

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

UNITED KISER SERVICES, LLC

and

**CONSTRUCTION & GENERAL LABORERS' UNION,
LOCAL 1329**

**Case No. 30-CA-18129
30-CB-5352**

and,

**NORTHERN WISCONSIN REGIONAL COUNCIL OF
CARPENTERS**

**MEMORANDUM OF LAW IN SUPPORT OF THE NORTHERN WISCONSIN
REGIONAL COUNCIL OF CARPENTERS' EXCEPTIONS TO THE ALJ'S DECISION¹**

MATTHEW R. ROBBINS
YINGTAO HO
PREVIANT, GOLDBERG, UELMEN, GRATZ,
MILLER & BRUEGGEMAN, S.C.
Post Office Box 12993
1555 N. RiverCenter Drive, #202
Milwaukee, WI 53212
PH: (414) 271-4500
FAX: (414) 271-6308

ATTORNEYS FOR NORTH CENTRAL
STATES REGIONAL COUNCIL OF
CARPENTERS

¹ As the parties stipulated, the current name of the charging party is the North Central States Regional Council of Carpenters. This brief will refer to the charging party using its current name.

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I. STATEMENT OF THE CASE

The Charging Party Northern Wisconsin Regional Council of Carpenters (“Carpenters”) filed unfair labor practice charges against United Kiser Services, LLC (“United Kiser”) and Construction and General Laborers’ Union Local 1329 (“Laborers”), alleging that United Kiser violated the Act by repudiating its labor agreements with the Carpenters by recognizing, and signing a separate agreement with the Laborers to cover employees who performed work, which under a separate agreement between United Kiser and the Carpenters, belonged exclusively to the Carpenters; and that the Laborers had violated the Act by accepting that recognition and entering into the separate agreement. The General Counsel issued separate complaints against United Kiser and the Laborers. The ALJ erred by concluding that the charges filed by the Carpenters were untimely.

The ALJ erred by charging the Carpenters with actual or constructive notice of the factual basis of the complaints against United Kiser and the Carpenters outside of the §10(b) period. The Carpenters cannot be charged with notice of information within the knowledge of purported steward Mike Manowski since Manowski was never the steward at United Kiser, and in any event did not perform the type of steward responsibilities that under Board law would permit charging his knowledge to the Carpenters. Similarly, since the Carpenters and especially its business agent Greg Dhein did not have notice of United Kiser and the Laborers’ violations of the Act, its only duty was to maintain contact with the unit, and represent the unit in negotiations. Since the Carpenters and Dhein satisfied the requirements on both counts, they were diligent and cannot be charged with constructive notice. Notice that individuals other than

Carpenters were working in the shop would not give the Carpenters notice that United Kiser had either recognized the Laborers as the bargaining representative of a separate unit of shop laborers, or had signed a separate labor agreement covering the shop laborers, i.e. the factual basis of the complaints against United Kiser and the Laborers.

The ALJ further erred by failing to conclude that United Kiser violated the Act through its delayed bargaining. United Kiser waived its right to challenge the untimeliness of the Carpenters' reopener notice, by participating in four separate bargaining sessions without raising an objection. Even assuming Board law permits a party to delay bargaining to seek advice of counsel, a delay of two months to seek advice of counsel was unreasonable, and violated the Act.

The Board should therefore find United Kiser and the Laborers violated the Act as charged in the complaints. Alternatively, and to the extent the Board finds that a remand is necessary, it should remand all allegations with the exception of the delayed bargaining allegation to an ALJ. The remand should be to a different judge.

II. FACTS

United Kiser is a company with a manufacturing shop and principal place of business located in Norway, Michigan. (Tr. 11-12) It has a workforce consisting of field employees and shop employees. (Jt. Ex. 1, ¶19) The field employees include individuals represented by the Carpenters and the Laborers. United Kiser performs hydroelectric repair and specialized machine shop work. (Tr. 40-41) It is party to separate field agreements with the Carpenters and Laborers unions. (Jt. Ex. 3, 5) There are over 400 contractors covered by the Carpenters field agreement. Individual contractors may modify the terms of the field agreement by entering into addendum

agreements with the Carpenters. (Tr. 43) At all relevant times, the Carpenters were well aware that United Kiser employed field laborers under the Laborers' Field Agreement. (Tr. 195)

While the jurisdiction of the Carpenters' field agreement is limited to Wisconsin and the lower half of Marathon County, Michigan, United Kiser has consistently applied the agreement, including dues the checkoff provision, grievance procedure and the benefit contribution rates, when employees worked in Dickenson County, Michigan, the county where the United Kiser shop is located. (Tr. 68, 69, 279) In 1990 the Michigan Carpenters' Unions agreed, with the knowledge of United Kiser's legal predecessor Kiser Johnson (Stipulated Facts, ¶11), to extend the geographical jurisdiction of the Carpenters to the Kiser Johnson shop. (GC Ex. 30, 31) In addition to the field agreements, United Kiser is also party to a shop addendum with the Carpenters. (Jt. Ex. 4)

Michael Manowski has worked as a millwright in the shop of United Kiser and its predecessor employers for the past 13 years. (Tr. 79) Manowski's job responsibilities include all of the tasks listed on page 2 of the Carpenters' addendum agreement. (Jt. Ex. 4, pg. 2; Tr. 82) Manowski at one point was the steward of the Carpenters when his employer was Kiser Johnson but believed he stopped being the steward in 2003 when he resigned from the position. (Tr. 80; Stipulated Facts, ¶11) After Manowski became an employee of United Kiser in 2006, the Carpenters never sent written notice to United Kiser designating Manowski as its on-site steward. Manowski was not involved in negotiations, did not file or handle grievances and had no authority to sign documents that bound the Carpenters' Union. (Tr. 91) Manowski did not have authority

to make any independent decisions for the Carpenters. (Tr. 95) During the past five years (i.e. including and even preceding the entire time he worked at United Kiser) Manowski has not sent in any reports to the Carpenters, or performed any other actions as steward. (Tr. 91) Manowski's alleged role as steward at United Kiser is so poorly known by his fellow employees, that no one has ever approached Manowski with a workplace related problem. (Tr. 93) No evidence in the record indicates that Manowski has ever served as the point of contact for employees to resolve their disputes with United Kiser.

