

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

CRETE COLD STORAGE, L.L.C.)	
)	
and)	No. 17-CA-24469
)	
UNITED FOOD AND COMMERCIAL)	CRETE COLD STORAGE,
WORKERS INTERNATIONAL UNION,)	LLC’S BRIEF IN SUPPORT OF
AFL-CIO, CLC, LOCAL NO. 271)	ITS EXCEPTIONS TO THE ALJ
)	DECISION

COMES NOW, Crete Cold Storage, L.L.C., and for its Brief in Support of its Exceptions to the Administrative Law Judge Decision, states as follows:

I. STATEMENT OF THE CASE

Crete Cold Storage, L.L.C., (hereinafter “Employer”) is a company that is involved in the processing and cold storage of both edible and inedible products in Crete, Nebraska. Transcript (“Tr.”) p. 14, a copy of the select Transcript pages cited to by the Employer is attached hereto as Exhibit A and incorporated herein by this reference. On or about January 27, 2005, an election was conducted at Employer whereby United Food and Commercial Workers International Union, AFL-CIA, CLC, Local No. 271 (hereinafter “Union”) was selected as the collective bargaining representative of certain employees falling within the designated bargaining unit. Tr. p. 14. The Employer and Union entered into a Collective Bargaining Agreement with a term of April 1, 2006 through March 31, 2009. Tr. p. 15.

The Union’s April 1, 2009 Election Petition alleges that eleven (11) employees are members of the bargaining unit; however, Employer’s position is that there are only three (3) bargaining unit members. Tr. p. 43. Of those three employees, only Javier Garcia has had any involvement in the Union. Tr. p. 18; Gen. Counsel Ex. 6. The Employer was aware of this fact because Union dues for members were always collected by automatic deductions from the

employees' paychecks through the dues check-off program, which was provided to the Union. Tr. p. 21. The Employer had no knowledge of any employees who were a part of the union and did not pay dues through dues check-off as the employees paying dues to the Union always did so through dues check-off. Tr. p. 21.

Throughout the contract period---but especially during the calendar years of 2008-09---the Employer began to learn that none of the Crete Cold Storage bargaining unit employees showed any interest in the Union or in Union activities. For example, the employees refused to meet with Linda Lee, the Union representative, when she would come to visit the plant despite the Employer's posting of signs informing employees of her visit. Tr. pp. 47-49, 52, 72. In addition to the positing of signs, plant manager Jessica Placek would talk to employees during Ms. Lee's visit and remind them that a union representative was at the plant for them to go speak with. Tr. pp. 49-50. Despite the Employer's notices, no employees would meet with Ms. Lee. Tr. pp. 47-49, 52, 72.

Also during the calendar years 2008-09, the Employer heard complaints from employees regarding the Union, how the employees did not want a Union, and how the Union representatives did nothing for the employees. Tr. pp. 51-52, 60. When the bargaining unit was originally organized, eight (8) employees out of fourteen (14) voted for the Union. Gen. Counsel Ex. 3. Initially five (5) bargaining unit employees were involved and paying Union dues; however, at the time the contract expired, there was only one (1) employee paying dues and none of the employees were involved in the Union. Tr. p. 56. No one who has come to work for the Employer in the last four years has been a member of the bargaining unit nor joined the Union. Tr. p. 57.

In early 2009, the Employer learned that Javier Garcia no longer wished to be a part of the Union. Tr. p. 17. Mr. Garcia asked Sandra Franco to assist him in contacting the NLRB because he did not speak English and could not communicate with Ms. Lee but he wanted out of the Union and did not want to pay Union dues. Tr. p. 65. Mr. Garcia had initially called the NLRB but was unable to speak with someone who spoke his language and could not convey his wishes to withdraw from the Union. Tr. pp. 65, 86. Despite Ms. Franco's assistance, he continue to have the Union dues deducted from his paychecks. Tr. pp. 65,86.

Mr. Garcia also asked Sammy Sanchez to assist him with talking to Linda Lee at the beginning of 2009 because Ms. Lee only spoke English and Mr. Garcia needed Mr. Sanchez to translate for him. Tr. pp. 68, 71-72. Mr. Garcia, through Mr. Sanchez, informed Ms. Lee that he no longer wanted to be in the Union or pay dues, and asked her how to get out of the Union. Tr. p. 72. Ms. Lee refused to provide any assistance other than directing Mr. Garcia to a poster with contact information and telling him to write a letter to the Union. Tr. pp. 72, 77. Ms. Lee took no other action to assist, counsel or even ask Mr. Garcia why he did not wish to remain in the Union. Tr. pp. 72, 77.

Finally, Mr. Garcia also attempted to contact the Union but the call was answered by the Union's answering machine in English. Tr. p. 85. Mr. Garcia did write a letter to the Union asking the Union to stop charging him Union dues and stating that he no longer wanted them to represent him. Tr. p. 86. Despite all of this, the Union continued to deduct Union dues from Mr. Garcia's paycheck. Tr. pp. 84, 87. Mr. Garcia also attempted to contact the NLRB for assistance, however was unable to obtain such assistance as all of the prompts were in English. Tr. p. 86. Mr. Garcia testified that he does not want to be a member of the Union. Tr. p. 84. As

the only active (albeit involuntary) member of the Union, Mr. Garcia testified that he is unaware of *any other employee* at the plant who wants to be represented by the Union. Tr. p. 87.

Based on the above information, when Mr. Garcia, the only employee member of the Union, informed the Employer that he no longer wished to be part of or be represented by the Union, the Employer had knowledge that it was likely that the Union did not represent a majority of the collective bargaining employees. Tr. p. 24. Further, the Employer's attorney investigated whether the Union had majority support and determined that it did not. Tr. pp. 22-23. As such—despite the inability to directly ask the bargaining unit employees about their support of the Union—the totality of the information received from the employees and legal counsel led the Employer to believe that the Union was not supported by a majority of the bargaining unit employees.

The Union requested Union employee seniority information for bargaining purposes on January 13, 2009. Tr. pp. 97-98. The Employer provided the requested information, namely a seniority list with Mr. Garcia's information. Tr. p. 98. The Union then requested additional bargaining information from Employer on January 28, 2009. Tr. p. 102. The request gave the employer until February 20, 2009 to provide the information. Tr. p. 102; NLRB Gen. Counsel Ex. 10. Based on the above knowledge, on February 20, 2009, the Employer sent a letter informing it of the Employer's belief that the Union no longer represented a majority of the bargaining unit employees, that the Employer was, therefore, unable to bargain with the Union, and that the Employer intended to withdraw recognition when the current contract expired. Tr. pp. 19, 25, 104-05; Gen. Counsel Ex. 12. The letter asked the Union to provide evidence that the Union, in fact, did represent a majority of the bargaining unit employees and/or if it felt that the Employer's position was unwarranted or erroneous. Tr. pp. 19, 25, 104-05; Gen. Counsel Ex.

12. However, at no time prior to the filing of the Election Petition and Unfair Labor Charge did the Union contact the Employer regarding majority support or any other issue. Tr. pp. 19, 25, 112.

While the Union stated at hearing that it did not agree with the Employer's position regarding the complete lack of employee interest in the Union, it could offer no evidence to indicate the Union represented a majority—or any—of the bargaining unit employees. In fact, despite the Union's unsupported assertion that it did represent the employees in the bargaining unit, the Union admitted that it had no knowledge of (1) the number of employees, if any, actually in the bargaining unit; (2) whether the employees originally part of the bargaining unit at the time of certification were still employed with Employer; (3) why some employees had stopped paying dues; (4) who the actual Plant Manager was; or (5) whether the Union represented a majority of the bargaining unit employees. Tr. pp. 106-08, 111-112.

The Union not only had no knowledge of the basic information regarding Crete Cold Storage and its employees, it also made no attempt to procure the information from its field representative or its other sources—despite the fact that the Union admitted that its Field Representative would have had the requested information. Tr. pp. 108, 111. Also of note is the fact that Union President, Brian Schwisow, testified that he had never spoken with Mr. Garcia or any other member of the bargaining unit. Tr. p. 107. Finally, even counsel for the NLRB apparently concedes that the Union does not represent a majority of the bargaining unit employees since she asked the Plant Manager at the June 2009 hearing, “[i]sn’t it true that since certification the union has never had a majority of members from the bargaining unit?” Tr. p. 64.

On or about April 1, 2009, the Union filed an Election Petition and Unfair Labor Charge against the Employer. The Employer filed a Joinder to the Petition requesting an election in

order to quickly and conclusively resolve the matter. Tr. p. 28. Despite this, the Employer was informed by the NLRB, on or about May 14, 2009, that it had approved the Union's unilateral withdraw of the Election Petition—despite the Employer's joinder.

The initial Unfair Labor Charge alleged that the Employer had “failed and refused to bargain in good faith ... by withdrawing recognition” from the Union. An Amended Unfair Labor Charge was filed on or about May 15, 2009 asserting, in addition that the Employer committed an additional unfair labor practice by failing to provide requested bargaining information to the Union. A Complaint alleging the same was filed on June 1, 2009.

The Hearing was held on June 24, 2009 in Lincoln, Nebraska before Administrative Law Judge John West. Attorney Susan Wade-Wilhoit appeared on behalf of General Counsel, Attorney Lauren M. Fletcher appeared on behalf of the Charging Party, and Attorney Douglas A. Fulton appeared on behalf of the Respondent. Both the General Counsel and the Respondent provided Post-Hearing Briefs. The Union joined the Post-Hearing Brief filed by General Counsel. Administrative Law Judge John West issued his decision on or about August 17, 2009. An Order transferring the proceedings to the National Labor Relations Board was also filed on August 17, 2009.

II. STANDARD OF REVIEW

The National Labor Relations Act grants the Board itself, not its examiners (or administrative law judges) the power and responsibility in determining the facts, as revealed by a preponderance of the evidence. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (C.A. 3, 1951). Accordingly, all cases presented to the Board are reviewed de novo. *Id.*

III. QUESTIONS PRESENTED FOR REVIEW

EXCEPTION I.

1. Whether the testimony, statements and findings set forth by the ALJ are, in certain portions, unsupported by the evidence and are mischaracterizations of certain portions of the testimony and record of the Hearing?

EXCEPTION II.

2. Whether the ALJ erred by failing to include, analyze and consider relevant evidence?

EXCEPTION III.

3. Whether the ALJ erred in finding that the Employer had a duty to supply the requested information after indicating their intent to withdraw recognition?
4. Whether the ALJ erred in finding the fact that the Employer did not provide requested information?
5. Whether the ALJ erred in finding that the requested information was not within the Union's field representative's possession and knowledge?
6. Whether the ALJ erred in finding there was substantial evidence to support a finding that the Employer committed an unfair labor practice by failing to provide requested information?

EXCEPTION IV.

7. Whether the ALJ erred in failing to apply the Allentown standard requiring a reasonable uncertainty of the union's loss of majority support and specifically states that the Employer had a reasonable uncertainty of the union's loss of majority support?
8. Whether the ALJ erred in finding that the Employer failed to prove by a preponderance of the evidence that, at the time the employer withdrew recognition, it had actual knowledge of loss of majority support?
9. Whether the ALJ erred in failing to consider the Employer's argument that the Union's position puts the Employer in a no win situation?
10. Whether the ALJ decision that the Employer committed an unfair labor practice by withdrawing recognition was supported by substantial evidence?

EXCEPTION V

11. Whether the ALJ erred in failing to find that an election was the appropriate remedy rather than a cease and desist order and affirmative bargaining order?

IV. ARGUMENT

A. EXCEPTION I

- 1. The statements, testimony and findings set forth by the ALJ are not supported by the evidence and mischaracterize certain portions of the testimony.**

Other than determinations of credibility, the facts of a case are reviewed de novo by the Board. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950). When facts asserted and relied upon in the Decision by the ALJ are factually unsupported or not reflected in the record, the ALJ has committed prejudicial error. *See C.M.C. Mining, Inc.* 235 NLRB No. 5 (1978); *Lizdale Knitting Mills, Inc.*, 211 NLRB No. 111 (1974) (Kennedy dissent). A review of the ALJ Decision finds several material mischaracterizations of the testimony at the Hearing.

The ALJ Decision states:

Schwisow testified that before giving [the January 28, 2009 letter] to Crete he had no idea who was in the involved bargaining unit and that he did not know whether the union business agent who serviced Crete, Linda Lee, had any of the information the Union requested in General Counsel's Exhibit 10.

ALJ Decision p. 5, a Copy of the ALJ Decision is attached hereto as Exhibit B. The ALJ Decision also stated that

Schwisow testified that he received General Counsel's Exhibit 12 around February 20, 2009; that at the time he did not know how many employees were in the bargaining unit because Crete never gave the Union a current seniority list in response to the Union's January 13 and 28, 2009 requests.

ALJ Decision p. 8; *see also* p. 10. Such summarization of Mr. Schwisow's testimony is a mischaracterization of the testimony and/or fails to take into consideration additional testimony of Mr. Schwisow. In relevant part, the transcript of the Hearing provides:

Q Now wouldn't your field rep have had some information concerning who the people in the bargaining unit are?

A I'd like to think so.

Q Did she provide you with that information?

- A I never asked her for it.
Q Okay. Why not?
A I was in a new position and I just told them to go out and service their facilities. There wasn't a need.
Q Do you know whether your field representative had any of the information that you requested in General Counsel's Exhibit 10?
A No, I don't.

Tr. p. 111. The transcript also provides:

- A This is an e-mail that my office manager sent to Ms. Jessica Placek to request a current seniority list.
Q And does this document reflect that you were also -- you were sent a copy of this e-mail?
A Yes.
Q And is there -- was there response to Mr. Gerraro's e-mail regarding the seniority list?
A Yes, there is.
Q Who is the response by?
A It was from Ms. Placek.
Q And when did you receive the response?
A On the 13th.
Q And does this exhibit indicate that you received a copy of the response from Ms. Placek?
A Yes.
Q Okay. And what was the response?
A It said that their seniority list was as follows, Javier Garcia, warehouse.

Tr. p. 98.

While Mr. Schwisow had no actual knowledge of whether Ms. Lee had the information requested in General Counsel's Exhibit 10—because he never made the effort to ask her—the entirety of the record indicates that Mr. Schwisow thought his field representatives had the information that was requested from the Employer. Tr. pp. 98, 111. Accordingly, Mr. Schwisow admitted that his field representatives should have information concerning who the people in the bargaining unit were, and it appears the request was nothing more than an attempt to harass the Employer and set up an unfair labor practice charge. Further, while the summarized testimony found in the ALJ Decision suggests that Mr. Schwisow's lack of information was solely a result

of the Employer failing to provide requested information, the Employer did provide a response to the Union regarding the request for Seniority lists and Mr. Schwisow admitted that he did nothing to attempt to obtain the requested information from Ms. Lee, who he thought would have the information. Tr. p. 98, 111. This unsupported mischaracterization of the testimony was specifically relied upon by the ALJ in his analysis and findings. *See* ALJ Decision p. 10. Accordingly, to the extent that the ALJ's decision relied on the mischaracterization of testimony, it is unsupported by the evidence and such reliance has resulted in prejudicial error against the Employer.

The ALJ Decision further states:

Burke testified . . . that he did not know if the other employees were paying dues in some other way than dues check off; that based on his conversation with Placek, Respondent announced its intent to withdraw recognition from the Union on February 20, 2009; that at the time that the letter was sent to the Union announcing the intent to withdraw recognition, the only evidence that he had that the Union no longer represented Respondent's employees was that Garcia wanted out of the Union and he, Burke, interpreted that to mean that he did not want the Union to represent him anymore; that was the sole evidence that he had at the time. . .

ALJ Decision p. 5, 12. The ALJ's Decision also states:

Burke testified that he determined who was a dues paying member at Crete from Placek and respondent's payroll department; that since he has been CEO of Omaha Industries that he has "had . . . employees who don't do dues check off if they are in the union."

ALJ Decision p. 8. Such summarization of Mr. Burke's testimony is a mischaracterization of the testimony and/or fails to take into consideration additional testimony of Mr. Burke. In relevant part, the transcript of the Hearing provides:

Q Okay. Now how many employees did you believe to be members of the union?

A Mr. Garcia.

Q Okay. You didn't know if any other employees were paying dues in some

other way than dues check off, did you?

A That is correct.

. . .

Q Since you've been a CEO of Omaha Industries have you had any employees who don't do dues check off if they're in the union?

A Absolutely.

Q Okay. And have you investigated as to whether or not anybody else at Crete was a dues paying member of the union?

A Let me stop, as it relates to being part of the union and not paying dues or being part of the collective bargaining agreement?

Q Do you know of other employees that directly pay their dues to the union?

A That directly pay their dues to the union?

Q Yes.

A No.

Q Okay. That's what my question is, in your experience at Omaha or Crete Cold Storage, does anybody just pay dues directly or is it always through dues check off?

A It's always through dues check off to the best of my knowledge.

Q And do you have any knowledge that anybody else was paying dues to the union at Crete other than Mr. Garcia?

A No knowledge whatsoever.

Q Do you get notification of any type from the union as far as who is in the union?

A No.

Q Okay. Do you get any communication from the union as far as who is eligible to be in a particular collective bargaining unit?

A No.

. . .

Q Okay. And at some point was a decision made that the union didn't have the union didn't have majority support any longer?

