

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

CRETE COLD STORAGE, LLC

and

Case 17-CA-24469

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

**COUNSEL FOR GENERAL COUNSEL'S RESPONSE  
TO RESPONDENT'S EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S DECISION**

**OVERVIEW**

This case was based upon a Complaint that Crete Cold Storage, LLC, hereinafter Respondent, violated Sections 8(a)(1) and (5) of the Act when it failed to provide relevant requested information to the United Food and Commercial Workers International Union, AFL-CIO, CLC, Local No. 271, hereinafter the Union, and when it unlawfully withdrew recognition from the Union as the collective-bargaining representative of its employees. The issues in Case 17-CA-24469 were heard by Administrative Law Judge John H. West in Lincoln, Nebraska on June 24, 2009. On August 17, 2009, Judge West issued his decision sustaining all complaint allegations. Respondent has filed a number of exceptions to the ALJ decision.

**STATEMENT OF FACTS**

Respondent is owned by Omaha Industries and is in the business of processing and storing edible and inedible meat products. (Burke 13)<sup>1</sup> In January 2005 an election was conducted among certain of Respondent’s employees and on February 7, 2005 the Union was certified as the collective-bargaining representative of the following unit:

All full time and regular part time production, warehouse, scale quality assurance, truck wash, maintenance, lead and sanitation employees employed by the Employer at its facility located at South Highway 103 Crete, Nebraska, 68333, but EXCLUDING all office clerical employees, engineers, temporary employees, managers, guards and supervisors as defined in the Act.

(Burke 14, GC 3, GC 4) After certification of the bargaining unit, Respondent and the Union reached a collective-bargaining agreement which was effective by its terms April 1, 2006 through March 31, 2009. (Burke 15, GC 5)

At the time of the election and certification, there were approximately twelve employees employed in the bargaining unit. (GC 3) Since the Union was certified in 2005, only five unit employees have become dues paying members. (Schwisow 96, GC 6) It is noted that Nebraska is a “right to work” state and employees can not be required to join a union. (GC 2) As is shown below, for the last year, employee Javier Garcia has been the only member of the Union, as the other four former members are not currently employed in the bargaining unit. (GC 6)

Javier Garcia	Active since November 2006
Sebastian Marrero	Last paid dues August 2006
Timothy Gilman	Last paid dues March 2007
Michael Arellano	Last paid dues May 2007
Tony Sanchez	Last paid dues March 2008

<sup>1</sup> References to the transcript are shown by the witnesses name and page number. References to exhibits are shown by “GC” or “R” followed by the exhibit number.

Notably, the Union's only union steward at the Crete facility, Len Johnson, was not a member of the Union. (Placek 57, GC 6)

### **THE INFORMATION REQUESTS**

On about January 13, 2009, newly elected Union President Brian Schwisow directed Union office manager April Gerraro to make an information request on Respondent. On that same date, Gerraro sent the following e-mail message to Respondent's Plant Manager Jessica Placek:

Good Afternoon Jessica,

Could you please email a current seniority list of all bargaining unit employees to Brian and myself ASAP?

(Schwisow 97, GC 7) That same afternoon Placek replied by e-mail simply, "Javier Garcia – Warehouse." (GC 7) Unsatisfied with Placek's response, Schwisow contacted Placek by phone that same day and reiterated that the Union was requesting a list of **all** bargaining unit members, not just dues-paying members. Placek stated that she would contact her attorney. (Schwisow 99) Still unsatisfied with Placek's response, Schwisow telephoned CEO and President of Omaha Industries Patrick Burke, and left a message. Schwisow finally spoke to Burke about the third week of January. Schwisow explained that he had requested a list of all bargaining unit members and that Respondent's response was incomplete. Schwisow restated the Union's request for all bargaining unit members with their seniority date. Burke told Schwisow that he would get with his attorney. (Schwisow 100)

After receiving no response to his repeated attempts to obtain a complete answer to his January 13, 2009 request for a seniority list, and in anticipation of the upcoming

expiration of the parties' collective-bargaining agreement, on approximately January 28, 2009, Schwisow hand delivered two letters to Respondent's Plant Manager Placek.