In July of 2006 United Kiser hired Joe Spinnoto to serve as the shop manager. (Tr. 284). At the time United Kiser employed 4-5 millwrights and laborer Keith Kirshner in the shop. (Tr. 285, 288) Kirshner, the electrician, did not perform any work covered by the jurisdiction of the Carpenters. (Tr. 73, 288) While United Kiser produced a document indicating that laborers Arndt, Currie, and Younger worked in the shop earlier in 2006 (Resp. Ex. 3), it did not produce any evidence concerning what work the employees performed in the shop, or that any of the work they performed included the tasks listed on the Carpenters' shop agreement. (Jt. Ex. 4, pg. 2)

After Spinnoto's hiring he introduced additional work into the shop, including production machining, fabricating, and welding work. He also added spray painting, a CNC Machine to manufacture smaller hydroelectric components and production welding for Marinette Marine. (Tr. 288-294) No evidence in the record indicates when the new hydroelectric (as opposed to Marinette Marine) work was first introduced into the shop. Manowski did not know until approximately June of 2008 that laborers were performing hydroelectric, as opposed to Marinette Marine work in the shop. (Tr. 86)

When Spinnoto brought in the Marinette Marine work and hired new employees to perform them (Tr. 310-311), he chose to place them into the Laborers. (Tr. 277) Spinnoto reasoned that the Laborers' Union would provide a cheaper wage scale over time, and that the Laborers' benefits were cheaper as well. (Tr. 342, 371) Indeed, for 2007 while the total package hourly compensation for shop workers under the Carpenters' addendum agreement ranged between \$23.46 and \$29.03 per hour, the total package compensation under the laborers' shop agreement was between \$19.43 and \$25.92 per hour. (Jt. Ex. 4, 6) To further induce United Kiser to sign the shop agreement the Michigan laborers offered to United Kiser a sweetheart deal by reducing the annuity contribution from \$1 to 50 cents per hour, and eliminating a 35 cents per hour training contribution. (Resp. Ex. 4)

Spinnoto initiated contact with Michigan Laborers' business representative Gallino in January of 2007 concerning the newly hired employees. (Tr. 307) A shop agreement containing a union security clause covering the newly hired employees was signed a couple of months later. (Jt. Ex. 6) The ALJ found that the recognition and subsequent agreement was intended by United Kiser and the Laborers to apply to the Marinette Marine work only. (ALJ Decision, pg. 6, line 46 – pg. 7, line 3)

By June of 2007 Manowski noticed that there were laborers working in the shop. (Tr. 83) Manowski never communicated to Carpenters' business agent Greg Dhein prior to June of 2008 that there were laborers working in the United Kiser shop. (Tr. 179) Manowski did not know what labor agreement the laborers worked under, i.e. that the shop laborers were covered by a labor agreement different from the multi-employer agreement covering the field laborers. Manowski's knowledge of collective bargaining

is very limited, as he does not know what a labor agreement is or that he himself was working under a labor agreement. (Tr. 91-92) Manowski has never discussed the issue of wages with laborers, but did discuss with them differences in vacation funds in June of 2008. (Tr.100-101) The unfair labor practice charges against United Kiser and the Laborers were filed in August and October of 2008, respectively. (Stipulated Facts, ¶¶29-30)

Greg Dhein has served as the primary business representative for the Carpenters bargaining unit at United Kiser for the past eight and a half years. (Tr. 127) Dhein's job responsibilities as the business representative are to assist in negotiations, and to handle any problems in the bargaining unit should they arise. (Tr. 127-128) Dhein is responsible for 40 different contractors and approximately 800 employees, and would attend between 100 and 200 meetings per year. (Tr. 127, 190-191) Despite the fact that Dhein's office is more than two hours from the United Kiser shop, and despite the large number of contractors requiring Dhein's attention, Dhein visited the United Kiser shop 8 times between January 1 of 2006 and June of 2008. (GC Ex. 32-34, Respondent Ex. 1) During each shop visit Dhein would always go downstairs to visit with the Carpenters' shop employees unless he was told that they were not working. (Tr. 190) In addition, Dhein made or returned numerous phone calls with United Kiser representatives, and would respond promptly to email communications from United Kiser. (GC Ex. 37, Tr. 283)

Despite his frequent visits to the United Kiser shop, Dhein did not know prior to June of 2008 that United Kiser employed shop employees represented by the Michigan Laborers to perform work covered by the Carpenters' shop agreement. (Tr. 179) In

early May of 2008, Dhein contacted Jeff Kiser to commence negotiations over the addendum agreement, a month and a half after the Carpenters sent its reopener letter to United Kiser on March 24, 2008. (GC Ex. 2, Tr. 182) Kiser called back and stated that United Kiser wanted to negotiate in June, even though the Carpenters were ready to bargain with United Kiser before the Carpenters' addendum agreement expired on May 31, 2008. (Tr. 184)

In June of 2008, Dhein walked into the United Kiser shop and saw approximately 20 people. He did not see the faces of all 20 people. (Tr. 192, 194) While the remittance reports show that 11 employees represented by the Carpenters' union performed some work in the United Kiser shop during the week ending May 31, 2008 (Union Ex. 1), Dhein did not know all 11 of the employees by sight. (Tr. 194) In addition, Dhein would not receive notice if United Kiser hired a probationary employee for its Carpenters' bargaining unit. (Tr. 195) The 20 employees are far more than what Dhein likely would have seen at the United Kiser shop at the end of 2007, since by then United Kiser had hired nine laborers to complement its existing workforce of five shop Carpenters employees. (ALJ Decision, pg. 7, lines 3-5; Resp. Ex. 2)

None of the 20 employees that Dhein saw wore name tags indicating whether they were carpenters, shop laborers or field laborers. Dhein also could not tell what the wages and terms and conditions of employment for the employees were. (Tr. 195-196) Manowski informed Dhein that the employees were laborers (Tr. 179).

After Dhein finished talking to the millwrights, he went upstairs with Carpenters' Executive Director Ken Clark to begin negotiations. During the negotiations United Kiser representative Marty Cowie made a reference that the laborers were cheaper than

employees represented by the Carpenters' union. (Tr. 198) In fact, under the field agreement laborers were paid between \$25.53 and \$30.99 per hour in total package, i.e. under rates higher than paid to shop worker, shop worker I, and shop worker II under the Carpenters' addendum agreement. (Jt. Ex. 4, 5) In other words, Cowie's remark informed the Carpenters that United Kiser had signed a separate cheaper agreement with the Michigan Laborers to cover the shop laborers; information that the Carpenters could not have learned by watching people work in the United Kiser shop.

