reasons, Respondent’s Exception 4 fails as well.

Respondent also attacks the reasoned conclusions of the ALJ regarding Rogers’ conversation with Misael Ramirez. (Respondent’s Exception 5.) In this conversation, Rogers said in Ramirez’s presence that “the union was coming in and someone was going to get fired.” Respondent hangs its hat upon a general denial that Rogers made about how he never would have said that type of remark. However, the ALJ clearly rejected Rogers’ general denial over the specific testimony of Ramirez who said sometime in October in the midst of the Laborers’ organizing campaign, he overheard Operations Manager Chuck Rogers talking on his cell phone. (Tr. 210). As Ramirez entered the room, Rogers turned to look directly at Ramirez and said the union is coming in, somebody is about to get fired. (Tr. 210, 226). Ramirez testified that when Rogers turned to stare at him, Ramirez thought that Rogers was speaking to him. (Tr. 210, 226). Ramirez admitted that Rogers remained on his cell phone when he made the alleged statement. (Tr. 226-227). Because the clear preponderance of relevant evidence supports the ALJ’s reliance on the specific testimony of Ramirez over that of Rogers’ vague testimony on this point, Exception 5 fails.

Lastly, Respondent takes exception with the ALJ’s determination that it hired a martial arts fighter as a security guard to be on premises during the Teamsters’ election as evidence of its anti-union animus. The record reflects that employee Ray Embury saw an individual wearing mixed martial arts fighting gear poised at the main office door on the day of the election. (Tr. 73). Again misstating the record evidence in its brief, Respondent claims that the ALJ had no evidence to support this “unfounded conclusion.” (Brief pg. 16) If Respondent wished to

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<sup>2</sup> See *Sturgis-Newport Business Forms*, 227 NLRB 1426, 1432 (1977).

challenge Mr. Embury's observation, it had the power to call a witness to contradict his observation. As it stands however, the ALJ credited Embury's testimony over that of Kieft and, thus Exception 9 fails.

**B. Respondent's objections to the findings of fact and conclusions of law regarding the violations of Section 8(a)(3) flow directly from its meritless attacks on the ALJ's credibility determinations and thus should fail. (Exceptions 1, 2, 3)**

With insufficient legal underpinnings for its arguments, Respondent challenges the ALJ's appraisal of the credibility of its witnesses George Smith, Ed Carroll, and Larry Kieft who testified about the timing and rationale for laying off nearly forty percent of their employees in the fall of 2008. (Exceptions 1, 2, and 3). By these exceptions, Respondent repeatedly attacks that the ALJ did not credit their economic defense and makes the unsubstantiated argument that General Counsel failed to make a prima facie case. These exceptions are nothing more than arguments with the ALJ's credibility findings and his rejection of their defense.

The ALJ's decision amply shows is that it was the unreliable testimony of Respondent's witnesses and dearth of documentation to support their draconian layoffs that led to a well-reasoned rejection of Respondent's defense. As far as the strength of the General Counsel's prima facie case is concerned, evidence was presented on nearly all of the Board's indicators for discriminatory conduct. For example, the layoffs occurred shortly after employees engaged in union activity. *McClendon Electrical Services*, 340 NLRB 613, fn. 6 (2003). Similarly, by the employees' own testimony, the employer had historically never laid off anyone, even in economically challenging times, thus demonstrating the pretextual nature of the layoffs. *Pro-Spec Painting, Inc.*, 339 NLRB 946, 949 (2003). In addition, Respondent's animus was demonstrated circumstantially by its commission of numerous 8(a)(1) statements, by ignoring its 8(a)(5) bargaining obligations and making unilateral changes, and its 8(a)(5) failure to provide

information. *Amptech Inc.*, 342 NLRB 1131, 1135 (2004). This prima facie case in no way was premised upon any supposed reliance on the adverse inference drawn from Respondent's lack of documentary evidence, as Respondent suggests.

To counter the General Counsel's prima facie case, Respondent put up its witnesses George Smith, Larry Kieft, and Ed Carroll—whom the ALJ discredited. Respondent takes issue that the ALJ failed to whole-heartedly accept Respondent's premise that it had begun a discussion about layoffs in May 2008 which led to a decision about who would be selected for layoff in August, based on a performance ranking system that it allegedly completed in July. (R1, Tr. 499, 505). All of these actions conveniently would have been before any union activity was made known. In his decision, the ALJ pointed out that Respondent had no documentary proof of this sequencing of events other than a one-page document dated only "FYE2008." (R.1, ALJD pg. 14). Not surprisingly, the ALJ was unconvinced by this undated chart categorizes employees as having received an "A" "B" or "C" ranking, which was based on the subjective "mental notes" of Larry Kieft. (Tr. 759, 766).

In rejecting Respondent's conveniently concocted scenario of events, the ALJ specifically discredited Larry Kieft, including his testimony about "how Respondent decided to lay-off Embury and Dickerson, as opposed to other 'B' employees." (ALJD pg. 11, line 36-42). He also discredited Respondent's testimony that the Company "did not mean any of the reassuring statements made to employees on July 28 and October 4." (ALJD pg. 11, line 29.) Specifically, it was George Smith who made the incredible statements that the Company never meant what it said when it told employees on July 28 that "[w]e are hopeful that if everyone is focused on the big picture—which is the health of Kieft—and strives to work efficiently *that we will be well positioned to make it through this economic downturn without lay-offs or a reduction*

*in our workforce.*” (GC Ex.7, italics added, Tr. 503). Smith was also the one who attempted to back track on statements made in October that, as the ALJ noted, conditioned continuation of the company’s policy “...to offer our drivers non-delivery work assignments to keep them working” on their rejection of union representation. (GC Ex.4; ALJD pg. 11, line 24).

Lastly, although he does not specifically discredit Respondent’s Chief Financial Officer Ed Carroll, the ALJ explains at great length why Carroll’s words do not support the mantra that it was Respondent’s liquidity crisis that necessitated a layoff of forty percent of its workforce, nor that the decision was made in August, before knowledge of union activity. (ALJD pg. 13-14). By analyzing the borrowing base documents and comparing them to Carroll’s testimony, the ALJ judiciously concluded that the timing of such a layoff was simply not supported by the documentation. Also, the ALJ demonstrated that a comparison between Respondent’s concrete production (in yards) to their delivery totals on a month by month basis did not show any steep decline in concrete production and deliveries made from May, when Respondent claims that it began contemplating layoffs, to August, when it asserts it made the decision to institute layoffs. (ALJD pg. 13, line 13-17). In fact, the records actually support Respondent’s statement to employees in its July 28 memo indicating that it could get through this economic downturn without layoffs. (GC 7).