(Schwisow 102) The first letter, commonly referred to as a "reopener" letter, sought to terminate the existing collective-bargaining agreement at its expiration, and requested bargaining for a new agreement. (GC 9) The second letter was a detailed request for information needed to represent the unit members and to prepare for the anticipated upcoming contract negotiations. (Schwisow 103) The request sought the following information for bargaining unit employees:

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

(GC 10) The request asked that the information be provided by February 20, 2009. (GC 10) On February 3, 2009, Respondent's attorney Matt Brick sent a letter to Schwisow acknowledging Schwisow's January 28, 2009 letters and agreeing to sit down to negotiate a new agreement. Brick's letter stated Respondent would be providing the information requested in the Union's January 28 letter shortly. (GC 11) To date, Respondent has provided no information in response to the Union's January 28, 2009 request. (Schwisow 103)

### **THE WITHDRAWAL OF RECOGNITION**

Concomitant with the Union's January information requests, warehouse employee Javier Garcia approached his supervisor Samuel "Sammy" Sanchez to assist him in speaking with Union representative Linda Lee. (Sanchez 68) Lee visited Respondent's facility approximately once a month, and certainly no less frequently than every other month, to service the Crete bargaining unit. (Placek 47, Sanchez 72) Garcia can not speak English, so he asked Sanchez to tell Lee that he wanted to get out of the Union because they were taking too much of his money. (Sanchez 77) Sanchez translated the same to Lee. (Sanchez 68, 77) Lee directed Garcia to the Union's bulletin board, which contained the Union's address, and instructed Garcia to write a letter to the Union. (Garcia 82) Sanchez did not report his conversation with or assistance of Garcia to any member of Respondent's management. (Sanchez 69)

About this same time, office employee Sandra Franco approached Plant Manager Placek about Javier Garcia. Franco told Placek that Garcia wanted out of the Union. Franco explained that Garcia had spoken to his supervisor, Sammy Sanchez, about

stopping his dues. (Placek 39) The record does not reflect where Franco learned this information.

Placek testified that after her conversation with Franco she immediately called her superior Patrick Burke and reported what Franco had told her: that Garcia wanted out of the Union and that he did not want to pay dues. (Placek 41) Burke recalls that Placek called and told him that Garcia wanted to get out of the Union. Burke interpreted that to mean that Garcia didn't want the Union to represent him anymore. (Placek 17) This, despite the fact that Garcia never said that he wanted to get rid of the Union. (Garcia 82) Burke provided Placek with the telephone number and website information for the National Labor Relations Board. (Placek 41) Placek later called Burke and reported that Garcia was unable to speak with anyone at the Board. (Placek 41)

Based upon Burke's conversations with Placek, on about February 20, 2009 Respondent's attorney Matthew Brick sent a letter to the Union stating the following:

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

Consistent with its letter, Respondent withdrew recognition from the Union on April 1, 2009. Burke admitted at trial that as of the date of withdrawal the only evidence that the Employer possessed that the Union no longer represented employees was that Garcia wanted out of the Union. (Burke 19) It should be noted however, that on the date of

withdrawal, Garcia had not resigned his membership from the Union or stopped paying dues. (Burke 31, Garcia 91)

## **RESPONSE TO EXCEPTIONS**

### **EXCEPTION I**

Respondent argues in its first exception that statements, testimony and findings set forth by the ALJ are not supported by the evidence and mischaracterize certain portions of the testimony. In support of its exception, Respondent appears to assert that the ALJ mischaracterized certain testimony when he found that the Union was not aware how many employees were in the bargaining unit. Respondent argues that the Union could have obtained the information from Union representative Lee, who serviced the Unit, or, alternatively, that Respondent provided the Union with a seniority list.

First it should be noted that the ALJ did not mischaracterize the testimony, that at no point was evidence put on to show that the Union or Ms. Lee were aware of the names of all bargaining unit employees. Second, the evidence establishes that Respondent's only response to the information request was the name "Javier Garcia." This was certainly not a complete seniority list, but only the name of one Union member. Moreover, Respondent's argument seems to miss the point. Even if the Union could have obtained some information from Ms. Lee, they were under no obligation to do so. Under the National Labor Relations Act (Act), it is Respondent who 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

US 432 (1967). Respondent is not relieved of that obligation because the information may exist elsewhere, which Respondent has not proven is the case.