On July 16, 2008, the Carpenters sent a letter to United Kiser owner William Harris, informing the latter that it would pursue its legal remedies if United Kiser did not repudiate its separate agreement covering the shop laborers. (GC Ex. 4) During the August 2008 negotiations, Spinnoto stated that the parties were negotiating the millwright agreement, and that the negotiations did not concern the laborers and marine part of the work. The Carpenters did not claim during negotiations that the bargaining must include the shop laborers. (Tr. 186)

United Kiser suspended all negotiations with the Carpenters between August 25 and October 22, 2008. (GC Ex. 5, 6) After bargaining resumed, United Kiser sent to the Carpenters a Memorandum of Understanding on Bargaining Protocols. (GC Ex. 8) The Protocols provided in relevant part that the agreement the parties were negotiating covered the shop millwrights only and that United Kiser intended to enter into separate negotiations over the shop laborers if the Carpenters were the appropriate bargaining representative for the shop laborers. (Id.)

During the bargaining sessions that occurred in 2008 United Kiser never mentioned that the Carpenters' addendum agreement had renewed because the

reopener notice was sent less than 90 days prior to the shop agreement's expiration; or that it was reserving its right to argue that the shop agreement rolled over. (Tr. 68) United Kiser did not make the objection until March 6, 2009. (GC Ex. 18)

III. ISSUES PRESENTED

1. Did the ALJ err by imposing the burden of proof for the timeliness of the charges contained in the complaint upon the general counsel? (Exceptions 6-7, 9, 11, 13, 17-20, 23, 25, 28, 33-35, 39, 41)

2. Did the ALJ err when he concluded that Manowski was the steward for the Carpenters at United Kiser? (Exception 7-8)

3. Did the ALJ err when he concluded that even assuming Manowski was the steward for the Carpenters at United Kiser, he performed enough responsibilities for the Carpenters that information within his knowledge can be charged to the Carpenters? (Exceptions 9, 10, 22, 33-34)

4. Did the ALJ err in finding that Carpenters Business Representative Dhein did not visit with the shop employees in 2007; and that he likely visited the shop on a day when the employees were not working in January of 2008? (Exceptions 17, 18, 27, 28, 31)

5. Did the ALJ err when he concluded that Dhein failed to exercise reasonable diligence in monitoring the United Kiser shop? (Exceptions 21, 26, 29-30, 32)

6. Did the ALJ err when he concluded that the Carpenters had actual or constructive knowledge that United Kiser had laborers employees performing Marinette Marine work in the shop, which the Carpenters believed was covered by its shop

agreement with United Kiser? (Exceptions 6-12, 14, 19-23, 33-37)

7. Did the ALJ err when he concluded that notice that the laborers were performing Marinette Marine work in the shop also gave the Carpenters notice of all of the facts necessary to render ripe its charge against United Kiser and the Carpenters? (Exceptions 23, 32, 38)

8. Did the ALJ err when he concluded that the Carpenters are barred from challenging the transfer of hydroelectric work to the laborers, because it did not timely challenge the signing of a separate agreement between United Kiser and the Laborers covering the Marinette Marine work? (Exception 40)

9. Did the ALJ err by failing to address on the merits the Carpenters charges against United Kiser and the Carpenters? (Exception 42)

10. Did the ALJ err, when he failed to conclude that United Kiser violated the Act by unlawfully delaying its bargaining with the Carpenters? (Exceptions 43-52)

11. Did the ALJ err by failing to find that the Laborers and United Kiser violated the Act by entering into an earlier agreement covering shop employees? (Exception 38)

IV. ARGUMENT

1. The ALJ Erred by Dismissing the Complaint on Timeliness Grounds.
 - a. The ALJ Erred by Imposing the Burden on the General Counsel and the Charging Party to Prove that the Allegations of the Complaint were Timely.

The Board has clearly and consistently ruled that a claim that an unfair labor practice charge is time barred under §10(b) of the Act is an affirmative defense. The party claiming that the charge was untimely filed has the burden of proof. *Dutchess Overhead Doors*, 337 NLRB 162 (2001). While the ALJ admitted that the burden of

proof on the §10(b) issue should be imposed on United Kiser and the Laborers, he also stated with respect to the issue of whether Dhein exercised adequate diligence in servicing the bargaining unit:

For the following reasons, I find that the General Counsel did not conclusively establish the underpinnings of this argument.

Pg. 7, lines 14-15. The ALJ thus imposed the burden upon the General Counsel to “conclusively” prove that Dhein was reasonably diligent in administering the United Kiser bargaining unit. The ALJ continued to mis-apply the burden of proof on the §10(b) issue upon the General Counsel by:

Inferring Dhein did not visit the downstairs shop at all during his two visits to United Kiser in 2007, because he testified that he did not have a specific recollection of visiting the shop; even though Dhein also testified that he would visit the shop during each of his visits to United Kiser (Pg. 7, lines 23-28);

Inferring Dhein visited the shop on January 11, 2008 on a scheduled non-work day for shop carpenters, even though Dhein testified he went downstairs that day, and visited with the shop carpenters (Page 7, lines 32-35, Tr. 159-160);

Inferring Dhein would have learned of the laborers working in the shop because through the exercise of reasonable diligence he “could have learned that laborers were working in the shop” (Page 7, line 37);

Inferring, on the basis of Manowski’s testimony that the Carpenters instructed him to report *employee* concerns to the Carpenters (Tr. 93), that Manowski somehow was the “point of contact for the employees to discuss terms and conditions of employment with the *employer*” (Page 7, line 43 – Page 8, line 2);

Concluding without any supporting analysis that the Carpenters would have, by knowing that laborers worked in the shop, also acquired knowledge of the March 1, 2007 execution of the separate agreement between United Kiser and the Laborers covering the shop employees (Page 8, n. 10).

Concluding that the Carpenters’ knowledge of the laborers’ agreement, which the ALJ found applied to the Marinette Marine work only, also barred the Carpenters’ charges concerning the transfer of hydroelectric work to the laborers.