In addition to these inconsistencies between Respondent’s words and the documentary evidence, the ALJ spotted irregularities among the testimony of Respondent’s witnesses regarding the method and responsibility for the decision to layoff. For example Larry Kieft testified that George Smith and Ed Carroll told him that there needed to be layoffs. (Tr. 750, 752). Yet, Ed Carroll contradicted Kieft, testifying that he was not the one who made the decision as to how many people would need to be laid off and even admitted on cross

examination that he never contended that layoffs were the only way to realize economic savings. (Tr. 895, 930-932). George Smith testified that it was Larry Kieft and Larry Sims' responsibility for determining who would be laid off. (Tr. 499, 505, 508, 607). But contrary to Smith, Larry Kieft testified that it was not his call as to how many individuals would be laid off and instead placed that decision on Ed Carroll. (Tr. 803).

These irregularities clearly demonstrated that Respondent was not to be believed and contributed to the ALJ's discrediting of their affirmative defense. But the discrediting of these witnesses by the ALJ had nothing to do with the application of the adverse inference rule as Respondent asserts in Exception 2. As amply demonstrated above, the ALJ instead found that the General Counsel met its burden by its factual presentation and determined that Respondent did not have sufficient evidence to rebut this showing. As the ALJ's decision demonstrates, he rejected Respondent's defense because it lacked documentary support relying instead on the self-serving, unreliable, and contradictory "word" of George Smith, Larry Kieft, and Ed Carroll. Namely, Respondent never produced documents to show that its performance was below its revised budget for the year. (Brief pg. 7, 14). It never produced any documentation that there was no expectation of work from public works projects or the construction of new residential developments. (Brief pg. 6, 14). Without more, the testimony regarding Respondent's "perilous economic conditions" simply was not credible. (Brief pg.4). Neither were the bald assertions that "Respondent had never experienced an economic downturn as 'drastic' as the one faced in 2008." (Brief pg. 5).

To the contrary, employee George Kent recalled that in his recollection, business was even slower during the 1980s than it was in 2008, and yet Kieft Brothers did not layoff any drivers at that time. (Tr. 36-39). While the ALJ acknowledged that conditions may have been

“slowing down”, ALJ was surely unpersuaded by Larry Kieft’s testimony that Respondent had “run out of orders.” (Tr. 425).

Respondent’s witnesses also never testified consistently regarding how the company arrived at the number of nine employees. In the absence of documentation memorializing their expedient assertions, the ALJ astutely observed that at no time prior to November had Respondent engaged in a layoff as wide-sweeping as this one. (ALJD pg. 11, footnote 11). Instead, the ALJ found that the “timing of layoffs soon after the drivers unanimously chose union representation suggests discriminatory motive in conjunction with Respondent’s stated opposition to unionization and unprecedented mass-layoff.” (ALJD pg. 11).

The ALJ’s rationale clearly is supported by record evidence and sums up the correct assessment that not only did General Counsel meet its prima facie case but that Respondent did not meet its burden of showing that the same action would have taken place even in the absence of protected conduct.” *Wright Line*, 251 NLRB 1083 (1980). Thus the credibility determinations about Kieft, Smith, and Carroll must stand and Respondent’s Exceptions 1, 2, and 3 must fail.

**C. The ALJ discredited Respondent’s defense despite their failure to comply with the subpoena duces tecum. (Exception 3)**

In Exception 3, Respondent asserts that the ALJ failed to give sufficient weight to the testimony and documentary evidence that Respondent introduced in its defense. Not only was this not the case, the ALJ was more than generous in his consideration of the evidence presented by Respondent, considering their failure to comply with the General Counsel’s subpoena issued in March 2009. As is noted in the decision, the ALJ took great time and effort to analyze, for example, the “borrowing base reports” and the spreadsheets such as R.6. (ALJD pg. 12-13). It

bears noting however that at several points, the ALJ refers to instances in which Respondent failed to supply documentary evidence to support its defense.<sup>3</sup>

This lack of documentation did not result from a lack of effort on the General Counsel's part. In a Motion submitted on May 13, 2009 not ruled upon by the ALJ (attached as Exhibit 1), General Counsel argued that *Bannon Mills*<sup>4</sup> sanctions be imposed upon Respondent to prohibit them from relying upon the vague, self-serving evidence of its witnesses and upon documents that it did not properly produce on the first day of trial.<sup>5</sup> Thus the ALJ gave consideration and weight to the documentary evidence that was supplied by Respondent even though he could have appropriately issued sanctions for non-compliance with General Counsel's subpoenas.

For example, General Counsel subpoenaed such records as invoices<sup>6</sup> to demonstrate the amount of orders placed during these critical months leading up to the layoffs, to the number of orders placed in past years, for comparison. These were not produced although Respondent admitted, on the record, that invoices existed but had to be retrieved. (Tr. 738). Despite their

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<sup>3</sup> Namely, he remarks that Respondent produced no documentation to support Ed Carroll's testimony that "he calculated the cost savings Respondent would realize from the lay-off of nine employees in August." (ALJD pg. 14, line 13-14). He also points out that no documents were submitted to back up Carroll's testimony that just prior to the layoffs, Respondent became aware that \$400,000 would be recouped from outstanding liens to Dempsey, ING, Respondent's largest customer. (ALJD pg. 14, line 32).

<sup>4</sup> *Bannon Mills* permits the imposition of sanctions for failure to comply with subpoenas. 146 NLRB 611(1964). Such sanctions include striking testimony, removing documents not validly produced at the time of the hearing, and drawing adverse inferences against the non-complying party. *Packaging Techniques Inc.*, 317 NLRB 1252, 1253 (1995); *Iroquois Foundry Systems*, 327 NLRB 652, 653 (1999); *Graham-Windham Services to Families & Children, Inc.*, 312 NLRB 1199, 1201 (1993). They may be imposed when a party delays in its compliance or when it ignores an ALJ order. *McAllister Towing & Transportation Co.*, 341 NLRB 394, 417 (2004); *Essex Valley Visiting Nurses Association*, 352 NLRB 427 (2008); *Smithfield Packing Co.*, 344 NLRB 1 (2004). The purpose for such a holding is to prevent parties from introducing secondary, less reliable evidence of matters provable by the materials subpoenaed. *Smithfield Packing Co.*, *supra*; *Avondale Industries*, 329 NLRB 1064 (1999); *Hedison Manufacturing Co.*, 249 NLRB 791 (1980).

