UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KIEFT BROTHERS, INC.

And

GENERAL TEAMSTERS, CHAUFFERS, SALESDRIVERS AND HELPERS LOCAL 673

And

JAIME NIEVES, An Individual

And

CONSTRUCTION AND GENERAL LABORERS LOCAL UNION # 25

Case Nos. 13-CA-45023
13-CA-45058
13-CA-45062
13-CA-45194

COUNSEL FOR THE ACTING GENERAL COUNSEL'S FIRST AMENDED MOTION FOR FURTHER CONSIDERATION OF THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Now comes Richard Kelliher-Paz, Counsel for the Acting General Counsel, pursuant to Section 102.48 of the National Labor Relations Board's Rules and Regulations, with this First Amended Motion for Further Consideration of the Decision of the Administrative Law Judge.

In support of this First Amended Motion, Counsel for Acting General Counsel submits the following:

1. On March 12, 2012, Counsel for Acting General Counsel electronically filed Counsel for Acting General Counsel's Motion for Further Consideration of the Decision of the Administrative Law Judge to the Board.
2. On April 13-16, 2009, this case was tried in Chicago, Illinois before Administrative Law Judge ("ALJ") Arthur J. Amchan. ALJ Amchan issued a Decision on July 21, 2009. A copy of the Decision is attached as Exhibit #1.

3. On August 18, 2009, the Employer filed Exceptions of Kieft Brothers, Inc. to the Decision of the Administrative Law Judge. A copy is attached as Exhibit #2.
4. On August 28, 2009, Counsel for the General Counsel filed Counsel for the General Counsel's Cross Exceptions to the Decision of the Administrative Law Judge and Argument in Support Thereof. A copy is attached as Exhibit #3.
5. On August 28, 2009, Counsel for the General Counsel filed Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge. A copy is attached as Exhibit #4.
6. On March 15, 2010, the Board, in a two-member decision by Chairman Liebman and Member Schaumber, issued a Decision and Order finding that the Respondent, Kieft Brothers, Inc., acted in violation of Sections 8(a)(1) of the Act, by unlawfully threatening employees, and in violation of Section 8(a)(5) of the Act by failing to bargain with Teamsters Local 673. The Board adopted the recommended Order of the ALJ and ordered the Respondent to take actions as set forth in his Order. A copy of the Decision and Order is attached as Exhibit #5.
7. On June 17, 2010, the United States Supreme Court issued a decision in *New Process Steel, LP. v. NLRB*, holding that all decisions decided by the two-member panel of Chairman Liebman and Member Schaumber from January 2008 to March 2010 were invalid, as the Board did not have the required three-member quorum. 130 S. Ct. 2635 (2010). Among these decisions was the Decision and Order issued in the matter of 355 NLRB no. 19 (2010).
8. After the Supreme Court's decision in *New Process Steel*, a list of cases was forwarded to the National Labor Relations Board, of matters for consideration by

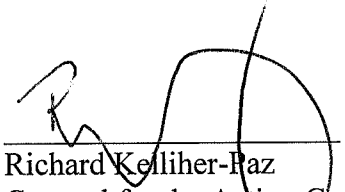
a required three-member Board. The *Kieft Brothers, Inc.* case appears to have been inadvertently omitted from the list of matters that was forwarded.

9. Respondent has failed to comply with the Board's order in this matter and further action by the Board is necessary for the Region to seek enforcement.

10. In light of the Supreme Court's decision in *New Process Steel*, Counsel for the Acting General Counsel respectfully requests that the Board further consider the Administrative Law Judge Decision for purposes of issuing a Decision and Order by a duly-constituted Board. Counsel for Acting General Counsel's Motion for Further Consideration of the Decision of the Administrative Law Judge should be granted for the reasons stated in ¶8.

WHEREFORE, Counsel for the Acting General Counsel respectfully requests that the Board grant this First Amended Motion for Further Consideration of the Decision of the Administrative Law Judge. The Board should adopt the recommended Order of the ALJ and order the Respondent take actions as set forth in his recommended Order.

DATED at Chicago, Illinois, this 20th day of March 2012.



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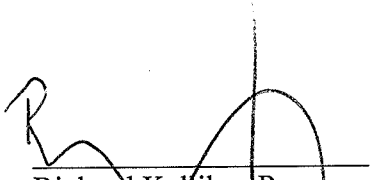
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 20th day of March 2012, true and correct copies of the **COUNSEL FOR GENERAL COUNSEL'S MOTION FOR FURTHER CONSIDERATION OF THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** have been served in the manner indicated below upon the following parties of record:

Via Certified Mail	**Via e-mail**
Kieft Brothers Inc. Attn: Mr. Larry Sims 837 Riverside Dr. Elmhurst, IL 60126	McDermott, Will & Emery Attn: Linda M. Doyle, Esq. 227 West Monroe Street Chicago, IL 60606 ldoyle@mwe.com
Teamsters Local 673 Attn: Mr. Roger Kohler 1050 W. Roosevelt Rd. West Chicago, IL 60185	Arnold & Kadjan Attn: Mr. John Toomey, Esq Chicago, IL 60604 Jtoomey100@hotmail.com
Construction and General Laborers' Union Local No. 25 Attn: Joseph Cocanato 9838 W. Roosevelt Road Westchester, IL 60154	Dowd, Bloch & Bennett Attn: Robert Cervone, Esq. 8 S. Michigan Avenue, 19th Floor rcervone@dbb-law.com
Jaime Nieves 13435 Ann Street Blue Island, IL 60406	



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JD-33-09
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UNITED STATES OF AMERICA
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DIVISION OF JUDGES

KIEFT BROTHERS, INC.

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CONSTRUCTION AND GENERAL LABORERS, LOCAL UNION #25

Cases 13-CA-45023
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13-CA-45194

Brigid Garrity and Neelam Kundra, Esqs., for the General Counsel.
Linda M. Doyle, Esq., (McDermott, Will & Emery) Chicago, Illinois, for the Respondent.
John Toomey, Esq., (Arnold & Kadjan) Chicago, Illinois for Charging Party Teamsters Local 673.
Robert Cervone, Esq. (Dowd, Bloch & Bennet) Chicago, Illinois for Charging Party Laborers Local Union #25.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Chicago, Illinois, from April 13-16, 2009. Teamsters Local 673 filed the charge in case 13-CA-45023 on November 24, 2008. Jaime Nieves filed the charge in 13-CA-45058 on December 16, 2008. Laborers Local # 25 filed the charge in 13-CA-45062 on December 17, 2008. On February 1, 2009, the Region issued a Consolidated Complaint.

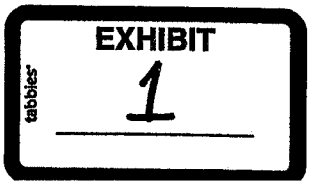
On the entire record,[1] including my observation of the demeanor of the witnesses, and

[1] I grant the General Counsel's July 1, 2009 motion to correct the transcript. I would note that the first correction is at page 12 lines 16-17, rather than at line 12 as stated in the motion. These corrections are logical and consistent with the context of the testimony. For purposes of this decision the most important corrections are as follows:

Tr. 160, lines 10-12: I find that witness Jaime Nieves testified that, "I told them that we already had problems with OSHA..."

Tr. 238, lines 15-16: I find that witness Virgilio Nieves testified that, "He said well, I don't

Continued



after considering the briefs filed by the General Counsel, Respondent and Charging Party Teamsters Local 673, I make the following

Findings of Fact

I. Jurisdiction

Respondent Kieft Brothers, Inc. manufactures precast concrete manholes at its facility in Elmhurst, Illinois. It also sells and delivers manholes and other plumbing products, such as sewer pipe, from this location. During 2008, Respondent purchased and received goods, products and materials valued in excess of $50,000 from points outside of Illinois. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Unions, Teamsters Local 673 and Laborers Local #25 are labor organizations within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Overview

The General Counsel alleges that agents of Respondent threatened employees on several occasions in violation of Section 8(a)(1) in October and November 2008. He also alleges that Respondent interrogated an employee about his union sympathies in violation of Section 8(a)(1).

Respondent laid off four employees on November 7, 2008 and five more on November 21, 2008. The General Counsel alleges that these lay-offs and Respondent's failure to reinstate these employees were discriminatorily motivated and thus violated Section 8(a)(3) and (1). The General Counsel contends that not only was the decision to have a lay-off discriminatorily motivated, but that anti-union animus also contributed to Respondent's choice of which employees were chosen for lay-off.

Furthermore, the General Counsel alleges that Respondent violated Section 8(a)(5) and (1) in failing to give Teamsters Local 673 prior notice and an opportunity to bargain with respect to the layoffs of the five employees who were truck drivers and the effects of the layoffs. The Board certified Local 673 as the bargaining representative of Respondent's drivers on October 22, 2008, two weeks before the first lay-offs occurred.[2]

Finally, the General Counsel alleges that Respondent violated Section 8(a)(5) and (1) in refusing and failing to provide Local 673 information the Union had requested about the company's health care plan and its financial records.

Statement of Facts

Respondent, Kieft Brothers, Inc., has been in business for more than thirty years. It produces manholes for use in the storm water and waste water markets. Respondent also

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think Larry is going to be really happy."

Tr. 675, lines 5-7, 9, 12, 20-21: The references to Ms. Kundra should be to Ms. Doyle. In addition, Tr. 864, line 17: 2007 should read 2008.

[2] Respondent's obligation to bargain with the Union, however, began on the date of the election, October 10, 2008.

purchases, sells and delivers sewer pipe. Its products are used in residential construction and in highway construction. Thus, Kieft's customers include private developers and governmental entities.

Until November 2005, Kieft Brothers was a family owned business. In that month, the Kieft family sold the business to KBI Holdings, Inc., which is managed by Freedom Venture Partners. George Smith is the Chief Executive Officer of KBI Holdings and thus the owner of Kieft Brothers. Ed Carroll is Respondent's Chief Financial Officer. Although the Kieft family no longer owns Respondent, Larry Kieft, a son of the founder, remains with the company as President. His brother, Tom Kieft, was Respondent's Vice-President of Operations until November 2008. Larry's father, Bob Kieft, retains a position as a consultant to Respondent.[3]

On July 28, 2008, George Smith sent a letter to all Kieft Brothers employees, GC Exh. 7. The stated purpose of the letter was to provide Respondent's employees with information regarding wage changes, cash bonuses and the company's discretionary bonus program.

Smith informed the employees that wage changes, cash bonuses and the discretionary bonus would be influenced by Kieft's financial performance and management's assessment of each employee's performance for the past year. Further, he informed employees that compensation would be based on a three-tier employee assessment. Employees, he wrote, had already been ranked and placed in three categories; those who in the past year exceeded expectations; those who met expectations and those whose performance was below expectations. Smith stated that the bonus program was designed to provide incentives for employee performance and to reward Kieft's top performers.

Smith continued:

> Kieft is experiencing a downturn in its business due to decreased levels of construction activity in the suburbs and Chicago market. The Company is also experiencing significant price increases related to its raw materials, supplies and fuel. As a result of these conditions, the Company's financial performance has declined relative to recent years. Given this financial performance, management has made the decision this year to reduce the level of raises and cash bonuses. In addition, management has made the decision to forego the discretionary bonus program during 2008.
>
> ***
>
> ...We are hopeful that the economy will improve during fiscal year 2009 and that the company will be in a position to increase the annual wage and cash bonus levels and to fund the discretionary bonus program again.
>
> ***
>
> ...If we all take a team approach during this time it should help the Company through

[3] Respondent's Answer admits that Larry and Bob Kieft are statutory supervisors and agents of Respondent and that Tom Kieft was a supervisor at all times relevant to this matter. It also admits that Chuck Rogers, who allegedly violated Section 8(a)(1) on behalf of Respondent is a statutory supervisor and agent. While Respondent's Answer denied that Smith and Carroll are owners of Respondent, they are clearly agents of Respondent. Moreover, Respondent's President, Larry Kieft, described George Smith as "the owner" of Kieft Brothers, Tr. 427.

these weaker market conditions. We are hopeful that if everyone is focused on the big picture —which is the health of Kieft—and strives to work efficiently that we will be well positioned to make it through this economic downturn without lay-offs or a reduction in our workforce. Please note that pursuant to Illinois law your employment with Kieft is at-will and your salary or hourly compensation is not a guarantee of employment for one year or for any other term.

In late August or early September employees rated in the highest tier, the "A" tier, received a bonus of 3% of their salary based on Respondent's assessment of their performance. Employees rated in the second or "B" tier, including drivers Ray Embury and Chuck Dickerson who were laid off in November, received a 1.5% bonus; employees in the third or "C" tier, for the first time during their employment with Kieft, did not receive a bonus, Tr. 456, 30, 73-74, 92, 186, R. Exh. 1.[4]

Teamsters Local 673 began organizing Respondent's drivers sometime in 2008. The Union held a meeting on August 28, 2008 at which a number of drivers signed authorization cards. The Union then filed a representation petition with the Board on August 29. The petition was faxed to Respondent on September 2, Tr. 649.

In September 2008 Laborers Local 25 began an organizing campaign amongst the production laborers at Kieft's facility. It faxed its representation petition to Respondent on October 20, 2008, Tr. 649.

One week prior to the representation election for the drivers' unit, which was scheduled and conducted on October 10, George Smith sent letters to Kieft's drivers urging them to vote against union representation, GC Exhs. 3 and 4. His October 3, letter concluded:

> The Union cannot guarantee you much and they cannot force the company to do much of anything. When you evaluate the advantages of being a Kieft employee against the disadvantages of joining the union and monetary cost of joining that membership, I am confident that you will see the only answer is to VOTE NO UNION.

In his October 4, letter, Smith again urged Respondent's drivers to vote against the Union and stated:

> ...We are hopeful that with all of the information that has been communicated to you recently that one message has been made clear - - - we value you as an employee and we will continue to work hard to maintain our position as a stable employer who provides a generous compensation package to our employees so that you can support you and your family.
>
> ...Throughout the years, Kieft has maintained a philosophy that it wants to keep its drivers busy even during slow business periods. During the winter months or rain days when customers are not accepting deliveries we have made it a point to offer our drivers non-delivery work assignments to keep them working...

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[4] The timing of this bonus is critical is assessing Respondent's claim that it decided to lay-off nine employees before it knew of the Teamsters' organizing drive. Payment of the bonus in late August or September 2008, is established by the uncontradicted testimony of George Kent and Jaime Nieves. The timing of the payment of a performance bonus to two drivers it later laid off, Embury and Dickerson, is inconsistent with a determination to lay-off nine employees in August.

Alleged Section 8(a)(1) violation on October 9, 2009

Teamsters Local 673 held a rally outside of Respondent's premises on October 9. During this rally Respondent called the Elmhurst Police twice and complained that participants in the rally were blocking the road adjacent to its property. The General Counsel alleges in Complaint paragraph V (a) that Larry Kieft threatened employees with discharge if they attended this rally.

In support of this allegation, Charles Dickerson, a driver who was laid off by Respondent a month and a half later, testified that Larry Kieft asked him if he wanted to go out and join the rest of the unemployed people at the rally, Tr. 87.

Larry Kieft testified in a very ambiguous fashion that he did not tell "an employee" that he can go join the unemployed if he liked. Kieft testified that he said to "somebody at the union," "shouldn't you be working," Tr. 808. He also testified that he told Respondent's employees that they could join the rally if they wanted to do so, Tr. 421. Larry Kieft did not deny that he spoke to Chuck Dickerson on the day of the rally. He did not testify about anything he said to Dickerson. Given Kieft's failure to testify directly that he did not tell Dickerson that he could go join the unemployed, I credit Dickerson's account.

Additional evidence of anti-union animus supports a finding of restraint, interference and coercion of Chuck Dickerson's Section 7 rights.

Moreover, given the fact that Kieft called the Elmhurst police twice during the Teamsters' rally, I do not credit his testimony at Tr. 421-22, which suggests that he spontaneously invited Kieft employees to attend the Teamsters rally at the end of the day "in a friendly way." Finally, I reject the assertion in Respondent's brief at page 4 that such a statement given the state of the American economy on October 9, 2008 would be perceived as a joke. To the contrary, his statement in connecting support for the Teamsters to unemployment, would reasonably coerce Dickerson and therefore violated Section 8(a)(1) of the Act, *Kona 60 Minute Photo,* 277 NLRB 867, 867-88 (1985).

More evidence of anti-union animus

On October 9, on the night before the election, Respondent changed the locks on the front gate of its facility and then changed the locks back after the election. It also hired a martial arts fighter as a security guard solely for the purpose of being on its premises during the election. These measures indicate a substantial degree of anti-union animus on Respondent's part. Even assuming that Teamster vehicles blocked the roadway on October 9, as Respondent contends, Respondent has shown no reasonable basis for it to conclude that its employees would assist unauthorized persons to gain entry into its premises or that there would be any activity inside its facility during the election that warranted a security guard's presence solely for the election.

Driver's unit election on October 10; Laborer's representation petition on October 20; Certification of the Teamsters on October 22,

The Board conducted a representation election on October 10, in which 9 votes were cast in favor of representation by Teamsters Local 673 and zero votes were cast against such representation. The Board certified Local 673 as the exclusive authorized bargaining representative of Kieft's drivers on October 22.

A number of laborers signed union authorization cards in October. Local 25 filed a representation petition on October 20, 2008. This petition was faxed to Respondent the day it was filed.

Alleged Section 8(a)(1) violation in Complaint paragraph 5(b)

Laborer Miseal Ramirez, who was laid off on November 7, 2009, testified that he had an encounter regarding the Union with Respondent's Operations Manager, Chuck Rogers, in October 2009. Ramirez testified that he walked into Respondent's production room and saw Rogers talking on a cell phone. Then Ramirez stated that Rogers told whoever he was talking to that the union was coming in and somebody was going to get fired. According to Ramirez, Rogers then turned and stared at him, Tr. 209-10.

Rogers did not directly contradict Ramirez. He testified that he never told any employee that they might be fired for supporting the union and that he never suggested to any employee that they might be laid off if they supported the union. He also testified that he ever never had any conversation with Miseal Ramirez about the union, Tr. 375-76. This is not the same as denying that he said what Ramirez testified Rogers said in his presence. I therefore credit Ramirez. I would note that Ramirez's testimony is consistent with that of Virgilio Nieves, discussed below, that Rogers told Virgilio that Larry Kieft was really mad about Respondent's employees' union activities. Despite the fact that Rogers was not initially speaking to Ramirez, his remark constitutes a violation of Section 8(a)(1), *Valley Community Services,* 314 NLRB 903, 907, 914 (1994).[5]

Alleged Section 8(a)(1) violation on November 3, 2009, Complaint paragraph 5(c)

Laborer Jaime Nieves testified that on his way to lunch on November 3, he noticed Respondent's Operations Manager, Chuck Rogers, holding a ladder for employee Mark Kieft. Nieves testified that he said to Rogers that, "we already had problems with OSHA not wearing our harnesses at work..." He testified further that Rogers responded by saying that Nieves was probably the one that calls the agencies and who called the unions. Nieves stated he asked Rogers why he wanted to know and Rogers told him that if he's the one who made the call, he'd probably lose his job for it, Tr. 160.