In each case, the ALJ leapt to unwarranted conclusions on issues, for which the

evidentiary record is silent, in favor of United Kiser and the Laborers, the parties with the burden of proof on the §10(b) issue: For example, even though Dhein would go to the downstairs shop each time he went to United Kiser, the ALJ inferred based on Dhein's testimony that he did not recall going to the downstairs shop in 2007 that he did not in fact go to the downstairs shop. (ALJ Decision, pg. 7, lines 23-28)

The ALJ erred by construing all ambiguities in the record on the §10(b) issue in favor of United Kiser and the Laborers. In fact, silence ambiguity in the record should be construed against the party with the burden of proof. *Salem Electric Co.*, 331 NLRB 1575, 1576 (2000) (When the record is silent on whether available jobs and the strikers' pre-strike positions were equivalent, Board inferred the positions were not equivalent); *Carrier Corp.*, 319 NLRB 184, 192-193 (1995) (Fact union may have, or probably received notice of unfair labor practice does not establish notice sufficient to start the running of the §10(b) period).

Similarly, the ALJ erred by starting the running of the §10(b) period because Dhein "could have" learned that laborers were working in the shop. Applying the correct legal standard, it will become clear that United Kiser and the Laborers fell far short of proving that the Carpenters had actual or constructive notice of all facts, which are necessary to render ripe the charges contained in the General Counsel's complaints.

b. The Carpenters Did not Have Actual Notice of United Kiser's Contract Repudiation Through Manowski.

The Board has consistently held that rank and file union members are not agents of the union, so that notice to them of unfair labor practices cannot constitute notice to the union. *Fire Tech Systems*, 319 NLRB 802, 805 (1995); *Patsy Trucking*, 297 NLRB 860, 863 (1990). United Kiser and the Laborers cannot charge information within

Manowski's knowledge to the Carpenters, unless they first establish that Manowski remained the steward of the Carpenters in 2007 and 2008, when laborers began to work in the United Kiser shop.

Whether an individual is a steward depends on the parties' agreed upon procedure for appointing stewards. *Goodyear Tire & Rubber Co.*, 322 NLRB 1007, 1008 (1997) (Whether a bumped employee may retain his steward position depends on the agreement of the parties). Similarly, the field agreement between the Carpenters and United Kiser provides in relevant part:

The Northern Wisconsin Regional Council of Carpenters should immediately notify the contractor in writing of the identity of the steward as soon as his identity is determined.

Jt. Ex. 3, pg. 20-21.² No language in the field agreement indicates that a notice given by the Carpenters to a predecessor employer continues to be binding upon the successor employer. Since the Carpenters never notified United Kiser that Manowski was its steward, pursuant to the parties' own agreement Manowski was never designated as the Carpenters' steward at United Kiser. Notice to Manowski therefore cannot be charged to the Carpenters.

The evidence shows Manowski never performed any duties as a steward at United Kiser; and that no employees had ever approached Manowski for help in dealing

² Parole evidence is admissible on the parties' intent concerning the geographical reach of the field agreement since the field agreement intended to permit the Carpenters and individual employers to modify its terms through side agreements (Tr. 43), so that the field agreement is not the complete agreement between the Carpenters and United Kiser. *Radio Ear Corp.*, 199 NLRB 1161 (1972) (Whether parole evidence is admissible to illustrate an agreement's meaning depends on the completeness of the agreement as an integration) Since United Kiser abided by the field agreement with respect to dues checkoff, the availability of a grievance/arbitration procedure, and contribution rates when its employees worked in Dickenson County, Michigan (Tr. 68-69, 279), the parties agreed to modify the geographical reach of their total agreement, including the field agreement, to include Dickenson County, Michigan. The steward recognition procedure required by the field agreement therefore applies to the United Kiser shop in Dickenson County, Michigan.

with the employer. (Tr. 91, 93) Manowski was never involved in negotiations, never filed or processed any grievances and never had authority to bind the Carpenters by signing documents. (Tr. 91) The Board has consistently held that even stewards with far more job responsibilities than Manowski had cannot have their knowledge charged to the union. *Philadelphia Pepsi-Cola Co.*, 340 NLRB 349 (2003) (Steward who could investigate and present grievances, send messages and collect dues on behalf of union cannot have his knowledge charged to the union, since he needed special authorization from the union before he could bind the union with his signature); *Brimar Corp.*, 334 NLRB 1035 (2001) (Notice to chief steward without collective bargaining responsibilities cannot be charged to the union).

The cases cited by the ALJ support the same conclusion. In *Courier-Journal*, 342 NLRB 1093, 1103 (2004), the steward in question was a member of the bargaining committee, had attended all bargaining sessions for a year, and had far more collective bargaining responsibilities than Manowski ever had. Similarly, in both *Goski Trucking*, 325 NLRB 1032, 1034 (1998) (Steward's responsibilities included maintaining labor relations and keeping everything running in a fair manner) and *A & M Wallboard*, 318 NLRB 196 n. 3 (responsibilities included ensuring employer compliance with CBA, record keeping, reminding employees of obligation to pay dues, and keep track of work cards), the steward had substantial contract administration responsibilities. In contrast Manowski has not performed any steward functions in the past five years; and is so loosely identified with the Carpenters that no employee has ever approached him with problems or concerns. (Tr. 91, 93) Manowski clearly is not the type of active super-steward whose knowledge can be charged to the union.

Notice to a steward cannot be charged to the union when the union never held the employee out as an appropriate agent for receiving notice of unfair labor practices, and the employer had no reason to believe that communicating with the steward was a fair method of communicating with the union. *California Portland Cement Co.*, 330 NLRB 144 (1999). Similarly, there is no evidence that anyone at the Carpenters ever instructed Manowski to keep track of and report contract violations and unfair labor practices at the United Kiser shop. United Kiser has ever used Manowski as a conduit for communicating with the Carpenters.

Whether Dhein expected Manowski to report problems in the shop to him is irrelevant, when no evidence in the record indicates Dhein ever communicated his expectations to Manowski. As stated in Restatement Third of Agency §3.01, comment b:

An agent's actual authority originates with expressive conduct by the principal toward the agent by which the principal manifests assent to action by the agent with legal consequences for the principal. A principal's unexpressed willingness that another act as agent does not create actual authority.

Dhein's unexpressed expectation that Manowski report problems in the shop to him does not confer actual authority or responsibility upon Manowski to report potential unfair labor practices in the shop to Dhein. *See also Toering Electric Co.*, 351 NLRB No. 18 *55 (2007) (Actual authority only created when the principal makes an express or implied manifestation that creates power to act on the principal's behalf); *Int'l Union of Elevator Constructors #2*, 349 NLRB 1207, 1209 (2007) (No actual authority because no evidence the principal took any actions to grant authority to agent). Notice to Manowski therefore cannot be charged to the Carpenters.