<sup>5</sup> Namely, General Counsel requested in its Motion that any and all testimony entered by Respondent which concerned their argument that they laid off employees because of economic conditions be stricken because they ignored the duces tecum subpoena and repeated instructions from the ALJ. In the alternative, General Counsel argued that at a minimum, an adverse inference be drawn from Respondent's failure to produce subpoenaed documents and that instead, the inference taken be that had the documents been produced, such evidence would have negated Respondent's economic defense.

<sup>6</sup> Respondent confirmed that it would supply invoices during the periods of June 2006 through November 30, 2006, June 1, 2007, through November 30, 2007, and May 1, 2008, through December 31, 2008. (Tr.738).

knowledge of the subpoena issued in March 2009, after four days of hearing, repeated instructions to comply, and a delay in the hearing of over a month from April 16 until May 20, Respondent later claimed that the documents no longer existed.<sup>7</sup>

Respondent also did not turn over documents covered by the subpoena until days into the hearing and then failed to provide the General Counsel with an opportunity to examine the document in advance of testimony. For example, Respondent's exhibit R 6 was seen by General Counsel for the first time when George Smith testified about this document, although it is clearly covered by paragraph 9, subparagraph (3). See Motion for *Bannon Mills* Sanctions at Exhibit 1. In the same way, Respondent did not produce exhibits R 7 and R 9-35 which included overtime records, production spreadsheets, borrowing base reports, and internal managements until it chose to introduce those records during its case in chief. (Tr. 676-677).

If these records such as invoices were presented, they could have demonstrated the dire conditions of which Carroll, Smith and Kieft spoke and could have established, for example, the lack of a pipeline of new business during the relevant period. However at their own peril, Respondent tried to substitute gross generalizations by Respondent's witnesses instead of presenting relevant documents. Indeed, based upon their lack of cooperation with the subpoena, the ALJ would have been within his rights to strike all testimony from Respondent's witnesses which related to the issue of their economic defense. While the ALJ did not mention taking the lesser step of drawing an adverse inference, he certainly would have been well within his rights to draw an appropriate adverse inference from Respondent's lack of cooperation with the subpoena and failure to produce relevant, necessary documents. In *Spurlino Materials*, 353 NLRB No. 125 (March 31, 2009), the Board adopted the recommendation from the ALJ, who

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<sup>7</sup> It is dubious that Respondent does not keep invoices when it is a corporation that does business with governmental entities and thereby must likely submit to audits or would have to keep invoices for tax purposes.

drew an adverse inference from Respondent's failure to produce relevant records. In the ALJ's analysis, he took issue with Respondent, a transportation company, and their failure to produce relevant leasing agreements, claiming they were not available. Specifically, the ALJ noted:

Respondent's counsel represented that Respondent contends that no such documents are in existence. This averment cannot be automatically accepted at face value without further evaluation. To do so would be to allow a party to avoid subpoena compliance by merely stating that it has no documents that are responsive to the request and thereby defeat the whole purpose of the subpoena process.

*Id.* at \*29.

For these same reasons, the lack of production of something as simple as invoices demonstrates that Respondent's defense lacks substance. It also bolsters the fact that the ALJ's analysis of Respondent's paltry defense was supported by record evidence, despite Respondent's attempts to the contrary. Respondent simply failed to carry the burden of showing that the same decision would have been made in absence of the employees' union activities and for this reason, Exception 3 fails.

**D. The ALJ's rejection of Respondent's testimony that the layoff occurred before the obligation to bargain necessitates that its violation of Section 8(a)(5) and imposition of a backpay remedy stand. (Exception 6)**

In Exception 6, Respondent makes the tortured analysis that because its discredited witnesses claimed that Respondent had discussions about a layoff before the Teamsters were elected, this exonerates them from liability under Section 8(a)(5) because bargaining would have been "futile." (Brief pg. 12). As discussed above, the ALJ did not believe that this layoff was contemplated as early as May and as late as August. He recognized that Respondent has absolutely no documentary evidence to demonstrate that somewhere in the May-August timeframe, it mapped out not only who would be laid off, but in what order other than the undated chart based again on convenient "mental notes" of Larry Kieft. (Tr. 759, 766). As this

chart indicates, employees are listed in alphabetical order and thus, even assuming arguendo that this was the document they used, there is nothing to suggest who would be laid off and in what order.

With nothing to back up their convenient testimony regarding this massive layoff, the first in Respondent's thirty year history, it is entirely reasonable that the ALJ found their assertions inherently unlikely. The ALJ also found that it was suspicious that Respondent awarded bonuses at the end of August or beginning of September to some of the same people it laid off weeks later, even at such an economically "perilous" time.

Because of this inherent implausibility based on the preponderance of the evidence, the ALJ made the similar finding that Respondent violated Section 8(a)(5) by subsequently failing to notify the newly-certified union of the layoff of more than half of the unit. The ALJ recognized that this massive layoff was most deleterious to the Teamsters because it negated any opportunity the Teamsters may have had to sit down with the Respondent and bargain over whether the layoffs were needed, who would be laid off, and in what order. He also saw that by reducing the unit from nine to four employees, Respondent handicapped the Teamsters, who were hampered by having fewer employees to assist them with meaningful contributions at the bargaining table. Perhaps most important, Respondent's failure to bargain about lay off with the Teamsters deprived the employees of the very thing they had voted for when selecting the Teamsters to be their bargaining representative. It is clear that Respondent's Exception 6, based solely on its discredited version of the timing of the decision to layoff nine individuals must fail.

In its exceptions, Respondent also attempts to negate its liability for backpay under the statute, drawing unfounded parallels to *Sundstrand Heat Transfer, Inc. v. NLRB*, 538 F.2d 1257, 1260 (7<sup>th</sup> Cir. 1968). In *Sundstrand*, the Employer had implemented a layoff the day after the

union election. Objections to the election were filed. Because the Employer did not provide notice to the Union about these layoffs, the Board held that the Employer violated Section 8(a)(5) because it had acted at its peril by changing the terms and conditions of employees. Soon thereafter, the parties met and did bargain as the Employer then closed its Jacksonville facility. Ultimately those bargaining sessions resulted in the payment of severance to the affected employees and a preferential hire list. However, regarding their initial failure to notify and bargain, because the union had ultimately become certified as the exclusive bargaining representative, the Board found that the Employer had violated Section 8(a)(5) when it had initially refused to meet pending the election objections.

