

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED KISER SERVICES, LLC

and

CONSTRUCTION & GENERAL LABORERS' UNION
LOCAL 1329

Case Nos. 30-CA-18129
30-CB-5352

and

NORTHERN WISCONSIN REGIONAL COUNCIL OF
CARPENTERS

**EMPLOYER'S BRIEF IN RESPONSE TO THE EXCEPTIONS OF THE GENERAL
COUNSEL & NORTHERN WISCONSIN REGIONAL COUNCIL OF CARPENTERS**

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INTRODUCTION

United Kiser Services, LLC (“United Kiser”) respectfully submits this Brief in Response to the Exceptions of the General Counsel and Northern Wisconsin Regional Council of Carpenters (“Carpenters Union”). The General Counsel and Carpenters Union except certain findings of the Administrative Law Judge (“ALJ”) in his August 25, 2009 Decision, wherein the ALJ found that the unfair labor practice charge challenging United Kiser’s recognition of the Construction & General Laborers’ Union, Local 1329 (“Laborers Union”) as the bargaining representative of certain shop employees performing production work at United Kiser’s plant located in Norway, Michigan was untimely and that United Kiser did not unlawfully refuse to bargain with the Carpenters Union.

General Counsel’s and the Carpenters Union’s exceptions are without merit and utterly unsupported by the record in this case. Notably, this case concerns the Carpenters’ challenge to United Kiser’s recognition of the Laborers as the representative of certain United Kiser shop employees hired after January 1, 2007.¹ The record is devoid of any evidence substantiating the Carpenters’ claim to the work at issue. The General Counsel’s claim that the Voluntary Recognition Agreement attached to the Carpenters Field Agreement grants 9(a) status over shop employees located in Michigan is indefensible since the Voluntary Recognition Agreement, by

¹ Throughout their Exceptions, General Counsel and the Carpenters Union attempt to characterize this case as a “contract repudiation” or “unilateral change” case. It is neither. The undisputed record clearly shows that United Kiser has never repudiated its agreement with the Carpenters, and has never attempted to transfer work from the five to six millwrights to employees not represented by the Carpenters. (Joint Ex. 1 ¶¶ 24, 31-32.) Notably, were the case actually a repudiation case, General Counsel’s arguments on the 10(b) issue would be moot since “It is at the moment of repudiation that the unfair labor practice – the refusal to bargain – occurs...[i]f the repudiation occurred outside the 10(b) period, all subsequent failures of the respondent to honor the terms of the agreement are deemed consequences of the initial repudiation for which the union may not recover.” *St. Barnabas Med. Center*, 343 NLRB 1125, 1127 (2004) (internal quotation omitted). In any event, the sole issue in this case is whether United Kiser lawfully recognized the Laborers as the representative of shop employees hired to perform shop production work.

its terms, is limited to operations in Wisconsin and Menomonee, Michigan and United Kiser's shop is indisputably located in Dickinson County, Michigan (outside of the geographic reach of the Field Agreement and the Voluntary Recognition Agreement). Likewise, the General Counsel's argument that the Carpenters Shop Agreement grants 9(a) status to the Carpenters is equally flawed since *no contract language* even remotely establishes a "clear," "unequivocal" acknowledgement of such status, as universally required by Board precedent. Accordingly, such arguments should be disregarded in their entirety.

More importantly, the ALJ's decision does not reach the merits of the Carpenters' representation claim because the ALJ properly concluded based upon ample, undisputed testimony in the record that the unfair labor practice charge was untimely because it was filed more than *one year* after United Kiser recognized the Laborers as the representative of shop production employees. The ALJ properly found that the Carpenters Union had both actual and constructive knowledge of the Laborers' performance of shop work (over which the Carpenters now claim exclusive jurisdiction) more than six months prior to the filing of the charge. Accordingly, the Complaint is clearly barred by the statute of limitations in section 10(b) of the Act and was properly dismissed.

The exceptions of the General Counsel and Carpenters Union find no support in the record and are, in fact, forcefully contradicted by the testimony of Carpenters Union Business Agent Greg Dhein and Union Steward Manowski. The record is replete with evidence that the Carpenters Union knew, or with reasonable diligence should have known, that the Laborers were performing shop production work a full year before any charge was filed. Indeed, Union Steward Manowski testified, on direct examination no less, that he observed Laborers performing work over which the Carpenters claim jurisdiction in the spring of 2007. General

Counsel and the Carpenters Union, despite attempts at obfuscation, cannot avoid the dire impact of witness testimony directly on point.

General Counsel's and the Carpenters' Union's attempts to minimize Manowski's testimony fail on every level. For example, General Counsel's argument that Manowski was no longer the Carpenters' steward is plainly contradicted by both Manowski and Dhein. Manowski testified that while he did not want to be the steward, he nonetheless held himself out as the steward to United Kiser in 2006 and never resigned his position. United Kiser's representative testified, without contradiction, that Manowski identified himself to management as the steward from the inception of United Kiser. For his part, Dhein testified that Manowski was his steward and that he expected Manowski would report performance of millwright work by non-millwrights, but that Manowski was "derelict" in this duty. In sum, Manowski's "derelict" performance as steward does not, by itself, relieve him of his authority and rights as steward, nor can the Carpenters' Union relieve itself of its obligations to police the contract simply because its steward was not doing the job.