A Yes, it was.

Q And do you know how that decision was made?

A It was made based on conversation as it relates to who the members of the collective bargaining unit were, who the dues paying members were and what type of representation was there.

Q And how did your attorney go about collecting that information?

A They went about speaking with Jessica Placek who was the plant manager and asking her various questions to ultimately gather the necessary information that they needed.

. . .

Q Okay. And who actually operates day-to-day at the plant, who is the –

A That would be Jessica Placek.

Q Would she be the person that would have the most knowledge of union activity and what was going on at the plant?

A Absolutely.

Q Okay. Did she give you any indication as far as what type of union activity went on at the plant in early 2009, what the extent of activity was?

- A Yes. We had conversations as it relates to -- as it relates that activity and that activity was minimal at best.
- Q Okay. Can you describe what you learned about the activity?
- MS. WADE-WILHOIT: I'd object. It's hearsay. I believe Ms. Placek is going to be a witness and she can testify directly as to her knowledge
- MR. FULTON: It goes to the state of mind of this witness as far as his decision to withdraw the recognition.
- JUDGE WEST: Overruled.
- THE WITNESS: I had in conversations with Ms. Placek had talked about the union representative and when they come to the facility and what they would do when they ultimately came to the facility.
- But that was something that was not consistent and happened on a very infrequent basis.
- Q BY MR. FULTON: As far as the union coming to the plant?
- A As far as the union coming to the plant.
- Q And what was the employee's response to that union?
- A The employee's response was that when that representative came to the plant, they didn't want to meet with that individual.
- Q At the time you sent the letter or Mr. Brick sent the letter indicating that the intent was to withdraw recognition at the end of the current contract, did you believe that there was any majority interest in the collective bargaining unit for union representation?
- A Absolutely not.
- Q Was there any interest in your mind?
- A None.

Tr. pp. 18-19; 20-21; 23-24.

Based on the testimony set forth from the transcript, it is clear that the Employer based the decision to withdraw recognition on much more than just the statement of Ms. Placek to Mr. Burke that Mr. Garcia wanted out of the union. Further, while the ALJ points to a portion of the transcript where Mr. Burke stated that he knew of employees who were members of the Union and paid their dues other than dues check offs, Mr. Burke later clarified and corrected this answer and it was apparent that he had simply misunderstood the question. The unsupported mischaracterization of the testimony was specifically relied upon by the ALJ in his analysis and findings. *See* ALJ Decision p. 12. Accordingly, to the extent that the ALJ's decision relied on the mischaracterization of testimony, it is unsupported by the evidence and such reliance has

resulted in prejudicial error against the Employer. The decision of the ALJ should not be adopted by the Board.

B. EXCEPTION II

1. The ALJ erred by failing to include, analyze and consider relevant evidence.

An ALJ's failure to consider all relevant evidence constitutes an error. *See Gold Standard Enterprises, Inc.*, 234 NLRB No. 64 (1978); enf. Denied 607 F.2d 1208 (7th Cir. 1979). In the instant case, the ALJ failed to consider several pieces of relevant evidence. Specifically, the ALJ made mention or consideration of the following evidence: (1) Crete employees refused to meet with Linda Lee, the Union representative, when she came to the plant despite the Employer's posting of signs informing employees of her visit and despite Ms. Placek's attempts to recruit employees to talk with Ms. Lee, Tr. p. 47-50, 52, 72; (2) Union membership decreased from 5 members to 1 member from the time the bargaining unit was certified to the present, Tr. p. 56; (3) no one who has come to work for the Employer in the last four years has been a member of the bargaining unit nor joined the Union, Tr. p. 57; (4) the NLRB had knowledge that, since the date of certification, the Union has not had a majority of members from the bargaining unit, Tr. p. 64; (5) the Employer's attorney investigated whether the Union had majority support and it was determined that it did not, Tr. pp. 22-23; (6) on April 1, 2009, at the direction of Mr. Schwisow, the Union filed a Petition for Election thereby admitting that it too was aware that there was a good faith question as to majority status. Tr. pp. 26-27, 115; Resp. Ex. 1. The Employer fully agrees that an election is the appropriate remedy and should be conducted. Tr. p. 27. In fact, the Employer filed a Joinder to the Petition requesting an election. Tr. p. 28. Despite this, the Petition for Election was unilaterally withdrawn by the Union on May

14, 2009; and (7) all information requested by the Union was provided to the Union prior to Hearing.

Failure to consider, include and analyze such evidence constitutes a prejudicial error as the evidence supports a finding that the Union has lost majority support and that such loss was known to the employer at the time it withdrew recognition. Further, knowledge of loss of support by the NLRB precludes the NLRB from issuing an affirmative bargaining order. *NLRB v. B.A. Mullican Lumber & Manuf. Co.*, 535 F.3d 271, 283 (4th Cir. 2008). Accordingly, the Board should not adopt the ALJ Decision.

C. EXCEPTION III

1. The ALJ erred in finding that the Employer had a duty to supply the requested information after indicating their intent to withdraw recognition.

On page 9-10 of his Decision, the ALJ found that *Champion Home Builders Co.*, 350 NLRB 788 (2007) could be distinguished and that the Employer had a duty to supply the requested bargaining information even after they had indicated their intent to withdraw recognition. ALJ Decision pp. 9-10. However, *Champion Home Builders* cannot be distinguished as the ALJ erred in finding that the Employer unlawfully withdrew recognition. See Exception IV. *Champion Enterprises, Inc.* provides that an employer has no duty to furnish information requested by a union after recognition has been withdrawn. *Champion Enterprises, Inc. d/b/a Champion Home Builders Co.*, 350 NLRB No. 062 (2007). The Employer properly withdrew recognition and, consequently, had no duty to supply the requested information.

2. The ALJ erred in finding the fact that Crete did not provide requested information.

Despite having no duty to provide the requested bargaining information, the Employer did, in fact, provide all relevant requested information. See *Champion Enterprises, Inc. d/b/a*

Champion Home Builders Co., 350 NLRB No. 062 (2007) (only relevant information needed by the Union was provided). In response to the informal January 13, 2009 request for a seniority list to prepare for bargaining, the Employer provided information regarding Mr. Garcia, the only employee believed by the Employer to be a member of the Union. Tr. p. 98. Further, the Employer provided all information requested in the January 28, 2008 follow-up request prior to the Hearing in response to a Subpoena Duces Tecum served by the Union's attorney upon the Employer's "Custodian of Records."

3. The ALJ erred in finding that the requested information was not within the Union's field representative's possession or knowledge.

As discussed above in Exception I, the ALJ's characterization of whether the Union's field representative had all available information as well as the its characterization that the Union did not have the requested employee information solely due to the Employer is not supported by the record and is, in fact, a mischaracterization of the testimony at the Hearing. *See* Exception I. Based on such unsupported and mischaracterized evidence, the ALJ determined that the information requested by the Union was not available through its field representative. ALJ Decision pp. 9-10. As set forth above, this finding is incorrect. Mr. Schwisow thought his field representative would have the information requested but never made the effort to ask the field representative for such information. Tr. pp. 98, 106-08, 111-112. Further, the NLRB presented, as an exhibit at trial, the Union's list of bargaining unit members. Accordingly, all relevant information was already within the possession and knowledge of the Union regardless of whether Mr. Schwisow took the time to obtain the information from his own employees/agents.

4. The ALJ erred in finding there was substantial evidence to support a finding that the Employer committed an unfair labor practice by failing to provide requested information?

Based on the above, the ALJ's finding that the Employer committed an unfair labor practice by failing to provide requested bargaining information is not supported by substantial evidence. *See C.M.C. Mining, Inc.* 235 NLRB No. 5 (1978). Accordingly, the ALJ decision should not be adopted and the Employer should be found not to have committed an unfair labor practice.

D. EXCEPTION IV

1. The ALJ erred in failing to apply the Allentown standard requiring a reasonable uncertainty of the union's loss of majority support and specifically states that the Employer had a reasonable uncertainty of the union's loss of majority support.

The ALJ failed to apply the standard set forth in *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 368 (1998). In fact, the ALJ stated that the standard set forth in *Allentown* was no longer applicable. ALJ Decision p. 11. Pursuant to *Allentown Mack Sales and Service, Inc. v. NLRB*, an employer may withdraw recognition from a union at the end of the term of a collective bargaining agreement when the employer has a good faith reasonable doubt, based on objective evidence, of the union's lack of majority status. *Id.* The term "doubt" was clarified by the Court to mean uncertainty. *Id.* at 367. Further, the Court explained that the requirement of objective evidence does not focus on the force but rather the source of the evidence. *Id.* at 368. The Employer is not aware of any case law overruling *Allentown*. While the ALJ relies on *Levitz*, the Employer is not aware of any part of the opinion of *Levitz* that expressly states that it overrules *Allentown*. *See Levitz Furniture Company of the Pacific, Inc., formerly Levitz Furniture Company of Northern California, Inc. d/b/a Levitz and United Food and Commercial Workers Union, Local 101, United Food and Commercial Workers International Union, AFL-*

CIO, Case 20–CA–26596 (NLRB 2001B.A.). Further, the Employer does not believe that an NLRB decision can overrule a United States Supreme Court decision. Accordingly, the “good faith reasonable doubt” standard of *Allentown* should apply to the Employer’s withdrawal of recognition.

At the time it withdrew recognition, the Employer had knowledge that, regardless of the size of the bargaining unit, Mr. Garcia was the only employee paying dues and even he did not want to be represented by the Union. Tr. p. 24. The Employer knew of no employees who were members of the bargaining unit who paid their dues in any manner other than the dues check-off provided to the Union by the Employer. Tr. pp. 18-19. The Employer knew that none of the employees were willing to meet with the Union Representative and had complained about the Union to management. Tr. pp. 47-52, 72. The Employer knew that it asked the Union if it disagreed with the withdrawal of recognition, to provide information of majority support, yet the Union failed and refused to provide any information. Tr. pp. 19, 25, 104-05, 112; Gen. Counsel Ex. 12. Accordingly, the Employer had sufficient actual knowledge to meet the standards of *Allentown*, allowing the Employer to withdraw recognition at the expiration of the collective bargaining agreement without being subject to unfair labor practice liability. *See Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 368 (1998); *see also Auciello Iron Works, Inc.*, 317 NLRB No. 60 (1995), *upheld in Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781 (1996) (within a reasonable time before a CBA expires, an employer that establishes a good faith doubt of a union's majority status may announce that it does not intend to negotiate a new contract. Tr. pp. 18-19. The employer has the burden of proving that it had a reasonable good-faith doubt that the union no longer represented majority, but it need not conclusively show that a majority of employees no longer wish to be represented by the majority).

2. The ALJ erred in finding that Crete failed to prove by a preponderance of the evidence that, at the time the employer withdrew recognition, it had actual knowledge of loss of majority support.

Levitz Furniture Company of the Pacific, Inc., formerly Levitz Furniture Company of Northern California, Inc. d/b/a Levitz and United Food and Commercial Workers Union, Local 101, United Food and Commercial Workers International Union, AFL-CIO, Case 20-CA-26596 (NLRB 2001B.A.), held that an employer may withdraw recognition of a Union when there has been an actual loss of support of the majority of the bargaining unit. This contrasts with the requirement for filing an RM petition for election that the employer need only have a reasonable uncertainty as to majority support. *Id.*

While interpreting and discussing *Levitz*, the Court in *McDermott v. Dura Art Stone*, found that, under *Levitz*, an employer has the right to honor a collective bargaining agreement until it expires and then either “(a) withdraw recognition or (b) file an RM petition.” *McDermott v. Dura Art Stone*, 298 F. Supp. 2d 905, 910 (C.D. Cal. 2003). Either action insulates an employer from unfair labor practice liability arising out of the decision to unilaterally withdraw recognition of a union. *Id.*

As set forth above, the Employer had actual knowledge that, regardless of the size of the bargaining unit, Mr. Garcia was the only employee paying dues, and therefore the only union member, and even he did not want to be represented by the Union; that none of the employees were willing to meet with the Union Representative and had, in fact, complained about the Union to management; and that the Union refused to provide any information evidencing their majority support. *See Levitz* and *McDermott*, allowing the Employer to withdraw recognition at the expiration of the collective bargaining agreement without being subject to unfair labor practice liability. *See Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 368 (1998);

McDermott v. Dura Art Stone, 298 F. Supp. 2d 905, 910 (C.D. Cal. 2003); *Levitz Furniture Company of the Pacific, Inc., formerly Levitz Furniture Company of Northern California, Inc. d/b/a Levitz*, Case 20–CA–26596 (NLRB 2001B.A.).

Further, The Union admits that it had no knowledge of (1) the number of employees, if any, actually in the bargaining unit; (2) whether the employees originally part of the bargaining unit at the time of certification were still employed with Employer; (3) why some employees had stopped paying dues; (4) who the actual Plant Manager was; or (5) whether the Union represented a majority of the bargaining unit employees. Tr. pp. 106-08, 111-112. Not only did the Union not have any knowledge with regard to the above, the most basic information regarding Crete Cold Storage and its employees, it also made no attempt to procure the information from its field representative or its other sources despite the fact that the Union admitted that the Field Representative would have had the above information and the information requested from the Employer by the Union. Tr. pp. 108, 111.

The evidence provided at trial, including the comment of attorney Susan Wade-Wilhoit—Tr. p. 64—shows that all parties involved have actual knowledge of the lack of majority status. Once a union has lost majority support, the employer must cease recognizing it, both to give effect to the employees' free choice and to avoid violating Section 8(a)(2). *NLRB v. B.A. Mullican Lumber & Manuf. Co.*, 535 F.3d 271, 283 (4th Cir. 2008); National Labor Relations Act, 29 U.S.C. §§ 158(a)(2) (2009). The NLRB's responsibility under the NLRA is to assure that the employees' choice is given effect – whether it is the choice to be represented by a union or not. *See B.A. Millican Lumber*, 535 F.3d at 282. Under *Levitz* the Board moved to an objective test to discover whether a union actually lost majority support and, therefore, the question is whether a union does or does not have majority support at the time of the withdrawal

of recognition. *See id.* Consequently, it would be improper for the NLRB, if it has evidence that a union no longer has majority support to order or adopt a bargaining order with a union that only represents a minority of the employees. *See id.* at 283. Pursuant to *B.A. Mullican Lumber*, the Employer is required to cease recognizing the Union and the NLRB cannot order the Employer to bargain with the Union. An affirmative bargaining order requiring the employer to recognize and bargain with the Union would cause Crete Cold Storage to violate Sections 8(a)(1), (2), (3) and 8(b)(1)(A) and (b)(2) of the National Labor Relations Act. *See National Labor Relations Act*, 29 U.S.C. §§ 158(a)(1)-(3); 29 U.S.C. §§ 158(b)(1)(A)-(b)(2).

3. The ALJ erred in failing to consider Crete's argument that the Union's position puts Crete in a no win situation.

Nowhere in the Decision does the ALJ consider or discuss the Employer's second argument with regard to withdraw—that the Union's position, if correct, places the Employer in a No-Win Situation. *See* the Employer's Post-Hearing Brief attached hereto as Exhibit C and incorporated herein by this reference. Failure to consider and discuss such position, or to fail to state why such position was not considered, constitutes error.

According to the Union and the NLRB, the Employer is faced with a “no-win” situation when it uncovers evidence indicating the Union has a lack of majority status as it can only: (1) continue to bargain and negotiate with the Union, despite lack of majority support, and risk an unfair labor practice; (2) poll employees to determine their representation and risk an unfair labor practice; or (3) withdraw recognition and risk an unfair labor practice. As set forth above, once a union has lost majority support, the employer must cease recognizing it, both to give effect to the employees' free choice and to avoid violating section 8(a)(2). *B.A. Millican Lumber*, 535 F.3d at 282; *National Labor Relations Act*, 29 U.S.C. § 158(a)(2). In addition, it is an unfair labor

practice to question and/or poll employees regarding their position toward the Union¹. National Labor Relations Act, 29 U.S.C. § 158(a).

Based on the applicable law, choose the course of action allowed, which is to withdraw recognition after a bargaining agreement expires once an employer has a good faith uncertainty regarding majority support. When faced with the three options above, all of which opened the Employer to liability for unfair labor practice charges, the Employer chose to withdraw recognition. In this case, the Employer had actual knowledge and a good faith uncertainty as to the majority support and, based on its knowledge as well as the investigation conducted by its attorney, the Employer decided the best course of action would be to inform the Union of its intent to withdraw recognition and ask the Union to provide any information indicating the Employer was incorrect. Tr. pp. 19, 25, 104-05; Gen. Counsel Ex. 12. No evidence of majority support was ever provided. Tr. pp. 19, 25, 112. Based on the Union's actions and refusal to provide any information, it is evident that it is merely playing "gotcha" and any choice undertaken by the Employer would have resulted in either a violation of the NLRA and/or unfair labor charges.

The ALJ's complete failure to even consider the above argument constitutes prejudicial error and the decision should not be adopted.

¹ All information obtained by the Employer was not obtained as a result of direct questioning by the Employer, rather, it was obtained as a result (1) of the Employer's attempt to assist the Union by posting notices of the Field Representatives' visits to the plant and asking bargaining unit employees to go speak with Ms. Lee and (2) of Mr. Garcia's inability to communicate with the Union and NLRB because he only spoke Spanish and his subsequent requests for assistance from non-bargaining unit employees to assist him in such communications. Tr. p. 47-52, 60

4. The ALJ decision that Crete committed an unfair labor practice by withdrawing recognition was supported by substantial evidence.