At the Seventh Circuit, the Court reversed the Board's order. It instead found that there had been no failure to bargain prior to certification, and thus refused to award backpay from the date of the layoff until the individuals were granted severance and placed on the preferential hire list. While this case is not binding Board law, it also bears no resemblance to the facts in this case. In this case, the Teamsters were elected on October 10 and certified on October 22. No objections were filed. Layoffs were effectuated on November 7 and November 21 without providing the Teamsters with notice and an opportunity to bargain. Although *Sunstrand* does indicate a layoff based on economic conditions, the ALJ specific found in this case that Respondent had not shown the exigent circumstances necessitating a mass layoff. Thus, *Sunstrand* provides no guidance and Respondent's Exception 3 regarding liability under Section 8(a)(5) of the Act fails.

### III. CONCLUSION

For the foregoing reasons, the General Counsel respectfully requests that the Respondent's Exceptions be overruled and that the ALJ's decision, including his findings, conclusions, and recommendations, should be adopted by the Board.<sup>8</sup>

**DATED** at Chicago, Illinois, this 28th day of August, 2009.



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Region 13  
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<sup>8</sup> Except as otherwise modified in accordance with the General Counsel's Limited Cross Exceptions, which has been filed separately.

## CERTIFICATE OF SERVICE

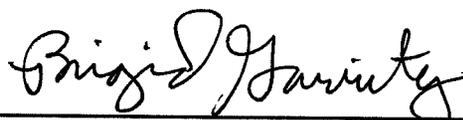
The undersigned hereby certifies that on this 28th day of August, 2009 the **Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge** has been electronically filed with the Board's Office of Executive Secretary and that, pursuant to Section 102.114 of the Board's Rules and Regulations as revised January 23, 2009, true and correct copies of that document have been served upon the following parties of record via electronic mail to the e-mail address listed below on that same date:

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**CONSTRUCTION AND GENERAL  
LABORERS, LOCAL UNION #25**

**MOTION FOR *BANNON MILLS* SANCTIONS AND TO CLOSE THE RECORD**

Now come Brigid Garrity and Neelam Kundra, Counsel for the General Counsel, who request that sanctions cognizable under *Bannon Mills*, 146 NLRB 641 (1964), and its progeny, be imposed upon Respondent for failure to comply with the General Counsel's subpoena and with the directives of Administrative Law Judge Arthur Amchan to produce validly requested documents. (Attached at Ex. 1) Throughout this proceeding, Respondent's counsel repeatedly asserted that documents would be produced expeditiously. Indeed, the Administrative Law Judge specifically adjourned the hearing, in part, to allow the production and review of relevant materials. But since the closing of the record on April 16, 2009, none of these records have been made available, despite numerous telephonic and email requests by Counsel for the General Counsel. (See attached email correspondence at Ex. 2)

In light of this flagrant failure to respect ALJ directives and a pattern of delay, General Counsel requests that any testimony or records which relate to Respondent's economic defense be stricken from the record. As an alternative, General Counsel requests that the ALJ make the requisite adverse inference against Respondent, namely that if they had been produced, these

Exhibit 1

records would negate Respondent's argument that it had a valid economic defense under *Wright Line*.

Counsel for the General Counsel also respectfully requests that the Administrative Law Judge close the record, set a briefing schedule, and proceed with issuing his recommended order, in light of the fact that the record was left open to allow General Counsel to review subpoenaed documents that Respondent had not yet produced and provide General Counsel with the opportunity to recall and cross Respondent's witnesses on these documents.

*Bannon Mills*, 146 NLRB 611 (1964), stands for the proposition that the Board has the right, if not the obligation to protect duly issued subpoenas and grants administrative law judges the authority to impose appropriate remedies for failure to comply with these subpoenas. Sanctions under *Bannon Mills* may include striking testimony, removing documents not validly produced at the time of the hearing, and drawing adverse inferences against the noncomplying party. *Packaging Techniques Inc.*, 317 NLRB 1252, 1253 (1995); *Iroquois Foundry Systems*, 327 NLRB 652, 653 (1999); *Graham-Windham Services to Families & Children, Inc.*, 312 NLRB 1199, 1201 (1993).

Sanctions may be granted when a respondent delays in complying with a subpoena. *McAllister Towing & Transportation Co.*, 341 NLRB 394, 417 (2004), *Essex Valley Visiting Nurses Association*, 352 NLRB 427 (2008). They may also be imposed for failure to comply with an administrative law judge's order. *Smithfield Packing Co.*, 344 NLRB 1 (2004). The rationale for such sanctions is that a respondent should not be permitted to introduce secondary, less reliable evidence of matters provable by those materials. *Smithfield Packing Co.*, supra; *Avondale Industries*, 329 NLRB 1064 (1999); *Hedison Manufacturing Co.*, 249 NLRB 791 (1980).

In *McAllister Towing*, Respondent's counsel engaged in the same type of delay tactics used herein but in a less egregious manner in some respects. In that case, Respondent continuously promised to supply validly requested documents throughout the hearing, after having been specifically directed by the administrative law judge to do so. After a pattern of reluctance to comply was established after days of hearing, the administrative law judge imposed sanctions on Respondent which were affirmed by the Board. As the Board noted, "that the Respondent might have intended or been able to produce the documents at some later point is no

excuse” because “[a] subpoena is not an invitation to comply at a mutually convenient time....” *Id.* at 398 and 397, respectively.

Similarly in *Essex Valley*, supra, the ALJ correctly drew adverse inferences based on Respondent’s lack of production of subpoenaed documents finding that “for all the exhortations about ‘willingness’ and ‘good-faith’ efforts at compliance, no reasonable explanation was provided by Respondent for its failure...” *Id.* at 440. As noted by the ALJ, General Counsel was prejudiced by not being able to examine the custodian of the records in order to prove that certain documents existed and were not produced. However, the ALJ granted the General Counsel’s rejection of a further postponement in that matter. Instead, the ALJ placed the burden squarely on the back of the Respondent for not having timely produced the records and drew the appropriate adverse inferences.

Respondent herein was specifically requested by ALJ Amchan to produce the documents relevant to paragraphs 4, 5, and 9 of the General Counsel’s subpoena. Indeed, the Respondent’s counsel had known of its requirement regarding these documents since the subpoena was served on March 23, 2009, three weeks before the hearing, which began April 13, 2009. Similar to *McAllister Towing* and *Essex Valley*, supra, Respondent showed up to the hearing without all of the required documents and then continuously promised to supply the General Counsel with its records during the entire pendency of the trial.