Respondent also appears to argue under Exception 1 that the ALJ mischaracterized certain testimony when he found that Respondent based its withdraw of recognition on the statements Placek made to Burke regarding Garcia's desire to get out of the Union. Respondent asserts that Burke believed that Garcia was the only dues paying member. This, however, misses the fact that employees can pay dues directly to the Union, and Burke would have no knowledge of the same. Moreover, Burke specifically testified that as of the date of withdrawal the only evidence that the Employer possessed that the Union no longer represented employees was that Garcia wanted out of the Union. (Burke 19) Inasmuch, there has been no mischaracterization of the evidence.

## **EXCEPTION II**

Respondent argues in its second exception that the ALJ erred by failing to include, analyze and consider relevant evidence. Respondent then lists seven numerated items of "evidence" that it feels the ALJ failed to consider. As discussed below Respondents enumerated list of "evidence" was either not "evidence" at all, was a mischaracterization of evidence or was irrelevant to the proceedings.

1) *"Crete employees "refused" to meet with Union representative Linda Lee when she came to the facility.* - The record evidence simply failed to establish that employees "refused" to meet with Lee. While there was some evidence that employees did not meet with Lee during her regular visits to the facility, nothing suggested that they *refused* to meet with her. Indeed, this may have been the result of a variety of reasons, none of them equating refusal. For instance, they may not have met with Lee because

they did not have any issues to raise with her or because they preferred to meet with her outside of work. Plant Manager Placek admitted at trial that she did not know the reasons why employees might not go to Lee when she visited the facility. (Placek 60) To now claim that the employees “refused” to do so requires the drawing of inferences not supported by the evidence.

2) *Union membership decreased from five members to one member.* – The testimony at hearing was that since certification there had been five unit members who were also union members. There was no testimony that the number of employees had decreased from five to one, or how many members there may have been at a given time. Respondent bases its claim solely on the decrease in the number of unit employees who have authorized dues checkoff. The Board has long held that a failure to pay union dues does not reflect a lack of support for union representation because employees are often content to support the union and enjoy the benefits of union representation without joining the union or giving it financial support. *Trans-Lux Midwest Corp.*, 335 NLRB 230, 232 (2001); *R.J.B. Knits*, 309 NLRB 201, n. 2, 905 (1992)(Board affirmed Judge’s holding that respondent could not rely on the fact that all six unit employees are not members of Union to support withdrawal of recognition.); and *Odd Fellows Rebekah Home*, 233 NLRB 143, 143 (1977)(Board held that it is well established that to support a reasonable doubt of union majority support employee expressions of antiunion sentiment must have been made prior to the employer’s withdrawal of recognition and must convey an intent not to be represented by the union as distinguished from a desire not to become members for any of a number of reasons or an inability or unwillingness to pay dues.). This is especially true in a right-to-work state such as Nebraska. See, *T.L.C St.*

*Petersburg, Inc.*, 307 NLRB 605 (1992) (the number of employees who have authorized the checkoff of union dues does not indicate— particularly in a right-to-work state—how many employees favor union representation, whether or not they are members of the union). Inasmuch, lack of membership, especially in a right to work state like Nebraska, is not relevant to determine union support.

3) *No one who has come to work for the Employer in the last four years has joined the Union.* – Plant Manager Placek testified that to her knowledge no employee that had come to work in the last four years had become a member of the Union. Placek’s knowledge however would be limited to those employee having dues deducted from their paychecks. Placek would have no way of knowing if employees were having dues remitted through another means, such as check, cash, or money order. More importantly, the Board has long maintained a presumption that newly hired employees support the union in the same proportion as the employees that they have replaced. *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, fn. 60 (2001). Accordingly, the fact that any new employees did not become members is not indicative of a lack of union support.