Based on the above arguments, the ALJ's decision that the Employer committed an unfair labor practice by withdrawing recognition is wholly unsupported by substantial evidence and the Employer should be found not to have committed an unfair labor practice.

E. EXCEPTION V

Even if the Board finds that the Employer committed an unfair labor practice in withdrawing recognition, the Employer at least had a good faith uncertainty of majority support and an election should be ordered as the appropriate remedy. The Union President himself felt an election was the appropriate remedy when he ordered the election petition to be filed. Tr. pp. 26-27, 115. On April 1, 2009, at the direction of Mr. Schwisow, the Union filed a Petition for Election. Tr. pp. 26-27, 115; Resp. Ex. 1. The Employer fully agrees that an election is the appropriate remedy and should be conducted. Tr. p. 27. In fact, the Employer filed a Joinder to the Petition requesting an election. Tr. p. 28. Despite this, the Petition for Election was unilaterally withdrawn by the Union on May 14, 2009.

An election is the only way to conclusively determine the existence, or lack thereof, of majority support. The Employer has done nothing to taint an election as it has not made any changes to the bargaining agreement, not discussed the Union directly with its employees and made no coercive or negative comments to the employees regarding the Union. Tr. p. 53, 58, 87-88. Further, the Employer is willing to recognize and bargain with the Union if it is, in fact, shown to represent a majority of the bargaining unit. Accordingly, this would be the most reasonable and effective resolution and remedy in this matter.

V. CONCLUSION

Based on the above, the ALJ Decision should not be adopted and instead, the Employer should be found to not have committed any unfair labor practices.

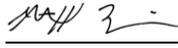
Original filed and copies to:

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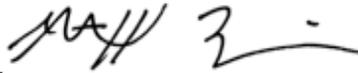
PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served on September 14, 2009, upon all parties to the above cause either through NLRB's E-Filing and/or by service to each of the attorneys of record herein at their respective addresses disclosed on the pleadings.

Signature: 

Respectfully Submitted,

BRICK GENTRY P.C.


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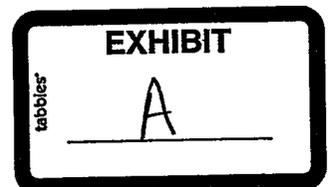
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

<hr/>)
In the Matter of:)
)
CRETE COLD STORAGE, LLC,)
)
	Respondent,)
)
and) Case No. 17-CA-24469
)
UNITED FOOD AND COMMERCIAL WORKERS)
INTERNATIONAL UNION, AFL-CIO, CLC,)
LOCAL NO. 271,)
)
	Charging Party.)
<hr/>)

The above-entitled matter came on for hearing, pursuant to Notice, before **JOHN WEST**, Administrative Law Judge, at the Federal Building, 100 Centennial Mall North, Room 124, Lincoln, Nebraska, on Wednesday, June 24th, 2009, at 9:05 A.M.

A. M.

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1 the incumbent union. Therefore, unless Crete Cold Storage
2 receives substantial evidence to the contrary upon termination
3 of the existing collective bargaining agreement, Crete Cold
4 Storage will withdraw recognition from the union and no longer
5 agree to bargain.

6 As stated in the letter the employer withdrew recognition
7 from the union upon the expiration of the contract based solely
8 on its hearsay knowledge that Javier Garcia wanted out of the
9 union, that he wanted to stop paying dues.

10 This clearly does not fulfill the requirements in Levitz
11 which require proof of an actual loss of majority support. By
12 its actions, including its failure to provide the requested
13 information and the withdrawal of recognition the employer has
14 violated Sections 8(a)1 and 5 of the National Labor Relations
15 Act.

16 JUDGE WEST: Do you wish to make an opening statement?

17 MS. FLETCHER: No thanks, Your Honor.

18 JUDGE WEST: Now, or is there --

19 MR. FULTON: I think I'd like to reserve until the end,
20 Your Honor.

21 JUDGE WEST: Are you ready to call your first witness?

22 MS. WADE-WILHOIT: I am.

23 JUDGE WEST: Proceed.

24 MS. WADE-WILHOIT: I'd call Patrick Burke.

25 Whereupon,

1 A Crete Cold Storage is a cold storage that's in the
2 processing and cold storage of both edible and inedible
3 products.

4 Q Is that mainly meats or what kind of --

5 A Yes, it is mainly meat.

6 Q Okay.

7 MS. WADE-WILHOIT: Judge, as this gentleman is an admitted
8 agent of respondent, I would ask to be able to continue
9 questioning him pursuant to Federal Rules of Evidence Section
10 611(c).

11 JUDGE WEST: Permission granted.

12 MS. WADE-WILHOIT: Thank you.

13 Q BY MS. WADE-WILHOIT: Now, Mr. Burke, isn't it true that
14 an election was conducted among certain employees of Crete Cold
15 Storage on about January 27th, 2005, to determine if they
16 wanted to be represented by United Food and Commercial Workers
17 Local No. 271?

18 A I was not employed with the company as of 2005, but to the
19 best of my knowledge, yes.

20 Q Okay. And you are aware however that the result of that
21 election was that the union won and was certified as the
22 collective bargaining representative of the employees?

23 A Yes, to the best of my knowledge, correct.

24 Q And after certification of the union, Crete and the union
25 were able to reach a collective bargaining agreement?

1 A Yes, that is correct.

2 Q Mr. Burke, I'm going to hand you what has been marked for
3 identification as General Counsel's Exhibit No. 5.

4 **(General Counsel's Exhibit No. 5, marked.)**

5 Q BY MS. WADE-WILHOIT: Mr. Burke, do you recognize this
6 document?

7 A Yes, I do.

8 Q And what is this?

9 A This is the last, best and final offer for a collective
10 bargaining agreement between Crete Cold Storage and United Food
11 and Commercial Workers Local 271.

12 Q Now were you involved in the negotiations of this
13 agreement?

14 A No, I was not.

15 Q Okay. Now despite the fact that it says last, best and
16 final offer, the union did in fact sign and agree to this
17 agreement, is that correct?

18 A Yes, to the best of my knowledge.

19 Q And the term of this agreement is April 1st, 2006, through
20 March 31st, 2009?

21 A Based on the document in front of me, that is correct.

22 Q All right.

23 MS. WADE-WILHOIT: Your Honor, I would ask to admit
24 General Counsel's Exhibit No. 5.

25 JUDGE WEST: Any objection?

1 A That is correct.

2 Q And Ms. Placek, could you tell us who Ms. Placek is in
3 relation to Crete Cold Storage?

4 A Ms. Placek is the plant manager of Crete Cold Storage.

5 Q And what are her duties at Crete?

6 A Her duties are to complete and fulfill the running of the
7 plant in Crete.

8 Q Okay. Now Ms. Placek reported to you that a office
9 assistant I believe, Sandra Franco, had told her that Javier
10 Garcia wanted to get out of the union?

11 A Yes, this is correct.

12 Q And those are Ms. Placek's words, that he wanted to --
13 Javier wanted to get out of the union?

14 A That is correct.

15 Q And you interpreted Ms. Placek's report that Garcia wanted
16 to get out of the union to mean that Mr. Garcia didn't want the
17 union the anymore?

18 A That is correct.

19 Q And that is, did not want the union to represent him
20 anymore?

21 A That is correct.

22 Q And after your conversation with Ms. Placek you contacted
23 your attorney?

24 A That is correct.

25 Q Now at the time of your conversation with Ms. Placek, how

1 many employees did you believe were in the unit, the collective
2 bargaining unit at Cold Crete Storage?

3 A At the time I believe that Mr. Garcia was the only dues
4 paying member in the collective bargaining unit.

5 Q And who was the -- did you believe there were other union
6 members however?

7 A No, not at that particular time.

8 Q You thought he was the only unit member covered by the
9 collective bargaining agreement?

10 A Just to be clear, I knew that there were -- I knew that
11 the collective bargaining agreement other individuals within
12 the organization but that he was the only dues paying member.

13 Q He was the only dues paying member. Who did you believe
14 the collective bargaining agreement to cover, how many
15 employees?

16 A At the time the collective bargaining agreement was
17 somewhere roughly between five and six.

18 Q Five and six employees?

19 A Correct.

20 Q And that was in about January of 2009?

21 A That's correct.

22 Q Okay. Now how many employees did you believe to be
23 members of the union?

24 A Mr. Garcia.

25 Q Okay. You didn't know if any other employees were paying

1 dues in some other way than dues check off, did you?

2 A That is correct.

3 Q Now based on your conversations with Ms. Placek, Crete
4 withdrew recognition from the union on February -- announced
5 its intent to withdraw recognition on February 20th, 2009?

6 A That is correct.

7 Q Now at the time that the letter was sent to the union
8 announcing the intent to withdraw recognition, the only
9 evidence that you had that union no longer represented your
10 employees was that Mr. Garcia wanted out of the union and you
11 had interpreted that to mean that he didn't want the union to
12 represent him anymore?

13 A That is correct.

14 Q And that is the sole evidence that you had at that time?

15 A That is correct.

16 Q And you spoke earlier, Mr. Burke, about certain
17 information requests that you were aware of in about late
18 January of 2009 regarding seniority lists?

19 A Okay. Yes, I received that request from the union and I
20 forwarded that on to counsel.

21 Q Right. And do you know if a response was ever made to
22 that information request?

23 A As I had just stated, I forwarded that on to counsel and
24 counsel handled that at that particular time.

25 Q Okay. So do you know what counsel did with it?

1 A I do not at this time, no.

2 Q Okay.

3 MS. WADE-WILHOIT: That's all the questions I have of this
4 witness.

5 JUDGE WEST: You didn't receive a carbon copy of any
6 letter which responded to the inquiry?

7 THE WITNESS: As it relates to the seniority list, no.

8 JUDGE WEST: Okay. Do you have any questions?

9 MS. FLETCHER: No, Your Honor.

10 JUDGE WEST: Cross.

11 MR. FULTON: Thank you, Your Honor.

12 **CROSS-EXAMINATION**

13 Q BY MR. FULTON: Mr. Burke, how do you gain knowledge as
14 far as who is a dues paying member at Crete?

15 A I would ultimately gain that knowledge from Jessica Placek
16 who is my -- ultimately my plant manager and then ultimately
17 through our payroll department as it relates to who is having
18 dues taken out of their weekly payroll.

19 Q Since you've been a CEO of Omaha Industries have you had
20 any employees who don't do dues check off if they're in the
21 union?

22 A Absolutely.

23 Q Okay. And have you investigated as to whether or not
24 anybody else at Crete was a dues paying member of the union?

25 A Let me stop, as it relates to being part of the union and

1 not paying dues or being part of the collective bargaining
2 agreement?

3 Q Do you know of other employees that directly pay their
4 dues to the union?

5 A That directly pay their dues to the union?

6 Q Yes.

7 A No.

8 Q Okay. That's what my question is, in your experience at
9 Omaha or Crete Cold Storage, does anybody just pay dues
10 directly or is it always through dues check off?

11 A It's always through dues check off to the best of my
12 knowledge.

13 Q And do you have any knowledge that anybody else was paying
14 dues to the union at Crete other than Mr. Garcia?

15 A No knowledge whatsoever.

16 Q Do you get notification of any type from the union as far
17 as who is in the union?

18 A No.

19 Q Okay. Do you get any communication from the union as far
20 as who is eligible to be in a particular collective bargaining
21 unit?

22 A No.

23 Q Now when you were -- have you ever talked to Brian
24 Schwisow?

25 A No.

1 Q And the information request that was sent to Crete Cold
2 Storage was sent to a Mr. Clark or a manager, were you aware of
3 that?

4 A I became aware of that later. He was a prior plant
5 manager that had not been with us for well over a year and a
6 half.

7 Q And Ms. Placek has been the manager, is the plant manager?

8 A That is correct.

9 Q Now when you ask your attorneys to handle the response,
10 did Mr. Brick do an investigation for you?

11 A Yes, he did.

12 Q And why did he do an investigation for you?

13 A To determine ultimately what we needed to provide as it
14 relates to what the union was requesting and where we needed to
15 go based upon the situation at hand.

16 Q Okay. And at some point was a decision made that the
17 union didn't have the union didn't have majority support any
18 longer?

19 A Yes, it was.

20 Q And do you know how that decision was made?

21 A It was made based on conversation as it relates to who the
22 members of the collective bargaining unit were, who the dues
23 paying members were and what type of representation was there.

24 Q And how did your attorney go about collecting that
25 information?

1 A They went about speaking with Jessica Placek who was the
2 plant manager and asking her various questions to ultimately
3 gather the necessary information that they needed.

4 Q Now you're not -- you don't office at the Crete plant, do
5 you?

6 A No, I do not.

7 Q Where is your office?

8 A My office is in Omaha, Nebraska.

9 Q Okay. And who actually operates day-to-day at the plant,
10 who is the --

11 A That would be Jessica Placek.

12 Q Would she be the person that would have the most knowledge
13 of union activity and what was going on at the plant?

14 A Absolutely.

15 Q Okay. Did she give you any indication as far as what type
16 of union activity went on at the plant in early 2009, what the
17 extent of activity was?

18 A Yes. We had conversations as it relates to -- as it
19 relates that activity and that activity was minimal at best.

20 Q Okay. Can you describe what you learned about the
21 activity?

22 MS. WADE-WILHOIT: I'd object. It's hearsay. I believe
23 Ms. Placek is going to be a witness and she can testify
24 directly as to her knowledge

25 MR. FULTON: It goes to the state of mind of this witness

1 as far as his decision to withdraw the recognition.

2 JUDGE WEST: Overruled.

3 THE WITNESS: I had in conversations with Ms. Placek had
4 talked about the union representative and when they come to the
5 facility and what they would do when they ultimately came to
6 the facility.

7 But that was something that was not consistent and
8 happened on a very infrequent basis.

9 Q BY MR. FULTON: As far as the union coming to the plant?

10 A As far as the union coming to the plant.

11 Q And what was the employee's response to that union?

12 A The employee's response was that when that representative
13 came to the plant, they didn't want to meet with that
14 individual.

15 Q At the time you sent the letter or Mr. Brick sent the
16 letter indicating that the intent was to withdraw recognition
17 at the end of the current contract, did you believe that there
18 was any majority interest in the collective bargaining unit for
19 union representation?

20 A Absolutely not.

21 Q Was there any interest in your mind?

22 A None.

23 Q Were you able to talk to Javier Garcia yourself?

24 A I have not spoken to Javier Garcia as it relates to this,
25 no.

1 Q Is Mr. Garcia a native of the United States?

2 A No, he is not.

3 Q Is English his first language?

4 A No, it is not.

5 Q Does Mr. Garcia speak English?

6 A Very little at best.

7 Q Okay. Do you speak Spanish?

8 A I do not.

9 Q Okay. Well, anything -- you have not been able to have a
10 direct conversation with him other than with translators?

11 A That is correct, sir.

12 Q And do you know that that's how Jessica, the plant
13 manager, talks to him?

14 A Yes, sir.

15 Q Now the union in a letter that was sent to the union
16 withdrawing -- notifying them of the withdrawal of
17 representation, do you recall any request being made to the
18 union to provide any information that would contradict your
19 position that they didn't have the majority representation?

20 A Yes, sir.

21 Q Did you ever receive anything from the union or from your
22 attorney that contradicted your position?

23 A No, we did not.

24 Q What's the first thing that you received in response to
25 the notice of withdrawal of representation and the request for

1 information that contradicted your position?

2 A The first and only thing that we received is the grievance
3 that was ultimately filed by the union.

4 Q Were there actually two petitions filed?

5 A Yes.

6 Q Was one petition for requesting an election, certification
7 election?

8 A Yes, sir.

9 MR. FULTON: Your Honor, would you prefer I ask to
10 approach the witness or may we just --

11 JUDGE WEST: Approach please. Permission granted.

12 Q BY MR. FULTON: Mr. Burke, I'm going to hand you an
13 exhibit marked Exhibit A for identification. Would that be a
14 copy of the petition for election?

15 A Yes, sir.

16 Q What was your response to --

17 JUDGE WEST: Do you plan to introduce this?

18 MR. FULTON: Yes, I do, Your Honor.

19 JUDGE WEST: Let's mark it Respondent's 1.

20 MR. FULTON: Okay. Respondent's 1.

21 **(Respondent's Exhibit No. 1, marked.)**

22 Q BY MR. FULTON: Looking at the document that will now be
23 Respondent's 1, you saw that document and provided that
24 document?

25 A Yes, that is correct.

1 Q And that's the document filed by the union with the NLRB?

2 A That is correct.

3 MR. FULTON: At this time we would ask that Respondent's
4 Exhibit 1 be entered into the record.

5 JUDGE WEST: Any objection.

6 MS. WADE-WILHOIT: No objection.

7 MS. FLETCHER: No.

8 JUDGE WEST: Respondent's 1 is received.

9 **(Respondent's Exhibit No. 1, received.)**

10 Q BY MR. FULTON: What was your response to that petition?

11 A My response was that I guess I was a little bit dismayed
12 in that we had had an individual who had come to our plant
13 manager and asked to be removed from the union or how he
14 ultimately could be removed from the union and based upon my
15 knowledge at the time, there was very little representation on
16 the part of the union. I had had an additional conversation
17 with counsel and asked counsel if we needed to continue --

18 Q Let's not get into those discussions.

19 A Okay.

20 Q Would you have allowed an election?

21 A Absolutely.

22 Q Why?

23 A Because I believe that the election will show that there
24 is not a majority of individuals at Crete Cold Storage that
25 would select union representation.