For instance, in both off the record and on the record discussions, Respondent agreed to provide General Counsel with invoices on numerous occasions. Tr. 688, 738. Respondent also agreed to provide a complete set of internal management statements for 2007. Tr. 675-677, 945-947. Respondent also agreed to provide purchase order tickets from Elmhurst Stone. Tr. 679-683, 681-83. Fourth, Respondent agreed to provide borrowing base documents for January through March 2007. Tr. 731-32, 734. Lastly, Respondent agreed to produce overtime records for 2005. Tr. 685. After failing to produce these records throughout four days of hearing, Respondent was then given the further opportunity to produce records during a break. The Administrative Law Judge cautioned Respondent that, if needed, General Counsel would be give the opportunity to call additional witnesses for further cross-examination on those records or could call additional witnesses, if necessary. Tr. 596, 888.

From April 16 through May 13, 2009, Respondent had an opportunity to search for the subpoenaed records as detailed above. Yet despite two voice mails, three email requests, and a month of time to comply, counsel for Respondent has attempted to provide what she believes is the best evidence instead of the documents requested by the General Counsel<sup>1</sup>, or has elected to simply ignore the General Counsel.

In specific terms, Respondent has failed to produce: 1) invoices for the period June 2006 through November 2006, June 2007 through November 2007, and May 2008 through December 2008; 2) internal management statements for 2007; 3) purchase order tickets from Elmhurst Stone; and 4) the "Borrowing Base" documents for January, February, and March 2007; and 5) overtime records from 2005. As detailed above, there were numerous on the record discussions and countless other off-the-record discussions where these documents were asked for and were promised to be provided.

In an eleventh hour email received in the late afternoon of May 12 (attached at Ex. 3.), less than a week before parties are to resume the hearing and a month after our hearing initially began, Respondent's counsel asserts that with respect to General Counsel's invoice request, "Kieft Brothers does not retain copies of all invoices." She explains that "[i]nvoices do not always show the driver who delivers the load." These vague statements prompt more questions than they answer and further demonstrate a pattern of delay and disregard apparent throughout this case. Respondent's counsel acts as if she is unaware of what the General Counsel is seeking when in fact she has been keenly aware of what documents are needed since at least the opening of the hearing and arguably since March 23, 2009, when the subpoena was served. This late breaking information contradicts assertions she made on the record that the invoices would be produced. Counsel's statement further evinces an intent to substitute her judgment for the General Counsel's as to what should be produced, but because the documents are relevant to the issue of Respondent's economic defense, there should be no room for debate on the question of production. Moreover, her statement tends to suggest that instead of complying with the subpoena, Respondent is irritated by repeated requests and believes that a simple blanket statement that all invoices are not kept will be sufficient. However, Counsel does not say that

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<sup>1</sup> The only document that Respondent has tendered since the adjournment of the hearing is a disk containing "Order Entry Invoice Detail Reports", a document which is not responsive to General Counsel's subpoena. This document is insufficient because it does not provide the same information as the invoices themselves, namely the names of the individuals delivering the loads and is therefore an inadequate substitute.

Respondent does not retain any invoices. Indeed, invoices were produced for 2009 subject to a separate subpoena not at issue herein, so General Counsel is aware of what information is provided on these documents and is therefore dubious of these latest assertions that the documents do not contain the information sought by the General Counsel. Invoices specifically appear in General Counsel's subpoena paragraph 5 and a diligent search for these records should have begun on March 24 when the subpoena was received, not on the eve of the second round of trial after repeated admonitions to produce such information.

Respondent's counsel also asserts that with regard to the Borrowing Base documents for the first three months of 2007, Ed Carroll is "trying to get them from the bank." Respondent's counsel also asserts that "[a]s to the Management Statements for 2007, I did not recall that we were to produce any beyond what we offered as Exhibits at trial. I have requested them from Ed Carroll."

With regard to the purchase order tickets from Elmhurst Stone, Respondent's counsel again offers contradictions to what she said at trial and since the closing of the hearing in April. For example, in response to emails sent to her on April 27 and May 8, 2009, by the General Counsel, Respondent's counsel asserts on May 6 that "we will produce the PO tickets for Elmhurst Stone. I will confirm that today." Yet on May 12, she states "[w]ith regard to Elmhurst Stone, Kieft Brothers does not retain the PO tickets."

As this pattern demonstrates, Respondent is selectively choosing to produce only those documents that are most favorable to them. It is because of this pattern of delay and obfuscation that General Counsel renews the request that it made on the record that any testimony or records which relate to Respondent's economic defense be stricken from the record. Tr. 596. This includes any of the testimony of George Smith, Larry Kieft, Chuck Rogers, and Ed Carroll that relate to the decision of Respondent to layoff nine employees. These sanctions are required because, by virtue of Respondent's total disregard for the Board's subpoena, General Counsel has been adversely handicapped in presenting its case.

Specifically, without the records of prior years General Counsel has been unable to attack the veracity of Respondent's argument that economic conditions were the worst in the company's history. General Counsel's case has been unduly hindered from attacking Respondent's witnesses to demonstrate that in past years, economic conditions may have been the same, or worse, and yet no layoff occurred during those periods. The General Counsel also

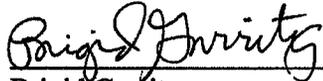
has been prejudiced by being unable to test the assertions of the company that they relied on certain financial documents which evinced a solid economic rationale for the timing of the layoffs. Without the purchase order tickets and invoices, business fluctuations from year to year cannot be accurately compared. The General Counsel also has been unable to rebut testimony regarding the availability of unit work in prior months and years and how that compares with the early months of 2009 which would be shown by the invoices.

As an alternative, General Counsel requests that the ALJ make the requisite adverse inferences against Respondent; namely, that if they had been produced, these records would negate Respondent's argument that it had a valid economic defense under *Wright Line*.

Indeed Respondent's pattern and practice of ducking and dodging the requirements of the Board's subpoena power can also be shown to have existed at the time of the investigation of the underlying charges at issue here. As the correspondence between the investigator and Respondent demonstrates in GC Ex.35-39, during the investigation of the underlying unfair labor practices, Respondent also ignored repeated requests for additional information, electing instead, when it suited them, to simply put forth vague, self-serving, and conclusory statements. Such evidence of ignoring the Administrative Law Judge and General Counsel clearly evinces a disregard for Board processes and as such, necessitates sanctions.

DATED at Chicago, Illinois, this 13th day of May 2009.