Significantly, there is no allegation of concealment in this case. To the contrary, the record shows that a full complement of Laborers was in plain view by mid-year 2007, a workforce that, in fact, outnumbered the shop Carpenters three-fold. It is only reasonable that the Carpenters Union could, by "mere observation" and presence at the worksite, discern the facts supporting their fatuous charge much earlier. The arguments of the General Counsel and Carpenters Union that the Laborers presence was not an obvious red flag are a misplaced distortion of the record. Most compelling on this point was Dhein's own testimony concerning his belated discovery of the Laborers. When asked how he learned of the alleged breach, Dhein testified that when he arrived onsite (after several months' absence) he saw that "the shop was

pretty full." This led Dhein to angrily question Manowski about the situation, and ultimately to the charge at issue in this case.

Certainly, had Dhein been diligent in his policing of the contract, he would have easily discovered the facts underlying the charge much earlier. But, the record shows that Dhein was not at all diligent, choosing to visit the site only a couple times per year and on occasions when the millwrights were not scheduled to work. In contrast, the Laborers' Business Representative is on site at least once per week, often two times, and has established a long-term, committed relationship as bargaining representative of the unit employees. Certainly, had Dhein had any regular presence in the shop, he would have noticed not only the sizeable contingent of Laborers doing production work, but also would likely have seen a competing Business Agent. Dhein's failure to do so, like Manowski's alleged "dereliction of duty" does nothing to toll the 10(b) limitations period. Accordingly, the exceptions of the General Counsel and the Carpenters Union should be disregarded and the decision of the ALJ adopted by the Board.

The exceptions concerning the ALJ's finding that United Kiser did not refuse to bargain by temporarily suspending bargaining to seek the advice of counsel following the Carpenters' unprecedented recognition demand, tendered between bargaining sessions, are unfounded. The ALJ properly found that under the circumstances of this case - where the Union's re-opener was indisputably untimely and where the parties mutually agreed to a period of 56 days between sessions- a suspension that lasted just two days longer was not a refusal to bargain. Again, the ALJ was correct. The refusal to bargain charge is a disingenuous throw-in designed to divert attention from the meritless 9(a) representation claim and should be dismissed.

Accordingly, United Kiser requests that, based upon substantial record evidence, the Board affirm and adopt the ALJ's findings and conclusions as its own.

STATEMENT OF UNDISPUTED FACTS

A full statement of facts is provided in United Kiser's post-hearing Brief to the Administrative Law Judge.

STANDARD OF REVIEW

The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the "clear preponderance of all the relevant evidence" convinces the Board that the ALJ was incorrect. *Goski Trucking Corp.*, 325 NLRB 1032, 1032 (1998), citing *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). Upon careful examination, the Board will find that in the present case the ALJ's conclusions and findings are fully supported by the record.

ARGUMENT

I. **THE ALJ CORRECTLY CONCLUDED THAT THE UNFAIR LABOR PRACTICE CHARGE CHALLENGING UNITED KISER'S RECOGNITION OF THE LABORERS AS THE REPRESENTATIVE OF SHOP PRODUCTION EMPLOYEES WAS UNTIMELY.**

The General Counsel and the Carpenters Union take exception with all of the ALJ's findings concerning the Carpenters' receipt of notice (actual and constructive) of the facts giving rise to the charge in this case. (General Counsel Brief ('GC Brief') at 18-41; Carpenters Brief at 10-23.) Notably, as a threshold matter, both General Counsel and the Carpenters Union both misstate the notice requirement. It is undisputed that "the six-month limitations period prescribed by Section 10(b) begins to run when a party has clear and unequivocal notice of a violation of the Act" and that "the requisite notice may be actual or constructive." *CAB Assoc.*, 340 NLRB No. 171, Slip Op. at 2 (2003) (internal citation omitted). Further, "[i]n determining whether a party was on constructive notice, the inquiry is whether that party should have become aware of a violation in the exercise of reasonable diligence." *Id.* (internal citation omitted).

However, both General Counsel and the Carpenters Union argue that the 10(b) period does not begin to run until the Carpenters had knowledge of the *Laborer's collective bargaining agreement with United Kiser*, and the 9(a) terms thereof. (GC Brief at 18-19; Carpenters Brief at 16-17.) That is incorrect. In this case, the Complaint alleges that the Carpenters Union is the exclusive bargaining representative of "all machinists and fabricators working in the shop." (Complaint ¶ 6.) The Complaint further alleges that on March 1, 2007 United Kiser violated the Act by granting recognition to the Laborers for performance of such work in the shop. (Complaint ¶ 8.)

Board precedent clearly states that the 10(b) limitations period begins to run when a party receives notice – either actual or constructive – “of the acts that constitute the alleged unfair labor practice, i.e., until the aggrieved party knows or should know that his statutory rights have been violated.” *Morrell & Co.*, 304 NLRB 896, 899 (1991). Accordingly, the relevant question is: at what point did the Carpenters Union acquire knowledge of “facts from which it should have known” that an unfair labor practice was committed. *Id.* (finding union had clear and unequivocal notice outside the 10(b) period of “facts from which it should have known that Morrell had closed and reopened its Ark City plant...”) In the present case, the Carpenters claim a right of exclusive representation of all shop employees performing machining or fabrication work. Therefore, observation of other non-Carpenter shop employees performing such functions would certainly impart knowledge of the relevant facts from which the Carpenters should have known of the alleged violation. To hold otherwise would be a perverse elevation of form over substance.

Because the record shows that the Carpenters Union had clear and unequivocal notice, both actual and constructive, of the facts that form the basis of the Complaint outside the six-

month limitation period, the ALJ's findings and decision should be affirmed and adopted by the Board.

A. Overwhelming Record Evidence Clearly And Convincingly Shows That The Carpenters Had Both Actual And Constructive Knowledge That Laborers Were Doing Fabrication Work In The Shop Before February 21, 2008.