1 Q I'm handing you what is marked as Respondent's Exhibit 2.

2 **(Respondent's Exhibit No. 2, marked.)**

3 Q BY MR. FULTON: Is that a motion filed on behalf of Crete
4 Cold Storage to join a petition for election?

5 A Yes, it is.

6 Q And does that reflect your desire to have the election
7 take place?

8 A Yes, it did.

9 MR. FULTON: We would ask that Respondent's Exhibit 2 be
10 introduced, Your Honor.

11 JUDGE WEST: Any objection?

12 MS. WADE-WILHOIT: No objection.

13 MS. FLETCHER: No.

14 JUDGE WEST: Respondent's 2 is received.

15 **(Respondent's Exhibit No. 2, received.)**

16 Q BY MR. FULTON: After the contract expired on March 31st,
17 2009, did you receive anything from the union as far as their
18 majority status?

19 A No.

20 Q To this day have you received anything from the union
21 regarding their majority status?

22 A No.

23 Q And again, you would be willing to have an election?

24 A Yes, I would.

25 Q Would you be willing to live by the results of that

1 desire to stop paying dues when he discovered they were being
2 taken out on his check, isn't that correct?

3 A Correct.

4 Q He asked you what -- in fact, he showed you his check and
5 asked you what a certain deduction was for and he told you it
6 was for union dues. And Mr. Sanchez stated that he didn't want
7 to pay them?

8 A Correct.

9 Q Now, Ms. Placek, how many employees has Crete contend were
10 in the collective bargaining unit on the day that Crete
11 withdrew recognition from the union?

12 A One.

13 Q The collective bargaining unit, I'm not talking about
14 union members. I'm talking about who is represented by the
15 collective bargaining agreement?

16 A That would be three.

17 Q And what would their names be?

18 A Javier, Brad --

19 Q Brad what?

20 A Jelinek.

21 Q Okay.

22 JUDGE WEST: What's the name please?

23 THE WITNESS: Jelinek, J-e-l-i-n-e-k, I believe.

24 JUDGE WEST: Okay.

25 THE WITNESS: And Rick Nigg, N-i-g-g.

1 A A couple times a year.

2 Q How was your relationship with her?

3 A Good.

4 Q How long did Linda come to the plant?

5 A I believe once a month or every other month.

6 Q Now how long was Linda the union representative while you
7 were at the plant?

8 A I believe all five years.

9 Q Okay. Now you've said that you had a problem with Linda
10 when she came to the plant at some point, when was that?

11 A A couple years back.

12 Q Okay. What was the problem?

13 A She was intermingling with the temporary staffing agency
14 employees and they were complaining. And I had asked her if
15 she could meet in one room where everybody who wanted to see
16 her, they could come see her. And she called me some vulgar
17 names.

18 And I immediately got our counsel on the phone while she
19 was there and told her that was not necessary. And just kind
20 of went back and forth, tried to talk. I then did talk to
21 Donna who was completely reasonable and we were able to work
22 through it.

23 Q Were there some safety concerns about having somebody just
24 in the plant?

25 A Yeah. I don't let anybody -- there is a sign-in log and I

1 have to know where these people are because if a forklift would
2 hit them or something was to fall, it's not a safe environment
3 unless you know what you're doing.

4 Q You've got a lot of trucks, forklifts --

5 A Exactly.

6 Q -- rail cars?

7 A Yes.

8 Q And a lot of heavy weight?

9 A Yes.

10 Q Now when Linda would come to the plant, did she follow
11 your instructions after that one incident?

12 A After Donna and I talked, yes, she did it perfect. She
13 would call in the morning and we would put up signs and
14 everything went fine after that.

15 Q Okay. And did you think you had any more
16 misunderstandings with her?

17 A Oh, no.

18 Q Okay. Now you said you put up signs, is that correct?

19 A Yes.

20 Q Same sign every time?

21 A Yes.

22 Q Okay.

23 A We just changed the dates. It's saved in the computer.

24 MR. FULTON: I've only got one copy. She just brought
25 this.

1 MS. WADE-WILHOIT: Okay.

2 THE WITNESS: I have another copy if you need it.

3 MR. FULTON: Okay. We may need it.

4 Q BY MR. FULTON: Ms. Placek, I'm handing you Respondent's
5 3.

6 **(Respondent's Exhibit No. 3, marked.)**

7 Q BY MR. FULTON: Can you tell us what that is?

8 A This is just the note that Donna or I would print off when
9 Linda would call and we would print off 10 and stick them on
10 all the doors so that everybody knew that Linda was going to be
11 there.

12 MR. FULTON: We would ask that Respondent's Exhibit 3 be
13 introduced.

14 JUDGE WEST: Any objection?

15 MS. WADE-WILHOIT: No objection.

16 JUDGE WEST: Respondent's 3 is received.

17 **(Respondent's Exhibit No. 3, received.)**

18 Q BY MR. FULTON: What was your observation, Jessica, about
19 the interaction between Linda and the people who you believed
20 to be in the bargaining unit?

21 A They wouldn't go in there.

22 Q How do you know?

23 A Because I would ask them to go. Well, I would ask Sammy
24 to make sure that everybody knew and ask that, you know, he
25 would contact them so they would go in there, just on good

1 faith. That was my part. I had to do my part to make sure
2 everything was on the -- I don't know how to say it but I
3 wanted to make sure that Linda knew I was giving her my whole
4 heart and that I was doing my best to get the people to her.

5 Q Now Sammy is who?

6 A Sammy is our supervisor.

7 Q Do you know whether Sammy got the word out?

8 A Yes, I'm sure he did.

9 Q You said -- is that Sammy Sanchez?

10 A Yes, it is.

11 Q Okay. And you --

12 A Are we supposed to say last names?

13 Q Sure. And you said that you ever went out. What do you
14 mean by that? You ever told people?

15 A Yes. I would tell like Brad. I told Rick. And Rick is
16 friends with Linda. And everybody knows when she's going to be
17 there. We made a point. Everybody knew that she was going to
18 be there. And she knows that.

19 Q And Brad and Rick, at least from your understanding, would
20 be in the bargaining unit?

21 A Yes.

22 Q They were the other two besides Javier?

23 A Yes.

24 Q Do you know if Javier knew that she was going to be there?

25 A I don't speak Spanish but, yes, I would -- I believe -- I

1 truly believe that he knew.

2 Q Okay. And would that have been Sammy's responsibility to
3 tell him?

4 A That would be.

5 Q Okay. Any other supervisors you would have talked to
6 about her visits?

7 A At that time, we hadn't started the inedible side, so
8 Sammy was -- Sammy Sanchez was in charge of all of the
9 warehouse at that time. So he would be the only one that I
10 would have had to contact.

11 Q And your inedible side only started --

12 A April 1st.

13 Q Okay. Of this year?

14 A Yes.

15 Q Okay.

16 A That's correct.

17 Q And when you told employees that Linda was going to be
18 there did you get any response from them?

19 A They didn't want to talk to her. And I can't be a part of
20 -- you know, I have to do my part. And that's between Linda
21 and them.

22 Q But they told you they didn't want to see her?

23 A They went outside. The people normally eat in that break
24 room so in my opinion that's a safe place, you know, for her to
25 be. It is a used break room. I normally go in there to eat.

1 But they would all go outside.

2 Q Now you talk about -- we had a discussion about the only
3 conversation with any member of the bargaining unit. Did you
4 get complaints or hear about complaints from members of the
5 bargaining unit, whether firsthand, secondhand?

6 A Secondhand I would hear them from Sammy. And if I would
7 walk in Sammy's office --

8 MS. WADE-WILHOIT: Objection, hearsay.

9 THE WITNESS: Okay.

10 MS. WADE-WILHOIT: Wait, let the Judge rule.

11 THE WITNESS: Oh, sorry.

12 MR. FULTON: Goes for state of mind, Your Honor. It's not
13 offered for the truth of the matter asserted.

14 JUDGE WEST: Overruled.

15 Q BY MR. FULTON: Go ahead.

16 A My office isn't very far from Sammy's. If I would walk in
17 and they were talking about it, I would just have to leave but
18 I can talk to Sammy about it. And so my -- yes, it would be
19 from Sammy.

20 Q Okay. So what kind of complaints were you getting?

21 A Just how do they get rid of it. How do they decertify.
22 What do they need to do. I can't give them that information.
23 That's from Linda Lee.

24 MS. WADE-WILHOIT: Judge, I'd like a continuing objection
25 on hearsay grounds for the truth of the matter asserted.

1 Q So you're one of the initial employees?

2 A Right.

3 Q And you've seen how the plant has grown or matured?

4 A Correct.

5 Q What have been your observations as far as from your
6 standpoint both your previous job and plant manager about
7 whether the union had the majority and had lost the majority?

8 A It's never been an issue. We just function as we normally
9 do. The -- I don't know what you mean by majority minority but
10 we have a solid team and we work together and we get the job
11 done and that union is not -- I don't know very much about the
12 union and it's not something that's brought up.

13 Q Has the union membership increased or decreased since the
14 union was certified?

15 A It's decreased.

16 Q From what level to what level?

17 A We're down to one.

18 Q Okay.

19 A I believe maybe there was five to start with. I don't --
20 I honestly don't recall.

21 Q And was that dues paying members?

22 A Correct. I get a sheet every month that I have to turn
23 into corporate that shows who is paying dues so that -- and
24 that goes directly to payroll. So that is how I know.

25 Q And years ago there were four or five members?

1 A There was more, yes.

2 Q Okay. Has anyone that has come to work in the last four
3 years at Crete joined the union?

4 A No.

5 Q And your understanding is Javier doesn't want to be in the
6 union any longer?

7 A That is my understanding.

8 Q Is there a union steward in the plant?

9 A A what?

10 Q Union steward?

11 A No.

12 Q Has there ever been a union steward?

13 A That's what Lenny was.

14 Q Was that an employee?

15 A Lenny -- Len Johnson, right.

16 Q Was he kind of the guy who --

17 A Yes, he -- yes.

18 Q Go ahead. Tell me what he was.

19 A He's the one that helped initiate it, I believe. And got
20 it going, I believe.

21 Q Was he also kind of the guy that handled union discussions
22 with the management and --

23 A We didn't have any.

24 Q Okay. When did Mr. Johnson leave?

25 A Several years ago, a couple years ago.

1 Q Did anybody take his place?

2 A No.

3 Q And again, you've never spoken to the employees directly
4 yourself as far as whether they want to be in the union or not,
5 correct?

6 A Yeah, I can't.

7 Q And you're not to do that?

8 A Yes, they know that I -- management cannot be involved.

9 Q Okay. To your knowledge has Crete Cold Storage made any
10 changes to the terms and conditions of its employees in the
11 bargaining unit since the contract expired in March of '09?

12 A No, we haven't made any changes.

13 Q Everything is still the same?

14 A Yes.

15 Q Okay.

16 MR. FULTON: I think that's all I have.

17 MS. WADE-WILHOIT: I have several.

18 JUDGE WEST: Okay.

19 **REDIRECT EXAMINATION**

20 Q BY MS. WADE-WILHOIT: You testified that you only had one
21 conversation with Brian Schwisow. Isn't it true that you
22 talked to him at least twice? Once on about January 12th and
23 then again on January 28th, 2009?

24 A I don't recall that. I remember him coming in with the
25 gentlemen from Washington I believe.

1 individuals might not go to Ms. Lee on any given date when she
2 visited the facility, do you?

3 A No.

4 Q And you testified that you heard some complaints that
5 employees had from your supervisor Sammy Sanchez, is that
6 correct?

7 A That is correct.

8 Q Now isn't it true that you don't know how many times
9 employees complained?

10 A I don't.

11 Q You don't know how many employees complained, isn't that
12 true?

13 A I trust Sammy.

14 Q You don't know how many employees complained, isn't that
15 true?

16 A Sure. I do not -- I do not know how to answer that, but,
17 yes. I don't know. I'm trusting Sammy.

18 Q Okay. And you don't know the names of the employees that
19 complained?

20 A Sammy has brought up names but that is again up to Sammy.

21 Q Okay. Ms. Burke -- excuse me, I'm sorry, Ms. Placek, I
22 would refer you to Page 6 of your affidavit before you.

23 A Okay.

24 Q Start at Line 8 and go through Line 13. Would you please
25 read that?

1 THE WITNESS: Oh, say that again.

2 Q BY MS. WADE-WILHOIT: Did you present this document to Mr.
3 Garcia for his signature on May 22nd, '09?

4 A I honestly don't recall. So I may have. I'm telling the
5 truth. I don't recall.

6 Q Okay.

7 MS. WADE-WILHOIT: I won't introduce those at this time
8 then.

9 Q BY MS. WADE-WILHOIT: Now, Ms. Placek, isn't it true that
10 there has only been one dues paying member for the last year
11 since at least March of 2008?

12 A Possibly.

13 Q Okay. And there is still one dues paying member, Mr.
14 Garcia?

15 A Yes, there is.

16 Q So at least in the last year membership has not declined,
17 isn't that true?

18 A True.

19 Q Isn't it true that since certification the union has never
20 had a majority of members from the bargaining unit?

21 A I don't understand. Could you repeat that?

22 Q Okay. Since certification, since the union was certified
23 as the collective bargaining agent, isn't it true that they've
24 never had a majority of bargaining unit members who were also
25 members of the union?

1 A I don't know. I would assume they would have had to had a
2 majority to get the union.

3 Q And you testified that Lenny Johnson was a union steward?
4 Isn't it true that Lenny Johnson was not a member of the union?

5 A I was not aware of that.

6 MS. WADE-WILHOIT: That's all I have.

7 JUDGE WEST: Anything else?

8 MS. FLETCHER: Nothing, Your Honor.

9 MR. FULTON: Just a couple questions, Your Honor.

10 **RECROSS-EXAMINATION**

11 Q BY MR. FULTON: Jessica, counsel questioned you concerning
12 whether you had complaints or knew of complaints from
13 individuals within the bargaining unit. You certainly knew
14 Javier had complaints, didn't you?

15 A Correct.

16 Q And isn't it true you also had a conversation with Sandra
17 Franco wherein she told you Javier had tried to call the NLRB?

18 MS. WADE-WILHOIT: Objection, hearsay.

19 JUDGE WEST: Overruled.

20 Q BY MR. FULTON: Is that true?

21 A Yes.

22 Q What did she tell you about that call?

23 A That there was nobody that spoke English.

24 Q Spoke English?

25 A Spanish, sorry.

1 he in fact resigned from the union?

2 A No.

3 Q No, it's not true or, no, he didn't resign from the union?

4 A He never told me nothing.

5 Q He never told you anything. Thank you.

6 MS. WADE-WILHOIT: I believe that's all I have of this
7 witness.

8 MS. FLETCHER: Nothing, Your Honor.

9 MR. FULTON: Thank you, Your Honor.

10 **CROSS-EXAMINATION**

11 Q BY MR. FULTON: Mr. Sanchez, are you a friend of Javier
12 Garcia?

13 A Yes.

14 Q Does Javier speak any English at all?

15 A No.

16 Q Have you kind of acted as a go-between to translate for
17 him so that he understands things?

18 A Yes.

19 Q And your plant manager, does she understand Spanish as far
20 as you know?

21 A No, she doesn't.

22 Q Okay. So as -- even though you're a supervisor, I assume
23 you're helping her out?

24 A Yes, sir.

25 Q Okay. And do you have daily contact with Jessica the

1 plant manager?