Rogers testified in a confusing manner about a conversation with Jaime Nieves at Tr. 368-372. Rogers first stated that he had a conversation with Jaime Nieves about the economy which changed to a conversation about the Union. Rogers testified that he told Jaime Nieves that the economy was really bad and there were a lot of people out of work. According to Rogers, Jaime Nieves responded by asking him whether his statement was a threat.

Rogers never directly contradicted Jaime Nieves' testimony, but relied on general denials about what he told employees, Tr. 375-76. He stated that he never brought up the subject of union elections or unions and that neither did Nieves. Thus, Rogers' initial statement that the conversation changed to a conversation about the Union is unexplained. Finally, Jaime Nieves' testimony is consistent with that of his brother, which is discussed below, regarding statements Rogers made to Virgilio concerning Larry Kieft's anger about union activity. I credit Jaime Nieves and conclude that Respondent, by Chuck Rogers violated Section 8(a)(1).

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[5] Indeed, this is stronger case for a Section 8(a)(1) finding than *Valley Community Services* in that Rogers was clearly aware that Ramirez was in earshot when he made his remarks.

The unprecedented lay-offs on November 7, and November 21, 2008

On November 7, 2008, Respondent laid off four employees, laborers Miseal Ramirez and Brandon White, and drivers Eracilio "Rocky" Esparza and Mike Kronkow. Respondent did not provide Teamsters Local 673 prior notice of the lay-offs of drivers Esparza and Kronkow.

On November 21, Respondent laid off three additional drivers, Ray Embury, George Kent and Charles Dickerson and two additional laborers, Jaime Nieves and Jose Jardon. Respondent did not give Teamsters Local 673 prior notice of the lay-offs of the three additional drivers. Kent had worked for Kieft Brothers for over 30 years; Jaime Nieves for 24 years; Dickerson for 12. Respondent retained employees who had worked for it for only a few years.

In the twenty-five years prior to November 2008, Respondent laid off only one driver for the winter; it never implemented a mass lay-off like the one in the instant case. Even if I accepted Respondent's testimony at face value there is no evidence that it ever laid off more than one employee at a time prior to November 2008.[6] As Respondent stated in its October 4, 2008 letter to its drivers, its practice had always been to keep its drivers working during slow periods.

Complaint Paragraph 5(d) alleged interrogation by Chuck Rogers[7]

Virgilio Nieves, one of Respondent's laborers, who drives a forklift in Kieft Brothers' yard, testified that Operations Manager Chuck Rogers asked him what he thought about employees bringing a union into Kieft a week or two weeks before an NLRB election, Tr. 237-38.[8] Virgilio Nieves told Rogers that the employees were doing what they thought was right for them. Rogers responded by telling Virgilio that he didn't understand why employees were bringing in a union because they were paid twice as much as employees at the firm at which Rogers used to work. Nieves told Rogers that the pro-union employees were trying to keep the benefits they already had. He testified that Rogers then said, "Larry Kieft says that he's not going to be really happy. I think he's going to be really mad about it."

Rogers conceded that he approached Virgilio Nieves and asked him how he felt about the Union and that he told Nieves how much better compensated Kieft employees were than employees at other companies for which Rogers had worked, Tr. 373. He recalls this conversation occurring prior to the Teamster's election "before the time we knew anything about a Laborers' election." Rogers also testified that his inquiry to Nieves concerned the Teamsters and the drivers, not the laborers, Tr. 382. I discredit this testimony.

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[6] Other than evidence that Respondent laid off driver Robert Boland in 1997, there is no reliable evidence that it ever laid off any employee. I would note that Respondent called dispatcher Gary Egerton as a witness and failed to substantiate through him its claim that Egerton was laid off in 1983.

[7] The General Counsel moved to amend the Complaint to include this allegation and that in paragraph 7(d) and the outset of the trial, Tr. 8-9. I granted the motion over Respondent's objection to the addition of paragraph 7(d) relating to an alleged failure to provide the Teamsters information they requested in January 2009. Respondent did not object to the addition of paragraph 5(d).

[8] Virgilio Nieves is the brother of Kieft laborer Jaime Nieves, who was laid off on November 22.

I find that the conversation occurred after Rogers was aware that Laborer's Local 25 filed a representation petition on October 20. It is illogical to conclude that Rogers, who had responsibility for the laborers and none for the drivers, would be asking Virgilio Nieves, a laborer, how he felt about the Teamsters' organizing drive. Moreover, Nieves' account, which I credit in its entirety, makes it clear that Rogers was comparing Kieft's laborers' wages to those paid laborers by other employers. Rogers testified that Nieves said he didn't know how he felt about the Union.

Rogers' inquiry violated Section 8(a)(1). The applicable test for determining whether the questioning of an employee constitutes an unlawful interrogation is the totality-of-the-circumstances test adopted by the Board in *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In analyzing alleged interrogations under the *Rossmore House* test, it is appropriate to consider what have come to be known as "the Bourne factors," so named because they were first set out in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). Those factors are:

(1) The background, i.e. is there a history of employer hostility and discrimination?
(2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
(3) The identity of the questioner, i.e. how high was he in the company hierarchy?
(4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?
(5) Truthfulness of the reply.

These and other relevant factors "are not to be mechanically applied in each case." 269 NLRB at 1178 fn. 20, *Medicare Associates, Inc.*, 330 NLRB 935, 939 (2000).[9] I find that the questioning tended to coerce Nieves because he was not an open supporter of the Union and because Rogers was high-level management official. Moreover, Rogers let Virgilio know that company president Larry Kieft was seething with anti-union animus. Nieves' evasive response to the questioning also indicates that he was in fact intimidated and was concerned that Rogers might be seeking information on which Respondent might take retaliatory action.

Rogers' failure to specifically contradict Virgilio Nieves' testimony regarding anti-union animus on the part of Larry Kieft

Respondent's counsel's asked Rogers, "Did you say anything else after asking him that question and getting his response?" Rogers answered, No, Tr. 374. He also answered negatively to several other somewhat leading questions. However, Rogers did not specifically address Nieves' testimony that he told Nieves that Larry Kieft would be really mad about employees bringing a union into the company. Moreover, Board law recognizes that the testimony of current employees that contradicts statements of their supervisors is likely to be particularly reliable. *Flexsteel Industries*, 316 NLRB 745 (1995), enfd. mem. 83 F.3d 419 (5th Cir. 1996). The testimony of current employees that is adverse to their employer is "... given at considerable risk of economic reprisal, including loss of employment ... and for this reason not likely to be false." *Shop-Rite Supermarket*, 231 NLRB 500, 505 fn. 22 (1977). I therefore credit Virgilio Nieves' account and infer that Larry Kieft had expressed animus towards the union and pro-union employees to Chuck Rogers.

[9] *Medicare Associates* is frequently cited by the name *Westwood Health Care Center*.

That Larry Kieft bore such animus is also indicated by the fact that he called the Elmhurst police twice on October 9 concerning the Teamsters' rally adjacent to his property, changed the locks on Respondent's gates the night before the election and hired a security guard solely for the purpose of being on Kieft's premises during the election.[10]

The election in the Laborer's unit

The Board conducted an election among Respondent's laborers on December 1, 2008, after Respondent had already laid off four of its laborers. Eight laborers voted against union representation; six voted for the Union; one challenged ballot was not opened. Despite the fact that the layoffs occurred during the critical period between the filing of the representation petition and the election, Laborers Local 25 did not file objections to the conduct of the election.

As a general proposition, an employer violates Section 8(a)(5) and (1) in unilaterally laying off represented employees for economic reasons without providing prior notice to their collective bargaining representative and without giving their labor organization an opportunity to bargain about the lay-off decision and it effects.

In *Lapier Foundry & Machine,* 289 NLRB 952 (1988) the Board held that when an employer lays off represented employees for economic reasons, it must bargain with their collective bargaining representative over the decision to lay-off and the effects of that decision. An employer's decision to lay-off employees for economic reasons is a mandatory subject of bargaining.

The Board noted that the a decision to lay off turns on labor costs and must be bargained. A union can offer alternatives to the layoff, such as wage reductions, modified work rules, or part-time schedules for a larger group to save the company money during an economic downturn. The Board requires an employer to bargain over economic layoffs to insure that its employees' bargaining representative will have the opportunity to proposed less drastic alternatives.

An employer may implement a decision to lay-off represented employees for economic reasons without prior notice to their union if the decision to conduct the lay-off was made prior to its employees' selection of a bargaining representative

The Board has held that an employer who decides to lay-off employees before its employees select a bargaining representative does not violate Section 8(a)(5) and (1) if it implements that decision after the selection of the bargaining representative, *Starcraft Aerospace, Inc.,* 346 NLRB 1228 (2006); *SGS Control Services,* 334 NLRB 858 (2001); *Consolidated Printers, Inc.,* 305 NLRB 1061, 1061 n. 2, 1067 (1992).

The General Counsel has made out its prima facie case that Respondent's lay-off of its employees in November 2008 was discriminatorily motivated and specifically that Respondent decided to implement these lay-offs after it was aware of union activity on the part of both its drivers and laborers.

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[10] Larry Kieft testified that the police asked the Teamsters to move their vehicles off a public road twice, Tr. 787. Union organizer Santiago Perez testified that Teamster vehicles were not blocking ingress or egress. There is no police report in this record.

Respondent has not met its burden of proving non-discriminatory motivation for the lay-off or that it decided upon the lay-offs prior to its awareness of its employees' union activities, or prior to its drivers' selection of Local 673 as their collective bargaining representative.

In order to establish a violation of Section 8(a)(3) and (1), the Board generally requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatees' protected conduct was a 'motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (lst Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399-403 (1983); *American Gardens Management Co.*, 338 NLRB 644 (2002). Unlawful motivation and anti-union animus are often established by indirect or circumstantial evidence.

However, in the case of a mass lay-off or discharge, the General Counsel is not required to show a correlation between each employee's union activity and the termination of his employment. The General Counsel must only show that the decision to discharge or lay-off was ordered to discourage union activity or retaliate against the protected conduct of some employees, *Davis Supermarkets,* 306 NLRB 426 (1992). Thus, the General Counsel in this case was not required to prove employer knowledge of each employee's union activity or support.

Nevertheless, Respondent knew prior to the lay-offs that every one of its drivers voted in favor of representation by Teamsters Local 673 and that Ray Embury, one of the two drivers who had been rated a "B" (his performance met expectations), had been the Teamsters' observer at the October 10 election. Further, Larry Kieft's October 9, comments to Chuck Dickerson, the other "B" driver, leads me to conclude that Kieft was aware that Dickerson actively supported the Union.

The lay-offs of Embury and Dickerson are particularly powerful indicia of discriminatory motivation. Even assuming that Respondent had decided to lay-off some employees, it has not presented any credible evidence that it decided to lay-off nine employees prior to its knowledge of its employees' union activity. Thus, there is no credible evidence as to when it decided to lay-off two "B" employees, who I find it knew were among the more active union supporters.

I do not credit the testimony of Larry Kieft, as to how Respondent decided to lay-off Embury and Dickerson, as opposed to other "B" employees. Although, he testified that a decision to lay-off Embury and Dickerson was made on the basis of "cross-training," Kieft did not testify as to when this decision was made or by whom. Moreover, I find Kieft to an incredible witness given his evasiveness with regard to his alleged comments to Dickerson at the time of the Teamsters' October 9 rally.

I also discredit Kieft on the basis on his testimony that he was unaware of the Teamsters' organizing drive until mid to late September 2008, Tr. 740. The parties stipulated that the Teamsters' representation petition was faxed to Respondent on September 2. Kieft, as Respondent's President, would have been aware of the petition almost immediately upon its receipt. Finally, Kieft's testimony regarding prior lay-offs, none of which, except one, are documented, leads me to discredit him generally.

Discriminatory motivation and anti-union animus may reasonably be inferred from a variety of factors, such as the company's expressed hostility towards unionization combined with knowledge of the employees' union activities; inconsistencies between the proffered reason

for its decision and other actions of the employer; a company's deviation from past practices in implementing its alleged discriminatory decision; and the proximity in time between the employees' union activities and their discharge, *Birch Run Welding,* 269 NLRB 756, 765-66 (1984); *Birch Run Welding v. NLRB,* 761 F.2d 1175 (6th Cir. 1985); *W.F. Bolin Co. v. NLRB*, 70 F. 3d 863, 871 (6th Cir. 1995).

I conclude that the General Counsel has made out a prima facie case of discriminatory motivation that has not been rebutted. The timing of the lay-offs soon after the drivers unanimously chose union representation suggests discriminatory motivation in conjunction with Respondent's stated opposition to unionization and its unprecedented mass-layoff.[11]

By the time of the lay-offs, Respondent knew that all nine of its drivers had voted in favor of representation by Teamsters Local 673. Thus, Respondent knew that each driver had engaged in protected activity prior to the lay-off. It also was aware that Laborers Local 25 had filed a representation petition.[12]

There are also other indicia of discriminatory motive that Respondent did not rebut other than by self-serving oral testimony, which I decline to credit. In its July 28, letter, Respondent communicated to its employees its hope that Respondent would make it through the economic downturn without lay-offs. In late August or early September, it paid cash bonuses to 2/3 of its employees, including two that it later laid off. On October 4, Respondent reminded its drivers of its philosophy (and past practice) of keeping its drivers busy even during slow periods and giving them non-delivery work assignments during the winter months. In light of what occurred after the election, the October 4 letter suggests that Respondent was willing to continue this past practice only if its drivers rejected union representation.

Moreover, the record is replete with evidence of strong anti-union animus, particularly on the part of President Larry Kieft. Therefore, I do not credit Respondent's self-serving testimony that it did not mean any of the reassuring statements made to employees on July 28, and October 4, e.g. Tr. 504. Rather, I conclude that it decided to abandon its past practice of finding work for its employees during slow periods after its drivers voted unanimously to be represented by the Teamsters.

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[11] It is clear that in the thirty plus years it has been in business, prior to November 2008, Respondent had never implemented a mass lay-off. Assuming that Kieft had previously laid off employees, there is no evidence that it ever laid off more than one at a time prior the lay-offs at issue in this case.

I note that had Respondent established that the November lay-offs were consistent with past practice, this would not only cut against a finding of discriminatory motive, it would be a valid defense to the Section 8(a)(5) allegation. However, to prove that it was entitled to lay-off drivers without providing the Teamsters with notice and an opportunity to bargain, Respondent would have to show that the practice occurred "with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." *Sunoco, Inc.*, 349 NLRB 240, 244 (2007); *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353 (2003), enfd. mem. 112 Fed. Appx. 65 (D.C. Cir. 2004).

[12] It is well established that an employer's failure to take adverse action against all union supporters does not disprove discriminatory motive, otherwise established, for its adverse action against a particular union supporter, *Master Security Services,* 270 NLRB 543, 552 (1984); *Volair Contractors, Inc.*, 341 NLRB 673, 676 fn. 17 (2004).

The most appealing factor in Respondent's favor is the fact that by the fall of 2008, the worst global recession since World War II had already begun. Respondent's documentary evidence also shows declining sales in 2008 as opposed to prior years. However, a decline in business does not meet Respondent's burden of proving a nondiscriminatory motive given the strength of the General Counsel's prima facie case. Indeed, Respondent's Chief Financial Officer, Ed Carroll testified that there is no one document that he could point to that precipitated the decision to layoff particular people or lay-off anybody on November 7, or November 21, 2008, Tr. 929-30. Thus, Respondent's affirmative defense rests entirely on the credibility of testimony of its management witnesses.

Owner George Smith testified that it was liquidity, i.e., the assets Respondent had available to cover its loan from its bank that triggered the November lay-off, Tr. 555-56. Respondent's reliance on liquidity concerns as its nondiscriminatory basis for a lay-off decision in August is not credible.

Ed Carroll, Respondent's Chief Financial Officer, discussed Respondent's liquidity concerns as reflected by its "borrowing base reports" at great length. Respondent filed these reports, R. Exh. 9, with First Chicago Bank and Trust anywhere from five to fifteen days after the end of the month for which they were submitted. According to these documents, Respondent had the following amounts available to cover its loan in the period between April 30, 2007 and January 31, 2009:

April 2007	$1,304,887.90	report submitted	May 15, 2007
May 2007	$1,071,835.86	report submitted	June 13, 2007
June 2007	$1,402,409.43	report submitted	undated
July 2007	$1,343,100.58	report submitted	August 6, 2007
August 2007	$1,204,068.50	report submitted	September 13, 2007
September 2007	$620,975.33	report submitted	October 12, 2007
October 2007	$1,392,411.65	report submitted	November 9, 2007
November 2007	$918,851.48	report submitted	December 5, 2007
December 2007	$232,081.48	report submitted	January 15, 2008
January 2008	$122,808.56	report submitted	February 14, 2008
February 2008	$168,485.99	report submitted	March 13, 2008
March 2008	$ 95,174.04	report submitted	April 11, 2008
April 2008	$303,018.08	report submitted	May 14, 2008
May 2008	$990,284.68	report submitted	May 12, 2008[13]
June 2008	$521,603.07	report submitted	undated
July 2008	$728,651.85	report submitted	August 15, 2008
August 2008	$666,270.40	report submitted	September 15, 2008
September 2008	$352,131.39	report submitted	October 14, 2008
October 2008	$330,515.41	report submitted	November 14, 2008
November 2008	$ 49,149.42	report submitted	December 15, 2008
December 2008	$203.571.54	report submitted	January 13, 2009
January 2008	$321,000.01	report submitted	February 13, 2009

These figures alone, or in conjunction with the testimony of Respondent's witnesses do not establish a nondiscriminatory motive for the lay-offs. I would note first that there is no evidence that Respondent's bank threatened foreclosure or that Respondent had any

[13] The date of this report looks like May 12, 2008, but if this report was for May it had to have been submitted in June.

discussions regarding its financial situation with this lender, or any other financial institution to alleviate its liquidity concerns. The lack of such evidence contributes to my conclusion that Respondent has failed to make out its affirmative defense, *Huck Store Fixture, Co.,* 334 NLRB 119, 120 (2001).

Further, there is no credible explanation why, for example, the borrowing base figure for March 2008 did not lead to a lay-off while the figure for November 2008, which Respondent did not have until December 3, allegedly was a motivating factor for such a reduction in force. Moreover, Respondent's borrowing base improved slightly in July and August, when Respondent claims to have made its decision to lay-off nine employees, as compared to June.

As the General Counsel sets out at page 27 of its brief, Respondent's records regarding concrete production and delivery, R. Exhibits 6 and 7, also fail to establish a nondiscriminatory motive for the lay-offs. Concrete production increased from July to August 2008; deliveries of concrete decreased somewhat. The decrease in concrete production and delivery, compared to 2007, are smallest for any months of the year.