Section 10(b) of the Act requires that unfair labor practice charges challenging representation be filed within six months of the date the aggrieved party received notice. Because the Carpenters' unfair labor practice charge was first filed on August 21, 2008, the relevant inquiry is whether or not the Carpenters had actual or constructive knowledge of the facts giving rise to the charge on or before February 21, 2008. (Jt. Ex. 1, ¶ 29.) The record shows that United Kiser easily satisfied its burden to prove that the Carpenters had such knowledge prior to February, 2008.

The timeline of events is illustrative. First, the record shows that when United Kiser was formed in January, 2006, the Company entered Field Agreements with both the Carpenters Union and the Laborers Union. (Jt. Ex. 1, ¶¶ 5-10; Jt. Exs. 3, 5.) Notably, the Laborers Field Agreement's geographic jurisdiction includes Norway, Michigan (where United Kiser's shop is located), whereas the Carpenters Field Agreement clearly does not. (Jt. Ex. 3, p. 35-36; Jt. Ex. 5, p. 2.) Next, the record shows that United Kiser expanded operations in 2007 to include a new business, namely marine industry shop work. (Tr. at 288-289, 293-303.) Between January 1, 2007 and March 18, 2008, ten (10) Laborers were hired to work in the shop due to expanding business generated by Shop Superintendent Spinnato. (R. Ex. 2; Tr. at 266, 287-288.) As General Counsel and the Carpenters Union concede, United Kiser recognized the Laborers as the representative of the newly hired shop employees in March, 2007. (Compl. ¶ 8.)

Yet, the Carpenters Union failed to voice any objection to the Laborers' performance of such work until July, 2008, when the Carpenters took the position that they were the exclusive

representative of shop employees. (GC Ex. 4.) During the extensive period of Carpenters' silence on the subject, the Laborers Union established a strong presence in the shop, with a workforce much larger than the Millwrights and a Business Agent active in the shop, visiting on average once per week. (Tr. at 399-400; R. Ex. 2.) Under these circumstances, labor policy strongly favors continuing the Laborers' well-established relationship. *St. Barnabas Med. Center*, 343 NLRB 1125, 1128-1129 (2004) (Noting that tolling the limitations period because union claimed ignorance "is inconsistent with the policies underlying Section 10(b), which is intended 'to promote...stable collective-bargaining relationships by precluding extended periods of uncertainty regarding the validity of the agreement and the parties' contractual obligations.'"), quoting *A&L Underground*, 302 NLRB 467, 469 (1991).

More importantly, the record amply supports the ALJ's finding that the Carpenters had both actual and constructive knowledge of the relevant facts before February, 2008.

B. Union Business Representative Dhein Knew Or Should Have Known United Kiser Employed Non-Carpenters To Do Fabrication Work In The Shop Before February, 2008.

The ALJ properly concluded that, with reasonable diligence to police the contract, the Carpenters' Business Agent Gregory Dhein should have realized the operative facts giving rise to the unfair labor practice charge in this case. (ALJ Dec. p. 6-8.) Dhein has served as the Carpenters' Business Representative serving United Kiser's employees since the Company's inception on January 1, 2006. (Tr. at 126, 127.) Prior to that, Dhein served as the Carpenters' Business Representative for predecessors of United Kiser from November, 2000 to 2006. (Tr. at 127, 249.) Dhein testified that, on average, four to six Carpenters currently work in the United Kiser shop. (Tr. at 128, 191.) All of the Carpenters in the United Kiser shop perform hydroelectric work. (Tr. at 234.) Prior to 2007, virtually all of the work at United Kiser was hydroelectric repair work. (Tr. at 234.)

Significantly, however, Dhein admits that Laborers have always been present in the United Kiser shop. (Tr. at 224-225.) In fact, Dhein testified that in 2006, he solicited two shop Laborers to join his union. (224-225; 233.) Dhein testified explicitly that he was aware Laborers were working in the United Kiser shop as early as 2006:

Q. [Y]ou were fully aware from January 1 forward that there were Laborers union members working in the shop at United Kiser, is that correct?

A. Okay.

(Tr. 232.) Dhein further clarified, upon questioning from the ALJ:

Q. [D]id you know that there were Laborers at United Kiser based on your visits to the facility in 2006?

A. Yes.

(Tr. at 233.)

Clearly, Dhein was well aware that United Kiser was a competitive two-union shop for years before the Complaint in this case.

Moreover, on October 25, 2006, United Kiser informed Dhein specifically that the Company was seeking new shop work “specifically in the marine industry” and that there would be additional “production work” in the future. (Tr. at 323-325.) Spinnato testified, without contradiction, that Dhein agreed to look into classifications to do the new work, but *Dhein never got back to Spinnato*. (Tr. at 325.)

Shockingly, despite being told that United Kiser would be expanding its shop business significantly and despite knowing that a competing union had workers on site, Dhein made little to no effort to police his union’s alleged status as the exclusive representative of shop employees performing machining and fabrication work. Indeed, Dhein testified that he visited the shop only

twice in the relevant period: on July 23, 2007 and January 11, 2008.² (Tr. at 148-150, 153-154, GC Exs. 33-34.) By the time of Dhein's visits, a sizeable number of Laborers had been hired to perform the marine industry production work at United Kiser. (Tr. at 300-301; R. Ex. 2.) Yet, Dhein claims to have simply not noticed this substantial increase in the shop workforce, and the General Counsel argues that Dhein's inattentiveness justifies tolling of the 10(b) period. It does not. Dhein certainly should have been able to infer, based upon the employer's statement that it was seeking substantial new work combined with the presence of a much larger workforce in a dual-union shop, that perhaps his union's claim to exclusive jurisdiction over such work was not being honored.