2 A Yes.

3 Q Now again, Javier, did he come to you to ask for your
4 help?

5 A Yeah, because I'm the only one that can translate for him
6 in that moment when Linda Lee shows up at the plant.

7 Q And specifically what did he want you to translate for
8 him?

9 A Just to ask her how to get out of the union.

10 Q Was she helpful?

11 A No, not really.

12 Q All she did was direct him to a poster?

13 A Yes, sir.

14 Q With a telephone number on it?

15 A Yes.

16 Q Now had -- did Ms. Lee know Javier, do you know?

17 A Not that much.

18 Q Okay. Was there anybody else -- was she busy when Javier
19 went to talk to her?

20 A No, she was just sitting in the lunchroom by herself.

21 Q Did she come on a fairly regular basis?

22 A No, just once a month or once every two months.

23 Q Did you see any employees talking to her when she came?

24 A No.

25 Q Did you know whether or not the word was sent out to

1 Q Have you asked the union to let you out?

2 A Yes.

3 Q How did you do that?

4 A Through a letter.

5 Q Have you heard anything from the union about -- in
6 response to your letter?

7 A No.

8 Q Did you send it to the address that was on the poster?

9 A Yes.

10 Q Did you ask Sammy Sanchez to translate for you with Linda
11 Lee?

12 A Yes.

13 Q Other than translating for you did Sammy do anything else?

14 A No.

15 Q Did he tell you he couldn't do anything else to help you
16 get out of the union?

17 A Yes.

18 Q Did you talk to Sandra Franco about trying to get out of
19 the union?

20 A Yes.

21 Q Why did you talk to her?

22 A I just asked her a favor to call the telephone number.

23 Q The telephone number for the National Labor Relations
24 Board?

25 A Uh-huh. Yes.

1 Q Do you know if she did that for you?

2 A Yes.

3 Q Did you try to call that number yourself?

4 A Yes.

5 Q What happened when you tried to call it?

6 A I just got a computer answering machine in English.

7 Q And do you speak any English?

8 A No.

9 Q Do you know whether Sandra spoke with anyone at the NLRB?

10 MS. WADE-WILHOIT: Objection. Any knowledge would be
11 hearsay.

12 JUDGE WEST: Not necessarily, overruled. Answer please.

13 THE WITNESS: No, I don't know.

14 Q BY MR. FULTON: Okay. But you did ask her to call for
15 you?

16 A Yes.

17 Q She just didn't get back to you on what she found out or
18 anything like that?

19 A No.

20 Q Did you ever try to call the union yourself?

21 A Yes.

22 Q What happened when you tried to call the union?

23 A The answer machine was taking the call.

24 Q Did it say it was full or --

25 A To leave a message but I can't speak in English.

1 Q Okay. Do you know what it means to decertify a union?

2 A No.

3 Q Do you want the union to represent you any longer?

4 A No.

5 Q Are you aware of any other employees who want to be
6 represented by the union?

7 A No.

8 Q Have you talked to other employees about the being in the
9 union?

10 A No.

11 Q Has anyone at Crete Cold Storage tried to put pressure on
12 you to testify one way or another?

13 A No.

14 Q How many times did you actually speak to Linda for any
15 reason?

16 A Never because I cannot speak to her in English.

17 Q Do you know if anybody else speaks to her when she comes
18 to the plant?

19 A No.

20 Q Are you told when Linda is going to be there for a visit?

21 A We have signs on the door stating that she was coming.

22 Q Would those signs be in Spanish also?

23 A No, in English.

24 Q Then how would you know?

25 A Because I am understand some words.

1 Q Did anyone try to prevent you from going to meet with
2 Linda?

3 A No.

4 Q Did Jessica ever suggest you go talk with Linda?

5 A No.

6 MR. FULTON: Thank you. I think that's all I have.

7 **REDIRECT EXAMINATION**

8 Q BY MS. WADE-WILHOIT: Mr. Garcia, when you were testifying
9 to some questions by Mr. Fulton, you stated that you sent a
10 letter to the union. Isn't it true that you wrote a letter but
11 you haven't sent it?

12 A I sent it.

13 Q When?

14 A March 27th.

15 Q Mr. Garcia, I'm going to hand you what I'm making for
16 identification purposes only as General Counsel's Exhibit No.
17 16.

18 **(General Counsel's Exhibit No. 16, marked.)**

19 Q BY MS. WADE-WILHOIT: I'm going to have the interpreter
20 read certain sections. I would note that this --

21 JUDGE WEST: I'm sorry, before you do that, let me direct
22 your attention to the very last page of the document that you
23 have in front of you. Does he have the last page? Is that
24 your signature on the last page?

25 THE WITNESS: Yes.

1 MR. FULTON: No objection, Your Honor.

2 JUDGE WEST: General Counsel's 6 is received.

3 **(General Counsel's Exhibit No. 6, received.)**

4 Q BY MS. WADE-WILHOIT: Now during the course of
5 representing employees at Crete Cold Storage, did the union
6 ever have opportunity to request information from Crete for
7 their representational purposes?

8 A Yes.

9 Q What types of information historically has the union
10 requested?

11 A Seniority lists.

12 Q Okay. Did you make any such request for a seniority list
13 -- have you made any such request for a seniority list?

14 A Yes, on January 13th I instructed my office manager to.

15 Q Mr. Schwisow, I'm going to hand you what's been marked as
16 General Counsel's Exhibit No. 7.

17 **(General Counsel's Exhibit No. 7, marked.)**

18 Q BY MS. WADE-WILHOIT: You said -- I think you last
19 testified that you instructed your assistant to request
20 information?

21 A Office manager, yes.

22 Q Who is your office manager?

23 A Her name is April Gerraro.

24 Q Okay. And take a look at General Counsel's Exhibit No. 7.
25 Do you recognize this document?

1 A Yes, I do.

2 Q And what is this?

3 A This is an e-mail that my office manager sent to Ms.
4 Jessica Placek to request a current seniority list.

5 Q And does this document reflect that you were also -- you
6 were sent a copy of this e-mail?

7 A Yes.

8 Q And is there -- was there response to Mr. Gerraro's e-mail
9 regarding the seniority list?

10 A Yes, there is.

11 Q Who is the response by?

12 A It was from Ms. Placek.

13 Q And when did you receive the response?

14 A On the 13th.

15 Q And does this exhibit indicate that you received a copy of
16 the response from Ms. Placek?

17 A Yes.

18 Q Okay. And what was the response?

19 A It said that their seniority list was as follows, Javier
20 Garcia, warehouse.

21 Q And were you satisfied with the response?

22 A No, I was not.

23 Q Okay.

24 MS. WADE-WILHOIT: I'd offer General Counsel's Exhibit No.

25 7.

1 document.

2 **(General Counsel's Exhibit No. 11, marked.)**

3 MS. WADE-WILHOIT: I'd also take this opportunity to offer
4 Exhibits 9 and 10.

5 JUDGE WEST: Any objections?

6 MR. FULTON: No objection, Your Honor.

7 JUDGE WEST: General Counsel's 9 and 10 are received in
8 evidence.

9 **(General Counsel's Exhibit Nos. 9 and 10, received.)**

10 Q BY MS. WADE-WILHOIT: Do you recognize General Counsel's
11 Exhibit No. 11, Mr. Schwisow?

12 A Yes, I do.

13 Q What is that?

14 A That is the letter I received from Matthew Brick.

15 Q And when did you receive this letter?

16 A In February of 2009.

17 Q Now I notice that at the top of this letter it says
18 February 3rd, 2008. But it's your testimony you didn't receive
19 this letter until, of course, February of 2009?

20 A Correct.

21 Q I also note that this is -- it's addressed to you but then
22 says, Dear Mr. Neelan is?

23 A No, I do not.

24 Q Okay.

25 MS. WADE-WILHOIT: I'd offer General Counsel's Exhibit No.

1 11.

2 JUDGE WEST: Any objection?

3 MR. FULTON: No objection, Your Honor.

4 JUDGE WEST: No. 11 is received.

5 **(General Counsel's Exhibit No. 11, received.)**

6 Q BY MS. WADE-WILHOIT: Now did this response provide any of
7 the information that you had requested?

8 A No, I didn't.

9 Q Now after you received this letter from Mr. Brick, did you
10 receive any further communication from the employer?

11 A Yes, I did.

12 Q What did you receive and when did you receive it?

13 A I believe it was around February 20th of 2009, a letter to
14 withdraw recognition from the union.

15 Q I'm going to hand you what's been marked for
16 identification as General Counsel's Exhibit No. 12.

17 **(General Counsel's Exhibit No. 12, marked.)**

18 Q BY MS. WADE-WILHOIT: Take a moment and look at that
19 document. Do you recognize this document, Mr. Schwisow?

20 A Yes, I do.

21 Q And what is it?

22 A That is the letter I received from a Matthew Brick
23 withdrawing recognition from the union.

24 MS. WADE-WILHOIT: I'd offer General Counsel's Exhibit No.
25 12.

1 JUDGE WEST: Any objection?

2 MR. FULTON: No objection, Your Honor.

3 JUDGE WEST: General Counsel's 12 is received.

4 **(General Counsel's Exhibit No. 12, received.)**

5 Q BY MS. WADE-WILHOIT: And just as a point of
6 clarification, Mr. Schwisow, at the top of this letter it says
7 February 20th, 2008. But it says, received February 23, 2009.
8 Did you in fact receive this letter this year in February?

9 A Yes.

10 Q Of 2009?

11 A 2009, yes.

12 Q Now, Mr. Schwisow, on the date of withdrawal of
13 recognition from the union, the employer's withdrawal of
14 recognition, do you know how many employees were in the
15 collective bargaining unit?

16 A No, I don't.

17 Q And why don't you?

18 A I was never given a current seniority list.

19 Q Okay. Mr. Schwisow, is Javier Garcia a member of the
20 union?

21 A Yes, he is.

22 Q Was he a member of the union on April 1st, 2009?

23 A Yes, he was.

24 Q At any time, any time has the union received a letter from
25 Mr. Garcia indicating that he wants to withdraw his membership?

1 A No, we have not.

2 MS. WADE-WILHOIT: That's all I have.

3 MS. FLETCHER: Nothing, Your Honor.

4 MR. FULTON: Thank you, Your Honor.

5 **CROSS-EXAMINATION**

6 Q BY MR. FULTON: Mr. Schwisow, that's how you say it,
7 correct?

8 A Schwisow.

9 Q Schwisow, I'll probably butcher it and I'll apologize in
10 advance.

11 A You wouldn't be the first.

12 Q Have you ever spoken with Javier Garcia?

13 A No, I have not.

14 Q Have you ever spoken with any of the members of the
15 collective bargaining unit at Crete Cold Storage?

16 A No, I have not.

17 Q Now, Exhibit -- if you look at General Counsel's Exhibit
18 6, which you should have which is the union members.

19 A Okay.

20 Q Of those employees listed, and my understanding is these
21 are people who actually have paid dues and dues check-offs,
22 correct?

23 A Correct, well, with the exception of one.

24 Q Okay. Zach Baker couldn't be -- couldn't join the union,
25 could he?

1 A That's what I was told.

2 Q Okay. He's a temporary employee and specifically exempted
3 from the bargaining unit?

4 A Correct.

5 Q Javier Garcia, we know Javier still is employed at Crete,
6 correct?

7 A Uh-huh.

8 Q You've got to say yes or not?

9 A Yes.

10 Q Sebastian Marrero, do you know whether he's still
11 employed?

12 A No, I do not.

13 Q Timothy R. Gilman, is he still employed by Crete?

14 A I do not know.

15 Q Michael A. Arellano, is he still employed at Crete?

16 A I do not know.

17 Q Tony Sanchez, do you know if she is still employed at
18 Crete?

19 A I do not know.

20 Q Would the union do some investigation or have records as
21 to why dues have stopped from these employees?

22 A Yes.

23 Q Did you take a look to see why the dues stopped for any of
24 these employees?

25 A No.

1 A No.

2 Q When was it that you actually learned that Jessica was the
3 plant manager?

4 A Well, when I received that letter.

5 Q Which letter is that?

6 A From Matthew Brick.

7 Q Okay. And until then you thought Mr. Barker was still the
8 manager, correct?

9 A Correct.

10 Q Prior to you sending the letter of January 28th and your
11 request for information, did you have an idea of who might be
12 in the bargaining unit at Crete Cold Storage plant?

13 A I did not know.

14 Q Now wouldn't your field rep have had some information
15 concerning who the people in the bargaining unit are?

16 A I'd like to think so.

17 Q Did she provide you with that information?

18 A I never asked her for it.

19 Q Okay. Why not?

20 A I was in a new position and I just told them to go out and
21 service their facilities. There wasn't a need.

22 Q Do you know whether your field representative had any of
23 the information that you requested in General Counsel's Exhibit
24 10?

25 A No, I don't.

1 Q And you thought, I'm assuming in my next question, do you
2 know whether she could have provided it to you? You don't know
3 that either then, correct?

4 A Correct.

5 Q Now if you'll look at General Counsel's Exhibit 12, this
6 is a letter from Mr. Brick that indicated that there was going
7 to be a withdrawal of representation, correct?

8 A Correct.

9 Q Now in that letter, Mr. Brick asks or states, therefore,
10 unless Crete Cold Storage receives substantial evidence to the
11 contrary about a doubt of whether there is a majority of
12 employees in the bargaining unit, that upon the termination of
13 that contract, recognition would be withdrawn, am I
14 paraphrasing correctly?

15 A I believe so.

16 Q Did you ever provide Mr. Brick with any information
17 concerning why you thought there was still majority support for
18 the union?

19 A No, I didn't.

20 Q Did you have any information that there was majority
21 support in the union?

22 A No, I didn't.

23 Q Did you direct Linda Lee or anyone else on your behalf to
24 investigate in one of the visits the union had to the plant,
25 whether or not there was majority support for the union?

1 A Correct.

2 Q And regardless of whether you sent the letter or not, let
3 me ask you, will he be allowed to resign from the union?

4 MS. WADE-WILHOIT: Objection.

5 JUDGE WEST: Grounds?

6 MS. WADE-WILHOIT: Well, first of all, it's really
7 irrelevant to this proceeding. It had nothing to do with the
8 violation of the Act, whether or not he'll be allowed to resign
9 from the union.

10 MR. FULTON: Our intent in asking that, Your Honor, is,
11 No. 1, to help Mr. Garcia and to establish whether or not the
12 union will help him or not, which will also establish whether
13 there is majority support or not.

14 And also I think it's relevant to what the union is doing
15 to verify whether there is support.

16 MS. WADE-WILHOIT: It's not the union's obligation to
17 verify.

18 JUDGE WEST: Well, the only relevance here is up until the
19 company withdrew recognition. So this is not relevant.

20 MR. FULTON: Okay.

21 Q BY MR. FULTON: Can you tell me, sir, was it at your
22 direction that the union file the petition for an election in
23 this matter?

24 A Yes.

25 Q And why did you want that petition filed?

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CRETE COLD STORAGE, LLC

and

UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, AFL-CIO, CLC
LOCAL NO. 271

Case 17-CA-24469

ORDER TRANSFERRING PROCEEDING TO
THE NATIONAL LABOR RELATIONS BOARD

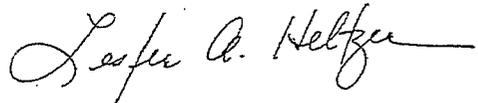
A hearing in the above-entitled proceeding having been held before a duly designated Administrative Law Judge and the Decision of the said Administrative Law Judge, a copy of which is annexed hereto, having been filed with the Board in Washington, D.C.,

IT IS ORDERED, pursuant to Section 102.45 of the National Labor Relations Board's Rules and Regulations, that the above-entitled matter be transferred to and continued before the Board.

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

By direction of the Board:

Lester A. Heltzer



Executive Secretary

NOTE: Communications concerning compliance with the Decision of the Administrative Law Judge should be with the Director of the Regional Office issuing the complaint.

Attention is specifically directed to the excerpts from the Board's Rules and Regulations appearing on the pages attached hereto. **Note particularly the limitations on length of briefs and on size of paper, and that requests for extension of time must be served in accordance with the requirements of the Board's Rules and Regulations Section 102.114(a) & (i).**

Exceptions to the Decision of the Administrative Law Judge in this proceeding must be received by the Board's Office of the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570, on or before **September 14, 2009.**

EXHIBIT

tabbies

B

EXCERPTS FROM NATIONAL LABOR RELATIONS BOARD RULES AND REGULATIONS

Sec. 102.46 *Exceptions, cross-exceptions, briefs, answering brief, time for filing; where to file; service on the parties; extension of time; effect of failure to include matter in exceptions; reply briefs; oral arguments.* -(a) Within 28 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to Section 102.45, any party may (in accordance with Section 10(c) of the Act and Sections 102.111 and 102.112 of these rules) file with the Board in Washington, D.C., exceptions to the administrative law judge's decision or to any other part of the record or proceedings (including rulings upon all motions or objections), together with a brief in support of said exceptions. Any party may, within the same period, file a brief in support of the administrative law judge's decision. The filing of such exceptions and briefs is subject to the provisions of paragraph (j) of this section. Requests for extension of time to file exceptions or briefs shall be in writing and copies thereof shall be served promptly on the other parties.

(b)(1) Each exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception. If a supporting brief is filed, the exceptions document shall not contain any argument or citation of authority in support of the exceptions, but such matters shall be set forth only in the brief. If no supporting brief is filed the exceptions document shall also include the citation of authorities and argument in support of the exceptions, in which event the exceptions document shall be subject to the 50-page limit as for briefs set forth in Sec. 102.46(j).

(2) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

(c) Any brief in support of exceptions shall contain no matter not included within the scope of the exceptions and shall contain, in the order indicated, the following:

(1) A clear and concise statement of the case containing all that is material to the consideration of the questions presented.

(2) A specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate.

(3) The argument presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page reference to the record and the legal or other material relied on.

(d)(1) Within 14 days, or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, a party opposing the exceptions may file an answering brief to the exceptions, in accordance with the provisions of paragraph (j) of this section.

(2) The answering brief to the exceptions shall be limited to the questions raised in the exceptions and in the brief in support thereof. It shall present clearly the points of fact and law relied on in support of the position taken on each question. Where exception has been taken to a factual finding of the administrative law judge and it is proposed to support that finding, the answering brief should specify those pages of the record which, in the view of the party filing the brief, support the administrative law judge's finding.

(3) Requests for extension of time to file an answering brief to the exceptions shall be in writing and copies thereof shall be served promptly on the other parties.