Respectfully submitted,

Brigid Garrity  
Neelam Kundra  
Counsels for General Counsel  
National Labor Relations Board  
Region 13  
209 South LaSalle Street, Suite 900  
Chicago, Illinois 60604  
(312) 353-9158

**CERTIFICATE OF SERVICE**

The undersigned hereby certify that true and correct copies of the Motion for Sanctions and to Close the Record have this 13th day of May, 2009 been served in the manner indicated below upon the following parties of record:

Via Certified Mail

Kieft Brothers Incorporated  
Attn: Mr. Larry Kieft  
837 Riverside Drive  
Elmhurst, IL 60126

Teamsters Local 673  
Attn: Mr. Roger Kohler  
1050 W. Roosevelt Road  
West Chicago, IL 60185

Construction and General  
Laborers' Union Local No. 25  
Attn: Joseph Cocanato  
9838 W. Roosevelt Road  
Westchester, IL 60154

Via Electronic Mail

McDermott, Will & Emery  
Attn: Linda M. Doyle, Esq.  
227 West Monroe Street  
Chicago, IL 60606  
[ldoyle@mwe.com](mailto:ldoyle@mwe.com)

Arnold & Kadjan  
Attn: Mr. John Toomey, Esq.  
19 W. Jackson Blvd.  
Chicago, IL 60604  
[jtoomey100@hotmail.com](mailto:jtoomey100@hotmail.com)

Dowd, Bloch & Bennett  
Attn: Mr. Robert Cervone, Esq.  
8 S. Michigan Avenue, 19<sup>th</sup> Floor  
Chicago, IL 60606  
[rcervone@dbb-law.com](mailto:rcervone@dbb-law.com)

Jaime Nieves  
13435 Ann Street  
Blue Island, IL 60406  
[crosswordsjsn@sbcglobal.net](mailto:crosswordsjsn@sbcglobal.net)

Administrative Law Judge Arthur Amchan  
1099 14th Street, N.W., Room 5400 East  
Washington, D.C. 20570-0001  
[Arthur.Amchan@nrlrb.gov](mailto:Arthur.Amchan@nrlrb.gov)



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Brigid Garrity and Neelam Kundra  
Counsels for General Counsel  
National Labor Relations Board Region 13  
209 South LaSalle Street, Suite 900  
Chicago, Illinois 60604  
(312) 353-5564

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

Keeper of the Records, Kieft Brothers, Inc.

To 837 Riverside Drive

Elmhurst, IL 60126

As requested by Brigid Garrity, Counsel for the General Counsel

whose address is 209 South LaSalle Street Chicago Illinois 60604  
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE an Administrative  
Law Judge of the National Labor Relations Board

at 209 South LaSalle Street, Suite 900

in the City of Chicago

on the 13th day of April 2009 at 10:00 (a.m.) ~~(p.m.)~~ or any adjourned

or rescheduled date to testify in Kieft Brothers, Inc.

13-CA-45023, 13-CA-45058, 13-CA-45062  
(Case Name and Number)

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

**SEE ATTACHMENT**

In accordance with the Board's Rules and Regulations, 29 C.F.R. Section 102.31(b) (unfair labor practice proceedings) and/or 29 C.F.R. Section 102.66(c) (representation proceedings), objections to the subpoena must be made by a petition to revoke and must be filed as set forth therein. Petitions to revoke must be received within five days of your having received the subpoena. 29 C.F.R. Section 102.111(b) (3). Failure to follow these regulations may result in the loss of any ability to raise such objections in court.

Under the seal of the National Labor Relations Board, and by direction of the Board, this Subpoena is

**B - 565542**

Issued at **Chicago, Illinois 60604**

this **24th** day of **March** 20 **09**



*Lesfer A. Neltzer*

**NOTICE TO WITNESS.** Witness fees for attendance, subsistence, and mileage under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

**PRIVACY ACT STATEMENT**

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is mandatory in that failure to supply the information may cause the NLRB to seek enforcement of the subpoena in federal court.

Ex. 1

**KIEFT BROTHERS, INC.**

**ATTACHMENT**

For purposes of this subpoena, the term "document" means, without limitation, the following items, whether printed or recorded or reproduced by mechanical process, or written and produced by hand: manuals, books, binders, correspondence, memorandum, calendars, summaries or records of telephone conversations or interviews, graphs, reports, notebooks, summaries of reports of investigations, forms, notices, letters, faxes, invoices, receipts, data contained in computers, electronic mail, hard disks and/or floppy disks and any and all other writings, figures and symbols of any kind.

This subpoena covers all documents which are available to Kieft Brothers, Inc. or which are subject to reasonable acquisition, including but not limited to, any documents in the possession of attorneys, advisors, consultants shareholders, partners, officers, relatives or any other individual directly or indirectly employed by any of the entities named as Respondent, other related companies, or anyone else subject to their control during the period specified in the specific document request.

As used in this attachment, the term "Respondent" refers to Kieft Brothers, the term "Teamsters Local 673" refers to the General Teamsters, Chauffeurs, Salesdrivers, and Helpers Local 673; the term "Laborers Local 25" refers to the Construction and General Laborers' Local Union # 25; and the term "Elmhurst facility" refers to the Respondent's facility located at 837 Riverside Drive, Elmhurst, IL. The original or a true copy, if the original of the following documents is unavailable, is requested, and unless otherwise indicated, the requested documents refer to those produced between January 1, 2006 to the present for:

1. Payroll records for the period April 1, 2006 through August 1, 2008 demonstrating the hourly paid driver and laborer employees of Respondent who were given bonuses and/or raises, the amount of such raises and/or bonuses, and date given.
2. Documents showing the criteria used to determine the amounts of bonuses and/or raises given to hourly paid driver and laborer employees of Respondent for the period April 1, 2006 through August 1, 2008.
3. Documents showing the names and job titles of all individuals of Respondent who were responsible for creating the criteria used to determine the amounts of bonuses and raises given to hourly paid driver and laborer employees for the period April 1, 2006 through August 1, 2008.
4. Documents, including but not limited to invoices, work orders, customer/client lists, contracts and bids showing customer/clients for whom Respondent supplied product and the amounts Respondent sold to each of those customers/clients during the period November 1, 2006 to present.
5. To the extent not previously request above in Item 4, documents including but not limited to invoices, receipts, and purchase orders from East Jordan, Elmhurst Chicago Stone, and Freedom Pipe to Respondent demonstrating the product and amounts requested by and supplied to these entities by Respondent during the period November 1, 2006 to present.

6. Payroll records for the period May 1, 2005 to present demonstrating overtime paid to hourly paid driver and laborer employees of Respondent.

7. All documents which set forth the working conditions, work rules, policies and procedures for hourly employees working for Respondent including but not limited to personnel manuals and handbooks, and disciplinary procedures in effect January 1, 2008 to date.