It is well settled that ignorance on the part of union agents does not toll the 10(b) statute of limitations. *John Morrell & Co.*, 304 NLRB 896 (1991) (“[following] Morrell's reopening of Ark City, the Union should have been able to infer Morrell's unlawful scheme. That it did not, in fact, make the connection does not toll the running of the 10(b) period.”). As the Board aptly noted in *Moeller Bros. Body Shop*, 306 NLRB 191, 193 (1992):

While a union is not required to [] police its contracts aggressively in order to meet the reasonable diligence standard, it cannot with impunity ignore an employer or a unit...and then rely on its ignorance of events occurring at the shop to argue that it was not on notice...

1. Based upon “mere observation” Dhein could have learned of the alleged violation.

In this case, “mere observation” and a modicum of attentiveness during his visits in 2007 and 2008 would have put Dhein on notice of the alleged violation in this case. General Counsel and the Carpenters Union go to extraordinary lengths to argue that the “mere presence” of

² Dhein also claimed to have had a meeting at United Kiser on Friday, Feb. 2, 2007, but he concedes that he did not visit the shop on this occasion because it was a Friday and the millwrights did not work on Fridays. (Tr. at 146, 148.)

Laborers performing such work is "insufficient" to place the Union on notice that its alleged right to exclusively represent shop employees was violated. (GC Brief at 37-39; Carpenters Brief at 20-23.) Yet **Dhein's testimony conclusively refutes such arguments**. Most tellingly, Dhein testified (on direct examination by General Counsel) that, in fact, the presence of the large number of workers in the shop was precisely what put him on notice in 2008 that something was amiss. Dhein testified:

Q. [W]hen did you first learn that there were Laborers performing work in the United Kiser shop?

A. On-- when we began the shop negotiations for the addendum in June of 2008.

Q. And how did you find out about it?

A. **I walked into the shop and it was pretty full.**

(Tr. at 179.)

Likewise, on direct exam from his own counsel, Dhein testified:

Q. In June of 2008 when you went down to United Kiser shop what did you see?

A. Shop full of workers.

Q. Approximately how many do you remember seeing?

A. Probably 20 people altogether.

Q. Were you able to see the faces of all 20 people?

A. No.

Q. You testified that there were normally four to six shop employees in the shop?

A. Yes.

(Tr. at 191.)

Dhein further testified (on direct examination):

Q. Did you talk to the Carpenters employees after you saw these twenty people in the shop?

A. The shop millwrights?

Q. Right.

A. Yes.

Q. Who did you talk to?

A. Mike Manowski.

Q. What do you remember being said during that conversation?

A. I asked him who everybody was in the shop there.

Q. And what did he say?

A. He said they were Laborers.

(Tr. at 196-197.)

Mere weeks later, July 18, 2008, the Carpenters Union demanded that United Kiser recognize it as the exclusive representative of shop employees and repudiate recognition of the Laborers. (GC Ex. 4.) The Carpenters' demand was clearly based upon Dhein's "mere observation" of a shop full of workers who were not Carpenters, which indisputably prompted his conversation with Manowski wherein Dhein learned that the employees were Laborers. Accordingly, excepting parties' arguments that the "mere presence" of the Laborers working in the shop did not constitute notice must be disregarded and the ALJ's findings affirmed.

Strikingly, the fact that Dhein discovered the alleged violation through "mere observation" of workers on the shop floor, followed by a brief conversation with Steward Manowski shows that had Dhein engaged in due diligence earlier (such as at the January 2008 meeting with United Kiser, which Dhein claims was for the purpose of "signing up" two field workers who were performing millwright work that Dhein claims had been hidden from him (Tr. at 154-155)) he certainly would have discovered the Laborers performing production work. It is well settled that Dhein, as the Carpenters' long-time Business Representative, had a duty to police the terms of the contract, which would include the alleged 9(a) representation terms. *Earthgrains Co. (Sara Lee Bakery Group, Inc.)*, 349 NLRB 389, 395 (2007) (noting request for information concerning third party was logically connection to ("[the union's] duty to police that portion of the collective bargaining agreement that prohibits the Company from entering into agreements that are inconsistent with its labor contract."); *New York Printing Pressmen & Offset*

Workers Union, No. 51 et al. v. NLRB, [cite] (2d Cir. 1978) (finding that union's failure to appear in the plant for period of seven to nine months showed lack of due diligence, stating "[O]f particular note is the failure of the Union during this period to make any effort to police the union security provision of the collective bargaining agreements.") (citations omitted).

The ALJ correctly found that Dhein was derelict in his duty to police the agreement, and should have discovered the alleged violation much earlier. Dhein's dereliction of his duties does not toll the 10(b) limitations period, and United Kiser has more than met its burden to prove that the Charge was untimely.³ The exceptions of the General Counsel and the Carpenters Union should be disregarded and the ALJ's decision affirmed.