Respondent has not established when it decided to lay-off employees, who made this decision or decisions and/or the means by which this decision was finalized.

Larry Kieft testified that by the end of 2007 work was slowing down. George Smith also testified that Kieft's business started to decline in the third quarter of 2007, Tr. 458. According to Kieft, by April-May 2008, Respondent knew 2008 was going to be "kind of a lean year," Tr. 410-11. Kieft testified that in the "spring-summer" Dempsey Ing, Incorporated, which accounted for 8-10% of Kieft's business went bankrupt. Smith testified that in May 2008 Dempsey owed Kieft $775,000.

Kieft intimated that George Smith and Ed Carroll first spoke to him about lay-offs in June or July, Tr. 427. Carroll indicated that he told Kieft and Smith that Respondent needed economic savings through reduced labor costs, Tr. 931. If credited, his testimony leaves open the possibility that this reduction could have been realized through means other than lay-offs, such as wage cuts, reduced hours and/or furloughs. There is no evidence that Respondent considered any way to reduce labor costs other than by lay-off. Given the fact that I find that this decision was made after Respondent knew about the Teamster's election victory, Respondent was legally obligated to bargain about such matters with Local 673.

Kieft testified on cross-examination that a decision to have a lay-off was made in June and the decision as to how many employees were to be laid off was made in August, Tr. 752-53. He also testified that the decision to lay-off employees "was officially made" in August, Tr. 428. Larry Kieft also testified that he ***thinks*** the decision to lay-off four laborers and five drivers was made in August, Tr. 429. Later, he recalled that the decision was made at a meeting at Respondent's facility attended by himself, Larry Sims, Jr., Respondent's General Manager and George Smith, Tr. 749, but could not testify as to the date this decision was made, Tr. 759.

George Smith testified that he and Carroll starting considering lay-offs in May 2008, Tr. 464. He further stated that the decision on the quantity of lay-offs was made in the early part August, but could not testify as to the date this decision was made and testified that there is no documentation as to when this decision was made, Tr. 498-500. He testified that it ***could*** have been either the first or second week of August. Smith also testified that the decision as to which employees would be laid off was made in early August, Tr. 505, 507.

Ed Carroll's testimony as to when the critical decisions regarding the lay-off is even more tentative. When asked when specific decisions were made, Carroll testified, "sometime in August, I believe, it was," Tr. 727. As to the number of employees to be laid off, Carroll testified this was determined, "sometime in that August timeframe," Tr. 728. Carroll's testimony suggests that the decision to lay off employees and the number to be laid off may have been made at different times. The testimony of Smith and Larry Kieft suggests that a decision to lay-off nine employees was made at the same time a decision was made to have any lay-off. However, neither testified as to how it was determined that it was that nine employees, as opposed to a lesser or greater number was chosen or who made that determination, Tr. 803-04,

Carroll also testified that he calculated the cost savings Respondent would realize from the lay-off of nine employees in August. However, Respondent has no documentation to support his testimony and I do not credit it.

The fact that Respondent paid cash bonuses to Ray Embury and Chuck Dickerson in late August or early September makes it very unlikely that Respondent had decided to lay them off before that date—particularly since neither Embury nor Dickerson knew they were getting a bonus until the bonus appeared in their paychecks.

As to the exact timing that the layoffs would occur, Smith testified that Respondent wanted to make it to Thanksgiving before laying off any employees, but decided to lay-off four on November 7, due to a deteriorating liquidity situation, Tr. 555-56. He did not specify when this decision to accelerate the lay-off of four employees was made.

Respondent's liquidity problem markedly improved in December 2008 when Dempsey, Ing paid Respondent $400,000 of the $775,000 it owed to Kieft Brothers and Respondent determined that it had $150,000 in inventory more than what it showed on its books.

Ed Carroll testified that "right around Thanksgiving," Respondent received notice that $400,000 worth of liens on money due from Dempsey, Ing, were going to be processed, Tr. 872. Respondent presented no documentary evidence to support this testimony. The exact date that Respondent became aware that it was going to receive this money is critical to this case, in that if Kieft knew it was receiving the $400,000 prior to November 21, it would have obviated the need for some or all of the lay-offs. The date as of which Respondent knew or suspected that it had additional inventory to cover its loan is also critical to Kieft's contentions that it had to lay-off nine employees in November to avoid foreclosure.

Respondent's failure to present precise testimony as to when critical decisions were made, who made those decisions and on what basis these decisions were made and its failure to present precise and consistent testimony as to when it was aware of critical facts leads me to discredit its affirmative defense. I thus conclude it has failed to rebut the General Counsel's *prima facia* case. Further I conclude that the decision to lay-off employees was discriminatorily motivated and was made after the Teamsters prevailed in the October 10, representation election.

The Teamsters' Information Request

At the second bargaining session between Respondent and Teamsters Local 673 on January 6, 2009, the Union proposed that Respondent agree to participate in its health insurance and pension plan. Respondent rejected that proposal and stated it wished to remain with its health insurance plan. Roger Kohler, Secretary-Treasurer of Teamster's Local 673 asked Respondent for a copy of its health insurance plan, Tr. 281.

When a collective bargaining representative seeks information from an employer regarding matters pertaining to bargaining unit employees, the request is presumptively relevant and the employer generally has a duty to provide such information. Respondent appears to concede that the Union is entitled to the information it requested. Its defense is that it has not refused to provide the information nor has it been dilatory in responding to the Union's requests.

I find that Respondent violated Section 8(a)(5) in failing to provide the Union a copy of its health insurance plan in a timely fashion. This request was made orally to Respondent on January 6. A request for information need not be in writing to commence an employer's obligation to provide the requested material, *A.W. Schlesinger Geriatric Center,* 304 NLRB 206, 207 n. 7 (1991); *LaGuardia Hospital,* 260 NLRB 1455 (1982). An employer must respond to an information request in a timely manner. An unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all, *American Signature Inc.,* 334 NLRB 880, 885 (2001).[14] In the instant case, Respondent's failure to provide the Union a copy of its health insurance plan from January 6, through April 14, is an unreasonable delay and violates Section 8(a)(5).

Roger Kohler testified that his February 2, 2009 written information request was sent to Respondent in the mail. There is no persuasive evidence that Respondent received this letter. However, on February 26, 2009, the Union sent a three page fax to McDermott, Will & Emery, Respondent's counsel's law firm, GC Exh. 30. Only the cover sheet is in this record. That sheet reflects a fax of three pages pertaining to an information request to Kieft Brothers. On March 24, the Union sent a two page fax specifically addressed to Ms. Doyle at McDermott, Will & Emery, GC Exh. 29. George Smith testified that he did not see the February 2, letter until late March or early April, Tr. 518-19.

Respondent suggests that it was not aware of the February 2, letter until March 24, and thus has not been unreasonably dilatory in responding to it. Given the fact that it has not been established that Respondent was aware of the request for financial records until two to three weeks prior to the hearing, I decline to find that it had violated Section 8(a)(5) in this regard as of April 15. I would note, however, that if Respondent has not satisfied this request as of the date of this decision, its failure to do so would be unreasonable.

Summary of Conclusions of Law

1. Respondent, by Larry Kieft, violated Section 8(a)(1) of the Act on October 9, 2008, when he asked employee Chuck Dickerson whether he wanted to join the rest of the unemployed people at the Teamsters Local 673 rally.

2. Respondent, by Chuck Rogers, violated Section 8(a)(1) in October 2008 by stating in the presence of employee Miseal Ramirez that the Union was coming in and somebody was going to get fired.

3. Respondent, by Chuck Rogers, violated Section 8(a)(1) on or about November 3, 2008 by telling employee Jaime Nieves that if he was the one calling the agencies and the unions he would probably lose his job.

[14] This case has also been cited under the name of *Amersig Graphics, Inc.*

4. Respondent, by Chuck Rogers, violated Section 8(a)(1) in October or November 2008 by interrogating Virgilio Nieves about whether he supported or sympathized with an organizing drive at Respondent's facility.

5. Respondent violated Section 8(a)(3) and (1) in laying off four employees on November 7, 2008 and five more employees on November 21, 2008.

6. Respondent violated Section 8(a)(5) and (1) by failing to give Teamsters Local 673 advance notice of its lay-off of five employees represented by Local 673 and failing to give the Union an opportunity to bargain about the lay-off and/or its effects.

7. Respondent violated Section 8(a)(5) and (1) in failing to provide Teamsters Local 673 a copy of its health insurance plan in a timely manner.

Remedy

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

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Remedy for Respondent's failure to give Teamsters Local 673 advance notice and an opportunity to bargain over the November lay-offs.

The Board held in *Lapier Foundry and Machine, supra,* that the remedy for a failure to bargain over a decision to lay off employees is reinstatement of the laid-off employees with backpay, *Id.,* at 955. It reiterated this holding in *Ebenezer Rail Car Service,* 333 NLRB 167 (2001).

The Board noted that this remedy provides an economic incentive for an employer to comply with the rules that requires an employer to negotiate with the union before changing the working conditions in the bargaining unit thereby preventing the employer from undermining the union by taking steps which suggest to the workers that the union is powerless to protect them. Thus, I will order Respondent to reinstate employees Esparza, Kronkow, Dickerson, Kent and Embury as a remedy for Respondent's failure to bargain, as well as for its discriminatory lay-off. Respondent's backpay liability shall run from the date of the lay off until the date the employees are reinstated to their same or substantially equivalent positions or have secured equivalent employment elsewhere.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

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[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Kieft Brothers, Inc., Elmhurst, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with, restraining and/or coercing employees in the rights guaranteed by Section 7 of the Act, by coercively interrogating them regarding their union sympathies or support or threatening retaliation against them for supporting any union;

(b) Failing and refusing to bargain in good faith with Teamsters Local 673 with regard to the wages, hours and working conditions of members of its drivers' bargaining unit;

(c) Failing to respond with reasonable promptness to information requests from Teamsters Local 673;

(d) Discriminating or retaliating against any employees due to their support or the support of any other employees for a labor organization;

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

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

(a) On request, bargain with Teamsters Local 673 as the exclusive representative of the employees in the truck drivers' bargaining unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement;

(b) Within 14 days from the date of the Board's Order, offer Miseal Ramirez, Brandon White, Eracilio "Rocky" Esparza, Mike Kronkow, Ray Embury, George Kent, Charles Dickerson, Jaime Nieves and Jose Jardon full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Miseal Ramirez, Brandon White, Eracilio "Rocky" Esparza, Mike Kronkow, Ray Embury, George Kent, Charles Dickerson, Jaime Nieves and Jose Jardon whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Elmhurst, Illinois facility, copies of the attached notice marked "Appendix"[16] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 9, 2008.

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

Dated, Washington, D.C., July 21, 2009.

Arthur J. Amchan
Administrative Law Judge

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

JD-33-09
Elmhurst, IL

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT threaten to fire you or lay you off because you support Teamsters Local 673, Laborers Local Union 25, or any other union.

WE WILL NOT interrogate you about your activities, sympathies for, or support of any labor organization, nor will we interrogate you about the union activities, sympathies or support of any other employee.

WE WILL NOT fail or refuse to bargain collectively and at reasonable times upon request concerning wages, hours and other terms and conditions of employment with Teamsters Local 673, as the exclusive bargaining representative of all our full time and regular part time drivers.

WE WILL NOT layoff our drivers without notice to Teamsters Local 673 and providing Local 673 the opportunity to bargain with regard to any lay-off and its effects.

WE WILL NOT fail and refuse to provide information in a reasonably prompt manner to Teamsters Local 673 upon a written or oral request when such information is relevant to Local 673's responsibilities relating to collective bargaining.

WE WILL NOT lay-off employees in retaliation for their support, or the support of other employees, for Teamsters Local 673, Laborers Local Union 25 or any other union.

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

WE WILL, within 14 days from the date of this Order, offer Miseal Ramirez, Brandon White, Eracilio "Rocky" Esparza, Mike Kronkow, Ray Embury, George Kent, Charles Dickerson, Jaime Nieves and Jose Jardon full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Miseal Ramirez, Brandon White, Eracilio "Rocky" Esparza, Mike Kronkow, Ray Embury, George Kent, Charles Dickerson, Jaime Nieves and Jose Jardon whole for any loss of earnings and other benefits resulting from their discriminatory lay-off, less any net interim earnings, plus interest.

WE WILL promptly provide Teamsters Local 673 with any information it requests either in writing or orally which is relevant to its duties as the exclusive collective bargaining representative of our truck drivers.

KIEFT BROTHERS, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

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

209 South LaSalle Street, Suite 900
Chicago, Illinois 60604-1219
Hours: 8:30 a.m. to 5 p.m.
312-353-7570.

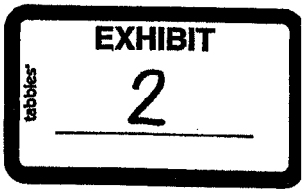
THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 312-353-7170.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KIEFT BROTHERS, INC. and GENERAL TEAMSTERS, CHAUFFEURS, SALESDRIVERS AND HELPERS, LOCAL 673 and JAIME NIEVES, and CONSTRUCTION AND GENERAL LABORERS, LOCAL UNION #25	Case Nos. 13-CA-45023 13-CA-45058 13-CA-45062 13-CA-45194

EXCEPTIONS OF KIEFT BROTHERS, INC. TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE



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The Employer-Respondent, Kieft Brothers, Inc. ("Kieft" or "Respondent"), through its undersigned attorneys, files the following Exceptions to the July 21, 2009 Decision of the Administrative Law Judge (the "ALJ") in this matter.

Exception No. 1. The ALJ improperly discredited the testimony of Respondent's Chief Executive Officer, George Smith ("Smith"), and its Chief Financial Officer, Ed Carroll ("Carroll") regarding when Respondent made the decision to engage in the layoffs at issue in this case where the testimony was undisputed because the General Counsel offered no evidence to rebut it. (Decision pp. 13-14).

Argument: As the ALJ conceded in his Decision and Order, at the hearing, Smith and Carroll both testified that the layoffs decisions at issue in the case (how many to layoff and who to layoff) were made in August 2008. (Decision pp. 13-14). The ALJ is correct that neither testified as to a precise date in August that the decision was made, but both testified that the decisions were made in August. The General Counsel offered no witness and no other evidence that contradicted Carroll and Smith's testimony. The ALJ took issue with the fact that Carroll testified that the decision was made "sometime in August, I believe" and later, "sometime in the August time frame," calling the testimony "tentative." (Decision p. 14). But the fact remains that Smith and Carroll (and Respondent's President, Larry Kieft) testified repeatedly that the decisions were made in August 2008. The General Counsel offered no evidence to rebut this testimony and the ALJ cited none. (Decision, *passim*). Rather, the ALJ simply discredited and dismissed the undisputed testimony. Doing so was improper.

The weight of the evidence, in fact all of the evidence, shows that the decisions were made in August 2008, *before* either union filed a petition for an election, and before Respondent was aware of any union activity. Carroll and Smith testified that the decision was made in

August 2008. Larry Kieft, President of Respondent, also testified that the decision was made in August 2008. (Tr. 428-31; 447-51; 464-888; 498-508; 633-35; 722). An exhibit introduced at the hearing (R-1 – a July 2008 performance ranking of all employees) was the basis that Respondent used to determine who would be laid off. (R-1; Tr. 428-32; 447-51; 633-5). Under well-settled law, the ALJ's factual findings must be supported by substantial evidence. *NLRB v. Cook County School Bus, Inc.*, 283 F.3d 808 (7th Cir. 1992). Here, the ALJ's factual finding that the layoffs decisions were made after the elections were held is not supported by any evidence, let alone substantial evidence. Indeed, it is entirely contrary to the evidence introduced at trial. (*Double D. Construction Group*, 339 NLRB 303, 305 (2003); *see also Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950) *enfd.*, 188 F.2d 362 (3rd Cir. 1951). Thus, that finding was improper and should be set aside.

Exception No. 2. The ALJ improperly applied the adverse inference rule against Respondent by improperly by: 1) finding that "Respondent's witness testified that there was no one document he could point to that precipitated the decision to layoff particular people or layoff anyone on November 7 or November 21, 2008"; and 2) by discrediting Chief Financial Officer Ed Carroll's testimony that in August 2008 he calculated the cost savings of laying off the nine (9) employees, merely because Carroll did not produce a document on that exercise, and by relying on those findings to discredit Respondent's affirmative defense that it made the layoff decisions at issue in August 2008 due to its declining economic condition. (Decision pp. 12, 14).

Argument: The adverse inference rule cannot be used to support a party's burden of proof. *See NLRB v. Louis A. Weiss Memorial Hospital,* 172 F.3d 432, 446 (7th Cir. 1999) (stating that "it is perfectly clear from the ALJ's opinion that she considered the gaps in the record to support General Counsel's burden of proof. That can't be."). The "absence of

evidence does not cut in favor of the one who bears the burden of proof on an issue." *Id.* Here, the General Counsel had the burden of proof to show that Respondent made the layoffs at issue because of the employees union activities. *Wright Line*, 251 NLRB 1083 (1980); *Vulcan Basement Waterproofing, Inc. v. NLRB*, 219 F.3d 677, 684 (7th Cir. 2000). To do so, the General Counsel had to show that Respondent was aware of the union activity when it made the layoff decisions. *Id.* The undisputed testimony shows that the decisions were made in August 2008, undisputedly *before* Respondent was aware of any union activity. Nevertheless, the ALJ invoked the adverse inference rule finding against Respondent and in favor of the General counsel as to when the layoff decisions were made based on Respondent's failure to document the August 2008 layoff decision. Under *Louis A. Weiss Memorial Hospital,* the General Counsel cannot use the adverse inference rule to prove its *prima facie* case. By relying on Respondent's failure to document the timing of its layoff decision, the ALJ allowed the General Counsel to do so.

While it may not be used by the General Counsel to state (or the ALJ to find) a *prima facie* case, the adverse interest rule may be used to rebut an affirmative defense in limited circumstances. The adverse inference rule states the failure of the employer to produce evidence that is particularly within its control allows the trier of fact to draw an adverse inference that the evidence would have been unfavorable to the employer. *See NLRB v. Dorothy Shamrock Coal Company,* 833 F.2d 1263, 1269 (7th Cir. 1987). However, "an employer's destruction of or inability to produce a document, standing alone, does not warrant an [adverse] inference." *Park v. City of Chicago,* 297 F.3d 606, 616 (7th Cir. 2002). Rather, to draw such an inference, the General Counsel must show that the reason for non-production is bad faith on the part of the employer. *See id.* (stating that "to draw such an inference, the employer must have destroyed the

documents in bad faith. Thus, the crucial element is not that evidence was destroyed but rather the reason for the destruction."). Here, there is *no* evidence that Respondent's failure to document the layoff decision in August of 2008 was done in bad faith. Rather, as Carroll testified, he did not typically document such decisions and did not document any of various components of the plans he was working on to address Respondent's declining financial condition, including the layoffs. (Tr. 873, 879, 886). While the ALJ may disagree, it is not unusual or unlawful for an employer not to document such decisions. Simply put, in August of 2008, Respondent saw no reason to document its plans and decisions and did not do so.