4) *The NLRB has knowledge that, since the date of certification, the Union has not had a majority of members from the bargaining unit.* – During the trial, Counsel for General Counsel asked Plant Manager Jessica Placek the following, “Since the union was certified as the collective bargaining agent, isn’t it true that they’ve never had a majority of bargaining unit members who were also members of the Union.” (Placek 64) The question was not intended to, nor did it establish that the Union lacked majority support of the bargaining unit, but merely highlighted Respondent’s misplaced reliance on a lack of membership to establish a lack of support. Even after the Union won a majority vote

in an NLRB conducted election eight to four, a majority of employees did not join the Union. Inasmuch, attempting to rely on lack of membership to withdraw recognition was misguided, as union membership had not historically been a reliable indicator of actual union support.

5) *The Employer's attorney investigated whether the Union had majority support, and it was determined that it did not.* - During trial, Patrick Burke, Chief Executive Officer and President of Omaha Industries, the holding company that owns Crete Cold Storage, testified that his attorney conducted an investigation into the Union's majority support by talking to Plant Manager Placek, and determined that the Union did not have the support of a majority of employees. Crete's attorney did not testify to the evidence adduced during this "investigation," nor did Jessica Placek. Inasmuch, stating that there was investigation without stating what that investigation was or what was discovered by it does not in any way support the conclusion that the investigation revealed a lack of majority support for the union, and inasmuch is not probative evidence.

6) *On April 1, 2009 the Union filed a Petition for Election, which the Employer sought to join.* - The fact that the Union filed a petition which it later withdrew is irrelevant to the lawfulness of Respondent's withdraw of recognition. The only thing that the filing of the petition shows is that the Union sought to protect this unit even in the event that the withdrawal of recognition was upheld.

7) *All information requested by the Union was provided to the Union prior to hearing.* There is simply no record evidence to support this claim.

### EXCEPTION III

Respondent argues in its third exception that the ALJ erred in four of its findings. Each will be dealt with separately.

1) *The ALJ erred in finding that the Employer had a duty to supply the requested information after indicating their intent to withdraw recognition.* - Respondent bases its argument on *Champion Home Builders Co.*, 350 NLRB 788 (2007). Respondent reliance on *Champion* is misplaced. In *Champion* the Board determined that an Employer was not obligated to provide information after a) a lawful withdrawal of recognition, where b) by agreement of the parties, the information was not required to be provided until after the effective date of the withdrawal. *Id* at 793. In the instant case, there was not a lawful withdrawal of recognition and the information was requested some eight-plus weeks prior to the effective date of the anticipated withdraw. The Union and Respondent had no agreement regarding when the requested information should have been provided. Respondent had ample time to provide the requested information prior to the withdrawal, and should have done so.

To the extent that Respondent now claims that it was under no obligation to produce the information after its announced withdrawal of recognition, their argument is specious at best. In many respects, Respondent's announced withdrawal of recognition heightened the Union's need for the requested information; especially in terms of the information that would allow the union to identify members of the bargaining unit.

In its February 20, 2009 letter announcing its intended withdrawal of recognition, Respondent challenged the Union with providing it "evidence" that the Union continued to represent a majority of the bargaining unit. (GC 12) While the Union was under no

obligation to provide such evidence, Respondent's failure to produce the requested information unreasonably hampered any effort the Union might have made in determining support or substantiating Respondent's claims. Indeed, the Union had no way of determining who was in the unit, the unit's size, or the support of unit employees without the complete seniority list designating those employees. This demonstrates Respondent's bad faith associated both with its failure to provide the requested information and its unlawful withdrawal of recognition.

2) *The ALJ erred in finding the fact that Crete did not provide requested information.* - It is entirely unclear on what record evidence Respondent bases this argument. It is undisputed that the only response to the January 13, 2009 request for a seniority list was an email stating "Javier Garcia," who was the only known union member, and not a seniority list which included all unit employees. Inasmuch, the response is woefully incomplete at best and intentionally misleading at worst. In regards to the January 28, 2009 request, Respondent presented no evidence at trial that it provided all information relevant to that request to the Union pursuant to a Subpoena Duces Tecum. As a matter of record, no evidence exists that Respondent provided any information in response to the Union's January 28, 2009 request.