2. The ALJ did not shift the burden of proof to the General Counsel.

In yet another attempt to obfuscate the issues in this case and avoid the impact of the unambiguous record, General Counsel and the Carpenters Union argue that the ALJ's decision must be overturned because he allegedly shifted the burden of proof on the 10(b) defense to the General Counsel. (GC Brief at 19; Carpenters Brief at 9, 11-12, citing ALJ Decision p. 7, lines 7-15.) Again, the excepting parties' arguments are unsupported. The ALJ's statement that "the General Counsel did not conclusively establish the underpinnings of this argument" concerns the ALJ's assessment of record evidence of Dhein's alleged due diligence and the lack of persuasiveness of the General Counsel's argument on this point, given that Dhein visited the

³ Both General Counsel and the Carpenters Union argue that Dhein exercised due diligence and his failure to visit the site more frequently or interact with the workers should be excused because of Dhein's workload and the distance of his office from United Kiser. (GC Brief at 35; Carpenters Brief at 20-21.) Such arguments are frivolous. The standard of due diligence is an objective standard, not a variable subjective standard based upon the workload of the business representative or geographical concerns. *Moeller Bros. Body Shop, Inc.*, 306 NLRB 191, 197 (1992) (union's choice to ignore small unit constituted failure to exercise due diligence); *Garrett Railroad Car & Equip.*, 289 NLRB 158 (1988) ("[T]he elements of this counterpoise include the exercise of due diligence.") *Shapiro v. Cook United, Inc.*, 762 F.2d 49, 51 (6th Cir. 1985) (A party's mere ignorance of the circumstances "does not constitute due diligence to discover the operative facts of his claims."); see also *Demars v. General Dynamics Corp.*, 779 F.2d 95, 99 (1st Cir. 1985); *Metz v. Tootsie Roll Indus., Inc.*, 715 F.2d 299 (7th Cir. 1983).

shop floor on only one occasion (a Friday) from January, 2007 to June, 2008. The statement does not reflect any unlawful burden-shifting, but rather states the ALJ's assessment that the evidence presented did not evince "due diligence" on Dhein's part. The record clearly shows that the General Counsel introduced evidence concerning Dhein's site visits and contacts for the sole purpose of refuting United Kiser's argument that Dhein failed to exercise due diligence. (GC Exs. 32-25; Tr. at 141, 151.) The ALJ's explanation for his rejection of General Counsel's argument is not evidence that the burden was unlawfully placed upon the General Counsel. Accordingly, the ALJ's decision should be affirmed.

C. Union Steward Manowski Knew Or Should Have Known Of The Facts Supporting The Alleged Violation Prior To February, 2008.

1. The ALJ properly found that Manowski was, at all relevant times, the Carpenters' Union Steward.

The General Counsel's and Carpenters Union's claims that Manowski was not a union steward in 2007-2008 are farfetched, at best. Both Manowski and Dhein testified that Manowski was the union steward during the relevant time period. Manowski testified under questioning by the ALJ:

Q: Who originally appointed you as steward?

A: Greg Dhein.

Q: And do you recall when he appointed you as steward?

A: After 9/11 when the planes hit.

(Tr. at 94.) Manowski further testified:

Q: Did you have any discussions with Mr. Dhein at that time as to what your responsibilities were as steward?

A: Not really.

Q: Well, did he tell you when he was appointing you the steward?

A. Just, you know, if anybody has any problems and, you know, if they get a hold of me I'd get a hold of him.

(Tr. at 95.) Although Manowski testified that he intended to resign, he also clarified that he never actually informed anyone of his alleged resignation as steward:

Q. [D]id you inform anybody at the employer that you were no longer the steward?

A. No. I'm not sure if they even knew.

Q. Did you inform Mr. Dhein that you were no longer wanting to be the steward at the facility?

A. No.

Q. Did you at any time ever inform after 2003 Mr. Dhein that you no longer wanted to be the steward at the plant?

A. No.

(Tr. at 96.)

Additionally, Spinnato's unrefuted testimony shows that when he came on board in 2006, Manowski presented himself to Spinnato as the steward. Spinnato testified:

Q. When you started with United Kiser, did anyone tell you that there was a steward for the millwrights?

A. Yes.

Q. Who told you that?

A. Mike Manowski did.

Q. And do you recall when he said that?

A. The date? No. But it would have been within probably the – well, it would have been within the first month I worked there.

Q. Do you recall what the occasion was for him to tell you he was shop steward?

A. I was just down talking to the guys on the shop floor. And I'm not familiar with the Millwright Union. We were – you – they were just talking to me about the union, and Mike said that – well, we were talking, you know, talking about steward, and I said "Well, whose the steward here?" And Mike said – the way he said it was "I guess I am."

Q. Did anyone ever tell you otherwise, that anyone else was the steward?

A. No.

Q. Did Mike ever tell you he had resigned or was no longer the steward?

A. No.

(Tr. at 327.)

Most importantly, Dhein believed that Manowski was his steward. Dhein testified:

Q. Mr. Manowski was appointed as a steward by you, correct?

A. Yes.

Q. And he remains the steward until today, correct?

A. Yes.

...

Q. [Y]ou gave a statement to an investigator in this case, you indicated 'I have a steward in the shop and his name is Mike Manowski,' correct?

A. Yes, sir.

Q. And you said that in September, 2008, correct?

A. Yes, sir.

Q. And he was appointed by you back in 2001 or '02 correct?

A. Yes, I think it was 2002. It has been a while.

(Tr. at 250-251.)

By all accounts, Manowski was the Carpenters' steward. Accordingly, the exceptions of the General Counsel and the Carpenters Union should be disregarded and the decision of the ALJ should be adopted by the Board.