All of Respondent's witnesses testified that in the spring of 2008, they began discussing the need to layoff employees due to Respondent's declining financial conditions. All testified that the July 2008 performance rating (which was documented, see Exhibit R-1) were done with an eye toward layoffs. All testified that the decision to layoff employees was made in August 2008. All testified that the decision as to how many and who to layoff was also made in August of 2008. The General Counsel offered no evidence to rebut this testimony. Indeed, the ALJ points to none. Under well-settled law, the ALJ's reliance on the fact that Respondent did not document this decision in August of 2008 as evidence that it did not occur at that time was improper. Thus, the ALJ's finding with regard to the timing of the layoff decision should be set aside. (*NLRB v. Louis A. Weiss Memorial Hospital*, 172 F.3d 432, 446 (7th Cir. 1999)).

Exception No. 3. The ALJ failed to give sufficient weight to the testimony and documentary evidence that Respondent introduced to support its affirmative defense that it made the layoff decisions at issue due to economic concerns. (Decision pp. 12-13).

Argument: At the hearing, the General counsel offered no evidence to rebut Respondent's evidence regarding its perilous economic condition. Nevertheless, in his Decision

and Order, the ALJ dismissed Respondent's economic argument focusing on the fact that Respondent's lender did not actually threaten foreclosure, a lack of a document for the timing of layoffs decisions and a few months where a consistent historically low borrowing base (credit available to cover debt) increased slightly. (Decision pp. 12-13). In his Decision and Order, the ALJ devotes less than two (2) pages to Respondent's economic argument and summarily concludes that it was not "credible." This was improper. First, the Respondent's economic condition was supported by substantial evidence: documents and testimony. Second, the General Counsel did not rebut any of Respondent's evidence with counter evidence. Indeed, the ALJ points to none. Third, there was no basis for the ALJ to conclude that the evidence was not credible. In fact, the ALJ does not offer a basis for this finding beyond the absence of a threat of foreclosure and absence of documents memorializing the layoff decisions which, as discussed above in Exception No. 2, is improper. Fourth, the ALJ erroneously concluded that the Respondent's affirmative defense of economics rests solely on "the credibility of its management witnesses." This is incorrect. In fact, Respondent submitted detailed documents regarding its financial condition, including borrowing base documents (cited by the ALJ); financial statements (ignored by the ALJ); and documents showing that orders were down in 2008 at the time of the layoffs (conceded by the ALJ).

At the hearing, Respondent presented detailed testimony and other evidence as to the economic condition that lead to the layoffs at issue in this case: Larry Kieft, President and former owner of Respondent, testified that in his many years with Respondent, Respondent had never experienced an economic downturn as "drastic" as the one that Respondent faced in 2008. (Tr. 409-11). Kieft estimated Respondent's revenue to be down approximately 35% in the last two years. (Tr. 409-10). Kieft testified that Respondent's largest customer, Dempsy Ing, Inc.,

went bankrupt in 2008, causing Respondent to lose a significant volume of work which it has not replaced. (Tr. 411-12).

Kieft also testified that, by the summer of 2008, Respondent's order volume was down significantly. There were very few new orders coming in and Respondent was not quoting many jobs. (Tr. 803-4, 425-6). That meant, among other things, that Respondent would not need to build inventory over the winter months. (Tr. 425-6). There were no new housing subdivisions being built and no state-funded Illinois public works projects being planned (Tr. 825-6, 425-6), and, consequently, projections for future work were not good. (*Id.*) In the summer of 2008, Respondent started trying to lien jobs. (Tr. 411).

Owner George Smith testified, that by the third quarter of 2007, Respondent saw a decline in revenue that ultimately continued. (Tr. 457-60, 489). Respondent was concerned about escalating costs of raw materials (redi-mix and steel) and fuel. (Tr. 457, 462). Costs were up, profit margins were tightening and business was slowing down. (Tr. 465). One of Respondent's largest customers Dempsy Ing, Inc. owed Respondent $775,000 and was going out of business. (Tr. 462, 567, 570). Other accounts receivables were stretched. (Tr. 480).

Respondent's audit financial statements which were introduced at the hearing (R-3, R-4 and R-5), show that net sales decreased over the two-year period, fiscal years 2006 to 2008. (*Id.*; Tr. 478). In the spring and summer of 2008, Respondent used those audited financial statements to review past sales and revenue and to make projections for fiscal year 2009. (Tr. 469-70). Demonstrative exhibit R-2 shows those projections, which projected a decline. Two key measures of Respondent's business – deliveries and production – were down 25-30%. (Tr. 487). Smith testified that he believed, based on what he saw at Respondent, his experience in the construction industry and what others in the industry shared with him, that the market would

continue to decline in late 2008 and 2009. (Tr. 478-80, 490, 570). In fact, in November and December 2008, Respondent was 50% below its prior year's budget. In the first quarter of calendar year 2009, Respondent did not make up the shortfall. (Tr. 571-2). At the time of the hearing, as of the first three months of 2009, Respondent was 15-20% below its revised budget.[1] Smith testified that because of this, orders were down significantly and Respondent's projections for business into 2009 had never been so low. (Tr. 490).

In early 2008, conditions continued to decline, Respondent was facing what Smith referred to as a "liquidity crises" (Tr. 495) and was precariously close to defaulting on its bank covenants. (Tr. 495, 566-7). Consequently, Respondent began to consider many cost cutting measures, including layoffs. (Tr. 487). Respondent had been working a plan (referred to by Carroll as the 8-point plan) to try to shore up Respondent's finances in light of the declining business conditions and projections. Cutting labor costs became part of the plan in May 2008. (Tr. 487, 562-64). Smith testified that at that point, Respondent had lost one of its largest customers, prospects for the industry were bleak, costs were increasing, customers were not placing orders, and conversations with customers indicated that they would not increase orders in the future. (Tr. 570-1, 575-6).

Smith testified that beginning in June 2007 and at times in 2008, he met with employees and discussed Respondent's economic challenges. (Tr. 662-3). Employees who testified admitted that Smith did so. (Tr. 24, 78, 100-01). Smith also discussed these issues in his July, 2008 letter to employees. (GC-7). The ALJ took issue with Smith's statement in that letter that he was "hopeful" that if employees were focused on the health of Respondent and if Respondent "strives to work efficiently," that Respondent would be "well positioned to make it through

[1] As Smith testified, internal management statements introduced at the hearing and testified to by Carroll, show this 50% budget decline. (Tr. 574).

without layoffs." (Decision p. 11). Smith admitted that when he wrote that letter, he knew Respondent would engage in layoffs. Indeed, in the letter, Smith also reminded employees that they were "at-will" and not guaranteed employment. (Decision p. 4). The letter, while perhaps inspiring false hope, was not a promise not to layoff employees. Smith testified that he had some hope (Tr. 578), as did Kieft (Tr. 752-4, 811). In any event, that statement is not a promise not to layoff. And, it does not negate Respondent's undisputed testimony that a month later, in August 2008, it decided to layoff nine employees (5 drivers and 4 laborers).

Co-Owner Ed Carroll and Chief Financial Officer testified in even greater detail than Smith about Respondent's declining economic condition, the 8-point plan to try to address it, the financial forecasting he did, and why, by August 2008, the layoff of nine employees (in addition to the other cost cutting measures) was critical.

Carroll authenticated and testified about group Exhibit R-9, the borrowing base documents Respondent submits to its primary secured lender, First Chicago Bank and Trust, each month. (Tr. 839). With regard to the borrowing base documents (essentially the amount of money a lender is willing to lend against collateral or as Carroll called it the "cash availability" to run the business), in the spring of 2008, the borrowing base was down significantly as compared to 2007. (Tr. 863-7). From May to November, 2008, it continued to drop (albeit with a rise in July) and by November, it was just $49,000. (Tr. 864-69). This created liquidity crisis. As Carroll testified, that low of a borrowing base could be "wiped out" by one payroll cycle, or one customer who does not pay their bill that month. (Tr. 869). Default and liquidation was a serious threat. (*Id.*; Tr. 879-82).

Carroll also authenticated and testified about R-14 to R-24, the Balance Sheets for Respondent for May 2008 through May 2009, and R-25 to R-35, the Income Statements for that

same period. (Tr. 841-43). These two sets of documents together are known as "internal management statements" and are used to prepare the audited financial statements. (R-4, R-5 and R-6; Tr. 846-7). Carroll used them to create and update his forecasting models. (Tr. 846-8). As Carroll testified, referring to R-14 and R-25, in May 2008, Respondent had a revenue base of $1.6 million which was "disturbing," because May was the start of the busy season and, thus, the revenue base should have been over $2 million. (Tr. 849). Carroll testified that things got worse in June and July, the height of the busy season, as the net revenue base decreased. (R-15, R-16, R-26, R-27; Tr. 850-1). Carroll also gave detailed testimony about Respondent's audited financial statements for 2006, 2007 and 2008. (R-3, R-4 and R-5). They show a 30% drop in revenue in 2006 to 2008. (Tr. 854).

Carroll explained the perilous state of business at Respondent in the spring and summer of 2008 leading up to the layoff decisions in August 2008 He explained that his concern about the economic viability of Respondent increased as the summer of 2008 progressed because the three markets Respondent served – residential, housing, commercial buildings and government construction projects (highways) – were down significantly. The residential sector was at a standstill, the commercial sector was falling off fast and the government sector was troubled because municipalities lacked tax revenue to pay for projects. (Tr. 855-6). Carroll testified that he kept changing its revenue forecasts to adjust to the declining markets, yet Respondent continued to miss revised revenue targets. (Tr. 856-7).

Carroll and Smith testified that Respondent engaged in several other cost cutting measures as part of the 8-point plan. (Tr. 562-6, 706-12, 884-7). Respondent terminated two non-union salaried employees, Mark Geraci and Tom Kieft. (Tr. 598, 653-4). Respondent also deferred payments to shareholders in 2008 and 2009 because Respondent did not meet its

financial targets. (Tr. 654-5; Tr. 435-6). Because of the liquidity crisis, and the need to preserve cash, Respondent also declined to make a seller note payment due in August 2008. (Tr. 654-5). Smith also directed management to reduce overtime. (Tr. 655). Respondent also approached suppliers and attempted to get price concessions, but those efforts failed. (Tr. 653). Respondent eliminated one of two bonus programs, the profit sharing bonus program, due to its financial condition. (Tr. 455-6). Respondent began "liening jobs" to force customers to pay money owed to Respondent. (Tr. 411, 435-6). Finally, Smith put his management fee back into the business and The Freedom Group (Owners) made a capital contribution to Respondent. (Tr. 671, 869). Layoffs became part of the plan in the spring. (Tr. 724-5). Conditions deteriorated and, in August 2008 (before either union filed a petition for an election), Respondent decided to layoff the nine employees. (Tr. 728-30).

Smith, Carroll and Kieft did not document all of the discussions they had in the spring or summer of 2008 and the many steps they took to assess and address the declining economic condition of Respondent, the bleak outlook for work and the many cost cutting measures it needed to engage in to address those issues. Carroll did not create a document called the 8-point plan. (Tr. 570, 700-1, 873, 879, 886). Rather, he simply did not keep the many versions of the forecasting model, but updated it on his computer. (Tr. 648-9, 716-17). Employers are not required to document all such events and, as discussed above in Exception 2, the ALJ's reliance on the lack of documentation to discredit Carroll's and Smith's testimony was improper.

The overwhelming weight of the evidence introduced at the hearing showed that Respondent's economic condition was dire. Yes, the ALJ ignored this evidence and found that Respondent's economic decision was not dire. That finding is not supported by substantial evidence. Rather, it is contrary to the undisputed evidence. Thus, it should be set aside.

Exception No. 4. The ALJ improperly concluded that Respondent's witness, Chuck Rogers ("Rogers"), did not contradict Laborer Jaime Nieves' ("Nieves") testimony wherein Nieves alleged that Rogers accused him of being "the one that calls the agencies and who called the unions" and stated that "he'd probably lose his job for it" where Rogers specifically testified that neither he (Rogers) or Nieves brought up the subject of the union. (Decision p. 6).

Argument: Contrary to the ALJ's conclusion, Rogers testified quite clearly as to his conversation with Nieves. In particular, contrary to the ALJ's conclusion, Rogers did not testify that "the conversation changed to a conversation about the union" but later deny that subject of union's came up. (Decision p. 6). Rather, Rogers testified as follows: "I was talking about the economy and I think it kind of changed to a union conversation on Jaime's part." (Tr. 368-9). Clearly, Rogers testified that he assumed that Nieves thought that the conversation was about the union. Contrary to the ALJ's finding, Rogers did not testify that Nieves (or her) mentioned the union specifically. Rogers went on the testify in detail about the conversation. Rogers testified that he (Rogers) began it by talking about the economy and job losses generally. Nieves asked him if that was a "threat" to which Rogers responded "no" and ended the conversation. (Tr. 370-2). As Rogers testified, neither he nor Nieves raised the topic of the union in that conversation or any other. (Tr. 372). The ALJ misread Rogers' testimony and then improperly relied on that misreading to find that Rogers did not deny Nieves' version of the conversation and, thus, Rogers violated Section 8(a)(1) of the Act. (Decision p. 6; Tr. 160; 368-376). Because Rogers clearly denied Nieves' version of the conversation, the ALJ's conclusion that he did not, and his using that conclusion to discredit Rogers and find him (and Respondent) guilty of anti-union animus, was improper and should be set aside.

Exception No. 5. The ALJ improperly concluded that Rogers did not contradict Laborer, Miseal Ramirez ("Ramirez"), who claimed that he overheard Rogers tell someone with whom he was speaking on the telephone that "the union was coming in and someone was going to get fired" and where Rogers specifically testified that he never told anyone that they might be fired for supporting the union. (Decision p. 6).

Argument: Contrary to the ALJ's conclusion, Rogers *did* deny that he said what Ramirez testified Rogers said in his presence. In fact, when questioned about this allegation, Rogers testified that he never said, while talking to someone on his cell phone, that employees who brought in the union would be fired. In fact, Rogers testified that he never uttered those words. (Tr. 376). Rogers did not need to testify that he never said these words on a cell phone in *Ramirez presence* because he testified that he never said them at all. *Id.* The ALJ ignored this part of Rogers' testimony and improperly relied on the absence of this testimony to find that Rogers violated Section 8(a)(1) of the Act. (Tr. 375-376). Because Rogers clearly denied Ramirez' version of this incident, the ALJ's conclusion that he did not, and his using that erroneous conclusion to discredit Rogers, and find him (and Respondent) guilty of anti-union animus, was improper and should be set aside.

Exception No. 6. The ALJ improperly awarded back pay to the four (4) drivers whom Respondent laid off, ignoring Respondent's uncontradicted evidence that the lay-off decisions were made *before* the employees elected the Teamsters as its bargaining representative and the ALJ's remedy of back pay was not appropriate because even if the Respondent had bargained the decision, bargaining would have been futile. (Decision pp. 9-10, 16).

Argument: As the ALJ noted in his Decision and Order, if the layoff decisions were made before Teamsters Local 673 became the bargaining representative for the drivers,

Respondent was not obligated to bargain with the Teamsters over the layoffs. (Decision p. 9); *Starcraft Aerospace, Inc.*, 346 NLRB 1228 (2006). As discussed above in Exceptions 1 and 2, the ALJ's conclusion that Respondent made the layoff decisions not in August, but rather in November after the Teamsters were certified as the bargaining representative, and, thus, was required to bargain the decisions as to drivers with the Teamsters, was in error because it was not based on substantial evidence. Moreover, even if the decisions were made after the election and Respondent's was therefore obligated to bargain, the ALJ's remedy of back-pay was improper.

In *Sundstrand Heat Transfer Inc. v. NLRB*, 538 F.2d 1257, 1260 (7th Cir. 1968), the Court rejected a back-pay remedy for the failure to bargain over the effects of a layoff. In *Sundstrand,* the employer implemented layoffs unilaterally, due to compelling economic circumstances. The Board ordered the employer to make whole all employees who were laid off until they were placed on recall lists. The Seventh Circuit Court of Appeals rejected the Board's order. The Court reasoned that back-pay was inappropriate because "if the employer had a duty to bargain, a full back-pay remedy must [be] predicated on the assumption that bargaining over the effects of the layoff would have kept the employees on the job. This is wholly improbable under the facts of this case [due to the change in economic circumstances]. Therefore, the back-pay remedy would be unreasonable." 538 F.2d at 1260.

The facts of *Sundstrand* are applicable here. In this case, Respondent, like *Sundstrand*, implemented layoffs due to compelling economic circumstances. Under the *Sundstrand* Court's reasoning, a full back-pay remedy must be predicated on the assumption that bargaining over the effects of the layoffs would have kept Respondent's employees on the job. This is wholly improbable. It is undisputed, and the ALJ conceded, that in the spring of 2008, Respondent's business was in decline; its costs had increased dramatically and revenues and projected

revenues were down significantly. By that time, Respondent's performance was already below its revised budget for the year by 15-20%. (Tr. 571). Projections for the next 3 quarters for fiscal year 2008 were bleak because Respondent had already lost one of its largest customers (Tr. 570), and orders from other customers were down significantly. The industry was in decline (Tr. 478-80, 490, 570-1), and that there was no expectation of work from public works projects or the construction of new home subdivisions, the main sources of revenue for Respondent. (Tr. 425-6, 825-6, 490, 885-6). As Smith and Carroll testified, at the time of the layoffs in November of 2008, Respondent was 50% below its revenue from 2007 and well below its revised fiscal year 2008 budget. (Tr. 572-72). By that time, one of Respondent's largest customers, Dempsy Ing, had closed its doors, owing Respondent $775,000 dollars. (Tr. 566).

As Carroll and Smith testified, given all of this, the layoffs were absolutely necessary to remain in business and avoid a liquidity crisis which would have resulted in Respondent defaulting on credit arrangements. (Tr. 555-59; 566-7, 855-61, 863-4). In fact, as Smith testified, in November of 2008, Respondent's borrowing base was the lowest it had been since Smith and Carroll acquired Respondent. (Tr. 560, 566). At that time, Smith and Carroll were seriously and legitimately concerned about the viability of Respondent. Moreover, as some employees admitted at the hearing and as he documents Respondent introduced showed, through the fall of 2008 and winter 2009 after the nine layoffs, Respondent managed its business without significant additional overtime hours despite the layoff of five drivers and four laborers. (Tr. 50-51; 245; 319-20; R-6; R-7; R-10; R-11 and R-12.) Clearly, the layoffs and other cost cutting measures were necessary, in fact critical, to Respondent's survival. Bargaining over the effects of the layoffs would have been futile as Respondent already made the decision based on overwhelming economic factors. Respondent had also taken several other steps to cut costs.

Smith put his earnings back into the business (Tr. 671) and the Freedom Group (the Owners) have made a capital contribution to Respondent. (Tr. 869).