3) *The ALJ erred in finding that the requested information was not within the Union field representative's possession or knowledge.* - As discussed above, the Union was not obligated to get the information from Union representative Lee. On the contrary, it is the Respondent who has an obligation to provide relevant information upon request. Any argument that the information could have been obtained from another source such as Lee misses the point. Respondent had an obligation to provide the

information, and was in the best position to provide it accurately. Moreover, no argument could be made that Union representative Lee, had in her possession all of the information requested in the Union's detailed January 28, 2009 request.

4) *The ALJ erred in finding there was substantial evidence to support a finding that the Employer committed an unfair labor practice by facility to provide requested information.* - Contrary to Respondent's argument, the Judge's decision is firmly supported by fact and law. As previously stated, 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 supra.* The standard for relevance is a "liberal discovery-type standard." *Id.*

On January 13, 2009, the Union requested that Respondent provide it with "a current seniority list of all bargaining unit employees." (GC 7) In response Respondent provided the Union with one name – Javier Garcia. (GC 7) CEO and President Burke testified that at about this time he believed that there were approximately five to six employees in the collective-bargaining unit. (Burke 18) Plant Manager Placek testified that at the time of the withdrawal of recognition there were approximately three employees in the collective-bargaining unit. (Placek 43) Under either Burke or Placek's testimony, it is clear that Respondent's response of "Javier Garcia" was an incomplete response to the January 13, 2009 information request. An employer does not satisfy its obligation to furnish information by providing only some of the information requested. *Int'l Telephone & Telegraph Corp. v. NLRB*, 382 F2d 266, 271 (C.A. 3). Inasmuch, Respondent's incomplete response was in violation of sections 8(a)(1) and (5) of the Act.

After receiving an incomplete response to his January 13, 2009 request for information, and in anticipation of upcoming contract negotiations, on January 28, 2009 the Union made a detailed request for information from Respondent. The request as outlined above sought information concerning employees' wages, benefits, and other compensation. The Board has determined that such information concerning unit employees is presumptively relevant. *Industrial Welding Company*, 175 NLRB 477 (1969); *Stahl Specialty Company*, 175 NLRB 129 (1969); and *Cowles Communications Inc.*, 172 NLRB 1909 (1968). Respondent produced no evidence at hearing that they had supplied the Union with any of the requested information. Inasmuch, Respondent's failure to provide the requested information is in violation of Sections 8(a)(1) and (5) of the Act.

#### **EXCEPTION IV**

Respondent argues in its fourth exception that the ALJ erred in four miscellaneous determinations. Each will be dealt with separately.

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.* - In *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998) the Supreme Court found that the Board's adoption of a unitary standard for polling, RM elections, and withdrawals of recognition was not irrational, but stated that it was equally within the province of the Board to "raise the bar" regarding withdrawals of recognition by imposing a more stringent requirement than the reasonable-doubt test as established in *Celanese Corp.*, 95 NLRB 664 (1951). *Id* at 374. Based on the Court's decision in

*Allentown*, the Board in *Levitz, supra*, enunciated just such a more stringent requirement. The Board found that an incumbent union enjoys a presumption of continuing majority support, and further enjoys an irrefutable presumption of majority support during the term of a contract with a duration of three years or less, and that an employer seeking to withdraw recognition from an incumbent union bears the burden of rebutting that presumption by showing that the union has *actually* lost support of the majority of the employees in the bargaining unit. *Levitz, supra*. That is, an employer that withdraws recognition bears the burden of proving that the incumbent union suffered a valid, untainted, numerical loss of its majority status. In adopting the “actual loss of majority support” standard for withdrawals of recognition, the Board specifically abandoned the “reasonable good-faith doubt” standard established in *Celanese Corp.*, and examined in *Allentown*. Inasmuch, the ALJ appropriately applied *Levitz* to the case at hand.

Moreover, as will be discussed below, Respondent can not satisfy the less stringent good faith uncertainty standard now used for elections, and formerly used for withdrawals of recognition.