1. Manowski's duties as steward included policing the alleged exclusive representation agreement.

Next, General Counsel and the Carpenters Union argue that even if Manowski was a steward (which he clearly was) his knowledge should not be imputed to the Union because his agency relationship did not extend to policing the contract. (GC Brief at 23-24; Carpenters Brief at 13-15.) Dhein's testimony flatly refutes this argument. With regard to the scope of Manowski's duties as steward, Dhein testified that it was Manowski's responsibility to bring it to the union's attention if there is someone within the shop doing work that may be Carpenters' work:

- Q. Isn't one of your primary functions to make sure that if someone is in your shop doing your work that you – that you think is your work – that you “red flag” that and bring it to the company’s attention?
- A. Well, that would...[objection, overruled]...The answer to that question, yah, I would have thought that Mike Manowski would have reported that to me but he has been pretty derelict in his duties.
- Q. A couple of his duties included, as you would expect, reporting just that very kind of thing, correct?
- A. Yes, yes.
- Q. You have relied upon him to report to you, correct?
- A. Well, he hasn't been very reliable.
- Q. I understand that, but you in your job function, you have known that you have to monitor the shop, correct, like every other shop you have. I mean, it's no different, right?
- A. Yes, sir.
- Q. Okay. And to do that, you appoint a steward, correct?
- A. Yes, sir.
- Q. Just like Mike Manowski, correct?
- A. Yes, sir.
- Q. And you would rely on him to report to you things such as people doing your work who are not members, correct?
- A. You would think so, yes.
- Q. Well that is the system that you have put in place, correct?
- A. Yes, sir.
- Q. That is the system you rely upon, correct?
- A. Yes.

(Tr. at 251-253.)

The fact that Manowski did not perform very well as the union’s eyes and ears on the shop floor does not strip him of his standing as steward, nor does it absolve the union of the consequences of the agency relationship. *Courier-Journal*, 342 NLRB 1093, 1103 (2004) (“Whether employees’ knowledge is imputed to their bargaining representative for purposes of determining when the 10(b) limitations period commences depends upon the factual context.”); *Goski Trucking Corp.*, 325 NLRB 1032, 1032 (1998) (steward’s knowledge was imputed to

union). Notably, none of the precedent cited by the General Counsel or Carpenters even remotely suggests that a steward's knowledge is not imputed to a union simply because the steward was negligent in performing his stewardship, nor is United Kiser aware of any precedent supporting such an argument. In fact, substantial precedent holds that the knowledge of the agent is generally imputed to the principal, regardless of whether the agent was negligent in performance of his duties. *See* 3 Am. Jur. 2d, Agency, P. 635, §273; 3 C.J.S. Agency §262, p. 194 ("The knowledge of an agent may be imputed to a principle irrespective of whether the agency is founded on express or implied authority."); *Johnson v. Assoc. Seed Growers, Inc.*, 240 Wis. 278, 3 N.W.2d 332 (1942) (noting the general rule is that a principal is chargeable with and bound by such knowledge and notice as his agent received in relations to a matter over which the authority of the agent extended.)

It is indisputable that Manowski knew, well before February, 2008, that there was a sizeable crew of Laborers performing marine industry production work in the bays next to him. Manowski testified (on direct examination by General Counsel):

- Q. [W]hen did you first notice Laborers working in the shop?
A. Probably June or July, 2006.
Q. Six?
A. Or 2007. Sorry.
Q. Okay. And at the time they began working what work were they performing?
A. They were working on Marinette Marine panels.
Q. All right. Did you observe them working?
A. Yes.

(Tr. at 83-84.)

Indeed, Manowski went on to describe specific job functions that he observed the Laborers performing in 2007 (the same functions over which the Carpenters claim exclusive shop jurisdiction). (Tr. at 84-85.) Manowski testified:

Q. And again in the time frame I'm looking for or looking at is around – you said June, 2007 you saw Laborers perform that type of work?

A. Yes.

(Tr. at 85.)

Thus, it is clear beyond question that Manowski had notice of the Laborers' performance of duties that allegedly belonged to the Millwrights far outside the 10(b) period. Moreover, it is equally clear that Manowski was a steward of the Union during the relevant period, and that his stewardship responsibilities included policing the shop floor and reporting if other workers were performing millwright work. The fact that Manowski was "derelict in his duty" does not operate to toll the statute of limitations and the exceptions of the General Counsel and Carpenters Union are utterly unsupported and should be disregarded.

II. THE CARPENTERS' CLAIM THAT THEY ARE THE 9(A) REPRESENTATIVE OF SHOP EMPLOYEES IS WHOLLY UNSUPPORTED.

Notably, the ALJ never reached the question of whether the Carpenters Union had a right to exclusively represent the employees performing marine industry work at United Kiser because he correctly found the Charge untimely under 10(b). However, should the Board choose to address the representation claim it should find that the charge is fatally flawed and unsupported at any level.

General Counsel argues that three documents "reaffirm" the status of the Carpenters as the 9(a) representative of "the shop employees," namely: 1) the Voluntary Recognition Agreement attached to the Carpenters Field Agreement (Jt. Ex. 3); 2) a Memorandum of Agreement adopting the Working Agreement Northern Wisconsin Regional Council of

Carpenters of the United Brotherhood of Carpenters and Joiners of America and Associated General Contractors of Wisconsin, Inc. (hereinafter "Carpenters Working Agreement" (GC Rej. Ex. 22.); and 3) an Addendum to the Working Agreement (hereinafter "Carpenters Shop Agreement.")

It is undisputed that no Board election has ever been held to determine whether the Carpenters ever represented a majority of United Kiser shop employees. It is further undisputed that the Carpenters has never made a showing of signed authorization cards to United Kiser (or any predecessor thereof). (Tr. at 386.) Therefore, the undisputed record includes no evidence whatsoever showing that a majority of United Kiser shop workers ever desired exclusive representation by the Carpenters. Under these circumstances, General Counsel and the Carpenters Union have a high hurdle to clear to present **clear, unequivocal evidence** of a 9(a) relationship and majority status. *H.Y. Floors & Gameline Painting*, 331 NLRB 304 (2000) (holding that to establish voluntary recognition in the construction industry pursuant to 9(a) the Board requires evidence that the union 1) unequivocally demanded recognition as the employees' 9(a) representative, and 2) that the employer unequivocally accepted it as such); *J&R Tile*, 291 NLRB 1034 (1988) (proof of 9(a) status requires evidence "that the union unequivocally demanded recognition as the employees' 9(a) representative and that the employer unequivocally accepted it as such."); *Brannan Sand*, 289 NLRB 977 (1988) (9(a) status can be "based upon contemporaneous showing of union support among a majority of the employees in a bargaining unit.")