8. To the extent not provided above in Item 7, documents setting forth work rules and policies of Respondent pertaining to economic layoffs.

9. For those employees of Respondent who were laid off subject to the request above in Item 8 during the period from January 1, 2003 until November 30, 2008, including but not limited to Misael Ramirez, Brandon White, Heraclio Esparza, Mike Kronkow, Raymond Embury, Jr., George Kent, Charles Dickerson, Jaime Nieves, and Jose Jardon, please provide:

(1) The personnel files of the subject employees including but not limited to disciplinary warnings, infraction notices, reports about said infractions, suspension and termination notices but excluding medical records.

(2) Documents reflecting the investigation conducted by Respondent regarding the events giving rise to these layoffs.

(3) Documents reflecting Respondent's deliberations regarding these layoffs.

10. To the extent not previously requested above in Item 9,

(1) The personnel files for J. Simpson, M. Krotz, R. Boland, A. Rodriguez, A. Garcia, and M. Anton (excluding medical records) including but not limited to disciplinary warnings, infraction notices, reports about said infractions, suspension and termination notices but excluding medical records.

(2) Documents reflecting the investigation conducted by Respondent regarding the events giving rise to the layoff.

(3) Documents reflecting Respondent's deliberations regarding the layoffs.

11. Load tickets demonstrating all employees performing any amount of driving during the period November 22, 2008 to present including but not limited to the load tickets of Joe Anelli and Gary Egerton.

12. Documents showing the names and job titles of all individuals responsible for the administration of the employee assessment program described in Respondent's July 28, 2008 memo issued by George Smith to "All Kieft Bros., Inc. Employees."

13. Documents including but not limited to memoranda, notes, observations, load tickets, and disciplinary records used to create the individual driver and laborer employee rankings referred to in Respondent's July 28, 2008 memo issued by George Smith to "All Kieft Bros., Inc. Employees" and documents reflecting Respondent's deliberations regarding those rankings.

14. Documents concerning the organizing effort of Teamsters Local 673 in the possession of Respondent, including, but not limited to:

- (1) All documents reflecting internal communications between managers and/or supervisors concerning the Teamsters Local 673's organizing.
- (2) All documents reflecting Respondent's observation of employee union activity on behalf of Teamsters Local 673.
- (3) All documents or lists identifying likely or possible supporters or organizers of Teamsters Local 673.
- (4) All documents or lists identifying employees likely opposed to Teamsters Local 673.
- (5) All documents reflecting conversations by supervisors or managers with any employee about Teamsters Local 673, their organizing campaign, or generally about unions.
- (6) All documents provided to employees about Teamsters Local 673, their organizing campaign, or distributed to employees as part of Respondent's campaign opposing Teamsters Local 673.
- (7) All documents including drafts, outlines, videotapes, or speeches presented by the Respondent to employees regarding the Teamsters Local 673's organizing campaign.

15. Documents, including internal manuals or directives, providing guidance to supervisors and managers concerning the organizing activity of Teamsters Local 673.

16. Documents concerning the organizing effort of Laborers Local 25 in the possession of Respondent, including, but not limited to:

- (1) All documents reflecting internal communications between managers and/or supervisors concerning the Laborers Local 25's organizing.
- (2) All documents reflecting Respondent's observation of employee union activity on behalf of Laborers Local 25.
- (3) All documents or lists identifying likely or possible supporters or organizers of Laborers Local 25.
- (4) All documents or lists identifying employees likely opposed to Laborers Local 25.
- (5) All documents reflecting conversations by supervisors or managers with any employee about Laborers Local 25, their organizing campaign, or generally about unions.
- (6) All documents provided to employees about Laborers Local 25, their organizing campaign, or distributed to employees as part of Respondent's campaign opposing Laborers Local 25.
- (7) All documents including drafts, outlines, videotapes, or speeches presented by the Respondent to employees regarding the Laborers Local 25's organizing campaign.

17. Documents, including internal manuals or directives, providing guidance to supervisors and managers concerning the organizing activity of Laborers Local 25.

18. Documents produced during the period October 22, 2008 to present including but not limited to correspondence, memoranda, notes from telephone conversations or meetings between Respondent and Teamsters, Local 673 about Respondent's decision and effects of laying off driver employees Heraclio Esparza, Mike Kronkow, Raymond Embury, Jr., George Kent, and Charles Dickerson.

19. Production logs of laborer employees of Respondent during the period April 1, 2006 to present.
20. Production lists supplied to laborer employees demonstrating work yet to be performed during the period April 1, 2006 to present.
21. All performance evaluations of driver and laborer employees of Respondent and those documents reflecting Respondent's deliberations regarding those evaluations produced during the period April 1, 2006 to present.
22. Disciplinary records of driver and laborer employees of Respondent including but not limited to disciplinary warnings, infraction notices, reports about said infractions, and suspensions during the period April 1, 2006 to present.

In lieu of the documents requested in paragraphs (1), (2), (3), (4), (5), (6), (11), (12), (19), (20), (21) and (22) above, Respondent may, if it prefers, deliver to Counsel for the General Counsel before close of business April 9, 2009, a signed, sworn affidavit of a duly authorized representative of Respondent who has knowledge of the information contained in the requested documents, a summary of all the information contained in the requested documents, provided that the underlying documents are made available for inspection by Counsel for the General Counsel by close of business April 9, 2009 for the purpose of verification of the information contained in the summary.

**Garrity, Brigid**

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**From:** Garrity, Brigid  
**Sent:** Friday, May 08, 2009 3:36 PM  
**To:** 'Doyle, Linda'  
**Subject:** Recent Information Provided

Linda:

I received your disk containing what you call "Invoices" yesterday. However, upon review of these documents, these are not actually invoices but instead are "Order Entry Invoice Detail Reports". These documents do not contain the driver associated with the delivery of these loads and do not match the other invoices you provided to us at trial. For this reason, I renew our request to receive these invoices for the period June 2006 through November 2006; June 2007 through November 2007; and May 2008 through Dec. 2008.

I have also had an opportunity to review the email you sent Neelam Kundra regarding what other documents also have yet to be provided. Contrary to your statement that you have provided internal management statements for 2007 we still have yet to receive these documents. The only documents in the record entered by Mr. Carroll are for 2008 and 2009. We also are missing purchase order tickets (Elmhurst Stone) and the "Borrowing Base" documents for Jan, Feb, and March 2007. The information in the record does not contain these months. Please advise us immediately as to when this information will be provided.

Thank you for your time and attention to this matter.