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.* - About February 20, 2009, Respondent announced its intent to withdraw recognition from the union upon the expiration of the collective-bargaining agreement. (GC 12) On that date, the only possible information that the Employer could rely upon to support its withdrawal was a hearsay report that employee Javier Garcia wanted to get out of the Union: that is, he no longer wanted to pay dues, as well as some anecdotal evidence that employees did not talk with Union representative Linda Lee

when she came to the facility. (Burke 19, Placek 42) Based on this negligible information, Respondent withdrew recognition from the Union stating that it had a “good-faith reasonable doubt” whether a majority of its employees supported the Union.

While anticipatory withdrawals of recognition, such as the Employer’s February 20, 2009 letter to the Union, are permitted, majority status is determined on the date the withdrawal of recognition is effective, herein the March 31, 2009 expiration date of the contract. See *Parkwood Development Center, Inc.*, 347 NLRB 974, at 975 fn. 10 (2006) (anticipatory withdrawal) and *HQM of Bayside, LLC*, 348 NLRB 787 (2006), enforced 518 F.3d 256, 183 LRRM 2937 (4<sup>th</sup> Cir. March 10, 2008); *Highlands Regional Medical Center*, 347 NLRB 1404 (2006), enforced 508 F.3d 28, 183 LRRM 2170 (DC Cir. Nov. 30, 2007) (date for determination of majority status).

It is not clear how many employees were in the bargaining unit on the date of the contract’s expiration. Plant Manager Jessica Placek maintains that there were three employees employed in the bargaining unit on the date of the withdrawal of recognition: Javier Garcia, Brad Jelineck, and Rick Nigg. Patrick Burke, the CEO and President of Respondent’s parent company Omaha Industries, testified that there were approximately five to six employees in the bargaining unit upon Respondent’s announced withdrawal. The Union has been unable to determine the number of employees in the collective-bargaining unit as Respondent has failed to provide it with the requested information necessary to make such a determination. Even giving Respondent the benefit of its most favorable testimony, there were at a minimum three employees in the bargaining unit on the date of withdrawal. Therefore, under *Levitz* Respondent is obligated to show that the

Union had lost the support of two of those bargaining unit members on the date of the withdrawal of recognition.

An Employer can establish such a loss by a variety of objective means, including an anti-union petition signed by a majority of the unit employees. Not all evidence of loss, however, is sufficient to demonstrate actual loss of support as required under *Levitz*. For instance, in *Port Printing Ad & Specialties*, 344 NLRB 354 (2005), the Board held that the employer did not establish an actual loss of support through hearsay conversations with 4 of the 8 unit employees over a three year period, even when accompanied by the absence of a collective-bargaining agreement for four years. Additionally, the lack of a secretary treasurer for the Union and the fact that only one of the employees was a dues paying member did not support evidence of actual loss of majority support. *Id.*

As stated previously, Respondent appears to have based its withdrawal of recognition on its hearsay knowledge that employee Javier Garcia, the only remaining unit employee to utilize dues checkoff, wanted out of the union, as well as some anecdotal evidence that employees did not talk with Union representative Lee when she came to the facility.

In regards to Respondent's evidence that Garcia wanted out of the Union, as stated previously, the Board holds that lack of membership in the unit at the time of withdrawal of recognition is not reflective of an actual loss of union support under *Levitz*. In fact, lack of membership is not even sufficient to establish a reasonable or good-faith doubt of lack of majority support under the old *Celanese* standard.

In *Tri-State Health Service v. NLRB*, 374 F.3d 347, 354-355 (5th Cir. 2004), and *McDonald Partners, Inc. v. NLRB*, 331 F.3d 1002, 1005- 1007 (D.C. Cir. 2003) the Fifth and D.C. circuit have questioned whether under certain circumstances decline or lack of membership should be considered as objective evidence of loss of support. However, despite the appellate courts' rulings in *Tri-State Health* and *McDonald Partners, Inc.*, and Respondent's argument that employee membership should be considered as objective evidence, the Board recently refused to consider the employer's evidence of an alleged decline in union membership, alleged vacancies in steward positions, a claim that union membership was concentrated among certain groups of employees, and testimony that an unspecified number of employees discussed removal of the Union, and held that this was not the type of evidence, even if considered collectively, that would be sufficient as objective proof of a union's loss of majority support. *Narricot Industries, L.P.*, 353 NLRB No. 82 (January 30, 2009). In *Narricot*, the Employer had relied on a tainted decertification petition to withdraw recognition, but also claimed that other evidence, as outlined above, supported a loss of majority support, citing circuit court cases *Tri-State Health Services* and *McDonald Partners*. Despite the Employer's arguments, the Board held that such evidence was not the type that would support a loss of majority support.