A cursory review of the record shows that General Counsel and the Carpenters Union have not come close to satisfying their burden to produce "clear" and "unequivocal" evidence of 9(a) status. Tellingly, General Counsel and the Carpenters Union *make no attempt whatsoever to*

show that a majority of United Kiser shop employees desire the Carpenters as their representative. Instead, they rely upon a wildly distorted interpretation of the Voluntary Recognition Agreement attached to the Carpenters Field Agreement. Such arguments cannot succeed in light of Board precedent and longstanding labor policy upholding the importance of employees' free choice of representative. *J&R Tile*, 291 NLRB 1034 (1988); *Decision, Inc.*, 166 NLRB 464 (1967).

Because of the importance of employees' freedom to select their representative, contract language, standing alone, cannot establish 9(a) recognition. To allow contract language to substitute for a valid showing of majority support would "create[] an opportunity for construction companies and unions to circumvent...[majority showing requirements]." *Nova Plumbing v. NLRB*, 172 LRRM 2700 (CA D.C. 2003), enf. den. 336 NLRB No. 61 (2001); *Sheet Metal Workers Local 19 v. Herre Bros*, 201 F.3d 231 (3d Cir. 1999) (contract language not dispositive); *NLRB v. Triple Maintenance*, 219 F.3d 1147 (10th Cr. 2000) (same). Because the General Counsel and Carpenters Union present no proof aside from contract language, it is axiomatic that they cannot establish 9(a) status.

A. The Voluntary Recognition Agreement Does Not Apply To United Kiser's Shop Employees.

It is immediately apparent that the only contract between the Carpenters Union and United Kiser that even arguably contains unequivocal 9(a) language is the Voluntary Recognition Agreement attached to the Carpenters Field Agreement. (Jt. Ex. 3.) Importantly, however, the Voluntary Recognition Agreement governs a defined, limited geographical jurisdiction that does not include Dickinson County, where United Kiser's shop is located.⁴ (Id.,

⁴ In stark contrast, the Laborers Field Agreement, also signed on Jan. 1, 2006, clearly extends jurisdiction to Norway, Michigan. (Jt. Ex. 5, p. 2.)

pages 35-37.) This agreement clearly does not include United Kiser's shop, as it is limited to Wisconsin, plus a portion of Menomonee, Michigan.

The Union's limited geographical jurisdiction during the relevant period is confirmed by James E. Moore, Executive Secretary - Treasurer of the Carpenters Union in his June 3, 2008 letter to "All Signatory Contractors," including an "Enclosure on state maps and accompanied county description of contractual area," from which Dickinson County, Michigan is clearly excluded. (R. Ex. 5.) Jeff Kiser also testified, without contradiction, that the Company has never been able to use Dhein's Local exclusively for work in Norway, Michigan because of the limited jurisdiction of the agreement. (Tr. at 389-390.)

Despite the glaringly obvious limit of the contract's jurisdictional reach, General Counsel and the Carpenters Union nonetheless argue that such contract meets the Board's requirements for "clear" and "unequivocal" evidence of the Carpenters' alleged 9(a) status in the shop. In forcing such argument, General Counsel relies upon his excluded Exhibit 22, by which he seeks to unilaterally expand the scope of the Carpenters' Field Agreement.

Significantly, even if the ALJ had accepted the irrelevant exhibit, it does not come close to providing unequivocal evidence of 9(a) status, nor does it constitute of majority support of any degree. More importantly, the outdated exhibit is superceded by the Union's own contemporaneous statement of its jurisdiction in 2008. (R. Ex. 5.) Equally important, uncontroverted witness testimony, including that of Dhein, shows that **the Carpenters have never represented "all shop employees"** and that a contingent of Laborers has always been present in the shop. (Tr. at 232-233, 385-386.) Thus, the practice of the parties shows that the Carpenters have never enjoyed exclusive representation of all shop employees, despite the language in the rejected exhibits. Accordingly, the exceptions of the General Counsel and

Carpenters Union must be disregarded.

B. The Carpenters Shop Agreement Does Not Establish The Carpenters Alleged 9(a) Status.

The Carpenters Shop Agreement contains no recognition language whatsoever. (Jt. Ex. 4.) The mere listing of job titles, without more, is no substitute for unequivocal contract language evincing an intention to create a 9(a) relationship, and it is a very far cry from an acknowledgement of majority support. More importantly, the record clearly shows that the Carpenters have **never been the sole representative of shop employees** and United Kiser has never, in practice, recognized it as such. (Tr. at 385 (Kiser Testimony); 276 (Keith Testimony), 288, 385 (Spinnato Testimony) ; R. Exs. 3, 4.) Indeed, uncontroverted testimony of Jeff Kiser shows that there was never even a discussion of 9(a) status for the Carpenters:

Q. During the discussions on the shop agreement, did you ever discuss with Mr. Dhein whether the shop agreement would cover all shop employees or only certain employees?

A. Never discussed any of that.

Q. Did you discuss who would be covered by the shop agreement?

A. No.

Q. Well, how did you know who the shop agreement applied to?

A. Because of the employees that had been there recently and had worked for me for years, we all knew them by name and personally who that the Millwrights would be covering.

