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

CRETE COLD STORAGE, L.L.C.	**)**	
	)	**No. 17-CA-24469**
and	**)**	
	)	**CRETE COLD STORAGE,**
UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, LOCAL NO. 271	**)**	**LLC'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

COMES NOW Crete Cold Storage, L.L.C. ("Employer") and for its Exceptions to the Administrative Law Judge's Decision, states as follows:

I. Exception is taken with regard to the question of fact of whether certain findings, statements and testimony set forth by the ALJ in his Decision are supported by the evidence or are mischaracterizations of the record.

1. The Employer takes exception to the following mischaracterizations of the testimony at and record of the hearing by the ALJ:

a. The ALJ's Decision states:

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

ALJ Decision p. 5, lines 5-7. The ALJ Decision also stated that

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

ALJ Decision p. 8. Such summarization of Mr. Schwisow' testimony is a mischaracterization of the testimony and/or fails to take into consideration additional testimony of Mr. Schwisow. *See* tr. pp. 98 & 111.

b. The ALJ Decision states:

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

ALJ Decision pp. 5 & 12. The ALJ's Decision also stated:

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

ALJ Decision p. 8. Such summarization of Mr. Burke's testimony is a mischaracterization of the testimony and/or fails to take into consideration additional testimony of Mr. Burke. *See* Tr. pp. 18-19; 20-21; 23-24.

2. Such mischaracterizations of testimony constitute prejudicial error as the mischaracterizations were included in and formed the basis of the ALJ's analysis and findings. ALJ Decision pp. 10, 12. The Decision of the ALJ should not be adopted or, at a minimum, should be modified.

II. Exception is taken with regard to the question of law and fact of whether the ALJ's Decision fails to set forth, consider and analyze all relevant evidence.

3. The Employer takes exception to the ALJ's failure to consider and/or include the following pertinent evidence:

a. Employees refused to meet with Linda Lee, the Union representative, when she came to the plant despite the Employer's posting of signs informing employees of her visit and despite Ms. Placek's attempts to recruit employees to talk with Ms. Lee. Tr. pp. 47-50, 52, 72.

b. Union membership decreased from 5 members to 1 member from the time the bargaining unit was certified to the present. Tr. p. 56.

c. No one who has come to work for the Employer in the last four years has been a member of the bargaining unit nor joined the Union. Tr. p. 57.

d. Employer's attorney investigated whether the Union had majority support and it was determined that it did not. Tr. p. 22-23.

e. The NLRB had knowledge that, since the date of certification, the Union has not had a majority of members from the bargaining unit. Tr. p. 64.

f. On April 1, 2009, at the direction of Mr. Schwisow, the Union filed a Petition for Election. Tr. pp. 26-27, 115; Resp. Ex. 1. The Employer fully agrees that an election is the appropriate remedy and should be conducted. Tr. p. 27. In fact, the Employer filed a Joinder to the Petition requesting an election. Tr. p. 28. Despite this, the Petition for Election was unilaterally withdrawn by the Union on May 14, 2009.

g. All information requested by the Union was provided to the Union prior to Hearing.

4. Such failure to include and consider the evidence set forth above was prejudicial error and the Decision of the ALJ should not be adopted or, at a minimum, should be modified.

III. Exception is taken with regard to the question of law and fact of whether the Respondent committed the unfair labor practice of failing to provide requested bargaining information.

a. The Employer takes exception to the ALJ's analysis and finding that the Employer failed to provide the information requested by the Union and, in doing so, committed an unfair labor practice. Pages 9-10 of the ALJ Decision set forth

the ALJ's analysis and findings that the Employer failed to provide information requested by the Union and committed an unfair labor practice. Page 12 of the Decision also provides, under conclusions of law, that the Employer committed unfair labor practices contrary to the provisions of Section 8(a)(1) and (5) of the Act by "Failing and refusing to furnish the Union with the information requested by it on or about January 13, 2009 and subsequently, and [stet] on or about January 28, 2009." Such analysis and findings are not supported by the evidence or the law. *See* ALJ Decision pp. 9-10; Tr. pp. 19, 25, 97-98, 102-08, 111-112.

b. Specifically, the Employer takes exception to the finding (1) it had a duty to provide the requested information after notice of intent to withdraw recognition was given; (2) that it did not provide the requested relevant information; and (3) that the Union did not have all requested information within the knowledge of possession of its field representative. Such findings are not supported by law or fact.

c. The Decision of the ALJ Decision should not be adopted or, at a minimum, should be modified.

IV. Exception is taken with regard to the question of law and fact of whether the Respondent committed an unfair labor practice by withdrawing recognition of the Union.

a. The Employer takes exception to the ALJ's failure to apply the *Allentown* standard requiring a reasonable uncertainty of the union's loss of majority support and specifically states that the Employer had a reasonable uncertainty of the union's loss of majority support. ALJ Decision p. 11; Tr. pp. 18-28, 47-52, 56-58, 64, 72, 85-88, 98, 104-08, 111-12; Gen. Counsel Ex. 12. Such failure was

prejudicial error and the Decision of the ALJ should not be adopted or, at a minimum, should be modified.

b. The Employer takes exception to the ALJ's analysis and finding that the Employer failed to prove by a preponderance of the evidence that, at the time the employer withdrew recognition, it had actual knowledge of loss of majority support. ALJ Decision p. 12, Tr. pp. 18-28, 47-52, 56-58, 64, 72, 85-88, 98, 104-08, 111-12; Gen. Counsel Ex. 12. Such analysis and finding was prejudicial error and the Decision of the ALJ should not be adopted or, at a minimum, should be modified.

c. The Employer takes exception to the ALJ's failure to consider the Employer's argument that the Union's position puts the Employer in a no win situation. ALJ Decision pp. 10-12; Tr. pp. 19, 25, 104-05, 112. Such failure was prejudicial error and the Decision of the ALJ should not be adopted or, at a minimum, should be modified.

d. The Employer takes exception to the ALJ's analysis and finding that the Employer committed an unfair labor practice by withdrawing recognition of the Union and states that such decision was not supported by the evidence. *See* ALJ Decision pp.10-12; Tr. pp.18-28, 47-52, 56-58, 64, 71-72, 77, 85-88, 98, 104-08, 111-12. Such analysis and finding was prejudicial error and the Decision of the ALJ should not be adopted or, at a minimum, should be modified.

V. Exception is taken with regard to the ALJ's decision that an election was not the appropriate remedy.

a. The Employer takes exception to the ALJ's failure to consider whether an election was the appropriate remedy. ALJ Decision p. 14; Tr. pp. 26-28, 53, 58, 87-88, 115; Resp. Ex. 1.

b. Such failure was prejudicial error and the Decision of the ALJ should not be adopted or, at a minimum, should be modified.

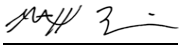
Original filed and copies to:

Susan Wade-Wilhoit
National Labor Relations Board
Kansas City Regional Office
8600 Farley Street – Suite 100
Overland Park, Kansas 66212

Lauren M. Fletcher
Blake & Uhlig, P.A.
753 State Avenue, Suite 475
Kansas City, Kansas 66101
ATTORNEYS FOR UNION

PROOF OF SERVICE

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

Signature: 

Respectfully Submitted,

BRICK GENTRY P.C.

By_____
Matthew S. Brick
Matthew S. Brick
Douglas Fulton
6107 Westown Parkway, Suite 100
West Des Moines, IA 50266
Matt.Brick@BrickGentryLaw.com
Doug.Fulton@BrickGentryLaw.com
Telephone: 515.274.1450
Facsimile: 515.274.1488
ATTORNEYS FOR EMPLOYER