The ALJ did not refute Respondent's evidence regarding its economic condition. In fact, as discussed above in Exhibit 3, at the hearing, none of this evidence was refuted. Yet in his Decision and Order, the ALJ barely discussed it. Rather, he stated that no lender had threatened foreclosure, and that in a few months, the borrowing base (amount of credit available to pay debt), which was at a historic low, increased slightly. (Decision p. 12-13). As discussed above in Exception 3, a review of the evidence (undisputed, but ignored by the ALJ) was that Respondent's economic condition was dire. Pursuant to the rationale of the *Sundstrand* Court, the ALJ's back-pay remedy against Respondent is unreasonable because bargaining over the effects of the layoff would not have kept the laid-off employees on the job and, thus, it should be set aside.

Exception No. 7. The ALJ improperly concluded that Larry Kieft coerced Dickerson with regard to his attendance at the rally in violation of section 8(a)(1) of the Act (by allegedly threatening him as he left work to attend it) where Dickerson admitted that he went to the rally and that Kieft did not criticize him for doing so. (Decision p. 5).

Argument: Driver Chuck Dickerson claimed that as he left to go to a union rally on Respondent's premises, Kieft said why don't you go join the rest of the "unemployed." Kieft denies saying this. The ALJ believed Dickerson; however, Dickerson did not testify that he felt coerced. Rather, he said he went to the rally despite what Kieft allegedly said and that Kieft did not criticize him for doing so. (Tr. 98-9). Thus, the ALJ's finding that Dickerson was coerced is not supported by substantial evidence and should be set aside.

Exception No. 8. The ALJ improperly concluded the fact that Kieft called the local police in on the day of the rally, was evidence of anti-union animus where Kieft testified that he did so because a fellow tenant called him to "complain" about the rally blocking traffic an where the General Counsel failed to rebut this testimony. (Decision p. 5).

Argument: The rally at issue was on Respondent's property. (Tr. 748-49). Kieft testified that he called the police because a neighboring tenant called him to complaint about the rally. (Tr. 820-21). There is no evidence that the police interfered with he rally, although the police did tell employees to move cars which indicates that they were blocking ingress and egress. (Tr. 787). The ALJ ignored Kieft's stated reason for calling the police and improperly concluded that it showed anti-union animus. This conclusion should be set aside.

Exception No. 9. The ALJ improperly concluded that Respondent hired a "martial arts fighter as a security guard" solely for being on the premises during the election and relied on this improper conclusion as evidence of anti-union animus where there was no testimony as to whether this person (a police officer) was a "martial arts fighter." (Decision p. 5).

Argument: The so-called "martial arts fighter" to which the ALJ refers did not testify at the hearing. Larry Kieft testified that this person wore a tee-shirt with a wrestling logo. (Tr. 424). There is no evidence that this person was a "martial arts fighter." The ALJ cites no evidence to support this unfounded conclusion and his reliance on this unfounded conclusion as evidence of anti-union animus by Respondent was improper and should be set aside.

WHEREFORE, Employer-Respondent, Kieft Brothers, Inc., requests that the National Labor Relations Board:

1. Reject the following Conclusions of Law in the Decision of the ALJ: 1, 2, 3, 4, 5 and 6;

2. Reject the Remedy articulated by the ALJ to address these Conclusions of Law, including the Remedy to reinstate the nine (9) employees (Miseal Ramirez, Brandon White, Eracillo Esparza, Mike Krankow, Ray Embury, George Kent, Charles Dickerson, Jaime Nieves and Jose Jordon) and to award them back pay and benefits;

3. Reject the following Paragraphs of the ALJ's recommended Order: 1(a), (b), (d), (e); 2(a)-(f);

4. Reject those portions of the ALJ's written opinion related to the above mentioned provisions of the ALJ's recommended Summary Conclusions of Law, Remedy and Order;

5. Grant Employer-Respondent oral argument with regard to these Exceptions; and

6. Order any other relief that the National Labor Relations Board deems appropriate.

Dated: August 18, 2009

Respectfully submitted,

By: s/Linda M. Doyle

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CERTIFICATE OF SERVICE

I certify that on this 18th of August, 2009, copies of the foregoing **EXCEPTIONS OF KIEFT BROTHERS, INC. TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** was e-filed upon the following:

The Board's Office of The Executive Secretary
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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KIEFT BROTHERS, INC.

and

GENERAL TEAMSTERS, CHAUFFEURS, SALESDRIVERS AND HELPERS, LOCAL 673

and

JAIME NIEVES,

An Individual

and

CONSTRUCTION AND GENERAL LABORERS, LOCAL UNION #25

CASES 13-CA-45023
13-CA-45058
13-CA-45062
13-CA-45194

COUNSEL FOR THE GENERAL COUNSEL'S CROSS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE AND ARGUMENT IN SUPPORT THEREOF

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Counsel for the General Counsel hereby files these limited cross exceptions to the Decision of Administrative Law Judge Arthur J. Amchan dated July 21, 2009 submitting as follows:

1. The ALJ's recommendations failed to find that the Employer failed and refused to provide information subject to the Teamsters properly served February 2, 2009 request.

In his Decision, Judge Amchan neglected to find that Respondent violated Section 8(a)(1) and (5) of the Act when it failed to provide information subject to the Teamsters' properly served February 2nd request for information. Specifically, the Judge found that "[g]iven the fact that it has not been established the Respondent was aware of the request

EXHIBIT
3

for financial records until two to three weeks prior to the hearing, I decline to find that it had violated Section 8(a)(5) in this regard as of April 15." (ALJD pg 15, line 29-32).

The record however is replete with evidence that Teamsters properly served Respondent with its request on February 2. Teamster Principal Officer Roger Kohler testified that he first sent the request, identified as GC Ex. 27, by mail on February 2. (Tr. 284.) He also testified that he then sent the same request again on February 26 by fax. (Tr. 285, 300, GC Ex. 28). Kohler even clarified that GC Ex 30 was the cover sheet to this February 26 fax. (Tr. 286).

Indeed, even Respondent's correspondence and testimony does not refute these facts. In GC Ex. 31, Respondent's counsel, Linda Doyle, wrote on March 24 to the Teamsters that "[w]ith regard to the February 2, 2009 request for information, I will follow up and respond as soon as possible." That statement does not take issue with the lack of service or intimate in any way that this was the first time she or her client had ever heard of the request. Further, although George Smith testified that he first became *aware* of the document two to three weeks before the trial, this denial does not thereby show that this was the first time that Respondent was served. (Tr. 518-19). Smith in fact testified that his offices were down the street from the address one used by the Company. (Tr. 647). Thus the fact that he didn't see the request until two to three weeks before trial is inconsequential. This is especially true when it is considered that Smith admitted that he didn't know if anyone else at Kieft Brothers received the request for information before he saw it. (Tr. 519). His lack of information is not the same thing as a strict denial that the request was never received. None of Respondent's witnesses, ever denied that they had received the letter on February 2 by mail, or February 26 fax request. Larry

Kieft never testified about this matter, although presumably, he would be in the best position to know whether such a document was received as his office which is located at the address identified on GC Ex. 27. (GC. Ex. 27, Tr. 740).

Based upon the lack of a denial from anyone in a position to know whether the request was received, it is presumed from Kohler's testimony that Respondent received the request on about February 2, 2009. The Board has found that the failure of the U.S. Postal Service to return documents sent by regular mail indicates actual receipt of those documents. See, e.g., *I.C.E. Electric, Inc.*, 339 NLRB 247 fn. 2 (2003), *Express Gourmet*, 338 NLRB No. 114, fn. 1(2003), *Lite Flight, Inc.*, 285 NLRB 649, 650 (1987). Based upon this case law and Kohler's record testimony that he first mailed the February 2, 2009, request for information at that time, it is presumed that Respondent received the document the day after it was mailed and not two or three weeks before the hearing, and was then under an obligation to provide this information.

From this, it follows that Respondent's delay in producing any documents as of the time of the hearing was sufficiently long to establish a violation of Section 8(a)(5). At the time of the hearing, April 13-16, the Teamsters had been waiting two and a half months for the information and had made multiple reminders to Respondent. (ALJD pg. 8 lines 45 – 53).

Accordingly, Counsel for the General Counsel respectfully requests that the Remedy, Order and Notice provisions of Judge Amchan's recommended Decision be amended to include provision that Respondent violated Section 8(a)(5) by failing and refusing to provide information relevant and necessary for bargaining found in the Teamsters' February 2 request for information.

2. The ALJ failed to rule on General Counsel's Motion to Strike Attachments and Corresponding Arguments in Respondent's Brief to the Administrative Law Judge dated July 1, 2009

On July 1, 2009, Counsel for the General Counsel filed a Motion to Strike Attachments and Corresponding Arguments in Respondent's Brief to the Administrative Law Judge. See Attachment 1. As is addressed in greater detail in the Motion, Respondent attached several documents to her post hearing brief to the ALJ. Most alarming is one which she refers to as EXHIBIT A. By this document, a letter purportedly of April 20, 2009, Respondent attempts to use thie letter to argue that it had complied with the Teamsters' request for information and thereby did not commit the 8(a)(5) violation. See Attachment 2. However, this letter was never entered in the record and was not subject to cross examination at trial. Beyond the normal concerns, this document becomes especially troubling when, in his Decision, Judge Amchan mentions in dicta that "I would note, however, that if Respondent has not satisfied this request as of the date of this decision, its failure to do so would be unreasonable." (ALJD pg. 15, line 33-34). Respondent cannot attempt to bootstrap evidence not a part of this record and thereby relieve itself of liability under the Act.

Based upon the foregoing, Counsel for the General Counsel respectfully requests that the Board review and rule upon the Motion to Strike Attachments and reject Respondent's improperly attached letter as not part of this record in this case.

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

Brigid Garrity
Counsel for the General Counsel
National Labor Relations Board, Region Thirteen
209 South LaSalle Street, Suite 900
Chicago, Illinois 60604

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CERTIFICATE OF SERVICE

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

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

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

Dowd, Bloch & Bennett
8 S. Michigan Avenue, 19th Floor
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Jaime Nieves
13435 Ann Street
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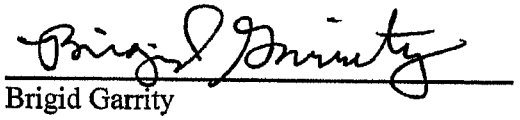

Brigid Garrity
Counsel for General Counsel
National Labor Relations Board Region 13
209 South LaSalle Street, Suite 900
Chicago, Illinois 60604
(312) 353-5564

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

KIEFT BROTHERS, INC.

and

GENERAL TEAMSTERS, CHAUFFEURS, SALESDRIVERS AND HELPERS, LOCAL 673

and

JAIME NIEVES,

An Individual

and

CONSTRUCTION AND GENERAL LABORERS, LOCAL UNION #25

CASES 13-CA-45023
13-CA-45058
13-CA-45062
13-CA-45194

GENERAL COUNSEL'S MOTION TO STRIKE ATTACHMENTS AND CORRESPONDING ARGUMENTS IN RESPONDENT'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

NOW COME, Brigid Garrity and Neelam Kundra, Counsel for the General Counsel who file this Motion to Strike Attachments and Corresponding Arguments in Respondent's Brief to the Administrative Law Judge and state the following:

The hearing in this case was held on April 13-16, 2009 but on April 16, the record was left open, in part, to permit Respondent to comply with General Counsel's subpoena. Following Respondent's failure to produce documents pursuant to the General Counsel's subpoena, General Counsel filed a Motion For Sanctions under *Bannon Mills* and to Close the Record. Respondent's Counsel Linda Doyle did not object to the closing of the record and so on May 15, Administrative Law Judge Amchan granted the motion to close the record.

Attachment 1

After a brief extension of time, the parties filed their briefs to the Administrative Law Judge on June 26. Upon receipt of the Respondent's brief, Counsel for the General Counsel noted that Respondent's Counsel attached two attachments to her brief which were never received into evidence by the Administrative Law Judge. Respondent did not offer these documents nor did she authenticate them at the hearing.

NLRB Rules and Regulations, Section 102.45(b) defines what constitutes "the record" in a proceeding as:

> "[t]he charge upon which the compliant was issued and any amendments thereto, the compliant and any amendments thereto, notice of hearing, answer and any amendments thereto, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the administrative law judge's decision and exceptions, and any cross-exceptions or answering briefs as provided in section 102.46..."

Board law has further clarified that documents attached to briefs may not be considered if not authenticated at the hearing. *EDP Medical Computer Systems,* 284 NLRB 1286, 1287 (1987); *Inland Steel Co.,* 259 NLRB 191, 192 (1981); *Washington Hospital Center,* 270 NLRB 396 (1984); *Operating Engineers Local 18 (Ohio Contractors),* 220 NLRB 147 (1975).

Throughout Respondent's brief, Ms. Doyle attempts to bootstrap evidence not produced, offered, or cross-examined at the hearing. Such evidence and all corresponding arguments should be stricken from the record. For example, she relies upon Attachment A, a letter dated April 20, 2009,[1] to demonstrate that Respondent did not refuse to supply information to the Teamsters. At the hearing, Respondent put forth a vigorous defense with respect to the 8(a)(5) refusal to provide information allegation made at the hearing. General Counsel's witness, Roger Kohler, was cross examined at length by Ms. Doyle about the facts concerning the sequencing of events resulting in Respondent's refusal to provide information. Respondent called witnesses Larry Kieft and George Smith to testify about this allegation as well. Although Respondent had the additional opportunity to call a witness to authenticate Attachment A when the parties were supposed to resume the hearing, she chose not to. Instead, she never objected to the closing of the record.

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[1] If one were to accept the date of this letter as true, this evidence also cannot be considered newly acquired. *Washington Hospital Center*, 270 NLRB 396 fn.1 (1984).

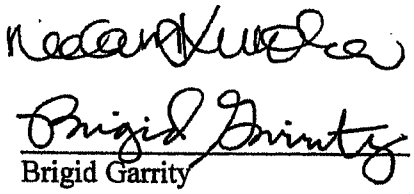
No evidence exists in the record supporting or corroborating the Respondent's claim in her brief that Respondent has complied with any of the information requests made by the Teamsters. Attachment A was never offered or authenticated and it cannot be considered as proof of Respondent's conduct regarding the 8(a)(5) refusal to provide information allegation for the reasons as stated above. Further Respondent's unilateral and unsubstantiated claim of its alleged post-hearing compliance simply does not suffice to warrant any consideration of its mootness claim. Nor, in any event, would a finding of mootness be warranted even if, as claimed by the Respondent, it turned over some of the requested information after the hearing closed. The Board has held that "subsequent compliance with a request for information does not cure the unlawful refusal to supply the information in a timely manner and belated compliance with a request for such information does not render moot a complaint of an unlawful refusal ...to supply the requested information." *Teamsters Local 921 (San Francisco Newspaper)*, 309 NLRB 901, 902 (1992); *Amersig Graphics, Inc.*, 334 NLRB 880, 897 (2001). Accordingly, Respondent's argument on brief of its alleged post-hearing compliance should be rejected and Respondent's Attachment A, along with all subsequent arguments flowing from it, should similarly be stricken from the record.

Next, Respondent attached Attachment B to her brief to attempt to explain her client's lack of cooperation with the subpoena. General Counsel asserts that the evidence contained in Attachment B should have been produced at the opening of the hearing on April 13. However, insofar as this evidence is also being offered to augment Respondent's *Wright Line* defense, this compilation of supposed facts is not in evidence and cannot be relied upon to make any determinations about the state of Respondent's operation. *WHLI Radio,* 233 NLRB 326, 331 (1977).

In sum, because Respondent did not offer either Attachment A or Attachment B or authenticate them at the hearing, they are not part of the record and may not appropriately be considered. Therefore, Counsel for the General Counsel respectfully requests that the all exhibits attached to Respondent's brief and all arguments associated with those arguments be stricken from the record.

Dated at Chicago, Illinois, this 1st day of July 2009.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certify that true and correct copies of the Counsel for the General Counsel's Motion to Strike Attachments and Corresponding Arguments in Respondent's Brief to the Administrative Law Judge have this 1st day of July, 2009 been served in the manner indicated below upon the following parties of record:

Via Certified Mail
Administrative Law Judge
Arthur Amchan
1099 14th St., N.W., Rm 5400 East
Washington, D.C. 20005

McDermott, Will & Emery
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Chicago, IL 60606

Arnold & Kadjan
Attn: Mr. John Toomey, Esq
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Chicago, IL 60604

Dowd, Bloch & Bennett
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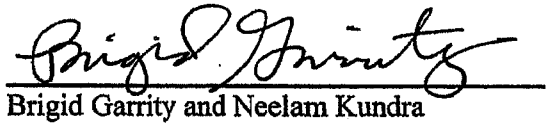
Chicago, IL 60606

Mr. Jaime Nieves
13435 Ann Street
Blue Island, IL 60406



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

EXHIBIT A

Attachment 2

McDermott
Will & Emery

Boston Brussels Chicago Düsseldorf Houston London Los Angeles Miami Munich
New York Orange County Rome San Diego Silicon Valley Washington, D.C
Strategic alliance with MWE China Law Offices (Shanghai)

Linda M. Doyle
Attorney at Law
ldoyle@mwe.com
+1 312 984 6905

April 20, 2009

VIA OVERNIGHT MAIL

Mr. Roger Kohler
Secretary Treasurer/Business Manager
General Teamsters, Chauffeurs, Salesdrivers
& Helpers, Local Union No. 673
1050 W. Roosevelt Rd.
West Chicago, Illinois 60185

Re: *Kieft Brothers, Inc.*

Dear Roger:

I enclose information in response to your written request. I apologize for the delay. I did not receive your written request until Jeff Ward sent it directly to me on March 24, 2009. George Smith did not receive the request until I sent it to him. I do not believe that anyone at Kieft Brothers Inc. with authority received the request until I sent it to George Smith. As you are aware, George Smith, Larry Kieft and I have been involved in a hearing before the National Labor Relations Board through April 16, 2009.

The following documents are enclosed:

1. Financial Statements for 2008;
2. A Vehicle List;
3. Information regarding the Health Insurance Plan;
4. Payroll records for 2008 and 2009 (containing attendance information);
5. A document regarding bonuses and raises to employees; and
6. The Handbook.

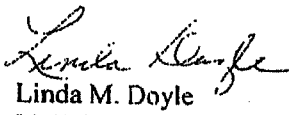
We do not have documents regarding customer complaints. We do not believe that "contracts with customers, suppliers and contractors" is relevant. Moreover, typically we do not enter into "contracts" with customers, contractors or suppliers. We do not maintain documents regarding "discipline records" for employees. We do not maintain EEO-1 reports. We do not have written

"job descriptions." We do not understand what you mean by "Health and safety audits." Likewise, beyond information in the health insurance plan (enclosed), we do not understand what you mean by "Insurance records." Beyond the Vehicle List enclosed, we do not understand what you mean by "Equipment specifications."