Q. And were these employees that you know personally and had been working there for years millwrights?

A. Yes.

Q. Did you ever talk about the agreement covering anyone other than millwrights?

A. Nope.

(Tr. at 384.)

Furthermore, Dhein himself testified that there were Laborers in the shop from the inception of United Kiser. Dhein testified:

Q. [y]ou were fully aware from January 1 forward that there were Laborers Union members working in the shop...is that correct?

A. Okay.

ALJ: Did you know there were Laborers at United Kiser based upon your visits to the facility in 2006?

A. Yes.

(Tr. at 232-233.)

Compelling evidence refutes the General Counsel's distorted argument that contract language vests the Carpenters Union with exclusive 9(a) status. Accordingly, the exceptions of the General Counsel and Carpenters Union must be disregarded.

III. THE ALJ CORRECTLY FOUND THAT UNITED KISER DID NOT UNLAWFULLY REFUSE TO BARGAIN WITH THE CARPENTERS

The record is equally clear that there was never an unlawful refusal to bargain by United Kiser. It is undisputed that the Carpenters Union's request to reopen bargaining of the shop agreement was untimely. (GC Ex. 2; Jt. Ex. 4.) This was noted not only during this proceeding, but also by counsel for the Carpenters Union, who acknowledged that the contract had, in fact, rolled over prior to bargaining. (R. Ex. 24.) Clearly, there was never any dispute that the contract had rolled over – thus, no preservation of waiver was called for. Specifically, the Carpenters stated, in January, 2009, well after the parties' bargaining sessions:

The Carpenters and United Kiser did not send any non-renewal notices to each other in 2008; and did not negotiate a successor agreement. The effect of the parties' non-action is that the CBA renewed for the time period of June 1, 2008 through May 31, 2009...

(R. Ex. 24, p. 2.)

Thus, the General Counsel's argument that United Kiser waived any objection to the

untimely reopener must be rejected.⁵

Moreover, despite the untimely reopener, United Kiser acted in good faith bargaining with the Union on four mutually agreed upon sessions: 1) June 19, 2008; 2) August 14, 2008; 3) November 7, 2008; and 4) December 4, 2008. (Jt. Ex. 1, p. 31.) Both parties exchanged multiple proposals, both written and oral, at the bargaining sessions. (Id. at 32.)

Significantly, 56 days elapsed between the first and second bargaining session, yet the Union voiced no objection to the time span between sessions. Yet, when United Kiser sought advice of legal counsel concerning the Carpenters' July 16 recognition demand during the midst of bargaining, the Union and General Counsel cry foul even though the parties indisputably returned to the bargaining table in October, 2008. This refusal to bargain claim is disingenuous and unsupported because any disruption to bargaining was minor and did not impair further bargaining in the least. Indeed, the hiatus between sessions was a mere 58 days - just two days longer than the time difference between the parties' first and second session, and it is undisputed that the suspension was for the purpose of consulting with legal counsel (unlike the Union's untimely reopener, for which it offers no excuse whatsoever). (GC Ex. 6.) The hiatus therefore had little or no disruptive effect on the bargaining process, as the parties returned to the bargaining table twice thereafter.

Under such circumstances, there is simply no refusal to bargain, much less any degree of resultant harm. *King Soopers, Inc.*, 295 NLRB 35, 37 (1989) (Noting that it may be appropriate in a particular case to consider the length of the bargaining hiatus in determining whether there was an unlawful refusal to bargain); *Lexus of Concord, Inc.*, 343 NLRB 851, 854 (2004) (finding

⁵ The decisions cited for such argument involve cases where the parties entered bargaining without reservation and without any question as to whether the agreement had rolled over, as the Union has repeatedly argued in this case. (R. Ex. 24.)

employer's suspension of bargaining was reasonable and delay caused by suspension did not constitute refusal to bargain); *Stone Container Corp.*, 313 NLRB 336, 341-42 (1993) (finding two-month delay in provision of wage proposal was not unreasonable and dismissing resultant 8(a)(5) charge).

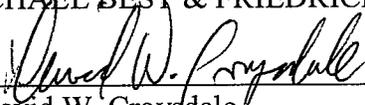
CONCLUSION

The exceptions of the General Counsel and Carpenters Union are unsupported in the record. Respondent has surpassed its burden to show that the charge was untimely and is therefore barred by section 10(b). Additionally, no evidence whatsoever supports the Carpenters Union's claim to 9(a) status. Therefore, the exceptions of the General Counsel and Carpenters Union should be disregarded and the decision of the ALJ adopted as that of the Board.

Dated at Milwaukee, Wisconsin, and respectfully submitted this 9th day of October, 2009.

Respectfully submitted,

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UNITES STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

UNITED KISER SERVICES, LLC

and

CONSTRUCTION & GENERAL LABORERS UNION,
LOCAL 1329

Case Nos. 30-CA-18129
30-CB-5352

and

NORTHERN WISCONSIN REGIONAL COUNCIL
OF CARPENTERS

CERTIFICATE OF SERVICE

I, Jane L. Wiese, a Legal Assistant with the law firm of Michael Best & Friedrich LLP, hereby certify that I arranged for the filing of Employer's Brief in Response to the Exceptions of the General Counsel & Northern Wisconsin Regional Council of Carpenters on the 9th day of October, 2009, by service on the following:

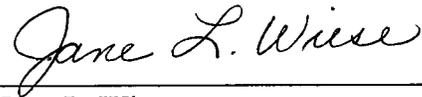
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