(e) Any party who has not previously filed exceptions may, within 14 days, or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, file cross-exceptions to any portion of the administrative law judge's decision, together with a supporting brief, in accordance with the provisions of paragraphs (b) and (j) of this section.

(f)(1) Within 14 days, or such further period as the Board may allow, from the last date on which cross-exceptions and any supporting brief may be filed, any other party may file an answering brief to such cross-exceptions in accordance with the provisions of paragraphs (c) and (j) of this section. Such answering brief shall be limited to the questions raised in the cross-exceptions.

(2) Requests for extension of time to file cross-exceptions, or answering brief to cross-exceptions, shall be in writing and copies thereof shall be served promptly on the other parties.

(g) No matter not included in exceptions or cross-exceptions may thereafter be urged before the Board, or in any further proceeding.

(h) Within 14 days from the last date on which an answering brief may be filed pursuant to paragraph (d) or (f) of this section, any party may file a reply brief to any such answering brief. Any reply brief filed pursuant to this subsection shall be limited to matters raised in the brief to which it is replying, and shall not exceed 10 pages. No extensions of time shall be granted for the filing of reply briefs, nor shall permission be granted to exceed the 10 page length limitation. Eight copies of any reply brief shall be filed with the Board, copies shall be served on the other parties, and a statement of such service shall be furnished. No further briefs shall be filed except by special leave of the Board. Requests for such leave shall be in writing and copies thereof shall be served promptly on the other parties.

(i) Should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board simultaneously with the statement of any exceptions or cross-exceptions filed pursuant to the provisions of this section with a statement of service on the other parties. The Board shall notify the parties of the time and place of oral argument, if such permission is granted.

(j) Exceptions to administrative law judges' decisions, or to the record, and briefs shall be printed or otherwise legibly duplicated. Carbon copies of typewritten matter will not be accepted. Eight copies of such documents shall be filed with the Board in Washington, D.C., and copies shall also be served promptly on the other parties. All documents filed pursuant to this section shall be double spaced on 8-1/2 by 11-inch paper. Any brief filed pursuant to this section shall not be combined with any other brief, and except for reply briefs whose length is governed by paragraph (h) of this section, shall not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the Board by motion, setting forth the reasons therefor, filed not less than 10 days prior to the date the brief is due. Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page references and an alphabetical table of cases and other authorities cited.

Sec. 102.47 *Filing of motion after transfer of case to Board.*--All motions filed after the case has been transferred to the Board pursuant to Section 102.45 shall be filed with the Board in Washington, D.C., by transmitting eight copies thereof to the Board, together with an affidavit of service upon the parties. Such motions shall be printed or otherwise legibly duplicated: *Provided, however*, that carbon copies of typewritten matter shall not be filed and if submitted will not be accepted.

Sec. 102.48 *Action of the Board upon expiration of time to file exceptions to administrative law judge's decision; decisions by the Board; extraordinary postdecisional motions.* --(a) In the event no timely or proper exceptions are filed as herein provided, the findings, conclusions, and recommendations contained in the administrative law judge's decision shall, pursuant to Section 10(c) of the Act, automatically become the decision and order of the Board and become its findings, conclusions, and order, and all objections and exceptions thereto shall be deemed waived for all purposes.

(b) Upon the filing of timely and proper exceptions, and any cross-exceptions, or answering briefs, as provided in Section 102.46, the Board may decide the matter forthwith upon the record, or after oral argument, or may reopen the record and receive further evidence before a member of the Board or other Board agent or agency, or may make other disposition of the case.

(c) Where exception is taken to a factual finding of the administrative law judge, the Board, in determining whether the finding is contrary to a preponderance of the evidence, may limit its consideration to such portions of the record as are specified in the exceptions, the supporting brief, and the answering brief.

(d)(1) A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing *de novo* and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

(2) Any motion pursuant to this subsection shall be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order, except that a motion for leave to adduce additional evidence shall be filed promptly on discovery of such evidence. Copies of any request for an extension of time shall be served promptly thereof on the other parties.

(3) The filing and pendency of a motion under this provision shall not operate to stay the effectiveness of the action of the Board unless so ordered. A motion for reconsideration or for rehearing need not be filed to exhaust administrative remedies.

Sec. 102.111 Time computation. - (a) In computing any period of time prescribed or allowed by these rules, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the official closing time of the receiving office on the next Agency business day. (*The closing time of the Board in Washington, D.C. is 5 p.m. local time*). When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation.

(b) When the Act or any of these rules require the filing of a motion, brief, exception, or other paper in any proceeding, such document must be received by the Board or the officer or agent designated to receive such matter before the official closing time of the receiving office on the last day of the time limit, if any, for such filing or extension of time that may have been granted. A request for an extension of time to file a document shall be filed no later than the official closing time of the receiving office on the date on which the document is due. Requests for extensions of time filed within three days of the due date must be grounded upon circumstances not reasonably foreseeable in advance. In construing this section of the rules, the Board will accept as timely filed any document which is hand delivered to the Board on or before the official closing time of the receiving office on the due date or postmarked on the day before (or earlier than) the due date; documents which are postmarked on or after the due date are untimely. "Postmarking" shall include timely depositing the document with a delivery service that will provide a record showing that the document was tendered to the delivery service in sufficient time for delivery by the due date, but in no event later than the day before the due date. Provided, however, the following documents must be received on or before the official closing time of the receiving office on the last day for filing:

- (1) Charges filed pursuant to section 10(b) of the Act (see also Sec. 102.14).
- (2) Applications for awards and fees and other expenses under the Equal Access to Justice Act.
- (3) Petitions to revoke subpoenas.
- (4) Requests for extensions of time to file any document for which such an extension may be granted.

(c) The following documents may be filed within a reasonable time after the time prescribed by these rules only upon good cause shown based on excusable neglect and when no undue prejudice would result:

- (1) In unfair labor practice proceeding, motions, exceptions, answers to a complaint or a backpay specification, and briefs; and
- (2) In representation proceedings, exceptions, requests for review, motions, briefs, and any responses to any of these documents. A party seeking to file such documents beyond the time prescribed by these rules shall file, along with the documents, a motion that states the grounds relied on for requesting permission to file untimely. The specific facts relied on to support the motion shall be set forth in affidavit form and sworn to by individuals with personal knowledge of the facts. The time for filing any document responding to the untimely document shall not commence until the date a ruling issues accepting the untimely document. In addition, cross-exceptions shall be due within 14 days, or such further period as the Board may allow, from the date a ruling issues accepting the untimely filed documents.

Sec 102.112 Date of service; date of filing. - The date of service shall be the day when the matter served is deposited in the United States mail, or is deposited with a private delivery service that will provide a record showing the date the document was tendered to the delivery service, or is delivered in person, as the case may be. Where service is made by facsimile transmission, the date of service shall be the date on which transmission is received. The date of filing shall be the day when the matter is required to be received by the Board as provided by § 102.111.

Sec 102.113 Method of service of process and papers by the Agency; proof of service.

(a) Service of complaints and compliance specifications. Complaints and accompanying notices of hearing, compliance specifications, and amendments to either complaints or to compliance specifications, shall be served upon all parties either personally or by registered or certified mail or by telegraph, or by leaving a copy thereof at the principal office or place of business of the person required to be served.

(b) Service of final orders and decisions. Final orders of the Board in unfair labor practice cases and administrative law judges' decisions shall be served upon all parties either personally or by registered or certified mail or by telegraph, or by leaving a copy thereof at the principal office or place of business of the person required to be served.

(c) Service of subpoenas. Subpoenas shall be served upon the recipient either personally or by registered or certified mail or by registered or certified mail or by telegraph, or by leaving a copy thereof at the principal office or place of business of the person required to be served.

(d) Service of other documents. Other documents may be served by the Agency by any of the foregoing methods as well as regular mail or private delivery service. Such other documents may be served by facsimile transmission with the permission of the person receiving the document.

(e) Proof of service. In the case of personal service, or delivery to a principal office or place of business, the verified return by the individual so serving the same, setting forth the manner of such service, shall be proof of the same. In the case of service by mail or telegraph, the return post office receipt or telegraph receipt therefor when registered or certified and mailed or when telegraphed shall be proof of service of the same. However, these methods of proof of service are not exclusive; any sufficient proof may be relied upon to establish service.

(f) Service upon representatives of parties. Whenever these rules require or permit the service of pleadings or other papers upon a party, a copy shall also be served on any attorney or other representative of the party who has entered a written appearance in the proceeding on behalf of the party. If a party is represented by more than one attorney or representative, service upon any one of such persons in addition to the party shall satisfy this requirement. Service by the Board or its agents of any documents upon any such attorney or other representative may be accomplished by any means of service permitted by these rules, including regular mail.

Sec. 102.114 *Service of papers by parties; form of papers; proof of service; filing and serving documents and papers by facsimile transmission* (a) Service of documents by a party on other parties may be made personally, or by registered mail, certified mail, regular mail, electronic mail (if the document was filed electronically) or private delivery service. Service of documents by a party on other parties by any other means, including facsimile transmission, is permitted only with the consent of the party being served. Unless otherwise specified elsewhere in these rules, service on all parties shall be made in the same manner as that utilized in filing the document with the Board, or in a more expeditious manner; however, when filing with the Board is done by hand, the other parties shall be promptly notified of such action by telephone, followed by service of a copy in a manner designed to insure receipt by them by the close of the next business day. The provisions of this section apply to the General Counsel after a complaint has issued, just as they do to any other party, except to the extent that the provisions of §§ 102.113(a) or 102.113(c) provide otherwise.

(b) When service is made by registered mail, or by certified mail, the return post office receipt shall be proof of service. When service is made by a private delivery service, the receipt from this service showing delivery shall be proof of service. However, these methods of proof of service are not exclusive; any sufficient proof may be relied upon to establish service.

(c) Failure to comply with the requirements of this section relating to timeliness of service on other parties shall be a basis for either:

(1) a rejection of the document; or

(2) Withholding or reconsidering any ruling on the subject matter raised by the document until after service has been made and the served party has had reasonable opportunity to respond.

(d) Papers filed with the Board, General Counsel, Regional Director, Administrative Law Judge, or Hearing Officer shall be typewritten or otherwise legibly duplicated on 8-1/2 by 11-inch plain white paper, shall have margins no less than one inch on each side, shall be in a typeface no smaller than 12 characters-per-inch (elite or the equivalent), and shall be double spaced (except that quotations and footnotes may be single spaced). Carbon copies shall not be filed and will not be accepted. Non-conforming papers may, at the Agency's discretion, be rejected.

(e) The person or party serving the papers or process on other parties in conformance with sections §102.113 and paragraph (a) of this section shall submit a written statement of service thereof to the Board stating the names of the parties served and the date and manner of service. Proof of service as defined in section (a) of this section shall be required by the Board only if subsequent to the receipt of the statement of service a question is raised with respect to proper service. Failure to make proof of service does not affect the validity of the service.

(f) Unfair labor practice charges, petitions in representation proceedings, objections to elections, and requests for extensions of time for filing documents will be accepted by the Agency if transmitted to the facsimile machine of the office. Other documents, except those specifically prohibited in paragraph (g) of this section, will be accepted by the Agency if transmitted to the facsimile machine of the office designated to receive them only with advance permission from the receiving office which may be obtained by telephone. Advance permission must be obtained for each such filing. At the discretion of the receiving office, the person submitting a document by facsimile may be required simultaneously to serve the original and any required copies on the office by overnight delivery service. When filing a charge, a petition in a representation proceeding, or election objections by facsimile transmission pursuant to this section, receipt of the transmitted document by the Agency constitutes filing with the Agency. A failure to timely file or serve a document will be excused on the basis of a claim that transmission could not be accomplished because the receiving machine was off-line or busy or unavailable for any other reason.

(g) Facsimile transmissions of the following documents will not be accepted for filing: Showing of Interest in Support of Representation Petitions, including Decertification Petitions; Answers to complaints; Exceptions or Cross-Exceptions; Briefs; Requests for Review of Regional Director Decisions; Administrative Appeals from Dismissal of Petitions or Unfair Labor Practice Charges; Objections to Settlements; EAJA Applications; Motions for Summary Judgment; Motions to Dismiss; Motions for Reconsideration; Motions to Clarify; Motions to Reopen the Record; Motions to Intervene; Motions to Transfer, Consolidate or Sever; or Petitions for Advisory Opinions. Facsimile transmissions in contravention of this rule will not be filed.

(h) Documents and other papers filed through facsimile transmission shall be served on all parties in the same way as used to serve the office where filed, or in a more expeditious matter, in conformance with paragraph (a) of this section. Thus, facsimile transmission shall be used for this purpose whenever possible. When a party cannot be served by this method, or chooses not to accept service by facsimile as provided for in paragraph (a) of this section, the party shall be notified personally or by telephone of the substance of the transmitted document and a copy of the document shall be served by personal service or overnight delivery service.

(i) The Agency's Web site (<http://www.nlr.gov>) contains certain forms that parties or other persons are permitted to file with the Agency electronically. Parties or other persons choosing to utilize those forms to file documents electronically are permitted to do so by following the instructions described on the Web site, notwithstanding any contrary provisions elsewhere in these rules. In the event the document being filed electronically is required to be served on another party to a proceeding, the other party shall be served by electronic mail (e-mail), if possible. If the other party does not have the ability to receive electronic service, the other party shall be notified by telephone of the substance of the transmitted document and a copy of the document shall be served by personal service no later than the next day, by overnight delivery service, or, with the permission of the party receiving the document, by facsimile transmission.

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

CRETE COLD STORAGE, LLC

and

Case 17-CA-24469

UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, AFL-CIO, CLC, LOCAL NO. 271

Susan A. Wade-Wilhoit, Esq. for the General Counsel.
*Matthew Brick, Esq. and Douglas Fulton, Esq. (Brick
Gentry P.C.)*, of West DeMoines, Iowa, for the
Respondent.

Lauren M. Fletcher, Esq. (Blake & Uhlig, P.A.) of Kansas
City, Kansas, for the Charging Party.

DECISION

Statement of the Case

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

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

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

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

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

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

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

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

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

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

35 Mr. Steve Barker
Plant Manager
40 Crete Cold Storage

....
RE: Crete Cold Storage CBA

45 This letter is sixty (60) days notice prior to March 31, 2009 as required in ARTICLE XXIII - TERM OF AGREEMENT of our desire to terminate the Agreement between Crete Cold Storage and this organization.

50 The purpose of his termination notice is to commence negotiations for a new labor agreement to replace the one presently in effect.

We will be in contact with you to schedule negotiations.

Brian Schwisow
President
UFCW LOCAL 271

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

10 Mr. Steve Barker
Plant Manager
Crete Cold Storage

....
RE: Information Request

15 In order to properly represent the employees in our bargaining unit in upcoming contract negotiations, would you please supply me with the following information, which should be for the fifty-two (52) week period ending December 31, 2008 as it pertains to our bargaining unit.

- 20 1. Current seniority list by classification, date of hire, rate of pay (and whether an employee is part time or temporary, if any).
- 2. Average weekly number of employees and hours worked by job classification and wage rate.
- 3. Total straight time hours worked.
- 4. Overtime hours and total premium expense.
- 25 5. Paid sick time hours and total expense.
- 6. Funeral Leave hours paid and total expense.
- 7. Jury duty total hours paid and total expense.
- 8. Saturday or Sixth Day premium hours paid, if applicable and total expense.
- 9. Sunday or Seventy Day premium hours paid and total expense.
- 30 10. Holiday hours worked and total expense.
- 11. Holiday hours (paid but not worked) and total expense.
- 12. Night premium hours by premium rate and total expense.
- 13. Vacation paid, including the number of employees with 1, 2, 3, 4, or 5 weeks of vacation for all employees.
- 35 14. Any bonus given to the employees and the total expense.
- 15. Total annual cost of health insurance. If more than one rate/plan of coverage, the number of employees at each specific rate/plan.
- 16. Total annual cost of pension.
- 17. If appropriate, the number of hours for which call-in-pay was paid, the number of those hours worked and total call-in expense.
- 40 18. Annual mandated benefit expenses:
 - Employer's Social Security _____
 - Unemployment Compensation _____
 - 45 Worker's Compensation _____

I would appreciate receiving this data no later than February 21, 2009 so that I may properly represent our members under the law.

50 Brian Schwisow
President
UFCW LOCAL 271

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

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

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

In addition, the purpose of this letter is to inform you that Jessica Placek, not Steve Barker, is the Plant Manager at the Crete cold Storage facility [3]

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

Burke testified that sometime after he received a request for information regarding upcoming negotiations he received a telephone call from Respondent's plant manager, Placek, about employee Javier Garcia; that Placek told him that an office assistant, Sandra Franco, told Placek that Garcia "wanted to get out of the union" (transcript page 17); that he interpreted this to mean that Garcia did not want the Union to represent him anymore; that he then contacted Respondent's attorney; that at the time, January 2009, he knew that the involved collective-bargaining agreement covered five or six employees at Respondent but Garcia was the only dues paying member; that he did not know if the other employees were paying dues in some other way than dues check off; that based on his conversation with Placek, Respondent announced its intent to withdraw recognition from the Union on February 20, 2009; that at the time that the letter was sent to the Union announcing the intent to withdraw recognition, the only evidence that he had that the Union no longer represented Respondent's employees was that Garcia wanted out of the Union and he, Burke, interpreted that to mean that he did not want the Union to represent him anymore; that was the sole evidence that he had at the time; that while union representative Linda Lee came to the Crete facility infrequently, he did not know if she had contact with the employees outside the facility; that neither he nor Placek had talked to any employees directly about their feelings regarding the Union; and that as of the time of the trial herein, Garcia was still a dues paying member of the Union.