Even if notice to Manowski can be charged to the Carpenters, at most Manowski

knew that laborers were working in the shop pursuant to a labor agreement. No evidence in the record suggests that Manowski knew the labor agreement was a separate agreement covering shop laborers, as opposed to the laborers' field agreement that the Carpenters had long known about. The complaint charged United Kiser with violating §8(a)(2) of the Act, which requires a showing both that United Kiser had recognized the Laborers as the representative of employees performing the shop work, and had signed an agreement with the Laborers to cover the employees performing the shop work. *Bell Energy Management Corp.*, 291 NLRB 168 (1989); *Weeke Electric Co.*, 242 NLRB 955 (1979). Seeing laborers work in the shop would not give Manowski notice that United Kiser had signed a separate agreement with the Laborers; or had extended the field agreement, to cover the shop work: The laborers presence in the shop can also be explained by United Kiser bringing field laborers to work in the shop because it mistakenly believed the work jurisdiction language of the Carpenters' shop agreement did not cover the work, rather than because it was disputing the Carpenters' status as the exclusive bargaining representative of all employees who performed work listed in the work jurisdiction language. (Jt. Ex. 4, pg. 2) United Kiser's act of signing a separate shop agreement with the laborers, which covered the same work as covered by the Carpenters' shop agreement was the act of repudiation that violated §8(a)(2) of the Act.

Similarly, the complaint alleges that the Laborers violated §8(b)(1)(A) of the Act by accepting the illegal recognition offered by United Kiser and entering into a labor agreement containing a union security clause for a unit that it was not the majority representative for. (Complaint, ¶8(a)) See *Stockton Door Co.*, 218 NLRB 1053, 1055

(1975). Just by seeing laborers in the shop Manowski had no way to know what labor organization represented the laborers or that there was a separate labor agreement containing a union security clause covering the shop laborers; especially since Manowski has never seen the labor agreement the shop employees worked under. (Tr. 87)

The §10(b) period does not start to run, until a party has knowledge of all facts necessary to support a ripe ULP charge. *Adult Residential Care Inc.*, 344 NLRB 826, 827 (2005); *Alternative Services*, 344 NLRB 824, 825 (2005). Since United Kiser's actual withdrawal of recognition from the Carpenters as the exclusive bargaining representative of all employees performing work covered by the Carpenters' shop agreement is an essential fact to the §8(a)(2) charge against United Kiser, while the signing of a separate labor agreement containing a union security clause is an essential fact in the charge against both United Kiser and the Laborers, Manowski's knowledge that some laborers worked in the shop, even if chargeable to the Carpenters, cannot start the running of the §10(b) limitations period.

c. The Carpenters Did not Have Constructive Notice of United Kiser and the Laborers' Violations of the Act.

In *Moeller Bros. Body Shop*, 306 NLRB 191 (1992), the Board held that a union can be held to have constructive notice of a violation for the start of the running of the §10(b) period only when it failed to exercise due diligence in monitoring the shop after it should have been aware of a potential issue³; and the union would have discovered the contract violation by making a minimal effort to monitor the shop. Board cases

³ In *Moeller* the Board held that the union should have known from its prior negotiations that there was an issue as to the treatment of pre-apprentices under the labor agreement; so that it should have monitored the shop concerning how the employer was treating pre-apprentices. See 306 NLRB at 192.

subsequent to *Moeller Brothers* clarify that a union can be charged with constructive notice only when the contract violation could be discovered through mere observation of the employees' work area. *Comcraft Inc.*, 317 NLRB 550 n. 3 (1995) (Union cannot be charged with constructive notice because it could not have discovered the violation by visiting the employer's office during working hours). In the case at bar, United Kiser and the Laborers cannot show either that the Carpenters failed to exercise due diligence in monitoring the United Kiser shop or that the Carpenters could have uncovered the unfair labor practices through mere observation of the United Kiser shop.

As the Board recognized in *Moeller*, a union is not required to police its labor agreement aggressively to uncover potential unfair labor practices. *Moeller Brothers*, 306 NLRB at 193. A due diligence requirement is not imposed upon a labor organization to investigate the potential occurrence of unfair labor practices until it has reason to suspect that the employer had violated the Act. *M & M Automotive Group*, 342 NLRB 1244, 1247 (2004). See also *Dedicated Services Inc.*, 352 NLRB 753 *33 (2008) (Union that did not know of a conversation suggesting the employer had violated the Act need not exercise due diligence to investigate the potential violation); *Miramar Hotel Corp.*, 336 NLRB 1203, 1233 (2001) (Due diligence did not require the union to anticipate that an employer may be violating the Act and request records to verify its suspicions). A union that is not on notice of the need to exercise due diligence to investigate a potential violation of the Act adequately monitors the shop by maintaining contact with its employees; and by actively representing the employees during collective bargaining negotiations. *M & M Automotive Group*, 342 NLRB at 1247.

There is no dispute that the Carpenters actively represented its bargaining unit of

shop and field carpenters during both the 2006 and 2008 negotiations. Dhein also maintained contact with employees in the unit, for example, by talking to Manowski about the labor agreement on May 27, 2008. (Tr. 174) Dhein additionally kept track of the unit by maintaining email and telephone contact with United Kiser representatives. (GC Ex. 37, Tr. 283) Undisputed evidence also shows that Dhein made visits to the United Kiser facility on February 2, 2007, July 23, 2007, and January 11, 2008. During the January 11, 2008 visit Dhein went downstairs and visited with the Carpenters employees. (Tr. 159-160)

The ALJ erred by concluding that Dhein did not go downstairs to visit with the employees during his 2007 shop visits. Dhein testified that his normal practice was to go downstairs to visit with the employees during each visit to the United Kiser facility and that he does not recall ever going to the United Kiser facility without visiting with at least one employee represented by the Carpenters. (Tr. 148, 190) While Dhein does not have a specific recollection of visiting with the employees during his 2007 visits to the United Kiser facility, United Kiser did not present any testimony that Dhein went home immediately after his discussions with company officials, without going downstairs to visit with the Carpenters employees.

In NLRB proceedings the Federal Rules of Evidence are controlling to the extent applicable. NLRB Rules and Regulations §102.39. Rule 406 of the Federal Rules of Evidence provides:

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

The Board has followed the rule in making findings of fact. *Ducane Heating Corp.*, 254

NLRB 112, 129 (1981) (Evidence of the employee's pattern of tardiness at earlier and later jobs admissible to prove he was also frequently tardy at the job in question). Similarly, since there is no evidence concerning whether Dhein actually visited with the shop employees during his 2007 shop visits, Dhein's testimony that he would always visit with the employees during his visits to the United Kiser facility renders it more likely than not that he did visit with the employees during both 2007 shop visits; especially since United Kiser and the Laborers have the burden of proving that Dhein failed to exercise reasonable diligence in maintaining contact with the Carpenters bargaining unit at United Kiser.