**Garrity, Brigid**

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**From:** Kundra, Neelam  
**Sent:** Wednesday, May 06, 2009 11:14 AM  
**To:** Garrity, Brigid  
**Subject:** FW: May 20 start time

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**From:** Doyle, Linda [mailto:ldoyle@mwe.com]  
**Sent:** Wednesday, May 06, 2009 9:57 AM  
**To:** Kundra, Neelam  
**Subject:** RE: May 20 start time

Kundra,  
I am out of the office.

With regard to the documents:

You have items 1 and 6. They were introduced through Ed Carroll at the hearing.

As Ed Carroll testified, item 3 was not a document.

As to personnel files, we produced all the we have. I will reconfirm this today but as the testimony indicated, Keift Brothers has no HR representative and has not kept "personnel files" on all of its employees.

As to the invoices, the company is trying to locate all of them but it looks like some for the earlier years have not been kept.

We will produce the PO tickets for Elmhurst Stone. I will confirm that today.

As to the Date, I think that we should start on a day that we have a full day work such that we have a chance of completing the hearing. Do you know how long you anticipate your rebuttal to be?

Linda

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**From:** Kundra, Neelam [mailto:Neelam.Kundra@nlrb.gov]  
**Sent:** Wednesday, May 06, 2009 9:33 AM  
**To:** Doyle, Linda  
**Cc:** Garrity, Brigid  
**Subject:** FW: May 20 start time

Good morning Linda,

Despite the emails below and the 2 voicemails I have left you over the past week, we have not heard from you regarding a start time for the May 20<sup>th</sup> hearing and we have also received none of the subpoenaed documents that Kieft had agreed to supply us. Therefore please contact myself or Brigid immediately to let us know how many witnesses you plan on calling and if you think we'd finish with an 11:00 a.m. start time vs. 1:00 p.m. so that the ALJ can make his travel arrangements accordingly and we can arrange for the Court Reporting Service.

If we have not received the requested documents by close of business May 7, I will have to get Judge Amchan involved to discuss subpoena enforcement and the fact that we have not received any of

5/12/2009

the documents that Kieft had agreed to provide to us.  
Thanks for your anticipated cooperation,  
Neelam

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**From:** Kundra, Neelam  
**Sent:** Monday, April 27, 2009 4:14 PM  
**To:** 'Doyle, Linda'  
**Cc:** Garrity, Brigid  
**Subject:** RE: Kieft Brothers Trial May 20

Hi Linda,

Just wanted to find out when we can expect to receive the remainder of the subpoenaed documents from you? I think we were on the same page as to what documents the Company had agreed to produce, but just to recap, my notes from the hearing list the following:

1. internal "management statements" for 2007 (Balance Sheets and Income Sheets)
2. purchase order tickets (Elmhurst Stone)
3. labor savings plan
4. Invoices from June 2006 through November 2006; June 2007 through November 2007; and May 2008 through Dec. 2008.
5. personnel files for other employees Company says were layoffs (ie. Chris Betteridge)
6. "Borrowing Base" document for year 2007 and for year 2008

I would appreciate it if you could get us these documents in the next week or so, by May 4<sup>th</sup> if possible. I can be reached at 312-353-9777 if you need to discuss.

Thanks!  
Neelam

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**From:** Garrity, Brigid  
**Sent:** Monday, April 27, 2009 9:23 AM  
**To:** 'Doyle, Linda'; 'jtoomey100@hotmail.com'; 'Robert Cervone'; Kundra, Neelam  
**Subject:** May 20 start time

Counsel:

Judge Amchan has asked to start at 1 p.m. on May 20, unless it is clear that by starting at 11 a.m. we will finish, and by starting at 1 we will run into Thursday. My thoughts were that 1 p.m. sounded fine but I didn't know how many additional witnesses Ms. Doyle plans to call. I will be out of the office starting tomorrow so if I could get this wrapped up today, it would be appreciated. Thanks all,

Brigid

\*\*\*\*\*  
IRS Circular 230 Disclosure: To comply with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained herein (including any attachments), unless specifically stated otherwise, is not intended or written to be used, and cannot be used, for the purposes of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter herein.

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5/12/2009

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Please visit <http://www.mwe.com/> for more information about our Firm.

**Garrity, Brigid**

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**From:** Doyle, Linda [ldoyle@mwe.com]  
**Sent:** Tuesday, May 12, 2009 3:18 PM  
**To:** Garrity, Brigid  
**Subject:** RE: Recent Information Provided

Brigit,

The Order Entry Report is the most complete and accurate information we have on what has been sold. Keift Brothers does not retain copies of all invoices. Instead, data from each invoice is entered, via a software program, and that report is created. It is updated to reflect returns, write-offs and other events that impact products sold history. Invoices do not always show the driver who delivered the load. Invoices will also not necessarily tie back exactly to other documents including this Report because the Invoices do not reflect returns, write-offs and other events.

With regard to the Borrowing Base documents for the first three months of 2007, there was not one for January. Keift Brothers does not have them for February or March. Ed Carroll is trying to get them from the bank but has not been successful. He placed another call today.

As to the Management Statements for 2007, I did not recall that we were to produce any beyond what we offered as Exhibits at trial. I have requested them from Ed Carroll.

With regard to Elmhurst Stone, Keift Brothers does not retain the PO tickets. What we can produce is an order summary from Elmhurst Stone (their document not ours). Please let me know if you want this document.

Linda

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**From:** Garrity, Brigid [mailto:Brigid.Garrity@nlrb.gov]  
**Sent:** Friday, May 08, 2009 3:36 PM  
**To:** Doyle, Linda  
**Subject:** Recent Information Provided

Linda:

I received your disk containing what you call "Invoices" yesterday. However, upon review of these documents, these are not actually invoices but instead are "Order Entry Invoice Detail Reports". These documents do not contain the driver associated with the delivery of these loads and do not match the other invoices you provided to us at trial. For this reason, I renew our request to receive these invoices for the period June 2006 through November 2006; June 2007 through November 2007; and May 2008 through Dec. 2008.

I have also had an opportunity to review the email you sent Neelam Kundra regarding what other documents also have yet to be provided. Contrary to your statement that you have provided internal management statements for 2007 we still have yet to receive these documents. The only documents in the record entered by Mr. Carroll are for 2008 and 2009. We also are missing purchase order tickets (Elmhurst Stone) and the "Borrowing Base" documents for Jan, Feb, and March 2007. The information in the record does not contain these months. Please advise us immediately as to when this information will be provided.

Thank you for your time and attention to this matter.

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