In the instant case, based on ample precedent, evidence shows that Respondent had no objective evidence that a majority of the unit employees did not support the Union. Rather, Respondent based its decision to withdraw recognition on the statement of one employee in a unit of three that he wanted to resign from the Union because he did not want to pay dues. First, such evidence from one employee in a unit of three is not objective evidence of a lack of *majority* support for the Union. Respondent had no direct

evidence from the other two employees in the unit concerning their support for or against the Union, other than Respondent's belief that neither employee supported the Union because they were not members of the Union. Respondent's belief as the membership status of Nigg and Jelinek was based solely on the fact that neither employee had dues deducted from their checks. As is set out above, union membership of the employees is not probative of their support for the Union and could not support a withdrawal of recognition even if all three employees had said that they wanted to resign from the Union. Secondly, even if such evidence was probative, Respondent only knew that Garcia wanted out of the Union. Respondent had no way of knowing Nigg and Jelinek's membership status because while they were not having dues checked off, as it was just as likely that the employees were paying dues directly to the Union.

Moreover, it should be noted that even if lack of membership were indicative of lack of support for the Union as the DC Circuit and the Fifth Circuit have suggested, the evidence Respondent relied on to substantiate Garcia's desire to "get out" of the Union was hearsay. While supervisor Sammy Sanchez claims to have heard directly from Sanchez that he wanted to resign from the Union, Sanchez testified that he never shared this with any other manager, let alone the managers that made the decision to withdraw recognition.

Finally, the hearsay evidence itself is too vague to support a lack of support for the Union, rather than the more likely interpretation that Garcia merely wanted to resign from the Union to avoid paying dues. Franco told Placek that Javier Garcia wanted to *get out* of the Union because he *did not want to pay dues*. While it could be argued that Garcia's comments meant that he wanted to be rid of the Union entirely, such a

contention is not supported by the language of what was told to Respondent, or by Garcia's own comments at the relevant time. Respondent as much as admits that it knew that Garcia merely wanted to resign from the Union, which it then wrongly and conveniently equated with Garcia and other non-members not wanting to be represented by the Union. As such, the indirect evidence that Garcia wanted to "get out" of the Union because he did not want to continue to pay Union dues, alludes to a desire to resign from membership, not rid the employees of the Union entirely, and cannot legally support Respondent's decision.

Other than Garcia's statements that he wanted to get out of the Union, Respondent presented no other probative evidence to support its decision to withdraw recognition other than a contention that employees would not speak to Union representative Lee when she came to the facility. This is not objective evidence of actual loss of support where there could be any number of reasons why employees would not talk to Lee, including that they were happy with their representation and had nothing to say to her. Inasmuch, the ALJ correctly concluded that Respondent failed to satisfy the requirements of *Levitz* prior to its withdrawal of recognition, and in doing so violated Sections 8(a)(1) and (5) of the Act.

3) *The ALJ erred in failing to consider Crete's argument that the Union's position puts Crete in a no win situation.* - Respondent's argument that it was placed in a "no-win" situation when it uncovered an alleged lack of majority support is a legal straw man. *Levitz* creates a "safe harbor" so that an employer faced with apparent proof of the union's loss of majority status need not withdraw recognition or face liability under Section 8(a)(2) of the Act, but can simply file an RM petition requesting an NLRB

election. *Levitz* at 726. The standard for an RM election is a “good faith reasonable uncertainty” that a majority of the bargaining unit employees wish to be represented by the incumbent union, a lower standard than that which is necessary to support a withdrawal of recognition. *HQM of Bayside, LLC*, 348 NLRB 787, 789 (2006).