Dhein's office is located more than two hours from the United Kiser facility. (Tr. 128) By visiting with the employees three times in 2007 and early in 2008; and by maintaining telephone and email contact with the employees and with United Kiser, Dhein exercised reasonable diligence in maintaining contact with the United Kiser unit. The Carpenters therefore cannot be charged with constructive notice of United Kiser and the Laborers' unfair labor practices through Dhein.

United Kiser and the Laborers also cannot show that Dhein would have acquired notice of their unfair labor practices through mere observation. As the Board held in *Amcar Div.*, 234 NLRB 1063 (1978):

Even if the circumstances had been such that it was more likely that the employees would have known that nonemployees were doing their work, that evidence would not be a sufficient basis for inferring that the Charging Party had notice of unlawful subcontracting. For where, as here, the rights of parties to use our processes are at stake, we have long applied a more stringent test for determining when a party has notice of a possible infringement of its rights.

The Board applied the above cited principle to hold that just because employees saw people they did not know maintaining machines, they did not have actual notice that the

strangers were in fact non-employees.

Similarly, when Dhein went to the work areas of the United Kiser shop in January of 2008 he saw Carpenters, as well as some strangers across the room or across the bays. (Tr. 251) Dhein would have no way to know whether the strangers he saw were field carpenters, newly hired probationary employees, or something else. Dhein could not recognize by sight all of the field carpenters who sometimes worked in the shop. (Union Ex. 1, Tr. 194) Dhein and the Carpenters also would not receive notice when United Kiser hired a new probationary employee. (Tr. 195) Dhein therefore had no way to know whether or not the employees he saw were members represented by the Carpenters, who were entitled to work in the shop under the Carpenters' labor agreements.

Dhein also could not have realized that something was wrong through the sheer number of people he saw in the shop. The Carpenters had access to the remittance reports, which show that there may be as many as 11 Carpenters working in the shop during a two week time period. (Union Ex. 1) As the ALJ found, by the end of 2007 United Kiser had hired nine laborers to complement its workforce of five shop carpenters. (ALJ Decision, pg. 7, lines 3-5) Even if Dhein visited the shop on a day when both the laborers and the carpenters employees were working, he would at most see little more than 10 employees working in the shop, which is a plausible number since more than 10 employees represented by the Carpenters may work in the shop during a two week period. This is especially true since the Carpenters would not receive notice when United Kiser hired probationary Carpenters employees.

Dhein therefore could not have clear and unequivocal notice through mere

observation that employees other than those represented by the Carpenters were working at the United Kiser shop. Moreover, since United Kiser did not put into the record evidence concerning the full range of tasks performed by laborers in the shop, there is no assurance that even if Dhein did see laborers work in the shop, he would see them perform work covered by the Carpenters' shop agreement. Even if the number of people in the shop may raise suspicion as to whether they were all represented by the Carpenters, Dhein had no obligation on pain of being charged with §10(b) notice to conduct further inquiries as to the identity of the people he saw. In *Positive Electrical Enterprises*, 345 NLRB 915, 921 (2005), the Board held a union's notice that an employee was working in the shop did not start the running of the §10(b) period, because the union did not know whether the employee was performing bargaining unit work as an electrician. Dhein was not required to ask whether the employees he saw were represented by the Carpenters and/or performing work covered by the Carpenters shop agreement, just as the union in *Positive Electrical Enterprises* was not required to ask its own members or the employer concerning what work the employee was performing.

Even if Dhein could be charged with constructive notice that United Kiser had laborers working in the shop, establishing the §8(a)(2) charge against United Kiser requires a showing that United Kiser knew that the work the laborers were performing were covered by the Carpenters' shop agreement and was repudiating the Carpenters' shop agreement by assigning the work to the laborers. Possible knowledge by the Carpenters that United Kiser had laborers working in the shop, possibly under the belief that the Laborers' work was not covered by the Carpenters' shop agreement, would not

violate §8(a)(2) of the Act. Similarly, the §8(b)(1)(A) charge against the Laborers in the complaint requires showing that the Laborers entered into a labor agreement with United Kiser containing a union security clause covering the shop employees. *Bell Energy Management Corp.*, 291 NLRB 168; *Stockton Door Co.*, 218 NLRB at 1055.

Dhein could not have deduced from knowing laborers were working in the shop either that United Kaiser had repudiated its agreement with the Carpenters; or that there was a separate labor agreement containing a union security clause covering the shop laborers. The Carpenters could not have unequivocal notice, just from seeing laborers working in the shop, of either the §8(a)(2) violation by United Kiser or the §8(b)(1)(A) violation by the Laborers. The §10(b) statute of limitations therefore could not begin to run, even if Dhein could be charged with notice that laborers worked in the shop.

d. United Kiser's Assignment of Hydroelectric Work to the Laborers Separately Violated the Act.

According to United Kiser Shop Foreman Spinnoto, sometime at the end of 2006 or the beginning of 2007 he began to introduce Marinette Marine work into the shop. (Tr. 310) Spinnoto then contacted Laborers Business Representative Gallino, and the two negotiated a labor agreement intended to, as the ALJ found, cover the Marinette Marine work only. (ALJ Decision, pg. 6, line 45 – pg. 7, line 3) Therefore, even if the Carpenters should have had notice of the execution of the laborers shop agreement, as the ALJ erroneously found (ALJ Decision, n. 10), that notice would not inform the Carpenters that United Kiser was also assigning hydroelectric work covered by the Carpenters' shop agreement to laborers.

While in his testimony Spinnoto described various types of new work he introduced into the United Kiser shop, he did not provide any testimony concerning

when the new work (aside from the Marinette Marine work) was first introduced into the shop. Manowski testified that as far as he knew, laborers had been performing hydroelectric work in the shop for about a year, i.e. starting at around June of 2008. (Tr. 86) There is also no evidence that Dhein, by seeing non-carpenters working in the shop, would have notice that the non-carpenters were performing hydroelectric, as opposed to Marinette Marine work.