When called by General Counsel as a 611(c) witness, Placek testified that she has been plant manager for two and one half years; that before this she was Crete's office manager for two and one half years; that in January 2009 an office clerical employee, Franco, told her that Garcia wanted out of the union, and he talked to his supervisor, Samuel Sanchez, about stopping the payment of his dues; that this is the sum of her conversation with Franco; that after here conversation with Franco, she telephoned Burke and told him what Franco had said; that

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

she and Burke obtained a telephone number and website information from the Board, and she told Franco to give the information to Garcia; that she had a second conversation with Franco who told her that Garcia telephoned the Board but he could not get anyone to speak with because he speaks Spanish; that she reported this second conversation with Franco to Burke; that at the time of the trial herein union dues were still being deducted from Garcia's paycheck; and that the only other employee that she ever talked with about the union was Tony Sanchez in 2006 when he was in the unit and he told her that he did not want to pay union dues.

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

Also in response to questions of Respondent's attorney, Placek testified that Schwisow is the current Union president; that she spoke with Schwisow once, namely in the first part of 2009 when he came by her office to give her a letter; that the letter may have requested information, and she forwarded it on; that union representative Lee, came to the plant once a month or every other month for 5 years; that a couple of years ago Lee was intermingling with the temporary staffing agency employees and they complained; that she asked Lee to meet the employees in one room where everybody who wanted to see her could go to the room to see her; that at the time Donna McDonald was president of the Union; that she discussed the matter with McDonald because there were safety concerns with a nonemployee being in the plant; that subsequently McDonald would telephone her when Lee was coming to the plant and she would put up the same sign on all of the doors, except for the date, to notify the employees about Lee's visits⁴; that she asked supervisor Samuel Sanchez, who was in charge of all of facility at the time, to make sure that everybody knew so they would go to the break room but they would not go; that she told Jelinek and Nigg when Lee was going to be at the Crête facility; that it would have been Samuel Sanchez's responsibility to tell Garcia since Sanchez speaks Spanish; that when Lee was in the break room the employees in the bargaining unit went outside; that Samuel Sanchez relayed bargaining unit complaints to her about how do they get rid of it, how do they decertify, what do they need to do⁵; and that she did not take any action on hearing these things because she had been instructed very clearly that she was not to be involved in that, "[a]nd I need by job" (transcript page 53).

⁴ The sign reads as follows:

Linda Lee (Union Rep)
will be here today
Thursday (Feb. 19th)
at noon.
She will be meeting
in the front break
room if you would like to meet with her
on your lunch break.

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

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

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

15 20 In response to questions of Respondent's attorney, Samuel Sanchez testified that he is a friend of Garcia; that Garcia does not speak English; that Garcia came to him and asked him to ask Lee for him how to get out of the Union; that when he asked Lee the question she directed Garcia to a Union poster with a telephone number on it; that Lee came to Crete's facility once a month or once every two months; that he never saw any employees talking with Lee at Respondent's facility, except for the time he accompanied Garcia to speak with Lee; that three days before Lee would come to Crete's facility Respondent would put up some signs in English and Spanish on the doors and the windows to let the employees know Lee was coming to Respondent's facility; and that, as a supervisor, he is not allowed to talk with the employees about the Union.

25 30 On redirect Samuel Sanchez testified that he did not have indications from employees that they did not want to be members of the Union; that Garcia told him that he wanted to get out of the Union because they were taking too much of his money, and this is what he told Lee⁶; and that when he spoke with Lee on behalf of Garcia, Lee told him to tell Garcia to write a letter asking to get out of the Union.

35 40 When called by General Counsel Garcia testified that he has worked at Crete for four years; that he belongs to the Union that represents Crete's employees; that about a year ago he decided that he wanted to resign from the Union; that he asked his supervisor, Samuel Sanchez, what he could do to get out of the Union; that Sanchez told him that he had to speak with Lee; that around the first of the year he spoke with Lee, using Sanchez as an interpreter; that he asked Lee what he could do to get out of the Union, and Lee told him that he had to write a letter and she pointed to the bulletin board; that at no point did he tell Lee that he wanted to get rid of the Union; and that he did not speak with anyone else about resigning from the Union.

45 50 ⁶ Subsequently, Samuel Sanchez testified that initially Garcia only told him that he wanted to get out of the Union.

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

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

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

25 Schwisow testified that he received General Counsel's Exhibit 12 around February 20, 2009⁷; that at the time he did not know how many employees were in the bargaining unit because Crete never gave the Union a current seniority list in response to the Union's January 13 and 28, 2009 requests; and that Garcia is a member of the Union, he was a member of the Union on April 1, 2009, and the Union has never received a letter from Garcia indicating that he wanted to withdraw his membership. On cross-examination Schwisow testified that he never responded to
30 Brick's invitation to provide "substantial evidence" that a majority of Crete's employees support the Union.

In response to questions of Respondent's attorney, Burke testified that he determined who was a dues paying member at Crete from Placek and Respondent's payroll department;
35 that since he has been CEO of Omaha Industries he has "had ... employees who don't do dues check off if they're in the union" (transcript page 20); that he does not know of other employees that directly pay their dues to the union; that to the best of his knowledge the dues payments are "always through dues check off" (Id. at 21); that he does not get notification from the Union as far as who is in the Union; that he has never talked to Brian Schwisow, who is president of the
40 Union; that his office is in Omaha, Nebraska; that Placek is responsible for the day-to-day operations of the involved facility; that Placek told him, with respect to union activity at the involved plant in early 2009, that it was minimal at best; that Placek told him that the union representative came to the plant on an infrequent, inconsistent basis; that when he sent the letter to Respondent's attorney, Brick, indicating that Respondent intended to withdraw
45 recognition at the end of the then current contract, he did not believe that there was any majority interest in the collective bargaining unit for union representation; that he has not spoken with Garcia, who speaks very little English, about this matter; that he does not speak Spanish; that the letter which was sent to the Union notifying it that Respondent withdrew recognition requested the Union to provide any information that would contradict Respondent's position that
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⁷ The letter is erroneously dated "February 20, 2008."

the Union did not have majority support; and that he did not receive anything from the Union that contradicted Respondent's position.

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

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

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

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

Analysis

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

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

50 *Champion Home Builders Co.* can be distinguished since in that case the Board found that the Respondent did not violate the Act when it withdrew recognition from the union involved

there. In the instant case, Crete did violate the Act when it withdrew recognition from the Union. Respondent's second argument set forth above certainly is not lacking in originality. The argument is so original that Respondent does not cite any precedent to support it. Whatever Respondent provided on the date of the hearing in response to a Subpoena Duces Tecum served by the Union's attorney upon the Employer was not made a matter of record.

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

Q Do you know whether your field representative had any of the information that you requested in General Counsel's Exhibit 10?

A No, I don't.

General Counsel on brief submits that under the Act an employer is obligated upon request to furnish the Union with information which is potentially relevant and which would be useful to the Union in discharging its statutory duties such as the representation of its bargaining unit members and contract negotiation, *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); that the standard for relevance is a "liberal discovery-type standard," *Id.*; that, with respect to the January 13, 2009 request, an employer does not satisfy its obligation to furnish information by providing only some of the information requested, *Airport Aviation Services*, 292 NLRB 823 (1989); that the January 28, 2009 request sought information concerning employees' wages, benefits, and other compensation, which information is presumptively relevant, *Industrial Welding Company*, 175 NLRB 477 (1969); and that if Respondent claims that it was under no obligation to produce the information after its announced withdrawal of recognition, Respondent's argument is specious at best. While Respondent's expressed (its letter) future intent to withdraw recognition is dated one day before the deadline, February 21, 2009, it received from the Union for providing the information sought in the Union's January 28, 2009 letter, it is noted that in its February 20, letter Respondent indicates " [t]herefore, unless Crete Cold Storage receives substantial evidence to the contrary, upon termination of the existing collective bargaining agreement Crete Cold Storage will withdraw recognition from the union and no longer agree to bargain." Crete could not, under the circumstances extant here, and did not withdraw recognition on February 20, 2009. The Union's information requests were made during the term of its collective-bargaining agreement with Crete, and the information, which is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative, should have been provided during the term of that agreement. For the reasons specified above, Respondent violated the Act as collectively alleged in paragraphs 7 and 8 of the complaint.

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

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

5 After careful consideration, we have concluded that there are compelling legal
and policy reasons why employers should not be allowed to withdraw recognition merely
because they harbor uncertainty or even disbelief concerning unions' majority status. We
therefore hold that an employer may unilaterally withdraw recognition from an incumbent
10 union only where the union has actually lost the support of the majority of the bargaining
unit employees, and we overrule *Celanese [Corp.]*, 95 NLRB 664 (1951)] and its progeny
insofar as they permit withdrawal on the basis of good faith doubt. Under our new
standard, an employer can defeat a post-withdrawal refusal to bargain allegation if it
shows, as a defense, the union's actual loss of majority status.

15 We emphasize that an employer with objective evidence that the union has lost
majority support – for example, a petition signed by a majority of the employees in the
bargaining unit – withdraws recognition at its peril. If the union contests the withdrawal of
recognition in an unfair labor practice proceeding, the employer will have to prove by a
preponderance of the evidence that the union had, in fact, lost majority support at the
20 time the employer withdrew recognition. If it fails to do so, it will not have rebutted the
presumption of majority status, and the withdrawal of recognition will violate Section
8(a)(5). [Footnote omitted and emphasis added]

25 Respondent has the burden of showing that the Union had, in fact, lost majority support
at the time the employer withdrew recognition. Respondent has not made this showing. As
noted above, an employer may unilaterally withdraw recognition from an incumbent union only
where the union has actually lost the support of the majority of the bargaining unit employees,
and when the employer unilaterally withdraws recognition based on objective evidence it acts at
its peril. At the time the Respondent withdrew recognition it knew that only one of the employees
30 in the bargaining unit, Garcia, was having the Respondent deduct union dues from his
paycheck. But as Burke conceded, he did not know at the time the employer withdrew
recognition if the other employees in the unit were paying union dues in some way other than
dues check off. Therefore, the fact that the dues check off authorizations had declined to just
Garcia is not determinative. Placek's testimony about discussions that Samuel Sanchez
35 allegedly had with employees in the bargaining unit over the years about the Union is not
credited.⁸ The fact that the Union did not fill the position vacated by Johnson would not support
a good faith doubt defense, which is no longer applicable with respect to a withdrawal, let alone
meet Respondent's burden of showing that that the union had, in fact, lost majority support. As

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

noted above, Burke testified that that at the time that the letter was sent to the Union announcing the intent to withdraw recognition, the only evidence that he had that the Union no longer represented a majority of Respondent's employees was that Garcia wanted out of the Union and he, Burke, interpreted that to mean that he did not want the Union to represent him anymore; that was the sole evidence that he had at the time; that while union representative Lee came to the Crete facility infrequently, Burke did not know if she had contact with the employees outside the facility; that neither he nor Placek had talked to any employees directly, including Garcia, about their feelings regarding the Union; and that as of the time of the trial herein, Garcia was still a dues paying member of the Union. None of that which was raised by the Respondent proves by a preponderance of the evidence that, at the time the employer withdrew recognition, the Union had actually lost the support of the majority of the bargaining unit employees.⁹ The Respondent violated the Act as collectively alleged in paragraphs 6 and 8 of the complaint.

Conclusions of Law

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

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

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

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

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

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

All full-time and regular part-time warehouse, scale, quality assurance, truck wash, maintenance, lead and sanitation employees employed by the Employer at its facility located at 2220 County Road "I", Crete, Nebraska, but excluding all office clerical

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

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

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

employees, engineers, temporary employees, managers, guards and supervisors as defined in the Act.

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

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

Remedy

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

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

25 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

30 ¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes. For the reasons set forth in *Caterair International*, 322 NLRB 64, (1996), an affirmative bargaining order is warranted as a remedy for Crete Cold Storage, LLC's unlawful withdrawal of recognition from the Union. An affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." *Id.* at 68.

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

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

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

Continued

ORDER

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

1. Cease and desist from

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

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

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

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

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

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

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

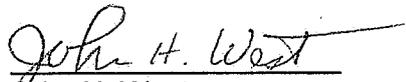
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 40 (3) A cease-and-desist order, alone, would be inadequate to remedy the Respondent's withdrawal of recognition and refusal to bargain with the Union because it would allow another such challenge to the Union's majority status before the taint of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

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

5 (c) Within 14 days after service by the Region, post, in English and Spanish, at its facility in Crete, Nebraska copies of the attached Notice marked "Appendix."¹¹ Copies of the Notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the
10 Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by the Respondent at any time since January 13, 2009.

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

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


John H. West
Administrative Law Judge

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50 ¹¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT withdraw recognition of UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, LOCAL NO. 271 as your exclusive collective-bargaining representative and fail, and refuse to recognize and bargain with UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, LOCAL NO. 271 as your exclusive representative.

WE WILL NOT fail and refuse to furnish UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, LOCAL NO. 271 with the necessary and relevant information UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, LOCAL NO. 271 requested.

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

WE WILL on request, bargain with UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, LOCAL NO. 271 as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

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

WE WILL furnish the necessary and relevant information requested by UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, LOCAL NO. 271.

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

8600 Farley Street, Suite 100

Overland Park, Kansas 66212-4677

Hours: 8:15 a.m. to 4:45 p.m.

913-967-3000.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 913-967-3005.

TABLE OF AUTHORITIES

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I. INTRODUCTION

This matter arises from an Election Petition and Unfair Labor Charge filed by the United Food and Commercial Workers International Union, AFL-CIA, CLC, Local No. 271 (“Union”), on or about April 1, 2009 against Crete Cold Storage (“Employer”). The initial Unfair Labor Charge alleged the Employer had “failed and refused to bargain in good faith ... by withdrawing recognition” from the Union. An Amended Unfair Labor Charge was filed on or about May 15, 2009 asserting, in addition, that Crete Cold Storage committed an additional unfair labor practice by failing to provide requested bargaining information to the Union.

The Employer agreed with and joined in the Union’s request for an election to quickly and conclusively resolve the matter; however, on May 14, 2009, the NLRB notified the Employer that it had approved the withdrawal of the Union’s Election Petition—despite the Employer’s Joinder. Ultimately, a hearing on the Unfair Labor Charge was held on June 24, 2009 in Lincoln, Nebraska before Administrative Law Judge John West. Attorney Susan Wade-Wilhoit appeared on behalf of General Counsel, Attorney Lauren M. Fletcher appeared on behalf of the Charging Party, and Attorney Douglas A. Fulton appeared on behalf of the Respondent.

II. STATEMENT OF FACTS

Crete Cold Storage is a company that is involved in the processing and cold storage of both edible and inedible products in Crete, Nebraska. Transcript (“Tr.”) p. 14. On or about January 27, 2005, an election was conducted at Employer’s facility whereby the Union was selected as the collective bargaining representative of employees falling within the designated bargaining unit. Tr. p. 14. The Employer and Union entered into a Collective Bargaining Agreement with a term of April 1, 2006 through March 31, 2009. Tr. p. 15.

The Union's April 1, 2009, Election Petition alleges that eleven (11) employees are part of the bargaining unit; however, Employer's position is that there are only three (3) bargaining unit employees. Tr. p. 43. Of those 3 employees, only Javier Garcia has had any involvement with the Union. Tr. p. 18; Gen. Counsel Ex. 6. The Employer was aware of this fact because Union dues for members were always collected by automatic deductions from the employees' paychecks through the dues check-off program, which was provided to the Union. Tr. p. 21.

Throughout the contract period—but especially during the calendar years of 2008-09—the Employer began to learn that none of the Crete Cold Storage bargaining unit employees showed any interest in the Union or in Union activities. For example, none of the employees would meet with Linda Lee, the Union representative, when she would come to visit the plant despite the Employer's posting of signs informing employees of her visit. Tr. pp. 47-49, 52, 72. In addition to the posting of signs, plant manager Jessica Placek would talk to employees during Ms. Lee's visit and remind them that a union representative was at the plant for them to go speak with. Tr. pp. 49-50. Despite the Employer's notices, no employees would meet with Ms. Lee. Tr. pp. 47-79, 52, 72.

Also during the calendar years 2008-09, the Employer heard complaints from employees regarding the Union, how the employees did not want a Union, and how the Union representatives did nothing for the employees. Tr. pp. 51-52, 60. When the bargaining unit was originally organized, eight (8) employees out of fourteen (14) voted for the Union. General Counsel Ex. 3. Initially five (5) bargaining unit employees were involved and paying Union dues; however, at the time the contract expired, there was only one (1) employee paying dues and none of the employees were involved in the Union. Tr. p. 56. No one who has come to

work for the Employer in the last four years has become involved with the Union and none has chosen to pay dues. Tr. p. 57.