Therefore, an employer faced by what it believes may be sufficient evidence to establish loss of majority status by an incumbent union can protect itself by filing an RM petition, rather than taking the risk that its assessment of the incumbent union’s majority status is erroneous. Moreover, the Employer will not be penalized if their evidence does not support an RM petition; the petition will simply be dismissed.

4) *The ALJ decision that Crete committed an unfair labor practice by withdrawing recognition was supported by substantial evidence.* - For the reasons previously stated, the ALJ’s decision was supported by fact and law.

#### **EXCEPTION V**

Respondent argues in its fifth and last exception that even if the Board finds that the Employer committed an unfair labor practice in withdrawing recognition, an election should be ordered as the appropriate remedy. As stated previously, the standard for an RM election is a “good faith reasonable uncertainty” that a majority of the bargaining unit employees wish to be represented by the incumbent union, a lower standard than that which is necessary to support a withdrawal of recognition. *HQM supra*. Respondent’s evidence of loss of majority support fails to meet this standard. The only evidence Respondent has produced regarding a “good faith reasonable uncertainty” is a hearsay report that employee Javier Garcia wanted to get out of the Union, that is that he no longer wanted to pay dues, as well as some anecdotal evidence that employees did not

talk with Union representative Linda Lee when she came to the facility. As discussed previously, lack of membership will not support a finding of actual loss or good faith reasonable uncertainty of majority support, as it is not a reliable indicator of actual union support. This is especially true in a right-to-work state such as Nebraska. In regards to employees not visiting with Lee, as previously stated this too is unreliable evidence on which to base a good faith uncertainty of loss of majority support. As Respondent's evidence fails to satisfy even the good-faith uncertainty standard, an RM Petition or election would not be appropriate in these circumstances. It should be noted, however, that had Respondent filed a petition for election, and presented its evidence to the Region, not withdrawing recognition as it did, these proceedings would not have been necessary.

The only appropriate remedy for Respondent's actions is a bargaining order. An affirmative bargaining order is warranted for the reasons set forth in *Caterair International*, 322 NLRB 64 (1996). The Board has held that 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. In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Bldg. Material v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). For the reasons stated below, even under the DC Circuit's analysis, an affirmative bargaining order is warranted. In *Vincent*, *supra*, the court summarized its requirement 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.'" Id. at 738. Consistent with the court's requirement, and the particular facts of this case, the 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 the Respondent's withdrawal of recognition and resulting refusal to collectively bargain with the Union. At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time ( no less than 6 months and no more than one year under the Board's ruling in *Lee Lumber & Bldg Materials*, 334 NLRB 399 (2001), does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation, because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation. Since the Union was never given an opportunity to begin negotiations for a second agreement with the Respondent, it is only by restoring the status quo ante and requiring the Respondent to bargain with the Union for a reasonable period of time that the employees will be able to fairly assess for themselves the Union's effectiveness as a bargaining representative. (2) An affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to delay bargaining in the hope of discouraging support for the Union. It also ensures that the Union will not be pressured by the Respondent's withdrawal of recognition to achieve immediate results at the bargaining

table following the Board's resolution of its unfair labor practice charges and issuance of a cease and desist order. Providing this temporary period of insulated bargaining will also afford employees a fair opportunity to assess the Union's performance in an atmosphere free of the Respondent's unlawful conduct. (3) A cease-and-desist order, alone, would be inadequate to remedy the Respondent's withdrawal of recognition and refusal to bargain with the Union because it would allow another such challenge to the Union's 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 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.

## CONCLUSION

The evidence establishes that by its failure to provide the information requested by the Union on January 13 and 28, 2009, and by its withdraw of recognition, Respondent has violated Sections 8(a)(1) and (5) of the Act, and the decision of the ALJ should be upheld.

Dated: September 28, 2009

Respectfully submitted,

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STATEMENT OF SERVICE

I hereby certify that in accordance with Section 102.114(a) and 102.114(i) I have this date served copies of the foregoing General Counsel's Response to Respondent's Exceptions to the Administrative Law Judge's Decision on all parties listed below by electronically filing with the Executive Secretary of the National Labor Relations Board and by electronic email to Counsel for Respondent, Counsel for Charging Party and the respective party representatives.

Dated: September 28, 2009

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