Therefore, even if the Carpenters had actual or constructive notice of the separate agreement between United Kiser and the Laborers, it would not have notice of the separate assignment of hydroelectric work to the laborers; or that United Kiser was assigning hydroelectric work to the laborers even after all of the Marinette Marine work had ended. (Tr. 86) The Carpenters therefore can timely bring a charge that United Kiser had violated the Act by repudiating the portion of the Carpenters' shop agreement reserving hydroelectric work to employees represented by the Carpenters, and by extending its shop agreement with the Laborers to apply to the hydroelectric work. Similarly, by accepting recognition as the collective bargaining representative of employees performing the hydroelectric work, the Laborers violated §8(b)(1)(A) of the Act. The charges against United Kiser and the Carpenters for the separate assigning of hydroelectric work to laborers therefore is not barred by §10(b) of the Act.

2. The ALJ Erred, When He Failed to Find that United Kiser Had Unlawfully Delayed Bargaining.
 - a. United Kiser Waived Its Right to Challenge the Timeliness of the Reopener Notice.

The Shop Agreement between United Kiser and the Carpenters was scheduled to terminate on May 31, 2008. The Carpenters sent a reopener notice to United Kiser

on March 24, 2008. The reopener notice was untimely, since under the shop agreement the notice must be sent 90 days in advance of contract expiration. However, the parties conducted four bargaining sessions for a successor to the Shop Agreement. Either before or during the four sessions United Kiser never claimed that the Carpenters' reopener notice was untimely or that it was discussing revisions to the shop agreement without waiving its right to object to the timeliness of the reopener notice.

The ALJ erred when he found that United Kiser did not waive its right to object to the timeliness of the reopener notice. The ALJ's factual finding that United Kiser participated in the bargaining sessions as "voluntary meetings to explore possible revisions to the existing agreement" (ALJ Decision, pg. 10, lines 25-26), rather than to carry out what it believed was an obligation imposed by the Act to bargain in good faith over a successor agreement is not supported by any evidence in the record.

Regardless of a party's subjective intent Board law is clear that a party waives its right to object to the timeliness of a reopener notice if it participates in even one bargaining session without raising the objection. *Local No. 6-0682 paper, Allied-Industrial Chem. & Energy Workers Int'l Union*, 339 NLRB 291 (2003); *Hutco Equipment*, 285 NLRB 651, 654 (1987). In order to preserve its right to object to the timeliness of the reopener notice, the employer must make it abundantly clear, prior to or during the bargaining session, that it was not waiving its objection. *Burroughs Corp.*, 281 NLRB 1099, 1100 (1986) (Employer contacted union stating that it was agreeing to talk about wage changes, but that it was not waiving its right to object to the timeliness of the reopener notice); *Sawyer Stores*, 190 NLRB 651 (1971) (Employer claimed during first bargaining session that reopener notice was untimely, and refused to

schedule further bargaining sessions). United Kiser therefore waived its right to object to the timeliness of the Carpenters' reopener notice by participating in four bargaining sessions without raising an objection.

The ALJ also erred, to the extent he ruled that a statement by counsel for the charging party was a binding admission that the shop agreement had renewed, so that United Kiser had no obligation to bargain over it. First, counsel for United Kiser had earlier stated in a position statement to the Region that the shop agreement did not renew, an "admission" equally binding upon United Kiser. (GC Ex. 38) Second, Board law is clear that an inadvertent misstatement by counsel is not binding upon the client. *National Semi-Conductor Corp.*, 272 NLRB 973, 983 n. 30 (1984) (Charging party cannot rely on inadvertent mis-statement that employer counsel made to the ALJ to argue that the employer had offered shifting explanations for terminating the employee).

b. United Kiser Unlawfully Delayed Bargaining.

The ALJ ruled that even if United Kiser had an obligation to bargain over a successor shop agreement, it could delay bargaining to seek legal advice related to the bargaining. As authority the ALJ cited solely to *Massey-Ferguson, Inc.*, 184 NLRB 640, 644 n. 6 (1970), a case in which the employer delayed bargaining for *nine* days to consult with counsel on the issue of whether it had a continued duty to bargain in light of the filing of a decertification petition.

In sharp contrast to the nine day delay in *Massey*, in the case at bar United Kiser delayed bargaining between August 25 and October 22, 2008, a period of 58 days, in order to consult with counsel. The Board has long held that a party has the duty to promptly engage in bargaining; and that a busy schedule on the part of the negotiator is

not a legitimate excuse for delaying bargaining. *Imperial Tile Co.*, 227 NLRB 1751, 1754 (1977); *Inter-Polymer Industries*, 196 NLRB 729, 760 (1972). Similarly, even if the Act permitted United Kiser to delay bargaining to consult with counsel, the consultation must be prompt, and cannot unduly delay bargaining. A two month delay to consult with counsel is unreasonable, and therefore violated the Act.

3. The Board Should Sustain All of the Allegations of the Complaints Against Both United Kiser and the Laborers; or Alternatively Should Remand All Allegations of the Complaint with the Exception of the Delayed Bargaining Allegation to a Different ALJ.

For the above stated reasons, the Board should find that United Kiser violated the Act by delaying its bargaining with the Carpenters, and that the remaining allegations of the complaints are not barred by §10(b) of the Act. Since the remaining allegations of the complaint can be resolved in favor of the General Counsel and the charging party without resolving disputes of fact, the Board should make the findings of violation without remanding the matter to an ALJ.

- a. The Board Should Find the Violations Charged in the Complaints.

United Kiser and the Laborers do not dispute that because the employees covered by the Carpenters shop agreement work in the shop rather than at a construction site, they are not employees in the construction industry. *Operating Engineers Local 12*, 204 NLRB 742, 753-754 (1993) (Even heavy equipment repair at the construction site is not work in the construction industry). There is thus a strong presumption that the Carpenters' agreements with United Kiser are valid §9(a) agreements. *Techno Construction Corp.*, 333 NLRB 75, 81 (2001).

Even a labor agreement without a clear recognition clause can constitute a valid §9(a) agreement when it identifies the employees it covers (such as "truck drivers"), has

a definite duration, is reduced to writing, and defines the employees' wages and working conditions. *A & M Trucking Inc.*, 314 NLRB 991, 992 (1994). Similarly, the Carpenters' shop agreement states that it covers shop employees, has a definite term in that it expires on May 31, 2008 unless extended from year to year, is reduced to writing, and clearly defines the wages and benefits payable to the employees it covers. The Carpenters shop agreement is therefore a valid §9(a) agreement that recognizes the Carpenters as the exclusive collective bargaining representative of all covered employees.