Please let me know if you would like to discuss any of these items or any of the enclosed documents.

Finally, please let me know when you are available to resume negotiations.

Sincerely,



Linda M. Doyle
LMD/sb
Enclosures
cc: George Smith (w/o encls.)
CHI99 5058484-3 075395.0010

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

KIEFT BROTHERS, INC.

and

GENERAL TEAMSTERS, CHAUFFEURS, SALESDRIVERS AND HELPERS, LOCAL 673

and

JAIME NIEVES,

An Individual

and

CONSTRUCTION AND GENERAL LABORERS, LOCAL UNION #25

CASES 13-CA-45023
13-CA-45058
13-CA-45062
13-CA-45194

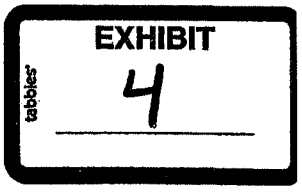
COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENTS' EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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

I. INTRODUCTION

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[2] See *Sturgis-Newport Business Forms,* 227 NLRB 1426, 1432 (1977).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at *29.

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

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

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

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

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

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

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

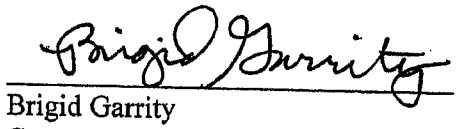
union election. Objections to the election were filed. Because the Employer did not provide notice to the Union about these layoffs, the Board held that the Employer violated Section 8(a)(5) because it had acted at its peril by changing the terms and conditions of employees. Soon thereafter, the parties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

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

III. CONCLUSION

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

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



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[8] Except as otherwise modified in accordance with the General Counsel's Limited Cross Exceptions, which has been filed separately.

CERTIFICATE OF SERVICE

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

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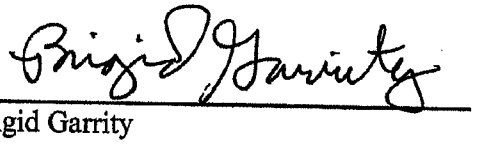

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

KIEFT BROTHERS, INC.

and

GENERAL TEAMSTERS, CHAUFFEURS, SALESDRIVERS AND HELPERS, LOCAL 673

and

JAIME NIEVES,

An Individual

and

CONSTRUCTION AND GENERAL LABORERS, LOCAL UNION #25

CASES 13-CA-45023
13-CA-45058
13-CA-45062
13-CA-45194

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

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

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

Exhibit 1

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

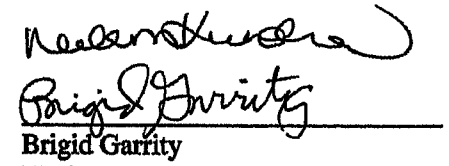
has been prejudiced by being unable to test the assertions of the company that they relied on certain financial documents which evinced a solid economic rationale for the timing of the layoffs. Without the purchase order tickets and invoices, business fluctuations from year to year cannot be accurately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

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

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

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

Respectfully submitted,



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CERTIFICATE OF SERVICE

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

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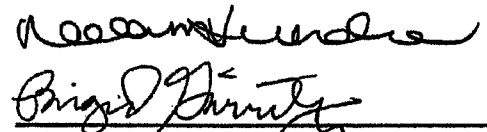
Dowd, Bloch & Bennett
Attn: Mr. Robert Cervone, Esq.
8 S. Michigan Avenue, 19th Floor
Chicago, IL 60606
rcervone@dbb-law.com

Jaime Nieves
13435 Ann Street
Blue Island, IL 60406
crossswordsjsn@sbcglobal.net

Administrative Law Judge Arthur Amchan
1099 14th Street, N.W., Room 5400 East
Washington, D.C. 20570-0001
Arthur.Amchan@nlrb.gov



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

7M NLRB-31
(12-07)

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Keeper of the Records, Kieft Brothers, Inc.
837 Riverside Drive
Elmhurst, IL 60126

As requested by Brigid Garrity, Counsel for the General Counsel

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

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

at 209 South LaSalle Street, Suite 900

in the City of Chicago

on the 13th day of April 2009 at 10:00 (a.m.) ~~(p.m.)~~ or any adjourned or rescheduled date to testify in Kieft Brothers, Inc.

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

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

SEE ATTACHMENT

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

B - 565542

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

Issued at Chicago, Illinois 60604

this 24th day of March 2009

Lester A. Heltzer

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

PRIVACY ACT STATEMENT

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

Ex. 1

KIEFT BROTHERS, INC.

ATTACHMENT

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

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

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

1. Payroll records for the period April 1, 2006 through August 1, 2008 demonstrating the hourly paid driver and laborer employees of Respondent who were given bonuses and/or raises, the amount of such raises and/or bonuses, and date given.

2. Documents showing the criteria used to determine the amounts of bonuses and/or raises given to hourly paid driver and laborer employees of Respondent for the period April 1, 2006 through August 1, 2008.

3. Documents showing the names and job titles of all individuals of Respondent who were responsible for creating the criteria used to determine the amounts of bonuses and raises given to hourly paid driver and laborer employees for the period April 1, 2006 through August 1, 2008.

4. Documents, including but not limited to invoices, work orders, customer/client lists, contracts and bids showing customer/clients for whom Respondent supplied product and the amounts Respondent sold to each of those customers/clients during the period November 1, 2006 to present.

5. To the extent not previously request above in Item 4, documents including but not limited to invoices, receipts, and purchase orders from East Jordan, Elmhurst Chicago Stone, and Freedom Pipe to Respondent demonstrating the product and amounts requested by and supplied to these entities by Respondent during the period November 1, 2006 to present.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16. Documents concerning the organizing effort of Laborers Local 25 in the possession of Respondent, including, but not limited to:
(1) All documents reflecting internal communications between managers and/or supervisors concerning the Laborers Local 25's organizing.
(2) All documents reflecting Respondent's observation of employee union activity on behalf of Laborers Local 25.
(3) All documents or lists identifying likely or possible supporters or organizers of Laborers Local 25.
(4) All documents or lists identifying employees likely opposed to Laborers Local 25.
(5) All documents reflecting conversations by supervisors or managers with any employee about Laborers Local 25, their organizing campaign, or generally about unions.
(6) All documents provided to employees about Laborers Local 25, their organizing campaign, or distributed to employees as part of Respondent's campaign opposing Laborers Local 25.
(7) All documents including drafts, outlines, videotapes, or speeches presented by the Respondent to employees regarding the Laborers Local 25's organizing campaign.

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

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

19. Production logs of laborer employees of Respondent during the period April 1, 2006 to present.

20. Production lists supplied to laborer employees demonstrating work yet to be performed during the period April 1, 2006 to present.

21. All performance evaluations of driver and laborer employees of Respondent and those documents reflecting Respondent's deliberations regarding those evaluations produced during the period April 1, 2006 to present.

22. Disciplinary records of driver and laborer employees of Respondent including but not limited to disciplinary warnings, infraction notices, reports about said infractions, and suspensions during the period April 1, 2006 to present.

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

Garrity, Brigid

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

Linda:

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

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

Thank you for your time and attention to this matter.

EX. 2

Garrity, Brigid

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

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

Kundra,
I am out of the office.

With regard to the documents:
You have items 1 and 6. They were introduced through Ed Carroll at the hearing.
As Ed Carroll testified, item 3 was not a document.
As to personnel files, we produced all the we have. I will reconfirm this today but as the testimony indicated, Keift Brothers has no HR representative and has not kept "personnel files" on all of its employees.
As to the invoices, the company is trying to locate all of them but it looks like some for the earlier years have not been kept.
We will produce the PO tickets for Elmhurst Stone. I will confirm that today.

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

Linda

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

Good morning Linda,

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

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

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

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

Hi Linda,

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

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

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

Thanks!
Neelam

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

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

Brigid

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

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Garrity, Brigid

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

Brigit,

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

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

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

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

Linda

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

Linda:

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

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

Thank you for your time and attention to this matter.

Ex. 3

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

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NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Kieft Brothers, Inc. *and* General Teamsters, Chauffeurs, Salesdrivers and Helpers, Local 673 *and* Jaime Nieves *and* Construction and General Laborers, Local Union #25. Cases 13–CA–45023, 13–CA–45058, 13–CA–45062, and 13–CA–45194

March 15, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On July 21, 2009, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed limited cross-exceptions, a supporting brief, and a brief in response to the Respondent's exceptions.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions, cross-exceptions and briefs and has decided to affirm the judge's findings[2] and conclusions, and to adopt his recommended Order.

We agree with the judge that the General Counsel met his initial burden under *Wright Line*[3] of establishing that the Respondent's layoff of nine employees was motivated by unlawful animus against union activity,[4] and that the Respondent did not meet its rebuttal burden of showing that the layoffs would have occurred even absent union activity.[5] In addition, we adopt the judge's findings that the Respondent violated Section 8(a)(5) by failing to bargain with Teamsters Local 673 over the layoffs;[6] and that the Respondent unlawfully threatened employees Chuck Dickerson and Jaime Nieves in violation of Section 8(a)(1).[7] Finally, we agree with the judge

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Teamsters Local 523 v. NLRB*, 590 F.3d 849 (10th Cir. 2009); *Narricot Industries, L.P. v. NLRB*, 587 F.3d 654 (4th Cir. 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. granted 130 S.Ct. 488 (2009); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377).

[2] Many of the Respondent's exceptions are based on disagreement with the judge's credibility findings. 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 us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. We also deny the Respondent's request for oral argument, as the record, exceptions, arguments, and briefs adequately present the issues and the positions of the parties.

The General Counsel has cross-excepted to the judge's failure to rule on his posthearing motion to strike two documents attached to the Respondent's brief to the judge. The documents sought to be stricken pertain to the issue of the Respondent's compliance with a subpoena requesting information relevant to the 8(a)(3) layoff allegation, and to the 8(a)(5) allegation regarding the timeliness of the response to the request for financial information. We have not relied on these documents in adopting the judge's conclusion as to both allegations and, therefore, we need not rule on this aspect of the General Counsel's cross-exceptions.

[3] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).

Regarding the *Wright Line* analysis, Member Schaumber notes that the Board and circuit courts of appeals have variously described the evidentiary elements of the General Counsel's initial burden of proof under *Wright Line*, sometimes adding as an independent fourth element the necessity for there to be a causal nexus between the union animus and the adverse employment action. As stated in *Shearer's Foods*, 340 NLRB 1093, 1094 fn. 4 (2003), because *Wright Line* is a causation analysis, Member Schaumber agrees with this addition to the formulation. Member Schaumber believes that such a causal nexus has been shown here.

[4] In finding that the layoffs were unlawfully motivated, we do not rely, as did the judge, on the Respondent's having purportedly hired a "martial arts" security guard to provide security on the day of the election won by Teamsters Local 673, or on Larry Kieft's having called the police on the occasion of the October 9, 2008 rally held by the Teamsters. Contrary to the judge, Member Schaumber also does not rely on the Respondent's changing of the locks on the front gates of its plant before the drivers' election as evidence of Respondent's unlawful motivation for the layoffs.

[5] In finding the Respondent's economic defense inadequate, Member Schaumber does not rely, as did the judge, on the Respondent's failure to produce documentary evidence that the bank that provided its operating line of credit had threatened to foreclose if the Respondent's monthly "borrowing base" figure declined to zero. Chairman Liebman finds it unnecessary to rely on this evidence.

[6] The judge stated that if the Respondent had shown that the layoffs were consistent with a past practice, it would not have been required to bargain over the layoff of the drivers. Chairman Liebman observes that under established Board precedent, the existence of a past practice during a period when employees are unrepresented does not excuse an employer from bargaining over the practice after a union becomes those employees' bargaining representative. E.g., *Mackie Automotive Systems*, 336 NLRB 347, 349 (2001); *Eugene Iovine, Inc.* 328 NLRB 294 (1999), enfd. 1 Fed Appx. 8 (2d Cir. 2001). Member Schaumber finds it unnecessary to reach this legal issue because the Respondent did not establish a past practice here. See *Seafood Wholesalers, Ltd.*, 354 NLRB No. 53 fn. 2 (2009).

[7] Because we adopt the judge's finding that the Respondent unlawfully threatened Dickerson and Nieves, we find it unnecessary as cumulative to pass on the judge's finding that the Respondent unlawfully threatened Miseal Ramirez. The Respondent did not except to the judge's finding that it interrogated Virgilio Nueves in violation of Sec.

EXHIBIT 5

that the General Counsel did not show that the Respondent violated Section 8(a)(5) by failing to respond in a timely manner to the Teamsters' request for information concerning its financial condition.[8]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Kieft Brothers, Inc., Elmhurst, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. March 15, 2010

Wilma B. Liebman, Chairman

Peter C. Schaumber Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Brigid Garrity and *Neelam Kundra, Esqs.*, for the General Counsel.

Linda M. Doyle, Esq. (McDermott, Will & Emery), of Chicago, Illinois, for the Respondent.

John Toomey, Esq. (Arnold & Kadjan), of Chicago, Illinois, for Charging Party Teamsters Local 673.

Robert Cervone, Esq. (Dowd, Bloch & Bennet), of Chicago, Illinois, for Charging Party Laborers Local Union #25.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Chicago, Illinois, from April 13–16, 2009. Teamsters Local 673 filed the charge in Case 13–CA–45023 on November 24, 2008. Jaime Nieves filed the charge in Case 13–CA–45058 on December 16, 2008. Laborers Local # 25 filed the charge in Case 13–CA–45062 on December 17, 2008. On February 1, 2009, the Region issued a consolidated complaint.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and Charging Party Teamsters Local 673, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Kieft Brothers, Inc. manufactures precast concrete manholes at its facility in Elmhurst, Illinois. It also sells and delivers manholes and other plumbing products, such as sewer pipe, from this location. During 2008, Respondent purchased and received goods, products, and materials valued in excess of $50,000 from points outside of Illinois. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Unions, Teamsters Local 673 and Laborers Local #25, are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Overview

The General Counsel alleges that agents of Respondent threatened employees on several occasions in violation of Section 8(a)(1) in October and November 2008. He also alleges that Respondent interrogated an employee about his union sympathies in violation of Section 8(a)(1).

Respondent laid off four employees on November 7 and five more on November 21, 2008. The General Counsel alleges that these layoffs and Respondent's failure to reinstate these employees were discriminatorily motivated and thus violated Section 8(a)(3) and (1). The General Counsel contends that not only was the decision to have a layoff discriminatorily motivated, but that antiunion animus also contributed to Respondent's choice of which employees were chosen for layoff.

Furthermore, the General Counsel alleges that Respondent violated Section 8(a)(5) and (1) in failing to give Teamsters Local 673 prior notice and an opportunity to bargain with respect to the layoffs of the five employees who were truckdrivers and the effects of the layoffs. The Board certified Local 673 as the bargaining representative of Respondent's drivers on October 22, 2008, 2 weeks before the first layoffs occurred.[2]

Finally, the General Counsel alleges that Respondent violated Section 8(a)(5) and (1) in refusing and failing to provide Local 673 information the Union had requested about the Company's health care plan and its financial records.

Statement of Facts

Respondent Kieft Brothers, Inc. has been in business for more than 30 years. It produces manholes for use in the storm water and waste water markets. Respondent also purchases, sells, and delivers sewer pipe. Its products are used in residential construction and in highway construction. Thus, Kieft's customers include private developers and governmental entities.

Until November 2005, Kieft Brothers was a family owned business. In that month, the Kieft family sold the business to KBI Holdings, Inc., which is managed by Freedom Venture Partners. George Smith is the chief executive officer of KBI Holdings and thus the owner of Kieft Brothers. Ed Carroll is

8(a)(1), and did not except to the finding that it violated Sec. 8(a)(5) by failing to provide the Union with a requested copy of its health plan.

[8] In Member Schaumber's view, the Respondent did not violate Sec. 8(a)(5), even assuming that the Respondent received the Union's request for information on or around February 2, 2009, rather than later. Its delay in responding to the request from that date until the opening date of the hearing (April 13, 2009) was not shown to be unreasonable under the circumstances.

[1] Certain errors in the transcript have been noted and corrected.

[2] Respondent's obligation to bargain with the Union, however, began on the date of the election, October 10, 2008.

Respondent's chief financial officer. Although the Kieft family no longer owns Respondent, Larry Kieft, a son of the founder, remains with the Company as president. His brother, Tom Kieft, was Respondent's vice president of operations until November 2008. Larry's father, Bob Kieft, retains a position as a consultant to Respondent.[3]

On July 28, 2008, George Smith sent a letter to all Kieft Brothers employees. (GC Exh. 7.) The stated purpose of the letter was to provide Respondent's employees with information regarding wage changes, cash bonuses, and the Company's discretionary bonus program.

Smith informed the employees that wage changes, cash bonuses, and the discretionary bonus would be influenced by Kieft's financial performance and management's assessment of each employee's performance for the past year. Further, he informed employees that compensation would be based on a three-tier employee assessment. Employees, he wrote, had already been ranked and placed in three categories; those who in the past year exceeded expectations, those who met expectations, and those whose performance was below expectations. Smith stated that the bonus program was designed to provide incentives for employee performance and to reward Kieft's top performers.

Smith continued:

> Kieft is experiencing a downturn in its business due to decreased levels of construction activity in the suburbs and Chicago market. The Company is also experiencing significant price increases related to its raw materials, supplies and fuel. As a result of these conditions, the Company's financial performance has declined relative to recent years. Given this financial performance, management has made the decision this year to reduce the level of raises and cash bonuses. In addition, management has made the decision to forego the discretionary bonus program during 2008.
>
> . . . .
>
> We are hopeful that the economy will improve during fiscal year 2009 and that the company will be in a position to increase the annual wage and cash bonus levels and to fund the discretionary bonus program again.
>
> . . . .
>
> If we all take a team approach during this time it should help the Company through these weaker market conditions. We are hopeful that if everyone is focused on the big picture—which is the health of Kieft—and strives to work efficiently that we will be well positioned to make it through this economic downturn without lay-offs or a reduction in our workforce. Please note that pursuant to Illinois law your employment with Kieft is at-will and your salary or hourly compensation is not a guarantee of employment for one year or for any other term.

In late August or early September employees rated in the highest tier, the "A" tier, received a bonus of 3 percent of their salary based on Respondent's assessment of their performance. Employees rated in the second or "B" tier, including drivers Ray Embury and Chuck Dickerson who were laid off in November, received a 1.5 percent bonus; employees in the third or "C" tier, for the first time during their employment with Kieft, did not receive a bonus. (Tr. 456, 30, 73–74, 92, 186, R. Exh. 1.)[4]

Teamsters Local 673 began organizing Respondent's drivers sometime in 2008. The Union held a meeting on August 28, 2008, at which a number of drivers signed authorization cards. The Union then filed a representation petition with the Board on August 29. The petition was faxed to Respondent on September 2. (Tr. 649.)

In September 2008 Laborers Local 25 began an organizing campaign amongst the production laborers at Kieft's facility. It faxed its representation petition to Respondent on October 20, 2008. (Tr. 649.)