In early 2009, the Employer learned that Javier Garcia no longer wished to be part of the Union or pay Union dues. Tr. p. 17. Mr. Garcia asked Sandra Franco, a co-employee, to assist him in contacting the NLRB because he did not speak English and could not communicate with Ms. Lee but he wanted out of the Union and did not want to pay Union dues. Tr. p. 65. Mr. Garcia had initially called the NLRB but was unable to speak with someone who spoke his language. Tr. pp. 65, 86. Despite Ms. Franco's assistance, he continued to have the Union dues deducted from his paychecks. Tr. pp. 65, 86.

Mr. Garcia also asked Sammy Sanchez, his supervisor and a bi-lingual speaker, to assist him with talking to the Union representative, Linda Lee, at the beginning of 2009 because Ms. Lee only spoke English and Mr. Garcia needed Mr. Sanchez to translate for him. Tr. pp. 68, 71-72. Mr. Garcia, through Mr. Sanchez, informed Ms. Lee that he no longer wanted to be in the Union or pay dues, and asked her how to get out. Tr. p. 72. Ms. Lee did not provide any assistance other than directing Mr. Garcia to a poster with contact information and telling him to write a letter to the Union. Tr. pp. 72, 77. Ms. Lee took no other action to assist, counsel or even ask Mr. Garcia why he did not wish to remain in the Union. Tr. pp. 72, 77.

Finally, Mr. Garcia attempted to contact the Union but the telephone call was answered by the Union's answering machine in English. Tr. p. 85. Mr. Garcia did write a letter to the Union asking the Union to stop charging him Union dues and stating that he no longer wanted them to represent him. Tr. p. 86. Despite all of this, the Union continued to deduct Union dues from Mr. Garcia's paycheck. Tr. pp. 84, 87. As the only active (albeit involuntary) member of

the Union, Mr. Garcia testified that he is unaware of *any other employee* at the plant who wants to be represented by the Union. Tr. p. 87.

Based on the above information, when Mr. Garcia, the only member of the Union, informed the Employer that he no longer wished to be part of or be represented by the Union, the Employer had knowledge that it was likely the Union did not represent a majority of the collective bargaining employees. Tr. p. 24. Further, the Employer's attorney investigated whether the Union had majority support and it was determined that it did not. Tr. pp. 22-23. As such—despite the inability to directly ask the bargaining unit employees about their support of the Union—the totality of the information received from the employees and legal counsel led the Employer to believe that the Union was not supported by a majority of the bargaining unit employees.

The Union requested Union employee seniority information for bargaining purposes on January 13, 2009. Tr. pp. 97-98. The Employer provided the requested information, namely a seniority list with Mr. Garcia's information. Tr. p. 98. The Union then requested additional bargaining information from Employer on January 28, 2009. Tr. p. 102. The request gave the Employer until February 20, 2009 to provide the information. *Id.*; NLRB Gen. Counsel Ex. 10. Based on the above knowledge, on February 20, 2009, the Employer sent the Union a letter informing it of the Employer's belief that the Union no longer represented a majority of the bargaining unit employees, that the Employer was, therefore, unable to bargain with the Union, and that the Employer intended to withdraw recognition when the current contract expired. Tr. pp. 19, 25, 104-05; Gen. Counsel Ex. 12. The letter asked the Union to provide any evidence that the Union, in fact, did represent a majority of the bargaining unit employees and/or if it felt that the Employer's position was unwarranted or erroneous. *Id.* However, at no time prior to the

filing of the Election Petition and Unfair Labor Charge did the Union contact the Employer regarding majority support or any other issues. Tr. pp. 19, 25, 112.

While the Union stated at hearing that it did not agree with the Employer's position regarding the complete lack of employee interest in the Union, it could offer no evidence to indicate the Union represented a majority—or any—of the bargaining unit employees. In fact, despite the Union's unsupported assertion that it did represent the employees in the bargaining unit, the Union admitted that it had no knowledge of (1) the number of employees, if any, actually in the bargaining unit; (2) whether the employees originally part of the bargaining unit at the time of certification were still employed with Employer; (3) why some employees had stopped paying dues; (4) who the Plant Manager was; or (5) whether the Union represented a majority of the bargaining unit employees. Tr. pp. 106-08, 111-112.

The Union not only had no knowledge of the basic information regarding Crete Cold Storage and its employees, it also made no attempt to procure the information from its Field Representative or other sources—despite the fact that the Union admitted its Field Representative had the requested information. Tr. p. 108, 111. Also of note is the fact that Union President, Brian Schwisow, testified he had never spoken with Mr. Garcia or any other member of the bargaining unit, and never asked his Field Representative to do any investigation regarding the Employer's position. Tr. p. 107. Finally, even counsel for the NLRB apparently concedes that the Union does not represent a majority of bargaining unit employees since she asked the Plant Manager at the June 2009 hearing, “[i]sn't it true that since certification the union has never had a majority of members from the bargaining unit?” Tr. p. 64.

Due to the complete lack of employee interest or involvement in the Union (aside from Mr. Garcia's unwilling payroll deductions), the Employer believes that an election remains the

quickest and most equitable way of resolving the dispute between the Employer and the Union. As stated above, on April 1, 2009, at the direction of Mr. Schwisow, the Union filed a Petition for Election. Tr. p. 26-27, 115; Resp. Ex. 1. The Employer filed a Joinder to the Petition requesting an election. Tr. pp. 27-28. Despite this, the NLRB approved the withdrawal of the Petition for Election—without input from the Employer—on May 14, 2009.

III. JURISDICTION

The Employer, a limited liability company with its principal place of business in Crete, Nebraska is engaged in the processing and cold storage of both inedible and edible products. Tr. p. 14. The parties stipulate that the Union is a labor organization within the meaning of the Act and that the Employer is engaged in commerce within the meaning of the Act.

IV. ARGUMENT

As an initial matter, this Unfair Labor Charge, like most all charges under the National Labor Relations Act, hinges upon finding that the alleged conduct was motivated by an anti-union purpose. *NLRB v. Great Dane Trailers, Inc.*, 388 US. 26 at 32-33 (1967) (finding a lack of anti-union animus for a charge brought under Section 8(a)(3)). In this case, there has been absolutely no evidence presented by the Union or the NLRB that the Employer's actions—in any way—were motivated by an anti-union animus. In fact, there is evidence that the Employer—through the Plant Manager—went beyond its obligations under the law and actively attempted to have employees meet with their union representatives. As such, the Employer respectfully requests a dismissal of all Unfair Labor Charges.

A. The Employer Did Not, In Bad Faith, Unlawfully or Unfairly Withdraw Recognition of the Union.

1. The Employer Had Requisite Knowledge of Lack of Majority Support to Support Withdraw of Recognition and the Union.

Pursuant to *Allentown Mack Sales and Service, Inc. v. NLRB*, an employer may withdraw recognition from a union at the end of the term of a collective bargaining agreement when the employer has a **good faith reasonable doubt**, based on objective evidence, of the union's lack of majority status. *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 368 (1998). The term "doubt" was clarified by the Court to mean uncertainty. *Id.* at 367. Further, the Court explained that the requirement of objective evidence does not focus on the force but rather the source of the evidence. *Id.* at 368.

Levitz Furniture Company of the Pacific, Inc., formerly Levitz Furniture Company of Northern California, Inc. d/b/a Levitz and United Food and Commercial Workers Union, Local 101, United Food and Commercial Workers International Union, AFL-CIO, Case 20-CA-26596 (NLRB 2001B.A.), held that an employer may withdraw recognition of a Union when there has been an actual loss of support of the majority of the bargaining unit. This standard requires that the employer need only have a **reasonable uncertainty** as to majority support. *Id.*

In *McDermott v. Dura Art Stone*, that court found, under *Levitz*, an employer has the right to honor a collective bargaining agreement until it expires and then either "(a) withdraw recognition or (b) file an RM petition." *McDermott v. Dura Art Stone*, 298 F. Supp. 2d 905, 910 (C.D. Cal. 2003). Either action insulates an employer from unfair labor practice liability arising out of the decision to unilaterally withdraw recognition of a union. *Id.* In this case, the Employer had actual knowledge of facts leading to the conclusion that the Union did not have majority status.

In the present case, the Employer had actual knowledge that, regardless of the size of the bargaining unit (*i.e.*, 11 versus 3), Mr. Garcia was the only employee paying dues and even he did not want to be represented by the Union. Tr. p. 24. The Employer had actual knowledge that none of the employees were willing to meet with the Union Representative and had, in fact, complained about the Union to management. Tr. p. 47-52, 72. The Employer had actual knowledge that it asked the Union, if it disagreed with the withdrawal of recognition, provide any information of majority support yet the Union failed and refused to provide any information. Tr. p. 19, 25, 104-05, 112; Gen. Counsel Ex. 12.

Accordingly, the Employer had sufficient actual knowledge to meet the standards of *Allentown*, *Levitz* and *McDermott*, allowing the Employer to withdraw recognition at the expiration of the collective bargaining agreement without being subject to unfair labor practice liability. *See Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 368 (1998); *McDermott v. Dura Art Stone*, 298 F. Supp. 2d 905, 910 (C.D. Cal. 2003); *Levitz Furniture Company of the Pacific, Inc., formerly Levitz Furniture Company of Northern California, Inc. d/b/a Levitz*, Case 20-CA-26596 (NLRB 2001B.A.); *see also Auciello Iron Works, Inc.*, 317 NLRB No. 60, 317 NLRB (1995), *upheld in Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781 (1996) (within a reasonable time before a CBA expires, an employer that establishes a good faith doubt of a union's majority status may announce that it does not intend to negotiate a new contract. The employer has the burden of proving that it had a reasonable good-faith doubt that the union no longer represented majority, but it need not conclusively show that a majority of employees no longer wish to be represented by the majority).

It is surprising that the Union has pursued this Unfair Labor Charge considering it admits that it has no knowledge of (1) the number of employees, if any, actually in the bargaining unit;

(2) whether the employees originally part of the bargaining unit at the time of certification were still employed with Employer; (3) why some employees had stopped paying dues; (4) who the actual Plant Manager was; or (5) whether the Union represented a majority of the bargaining unit employees. Tr. p. 106-08, 111-112. Nor has the Union made any attempt to procure the information. Tr. p. 108, 111.

The Union's position, if correct, forces the Employer into a Catch-22 as, once a union has lost majority support, an employer is required to cease recognizing it, both to give effect to the employees' free choice and to avoid violating Section 8(a)(2). *NLRB v. B.A. Mullican Lumber & Manuf. Co.*, 535 F.3d 271, 283 (4th Cir. 2008); National Labor Relations Act, 29 U.S.C. §§ 158(a)(2) (2009). The NLRB's responsibility under the NLRA is to assure that the employees' choice is given effect – whether it is the choice to be represented by a union or not. *See B.A. Millican Lumber*, 535 F.3d at 282. Under *Levitz* the Board moved to an objective test to discover whether a union actually lost majority support. *See id.* Consequently, it would violate the intent of the Act for the NLRB to order an employer to bargain with a union when the evidence suggests that said union does not have majority support. *See id.* at 283.

Pursuant to *B.A. Mullican Lumber*, the evidence and testimony introduced at trial—including the NLRB counsel's own comment—show that all the parties involved have actual knowledge of the lack of majority status, requiring the Employer to cease recognizing the Union. Consequently, an injunctive order requiring the Employer to recognize and bargain with the Union would cause Crete Cold Storage to violate Sections 8(a)(1), (2), (3) and 8(b)(1)(A) and (b)(2) of the National Labor Relations Act. *See* National Labor Relations Act, 29 U.S.C. §§ 158(a)(1)-(3); 29 U.S.C. §§ 158(b)(1)(A)-(b)(2).

However, even if the Employer did not meet the actual knowledge standard, at the very least the Employer had reasonable uncertainty as to the majority support and an election should be held—in accordance with the Union’s Election Petition—to resolve the outstanding issues between the parties. An election is the only way to conclusively determine the existence, or lack thereof, of majority support. There is no evidence that the Employer has done anything to taint an election as it has not made any changes to the bargaining agreement, not discussed the Union directly with its employees, and made no coercive or negative comments to the employees regarding the Union. Tr. p. 53, 58, 87-88. Further, the Employer is willing to recognize and bargain with the Union if it is, in fact, shown to represent a majority of the bargaining unit. Accordingly, this would be the most reasonable and effective resolution of this matter.

2. The Union’s Position, If Correct, Puts The Employer In a No-Win Situation.

According to the Union, the Employer is faced with a “no-win” situation when it uncovers evidence indicating the Union has a lack of majority status as it can only: (1) continue to bargain and negotiate with the Union, despite lack of majority support, and risk an unfair labor practice charge; (2) poll employees to determine their representation and risk an unfair labor practice; or (3) withdraw recognition and risk an unfair labor practice.

As set forth above, once a union has lost majority support, the employer must cease recognizing it, both to give effect to the employees’ free choice and to avoid violating Section 8(a)(2). *NLRB v. B.A. Mullican Lumbar & Manuf. Co.*, 535 F.3d at 283; National Labor Relations Act, 29 U.S.C. § 158(a)(2). In addition, it is an unfair labor practice to question and/or poll employees regarding their position toward the Union. National Labor Relations Act, 29 U.S.C. § 158(a).¹ Based on the applicable law, the Employer chose the course of action allowed,

¹ In this case, all information obtained by the Employer was obtained as a result of (1) the Employer’s attempt to assist the Union by posting notices of the Field Representatives’ visits to the plant and asking bargaining unit

which is to withdraw recognition after a bargaining agreement expires once an employer has a good faith uncertainty regarding majority support.

When faced with the three options above, all which opened the Employer to liability for unfair labor practice charges, the Employer chose to withdraw recognition. In this case, the Employer had actual knowledge and a good faith uncertainty as to the majority support and, based on its knowledge as well as the investigation conducted by its attorney, the Employer decided the best action would be to inform the Union of its intent to withdraw recognition and ask the Union to provide any information indicating the Employer was incorrect. Tr. p. 19, 25, 104-05; Gen. Counsel Ex. 12. No evidence of majority support was ever provided to the Employer (either in response to the Employer's letter or at the hearing on the Union's Unfair Labor Charge). Tr. p. 19, 25, 112. There is no evidence that the Employer withdrew recognition in bad faith or for reasons other than its honest belief that the Union lacked majority support. In fact, the Employer has made no changes to the expired bargaining agreement and has not attempted in any way to taint or coerce bargaining unit members. Based on the Union's actions and refusal to provide any information it is evident that it is merely playing "gotcha" and any choice undertaken by the Employer would have resulted in either a violation of the NLRA and/or an unfair labor charge.

B. The Employer Did Not Commit an Unfair Labor Practice by Refusing to Provide Information.

The Union asserts that the Employer failed to provide requested information and in doing so committed an unfair labor practice. The Union informally requested a seniority list to prepare for bargaining and the Employer provided information regarding Mr. Garcia. Tr. p. 98. On

employees to go speak with Ms. Lee, (2) unsolicited complaints about the Union made by employees to the Employer, and (3) Mr. Garcia's inability to communicate with the Union and NLRB because he only spoke Spanish and his subsequent requests for assistance. Tr. p. 47-52, 60.

January 28, 2008, the Union made a follow up request for information for bargaining purposes and asked that it be provided by February 20, 2009. Tr. p. 102; Gen. Counsel Ex. 10. The Employer notified the Union on February 20, 2009, of its intent to withdraw support and to refuse to bargain. Gen. Counsel Ex. 12. An employer has no duty to furnish information requested by a union under such circumstances. *Champion Enterprises, Inc. d/b/a Champion Home Builders Co.*, 350 NLRB No. 062 (2007). As the Employer had no duty to furnish the requested information, the Employer is not guilty of violating the NLRA.

In addition, this charge is moot as the Employer has already provided the requested information on the date of the hearing in response to a Subpoena Duces Tecum served by the Union's attorney upon the Employer's "Custodian of Records." This amended Charge is yet another example of the Union playing "gotcha" by failing and refusing to make any attempt in the three (3) months between the Employer's letter of February 20, 2009 (withdrawing recognition and seeking any information to the contrary) and May 18, 2009 (when the Amended Unfair Labor Charge alleging refusal to provide information was filed) to contact the Employer to resolve this matter.

Finally, the Union testified that all information requested from the Employer was within the knowledge and control of the Field Representative of the Union and could have been obtained from her. Tr. p. 106-08, 111-112. Despite this, the Union never requested the information from the Field Representative. Tr. p. 108, 111. In fact, even when the Employer specifically requested evidence of the Union's majority support, the Union did not request or obtain any information and never responded to the Employer. *Id.* As the Employer furnished what information it believed, in good faith, was requested; had no duty to furnish the requested

information; and all requested information was within the control of the Union, the Employer is not and should not be found guilty of violating the NLRA.

V. CONCLUSION

Based on the above, the Employer, Crete Cold Storage, L.L.C., respectfully requests the Arbitrator find that the Employer has not committed any unfair labor practice and dismiss all such charges. In the alternative, the Employer respectfully requests the Arbitrator order an election be held to determine majority status, and/or for such other relief it deems necessary and just.

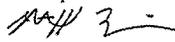
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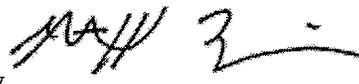
PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served on July 24, 2009, upon all parties to the above cause either through NLRB's E-Filing and/or by service to each of the attorneys of record herein at their respective addresses disclosed on the pleadings.

Signature: 

Respectfully Submitted,

BRICK GENTRY P.C.

By 

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