Alternatively, the Carpenters' field agreement contains explicit language recognizing the Carpenters as the exclusive bargaining §9(a) exclusive bargaining representative of bargaining unit employees working within its geographical jurisdiction, which the parties by mutual agreement extended to Dickenson County, Michigan, the location of the United Kiser shop. (See n. 2 of brief, *infra*). The bargaining unit covered by the field agreement, and hence its §9(a) recognition clearly includes the shop employees since United Kiser applies to them, for example, the dues checkoff and grievance/arbitration procedure language found solely in the field agreement. (Tr. 68-69)

During the 2006 negotiations, the parties wrote into the Carpenters shop agreement the classifications of shop worker, shop worker I, and shop worker II, and listed specific types of tasks that each classification can perform. (Tr. 199) The classifications clearly applied to future hires rather than journeymen Carpenters, since journeymen carpenters would be paid at their regular rates (as opposed to the lower shop worker rates) regardless of the type of work they performed. (Tr. 71, 201) On the

other hand, the Laborers field agreement, the only laborers agreement in existence when the Carpenters shop agreement was negotiated, contained a work jurisdiction clause that did not include any of the welding, grinding, painting, and other works covered by the Carpenters shop agreement. Neither United Kiser nor the Laborers ever disputed before the ALJ that the work performed by shop laborers in 2007 and thereafter was covered by the work jurisdiction clause of the Carpenters' shop agreement, or excluded by the work jurisdiction clause of the Laborers' field agreement.

The testimony of United Kiser Shop Foreman Spinnoto clearly establishes United Kiser's knowledge that the shop laborers performed in 2007 and thereafter work that can be classified as machining, welding, grinding and painting work (Tr. 288-289), i.e. work that is explicitly covered by the Carpenters' shop agreement. Spinnoto also candidly acknowledged that he assigned employees performing the work to the Laborers rather than the Carpenters because he believed laborers would require United Kiser to pay lower wages and benefits over time (Tr. 311), rather than because he, or United Kiser believed the laborers' work was not covered by the Carpenters' shop agreement. United Kiser also signed a labor agreement with the Laborers that recognized the Laborers as the exclusive bargaining representative of employees performing all work of a unskilled and skilled nature at the United Kiser shop, which would clearly include work covered by the Carpenters' shop agreement.

United Kiser thereby recognized the Laborers as the exclusive bargaining representative of employees performing work covered by the Carpenters' agreement; and signed a bargaining agreement with the Laborers formalizing the illegal recognition, in violation of §8(a)(2) of the Act. *Advanced Architectural Metals Inc.*, 351 NLRB No. 80

(2007). By accepting said illegal recognition and signing the illegal bargaining agreement, the Laborers similarly violated the Act. *Stockton Door Co.*, 218 NLRB 1053, 1055 (1975).

The Board should therefore order United Kiser to cease and desist from assisting or recognizing the Laborers as the bargaining representative of the shop employees, cease and desist from giving effect to its illegal recognition of the Laborers, and to cease and desist from giving effect to the Laborers' shop agreement. Similarly, the Laborers should be ordered to cease and desist from accepting the unlawful recognition from giving effect to the Laborers shop agreement and to disgorge any fringe benefit contributions or dues submitted under the Laborers' agreement. *Garner Morrison LLC*, 353 NLRB No. 78 *30 (2009); *Stockton Door Co.*, 218 NLRB at 1056. The Board should also order United Kiser to make whole all employees for wages and benefits they would have received, if they had been covered by the Carpenters' shop agreement throughout their tenure at the United Kiser shop. *New Concept Solutions*, 349 NLRB 1136, 1137 (2007).

b. Alternatively, the Board Should Remand the Case to a Different ALJ.

If the Board finds that a remand to an ALJ is necessary to resolve the allegations of the complaints, with the exception of the delayed bargaining allegation, it should remand the matter to a different administrative judge. The Board should remand a matter to a different ALJ to avoid the appearance of impropriety, even when it did not make a finding that the judge was biased or prejudiced against one of the parties in making his initial decision. *Patrick Cudahy*, 288 NLRB 968, 974 (1988). A matter should be remanded to a different judge when the ALJ adopted the views of one party;

so as to raise suspicion as to whether he had conducted an independent analysis of the case's underlying facts and legal issues. *O.G.S. Technologies*, 347 NLRB No. 29 (2006).

Similarly, in the case at bar the ALJ cited to the same three cases (*Courier-Journal*, *Goski Trucking*, *Moeller*) that United Kiser and the charging party cited in both its motions for summary judgment and its post hearing briefs, without discussing or attempting to distinguish any of the arguments or cases cited by the General Counsel or the charging party on the §10(b) issue. For example, just like in United Kiser's brief the ALJ concluded that Manowski's knowledge was chargeable to the Carpenters, without any discussion as to whether Manowski's (lack of) responsibilities as steward qualified him as an agent of the Carpenters under Board precedents cited by the General Counsel and the charging party. Similarly, the ALJ adopted United Kiser's constructive notice argument, i.e. that notice of employees working in the shop would have given the Carpenters notice of a separate shop agreement between United Kiser and the Laborers without any discussion of his reasoning for making this improbable leap in logic. The ALJ adopted the core of United Kiser's §10(b) argument without further discussion; his failure to cite to or consider in his decision any of the arguments or case law cited by the General Counsel or the Charging Party, raises suspicion that the ALJ simply adopted the position of United Kiser, without sufficient independent consideration of the arguments and case law cited by all parties. The possible appearance of improper decision making by the ALJ is sufficient to warrant remanding the task of making findings of fact and conclusions of law on the merits of the complaints to a different judge.

V. CONCLUSION

For the above stated reasons the Board should reverse the ALJ, find United Kiser violated the Act by delaying its bargaining with the Carpenters; and remand to a different ALJ to make findings of fact and conclusions of law on the remaining counts of the complaints against both United Kiser and the Laborers.

Dated this 25th day of September, 2009

Respectfully submitted,

s/Yingtao Ho
MATTHEW R. ROBBINS
YINGTAO HO
PREVIANT, GOLDBERG, UELMEN, GRATZ,
MILLER & BRUEGGEMAN, S.C.
Post Office Box 12993
1555 N. RiverCenter Drive, #202
Milwaukee, WI 53212
PH: (414) 271-4500
FAX: (414) 271-6308

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