One week prior to the representation election for the drivers' unit, which was scheduled and conducted on October 10, George Smith sent letters to Kieft's drivers urging them to vote against union representation. (GC Exhs. 3 and 4.) His October 3, letter concluded:

> The Union cannot guarantee you much and they cannot force the company to do much of anything. When you evaluate the advantages of being a Kieft employee against the disadvantages of joining the union and monetary cost of joining that membership, I am confident that you will see the only answer is to VOTE NO UNION.

In his October 4, letter, Smith again urged Respondent's drivers to vote against the Union and stated:

> We are hopeful that with all of the information that has been communicated to you recently that one message has been made clear—we value you as an employee and we will continue to work hard to maintain our position as a stable employer who provides a generous compensation package to our employees so that you can support you and your family.
>
> Throughout the years, Kieft has maintained a philosophy that it wants to keep its drivers busy even during slow business periods. During the winter months or rain days when customers are not accepting deliveries we have made it a point to offer our drivers non-delivery work assignments to keep them working.

[3] Respondent's answer admits that Larry and Bob Kieft are statutory supervisors and agents of Respondent and that Tom Kieft was a supervisor at all times relevant to this matter. It also admits that Chuck Rogers, who allegedly violated Sec. 8(a)(1) on behalf of Respondent is a statutory supervisor and agent. While Respondent's answer denied that Smith and Carroll are owners of Respondent, they are clearly agents of Respondent. Moreover, Respondent's president, Larry Kieft, described George Smith as "the owner" of Kieft Brothers, Tr. 427.

[4] The timing of this bonus is critical in assessing Respondent's claim that it decided to lay off nine employees before it knew of the Teamsters' organizing drive. Payment of the bonus in late August or September 2008 is established by the uncontradicted testimony of George Kent and Jaime Nieves. The timing of the payment of a performance bonus to two drivers it later laid off, Embury and Dickerson, is inconsistent with a determination to lay off nine employees in August.

Alleged 8(a)(1) Violation on October 9, 2009

Teamsters Local 673 held a rally outside of Respondent's premises on October 9. During this rally Respondent called the Elmhurst police twice and complained that participants in the rally were blocking the road adjacent to its property. The General Counsel alleges in complaint paragraph V(a) that Larry Kieft threatened employees with discharge if they attended this rally.

In support of this allegation, Charles Dickerson, a driver who was laid off by Respondent a month and a half later, testified that Larry Kieft asked him if he wanted to go out and join the rest of the unemployed people at the rally.. (Tr. 87.)

Larry Kieft testified in a very ambiguous fashion that he did not tell "an employee" that he can go join the unemployed if he liked. Kieft testified that he said to "somebody at the union," "shouldn't you be working." (Tr. 808.) He also testified that he told Respondent's employees that they could join the rally if they wanted to do so. (Tr. 421.) Larry Kieft did not deny that he spoke to Chuck Dickerson on the day of the rally. He did not testify about anything he said to Dickerson. Given Kieft's failure to testify directly that he did not tell Dickerson that he could go join the unemployed, I credit Dickerson's account.

Additional Evidence of Antiunion Animus Supports a Finding of Restraint, Interference, and Coercion of Chuck Dickerson's Section 7 Rights

Moreover, given the fact that Kieft called the Elmhurst police twice during the Teamsters' rally, I do not credit his testimony at Transcript 421–422, which suggests that he spontaneously invited Kieft employees to attend the Teamsters rally at the end of the day "in a friendly way." Finally, I reject the assertion in Respondent's brief at page 4 that such a statement given the state of the American economy on October 9, 2008, would be perceived as a joke. To the contrary, his statement in connecting support for the Teamsters to unemployment would reasonably coerce Dickerson and therefore violated Section 8(a)(1) of the Act, *Kona 60 Minute Photo*, 277 NLRB 867, 867–888 (1985).

More Evidence of Antiunion Animus

On October 9, on the night before the election, Respondent changed the locks on the front gate of its facility and then changed the locks back after the election. It also hired a martial arts fighter as a security guard solely for the purpose of being on its premises during the election. These measures indicate a substantial degree of antiunion animus on Respondent's part. Even assuming that Teamsters vehicles blocked the roadway on October 9, as Respondent contends, Respondent has shown no reasonable basis for it to conclude that its employees would assist unauthorized persons to gain entry into its premises or that there would be any activity inside its facility during the election that warranted a security guard's presence solely for the election.

Driver's Unit Election on October 10; Laborer's Representation Petition on October 20; and Certification of the Teamsters on October 22

The Board conducted a representation election on October 10, in which nine votes were cast in favor of representation by Teamsters Local 673 and zero votes were cast against such representation. The Board certified Local 673 as the exclusive authorized bargaining representative of Kieft's drivers on October 22.

A number of laborers signed union authorization cards in October. Local 25 filed a representation petition on October 20, 2008. This petition was faxed to Respondent the day it was filed.

Alleged 8(a)(1) Violation in Complaint Paragraph 5(b)

Laborer Miseal Ramirez, who was laid off on November 7, 2009, testified that he had an encounter regarding the Union with Respondent's operations manager, Chuck Rogers, in October 2009. Ramirez testified that he walked into Respondent's production room and saw Rogers talking on a cell phone. Then Ramirez stated that Rogers told whoever he was talking to that the Union was coming in and somebody was going to get fired. According to Ramirez, Rogers then turned and stared at him. (Tr. 209–210.)

Rogers did not directly contradict Ramirez. He testified that he never told any employee that they might be fired for supporting the Union and that he never suggested to any employee that they might be laid off if they supported the Union. He also testified that he never ever had any conversation with Miseal Ramirez about the Union. (Tr. 375–376.) This is not the same as denying that he said what Ramirez testified Rogers said in his presence. I therefore credit Ramirez. I would note that Ramirez' testimony is consistent with that of Virgilio Nieves, discussed below, that Rogers told Virgilio that Larry Kieft was really mad about Respondent's employees' union activities. Despite the fact that Rogers was not initially speaking to Ramirez, his remark constitutes a violation of Section 8(a)(1). *Valley Community Services*, 314 NLRB 903, 907, 914 (1994).[5]

Alleged 8(a)(1) Violation on November 3, 2009, Complaint Paragraph 5(c)

Laborer Jaime Nieves testified that on his way to lunch on November 3, he noticed Respondent's operations manager, Chuck Rogers, holding a ladder for employee Mark Kieft. Nieves testified that he said to Rogers that "we already had problems with OSHA not wearing our harnesses at work." He testified further that Rogers responded by saying that Nieves "was probably the one that calls the agencies and who called the unions." Nieves stated he asked Rogers why he wanted to know and Rogers told him that if he's the one who made the call, he'd probably lose his job for it. (Tr. 160.)

Rogers testified in a confusing manner about a conversation with Jaime Nieves at Transcript 368–372. Rogers first stated that he had a conversation with Jaime Nieves about the economy which changed to a conversation about the Union. Rogers testified that he told Jaime Nieves that the economy was really bad and there were a lot of people out of work. According to Rogers, Jaime Nieves responded by asking him whether his statement was a threat.

[5] Indeed, this is a stronger case for an 8(a)(1) finding than *Valley Community Services* in that Rogers was clearly aware that Ramirez was in earshot when he made his remarks.

Rogers never directly contradicted Jaime Nieves' testimony, but relied on general denials about what he told employees. (Tr. 368–376.) He stated that he never brought up the subject of union elections or unions and that neither did Nieves. Thus, Rogers' initial statement that the conversation changed to a conversation about the Union is unexplained. Finally, Jaime Nieves' testimony is consistent with that of his brother, which is discussed below, regarding statements Rogers made to Virgilio concerning Larry Kieft's anger about union activity. I credit Jaime Nieves and conclude that Respondent, by Chuck Rogers violated Section 8(a)(1).

The Unprecedented Layoffs on November 7 and 21, 2008

On November 7, 2008, Respondent laid off four employees, laborers Miseal Ramirez and Brandon White and drivers Eracilio "Rocky" Esparza and Mike Kronkow. Respondent did not provide Teamsters Local 673 prior notice of the layoffs of drivers Esparza and Kronkow.

On November 21, Respondent laid off three additional drivers, Ray Embury, George Kent, and Charles Dickerson, and two additional laborers, Jaime Nieves and Jose Jardon. Respondent did not give Teamsters Local 673 prior notice of the layoffs of the three additional drivers. Kent had worked for Kieft Brothers for over 30 years; Jaime Nieves for 24 years; and Dickerson for 12. Respondent retained employees who had worked for it for only a few years.

In the 25 years prior to November 2008, Respondent laid off only one driver for the winter; it never implemented a mass layoff like the one in the instant case. Even if I accepted Respondent's testimony at face value, there is no evidence that it ever laid off more than one employee at a time prior to November 2008.[6] As Respondent stated in its October 4, 2008 letter to its drivers, its practice had always been to keep its drivers working during slow periods.

Complaint Paragraph 5(d) Alleged Interrogation by Chuck Rogers[7]

Virgilio Nieves, one of Respondent's laborers, who drives a forklift in Kieft Brothers' yard, testified that Operations Manager Chuck Rogers asked him what he thought about employees bringing a union into Kieft 1 or 2 weeks before an NLRB election. (Tr. 237–238.)[8] Virgilio Nieves told Rogers that the employees were doing what they thought was right for them. Rogers responded by telling Virgilio that he didn't understand why employees were bringing in a union because they were paid twice as much as employees at the firm at which Rogers used to work. Nieves told Rogers that the prounion employees were trying to keep the benefits they already had. He testified that Rogers then said, "Larry Kieft says that he's not going to be really happy. I think he's going to be really mad about it."

Rogers conceded that he approached Virgilio Nieves and asked him how he felt about the Union and that he told Nieves how much better compensated Kieft employees were than employees at other companies for which Rogers had worked. (Tr. 373.) He recalls this conversation occurring prior to the Teamster's election "before the time we knew anything about a Laborers' election." Rogers also testified that his inquiry to Nieves concerned the Teamsters and the drivers, not the laborers. (Tr. 382.) I discredit this testimony.

I find that the conversation occurred after Rogers was aware that Laborer's Local 25 filed a representation petition on October 20. It is illogical to conclude that Rogers, who had responsibility for the laborers and none for the drivers, would be asking Virgilio Nieves, a laborer, how he felt about the Teamsters' organizing drive. Moreover, Nieves' account, which I credit in its entirety, makes it clear that Rogers was comparing Kieft's laborers' wages to those paid laborers by other employers. Rogers testified that Nieves said he didn't know how he felt about the Union.

Rogers' inquiry violated Section 8(a)(1). The applicable test for determining whether the questioning of an employee constitutes an unlawful interrogation is the totality-of-the-circumstances test adopted by the Board in *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In analyzing alleged interrogations under the *Rossmore House* test, it is appropriate to consider what have come to be known as "the Bourne factors," so named because they were first set out in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). Those factors are:

> (1) The background, i.e. is there a history of employer hostility and discrimination?
>
> (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking acction against individual employees?
>
> (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
>
> (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?
>
> (5) Truthfulness of the reply.

These and other relevant factors "are not to be mechanically applied in each case." 269 NLRB at 1178 fn. 20, *Medicare Associates, Inc.*, 330 NLRB 935, 939 (2000).[9] I find that the questioning tended to coerce Nieves because he was not an open supporter of the Union and because Rogers was a high-level management official. Moreover, Rogers let Virgilio know that Company President Larry Kieft was seething with anti-union animus. Nieves' evasive response to the questioning also indicates that he was in fact intimidated and was concerned that

[6] Other than evidence that Respondent laid off driver Robert Boland in 1997, there is no reliable evidence that it ever laid off any employee. I would note that Respondent called dispatcher Gary Egerton as a witness and failed to substantiate through him its claim that Egerton was laid off in 1983.

[7] The General Counsel moved to amend the complaint to include this allegation and that in par. 7(d) and the outset of the trial, Tr. 8–9. I granted the motion over Respondent's objection to the addition of par. 7(d) relating to an alleged failure to provide the Teamsters information they requested in January 2009. Respondent did not object to the addition of par. 5(d).

[8] Virgilio Nieves is the brother of Kieft laborer Jaime Nieves, who was laid off on November 22.

[9] *Medicare Associates* is frequently cited by the name *Westwood Health Care Center*.

Rogers might be seeking information on which Respondent might take retaliatory action.

Rogers' Failure to Specifically Contradict Virgilio Nieves' Testimony Regarding Antiunion Animus on the Part of Larry Kieft

Respondent's counsel asked Rogers, "Did you say anything else after asking him that question and getting his response?" Rogers answered, "No." (Tr. 374.) He also answered negatively to several other somewhat leading questions. However, Rogers did not specifically address Nieves' testimony that he told Nieves that Larry Kieft would be really mad about employees bringing a union into the Company. Moreover, Board law recognizes that the testimony of current employees that contradicts statements of their supervisors is likely to be particularly reliable. *Flexsteel Industries*, 316 NLRB 745 (1995), enfd. mem. 83 F.3d 419 (5th Cir. 1996). The testimony of current employees that is adverse to their employer is "given at considerable risk of economic reprisal, including loss of employment . . . and for this reason not likely to be false." *Shop-Rite Supermarket*, 231 NLRB 500, 505 fn. 22 (1977). I therefore credit Virgilio Nieves' account and infer that Larry Kieft had expressed animus towards the union and prounion employees to Chuck Rogers.

That Larry Kieft bore such animus is also indicated by the fact that he called the Elmhurst police twice on October 9 concerning the Teamsters' rally adjacent to his property, changed the locks on Respondent's gates the night before the election and hired a security guard solely for the purpose of being on Kieft's premises during the election.[10]

The Election in the Laborer's Unit

The Board conducted an election among Respondent's laborers on December 1, 2008, after Respondent had already laid off four of its laborers. Eight laborers voted against union representation; six voted for the Union; one challenged ballot was not opened. Despite the fact that the layoffs occurred during the critical period between the filing of the representation petition and the election, Laborers Local 25 did not file objections to the conduct of the election.

As a general proposition, an employer violates Section 8(a)(5) and (1) in unilaterally laying off represented employees for economic reasons without providing prior notice to their collective-bargaining representative and without giving their labor organization an opportunity to bargain about the layoff decision and it effects.

In *Lapeer Foundry & Machine,* 289 NLRB 952 (1988), the Board held that when an employer lays off represented employees for economic reasons, it must bargain with their collective-bargaining representative over the decision to lay off and the effects of that decision. An employer's decision to lay off employees for economic reasons is a mandatory subject of bargaining.

The Board noted that the decision to lay off turns on labor costs and must be bargained. A union can offer alternatives to the layoff, such as wage reductions, modified work rules, or part-time schedules for a larger group to save the company money during an economic downturn. The Board requires an employer to bargain over economic layoffs to insure that its employees' bargaining representative will have the opportunity to proposed less drastic alternatives.

An Employer May Implement a Decision to Lay Off Represented Employees for Economic Reasons Without Prior Notice to Their Union if the Decision to Conduct the Lay Off was Made Prior to its Employees' Selection of a Bargaining Representative

The Board has held that an employer who decides to lay off employees before its employees select a bargaining representative does not violate Section 8(a)(5) and (1) if it implements that decision after the selection of the bargaining representative, *Starcraft Aerospace, Inc.,* 346 NLRB 1228 (2006); *SGS Control Services,* 334 NLRB 858 (2001); *Consolidated Printers, Inc.,* 305 NLRB 1061, 1061 fn. 2, 1067 (1992).

The General Counsel has made out its prima facie case that Respondent's layoff of its employees in November 2008 was discriminatorily motivated and specifically that Respondent decided to implement these layoffs after it was aware of union activity on the part of both its drivers and laborers.

Respondent has not met its burden of proving nondiscriminatory motivation for the layoff or that it decided on the layoffs prior to its awareness of its employees' union activities, or prior to its drivers' selection of Local 673 as their collective-bargaining representative.

In order to establish a violation of Section 8(a)(3) and (1), the Board generally requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatees' protected conduct was a 'motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (Ist Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1983); *American Gardens Management Co.,* 338 NLRB 644 (2002). Unlawful motivation and antiunion animus are often established by indirect or circumstantial evidence.

However, in the case of a mass layoff or discharge, the General Counsel is not required to show a correlation between each employee's union activity and the termination of his employment. The General Counsel must only show that the decision to discharge or lay off was ordered to discourage union activity or retaliate against the protected conduct of some employees, *Davis Supermarkets,* 306 NLRB 426 (1992). Thus, the General Counsel in this case was not required to prove employer knowledge of each employee's union activity or support.

Nevertheless, Respondent knew prior to the layoffs that every one of its drivers voted in favor of representation by Teamsters Local 673 and that Ray Embury, one of the two drivers who had been rated a "B" (his performance met expectations), had been the Teamsters' observer at the October 10 election. Further, Larry Kieft's October 9, comments to Chuck

[10] Larry Kieft testified that the police asked the Teamsters to move their vehicles off a public road twice, Tr. 787. Union Organizer Santiago Perez testified that Teamster vehicles were not blocking ingress or egress. There is no police report in this record.

Dickerson, the other "B" driver, leads me to conclude that Kieft was aware that Dickerson actively supported the Union.

The layoffs of Embury and Dickerson are particularly powerful indicia of discriminatory motivation. Even assuming that Respondent had decided to lay off some employees, it has not presented any credible evidence that it decided to lay off nine employees prior to its knowledge of its employees' union activity. Thus, there is no credible evidence as to when it decided to lay off two "B" employees, who I find it knew were among the more active union supporters.

I do not credit the testimony of Larry Kieft, as to how Respondent decided to lay off Embury and Dickerson, as opposed to other "B" employees. Although, he testified that a decision to lay off Embury and Dickerson was made on the basis of "cross-training," Kieft did not testify as to when this decision was made or by whom. Moreover, I find Kieft to an incredible witness given his evasiveness with regard to his alleged comments to Dickerson at the time of the Teamsters' October 9 rally.

I also discredit Kieft on the basis on his testimony that he was unaware of the Teamsters' organizing drive until mid to late September 2008. (Tr. 740.) The parties stipulated that the Teamsters' representation petition was faxed to Respondent on September 2. Kieft, as Respondent's president, would have been aware of the petition almost immediately on its receipt. Finally, Kieft's testimony regarding prior layoffs, none of which, except one, are documented, leads me to discredit him generally.

Discriminatory motivation and antiunion animus may reasonably be inferred from a variety of factors, such as the Company's expressed hostility towards unionization combined with knowledge of the employees' union activities; inconsistencies between the proffered reason for its decision and other actions of the employer; a company's deviation from past practices in implementing its alleged discriminatory decision; and the proximity in time between the employees' union activities and their discharge, *Birch Run Welding*, 269 NLRB 756, 765–766 (1984); *Birch Run Welding v. NLRB*, 761 F.2d 1175 (6th Cir. 1985); *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995).

I conclude that the General Counsel has made out a prima facie case of discriminatory motivation that has not been rebutted. The timing of the layoffs soon after the drivers unanimously chose union representation suggests discriminatory motivation in conjunction with Respondent's stated opposition to unionization and its unprecedented mass layoff.[11]

By the time of the layoffs, Respondent knew that all nine of its drivers had voted in favor of representation by Teamsters Local 673. Thus, Respondent knew that each driver had engaged in protected activity prior to the layoff. It also was aware that Laborers Local 25 had filed a representation petition.[12]

There are also other indicia of discriminatory motive that Respondent did not rebut other than by self-serving oral testimony, which I decline to credit. In its July 28 letter, Respondent communicated to its employees its hope that Respondent would make it through the economic downturn without layoffs. In late August or early September, it paid cash bonuses to two-thirds of its employees, including two that it later laid off. On October 4, Respondent reminded its drivers of its philosophy (and past practice) of keeping its drivers busy even during slow periods and giving them nondelivery work assignments during the winter months. In light of what occurred after the election, the October 4 letter suggests that Respondent was willing to continue this past practice only if its drivers rejected union representation.

Moreover, the record is replete with evidence of strong antiunion animus, particularly on the part of President Larry Kieft. Therefore, I do not credit Respondent's self-serving testimony that it did not mean any of the reassuring statements made to employees on July 28 and October 4. (E.g., Tr. 504.) Rather, I conclude that it decided to abandon its past practice of finding work for its employees during slow periods after its drivers voted unanimously to be represented by the Teamsters.

The most appealing factor in Respondent's favor is the fact that by the fall of 2008, the worst global recession since World War II had already begun. Respondent's documentary evidence also shows declining sales in 2008 as opposed to prior years. However, a decline in business does not meet Respondent's burden of proving a nondiscriminatory motive given the strength of the General Counsel's prima facie case. Indeed, Respondent's chief financial officer, Ed Carroll, testified that there is no one document that he could point to that precipitated the decision to lay off particular people or lay off anybody on November 7 or 21, 2008. (Tr. 929–930.) Thus, Respondent's affirmative defense rests entirely on the credibility of testimony of its management witnesses.

Owner George Smith testified that it was liquidity, i.e., the assets Respondent had available to cover its loan from its bank that triggered the November layoff. (Tr. 555–556.) Respondent's reliance on liquidity concerns as its nondiscriminatory basis for a layoff decision in August is not credible.

Ed Carroll, Respondent's chief financial officer, discussed Respondent's liquidity concerns as reflected by its "borrowing base reports" at great length. Respondent filed these reports, (R. Exh.) 9, with First Chicago Bank and Trust anywhere from

[11] It is clear that in the thirty plus years it has been in business, prior to November 2008, Respondent had never implemented a mass layoff. Assuming that Kieft had previously laid off employees, there is no evidence that it ever laid off more than one at a time prior the layoffs at issue in this case.

I note that had Respondent established that the November layoffs were consistent with past practice, this would not only cut against a finding of discriminatory motive, it would be a valid defense to the 8(a)(5) allegation. However, to prove that it was entitled to lay off drivers without providing the Teamsters with notice and an opportunity to bargain, Respondent would have to show that the practice occurred "with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." *Sunoco, Inc.*, 349 NLRB 240, 244 (2007); *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353 (2003), enfd. mem. 112 Fed. Appx. 65 (D.C. Cir. 2004).

[12] It is well established that an employer's failure to take adverse action against all union supporters does not disprove discriminatory motive, otherwise established, for its adverse action against a particular union supporter, *Master Security Services*, 270 NLRB 543, 552 (1984); *Volair Contractors, Inc.*, 341 NLRB 673, 676 fn. 17 (2004).

5 to 15 days after the end of the month for which they were submitted. According to these documents, Respondent had the following amounts available to cover its loan in the period between April 30, 2007, and January 31, 2009:

April 2007	$1,304,887.90	report submitted	May 15, 2007
May 2007	$1,071,835.86	report submitted	June 13, 2007
June 2007	$1,402,409.43	report submitted	undated
July 2007	$1,343,100.58	report submitted	Aug. 6, 2007
Aug. 2007	$1,204,068.50	report submitted	Sept.13, 2007
Sept. 2007	$620,975.33	report submitted	Oct. 12, 2007
Oct. 2007	$1,392,411.65	report submitted	Nov. 9, 2007
Nov. 2007	$918,851.48	report submitted	Dec. 5, 2007
Dec. 2007	$232,081.48	report submitted	Jan. 15, 2008
Jan. 2008	$122,808.56	report submitted	Feb. 14, 2008
Feb. 2008	$168,485.99	report submitted	Mar. 13, 2008
Mar. 2008	$95,174.04	report submitted	April 11, 2008
April 2008	$303,018.08	report submitted	May 14, 2008
May 2008	$990,284.68	report submitted	May 12, 2008[13]
June 2008	$521,603.07	report submitted	undated
July 2008	$728,651.85	report submitted	Aug. 15, 2008
Aug. 2008	$666,270.40	report submitted	Sept. 15, 2008
Sept. 2008	$352,131.39	report submitted	Oct.14, 2008
Oct. 2008	$330,515.41	report submitted	Nov. 14, 2008
Nov. 2008	$49,149.42	report submitted	Dec. 15, 2008
Dec. 2008	$203.571.54	report submitted	Jan. 13, 2009
Jan. 2008	$321,000.01	report submitted	Feb. 13, 2009

These figures alone, or in conjunction with the testimony of Respondent's witnesses do not establish a nondiscriminatory motive for the layoffs. I would note first that there is no evidence that Respondent's bank threatened foreclosure or that Respondent had any discussions regarding its financial situation with this lender, or any other financial institution to alleviate its liquidity concerns. The lack of such evidence contributes to my conclusion that Respondent has failed to make out its affirmative defense, *Huck Store Fixture, Co.,* 334 NLRB 119, 120 (2001).

Further, there is no credible explanation why, for example, the borrowing base figure for March 2008 did not lead to a layoff while the figure for November 2008, which Respondent did not have until December 3, allegedly was a motivating factor for such a reduction in force. Moreover, Respondent's borrowing base improved slightly in July and August when Respondent claims to have made its decision to lay off nine employees, as compared to June.

As the General Counsel sets out at page 27 of its brief, Respondent's records regarding concrete production and delivery, (R. Exhs. 6 and 7), also fail to establish a nondiscriminatory motive for the layoffs. Concrete production increased from July to August 2008; deliveries of concrete decreased somewhat. The decrease in concrete production and delivery, compared to 2007, are smallest for any months of the year.

[13] The date of this report looks like May 12, 2008, but if this report was for May it had to have been submitted in June.

Respondent has not Established When it Decided to Lay Off Employees, Who Made this Decision or Decisions and/or the Means by Which this Decision was Finalized

Larry Kieft testified that by the end of 2007 work was slowing down. George Smith also testified that Kieft's business started to decline in the third quarter of 2007. (Tr. 458.) According to Kieft, by April-May 2008, Respondent knew 2008 was going to be "kind of a lean year." (Tr. 410–411.) Kieft testified that in the "spring-summer" Dempsey Ing, Incorporated, which accounted for 8–10 percent of Kieft's business went bankrupt. Smith testified that in May 2008 Dempsey owed Kieft $775,000.

Kieft intimated that George Smith and Ed Carroll first spoke to him about layoffs in June or July. (Tr. 427.) Carroll indicated that he told Kieft and Smith that Respondent needed economic savings through reduced labor costs. (Tr. 931.) If credited, his testimony leaves open the possibility that this reduction could have been realized through means other than layoffs, such as wage cuts, reduced hours, and/or furloughs. There is no evidence that Respondent considered any way to reduce labor costs other than by layoff. Given the fact that I find that this decision was made after Respondent knew about the Teamster's election victory, Respondent was legally obligated to bargain about such matters with Local 673.

Kieft testified on cross-examination that a decision to have a lay-off was made in June and the decision as to how many employees were to be laid off was made in August. (Tr. 752–553.) He also testified that the decision to lay-off employees "was officially made" in August. (Tr. 428.) Larry Kieft also testified that he *thinks* the decision to lay off four laborers and five drivers was made in August. (Tr. 429.) Later, he recalled that the decision was made at a meeting at Respondent's facility attended by himself, Larry Sims Jr., Respondent's general manager and George Smith (Tr. 749), but could not testify as to the date this decision was made. (Tr. 759.)

George Smith testified that he and Carroll starting considering layoffs in May 2008. (Tr. 464.) He further stated that the decision on the quantity of layoffs was made in the early part August, but could not testify as to the date this decision was made and testified that there is no documentation as to when this decision was made. (Tr. 498–500.) He testified that it *could* have been either the first or second week of August. Smith also testified that the decision as to which employees would be laid off was made in early August. (Tr. 505, 507.)

Ed Carroll's testimony as to when the critical decisions regarding the layoff is even more tentative. When asked when specific decisions were made, Carroll testified, "[S]ometime in August, I believe, it was," (Tr. 727.) As to the number of employees to be laid off, Carroll testified this was determined "sometime in that August timeframe." (Tr. 728.) Carroll's testimony suggests that the decision to lay off employees and the number to be laid off may have been made at different times. The testimony of Smith and Larry Kieft suggests that a decision to lay off nine employees was made at the same time a decision was made to have any layoff. However, neither testified as to how it was determined that it was that nine employees, as opposed to a lesser or greater number was chosen or who made that determination. (Tr. 803–804.)

Carroll also testified that he calculated the cost savings Respondent would realize from the layoff of nine employees in August. However, Respondent has no documentation to support his testimony and I do not credit it.

The fact that Respondent paid cash bonuses to Ray Embury and Chuck Dickerson in late August or early September makes it very unlikely that Respondent had decided to lay them off before that date—particularly since neither Embury nor Dickerson knew they were getting a bonus until the bonus appeared in their paychecks.

As to the exact timing that the layoffs would occur, Smith testified that Respondent wanted to make it to Thanksgiving before laying off any employees, but decided to lay off four on November 7, due to a deteriorating liquidity situation. (Tr. 555–556.) He did not specify when this decision to accelerate the layoff of four employees was made.

Respondent's liquidity problem markedly improved in December 2008 when Dempsey, Ing paid Respondent $400,000 of the $775,000 it owed to Kieft Brothers and Respondent determined that it had $150,000 in inventory more than what it showed on its books.

Ed Carroll testified that "right around Thanksgiving," Respondent received notice that $400,000 worth of liens on money due from Dempsey, Ing, were going to be processed. (Tr. 872.) Respondent presented no documentary evidence to support this testimony. The exact date that Respondent became aware that it was going to receive this money is critical to this case, in that if Kieft knew it was receiving the $400,000 prior to November 21, it would have obviated the need for some or all of the layoffs. The date as of which Respondent knew or suspected that it had additional inventory to cover its loan is also critical to Kieft's contentions that it had to lay off nine employees in November to avoid foreclosure.

Respondent's failure to present precise testimony as to when critical decisions were made, who made those decisions and on what basis these decisions were made and its failure to present precise and consistent testimony as to when it was aware of critical facts leads me to discredit its affirmative defense. I thus conclude it has failed to rebut the General Counsel's prima facia case. Further, I conclude that the decision to lay off employees was discriminatorily motivated and was made after the Teamsters prevailed in the October 10 representation election.

The Teamsters' Information Request

At the second bargaining session between Respondent and Teamsters Local 673 on January 6, 2009, the Union proposed that Respondent agree to participate in its health insurance and pension plan. Respondent rejected that proposal and stated it wished to remain with its health insurance plan. Roger Kohler, secretary-treasurer of Teamster's Local 673 asked Respondent for a copy of its health insurance plan. (Tr. 281.)

When a collective-bargaining representative seeks information from an employer regarding matters pertaining to bargaining unit employees, the request is presumptively relevant and the employer generally has a duty to provide such information. Respondent appears to concede that the Union is entitled to the information it requested. Its defense is that it has not refused to provide the information nor has it been dilatory in responding to the Union's requests.

I find that Respondent violated Section 8(a)(5) in failing to provide the Union a copy of its health insurance plan in a timely fashion. This request was made orally to Respondent on January 6. A request for information need not be in writing to commence an employer's obligation to provide the requested material, *A.W. Schlesinger Geriatric Center,* 304 NLRB 206, 207 fn. 7 (1991); *LaGuardia Hospital,* 260 NLRB 1455 (1982). An employer must respond to an information request in a timely manner. An unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all, *American Signature Inc.,* 334 NLRB 880, 885 (2001).[14] In the instant case, Respondent's failure to provide the Union a copy of its health insurance plan from January 6 through April 14, is an unreasonable delay and violates Section 8(a)(5).

Roger Kohler testified that his February 2, 2009 written information request was sent to Respondent in the mail. There is no persuasive evidence that Respondent received this letter. However, on February 26, 2009, the Union sent a three-page fax to McDermott, Will & Emery, Respondent's counsel's law firm. (GC Exh. 30.) Only the cover sheet is in this record. That sheet reflects a fax of three pages pertaining to an information request to Kieft Brothers. On March 24, the Union sent a two-page fax specifically addressed to Doyle at McDermott, Will & Emery. (GC Exh. 29.) George Smith testified that he did not see the February 2 letter until late March or early April. (Tr. 518–519.)

Respondent suggests that it was not aware of the February 2, letter until March 24, and thus has not been unreasonably dilatory in responding to it. Given the fact that it has not been established that Respondent was aware of the request for financial records until 2 to 3 weeks prior to the hearing, I decline to find that it had violated Section 8(a)(5) in this regard as of April 15. I would note, however, that if Respondent has not satisfied this request as of the date of this decision, its failure to do so would be unreasonable.

Summary of Conclusions of Law

1. Respondent, by Larry Kieft, violated Section 8(a)(1) of the Act on October 9, 2008, when he asked employee Chuck Dickerson whether he wanted to join the rest of the unemployed people at the Teamsters Local 673 rally.

2. Respondent, by Chuck Rogers, violated Section 8(a)(1) in October 2008 by stating in the presence of employee Miseal Ramirez that the Union was coming in and somebody was going to get fired.

3. Respondent, by Chuck Rogers, violated Section 8(a)(1) on or about November 3, 2008, by telling employee Jaime Nieves that if he was the one calling the agencies and the unions he would probably lose his job.

4. Respondent, by Chuck Rogers, violated Section 8(a)(1) in October or November 2008 by interrogating Virgilio Nieves about whether he supported or sympathized with an organizing drive at Respondent's facility.

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[14] This case has also been cited under the name of *Amersig Graphics, Inc.*

5. Respondent violated Section 8(a)(3) and (1) in laying off four employees on November 7, 2008, and five more employees on November 21, 2008.

6. Respondent violated Section 8(a)(5) and (1) by failing to give Teamsters Local 673 advance notice of its layoff of five employees represented by Local 673 and failing to give the Union an opportunity to bargain about the layoff and/or its effects.

7. Respondent violated Section 8(a)(5) and (1) in failing to provide Teamsters Local 673 a copy of its health insurance plan in a timely manner.

REMEDY

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

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Remedy for Respondent's Failure to Give Teamsters Local 673 Advance Notice and an Opportunity to Bargain over the November Layoff.

The Board held in *Lapeer Foundry & Machine*, supra, that the remedy for a failure to bargain over a decision to lay off employees is reinstatement of the laid-off employees with backpay. Id. at 955. It reiterated this holding in *Ebenezer Rail Car Service*, 333 NLRB 167 (2001).

The Board noted that this remedy provides an economic incentive for an employer to comply with the rules that requires an employer to negotiate with the union before changing the working conditions in the bargaining unit thereby preventing the employer from undermining the union by taking steps which suggest to the workers that the union is powerless to protect them. Thus, I will order Respondent to reinstate employees Esparza, Kronkow, Dickerson, Kent, and Embury as a remedy for Respondent's failure to bargain, as well as for its discriminatory layoff. Respondent's backpay liability shall run from the date of the layoff until the date the employees are reinstated to their same or substantially equivalent positions or have secured equivalent employment elsewhere.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, Kieft Brothers, Inc., Elmhurst, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with, restraining and/or coercing employees in the rights guaranteed by Section 7 of the Act, by coercively interrogating them regarding their union sympathies or support or threatening retaliation against them for supporting any union.

(b) Failing and refusing to bargain in good faith with Teamsters Local 673 with regard to the wages, hours, and working conditions of members of its drivers' bargaining unit.

(c) Failing to respond with reasonable promptness to information requests from Teamsters Local 673.

(d) Discriminating or retaliating against any employees due to their support or the support of any other employees for a labor organization.

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

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

(a) On request, bargain with Teamsters Local 673 as the exclusive representative of the employees in the truckdrivers' bargaining unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement;

(b) Within 14 days from the date of the Board's Order, offer Miseal Ramirez, Brandon White, Eracilio "Rocky" Esparza, Mike Kronkow, Ray Embury, George Kent, Charles Dickerson, Jaime Nieves, and Jose Jardon full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Miseal Ramirez, Brandon White, Eracilio "Rocky" Esparza, Mike Kronkow, Ray Embury, George Kent, Charles Dickerson, Jaime Nieves, and Jose Jardon whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Elmhurst, Illinois facility, copies of the attached notice marked "Appendix"[16] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reason-

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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

able steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 9, 2008.

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

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten to fire you or lay you off because you support Teamsters Local 673, Laborers Local Union 25, or any other union.

WE WILL NOT interrogate you about your activities, sympathies for, or support of any labor organization, nor will we interrogate you about the union activities, sympathies or support of any other employee.

WE WILL NOT fail or refuse to bargain collectively and at reasonable times on request concerning wages, hours, and other terms and conditions of employment with Teamsters Local 673, as the exclusive bargaining representative of all our full-time and regular part-time drivers.

WE WILL NOT lay off our drivers without notice to Teamsters Local 673 and providing Local 673 the opportunity to bargain with regard to any layoff and its effects.

WE WILL NOT fail and refuse to provide information in a reasonably prompt manner to Teamsters Local 673 upon a written or oral request when such information is relevant to Local 673's responsibilities relating to collective bargaining.

WE WILL NOT lay off employees in retaliation for their support, or the support of other employees, for Teamsters Local 673, Laborers Local Union 25, or any other union.

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

WE WILL, within 14 days from the date of this Order, offer Miseal Ramirez, Brandon White, Eracilio "Rocky" Esparza, Mike Kronkow, Ray Embury, George Kent, Charles Dickerson, Jaime Nieves, and Jose Jardon full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Miseal Ramirez, Brandon White, Eracilio "Rocky" Esparza, Mike Kronkow, Ray Embury, George Kent, Charles Dickerson, Jaime Nieves, and Jose Jardon whole for any loss of earnings and other benefits resulting from their discriminatory layoff, less any net interim earnings, plus interest.

WE WILL promptly provide Teamsters Local 673 with any information it requests either in writing or orally which is relevant to its duties as the exclusive collective-bargaining representative of our truckdrivers.

KIEFT BROTHERS, INC.