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**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<sup>1</sup> 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<sup>2</sup> and conclusions, and to adopt his recommended Order.

<sup>1</sup> 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).

<sup>2</sup> 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

We agree with the judge that the General Counsel met his initial burden under *Wright Line*<sup>3</sup> of establishing that the Respondent's layoff of nine employees was motivated by unlawful animus against union activity,<sup>4</sup> and that the Respondent did not meet its rebuttal burden of showing that the layoffs would have occurred even absent union activity.<sup>5</sup> 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,<sup>6</sup> and that the Respondent unlawfully threatened employees Chuck Dickerson and Jaime Nieves in violation of Section 8(a)(1).<sup>7</sup> Finally, we agree with the judge

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.

<sup>3</sup> 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.

<sup>4</sup> 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.

<sup>5</sup> 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.

<sup>6</sup> 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).

<sup>7</sup> 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 Miscal Ramirez. The Respondent did not except to the judge's finding that it interrogated Virgilio Nueves in violation of Sec.

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.<sup>8</sup>

#### 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

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Wilma B. Liebman, Chairman

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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,<sup>1</sup> 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

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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.

<sup>8</sup> 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.

<sup>1</sup> Certain errors in the transcript have been noted and corrected.

#### 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.<sup>2</sup>

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

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<sup>2</sup> 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.<sup>3</sup>

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.)<sup>4</sup>

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.

<sup>3</sup> 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.

<sup>4</sup> 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).<sup>5</sup>

#### 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.

<sup>5</sup> 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 Miscal 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.<sup>6</sup> 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<sup>7</sup>

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.)<sup>8</sup> 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

<sup>6</sup> 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.

<sup>7</sup> 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).

<sup>8</sup> Virgilio Nieves is the brother of Kieft laborer Jaime Nieves, who was laid off on November 22.

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 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).<sup>9</sup> 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

<sup>9</sup> *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.<sup>10</sup>

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 its 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

<sup>10</sup> 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.

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 (1st 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

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.<sup>11</sup>

<sup>11</sup> 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

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.<sup>12</sup>

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 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.

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

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).

<sup>12</sup> 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 <sup>13</sup>
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 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. 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.

<sup>13</sup> 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 facie 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 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).<sup>14</sup> 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 Miscal 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.

<sup>14</sup> 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<sup>15</sup>

#### ORDER

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

<sup>15</sup> 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.

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 Miscal 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 Miscal 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"<sup>16</sup> 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-

<sup>16</sup> 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 Miscal Ramirez, Brandon White, Eracilio "Rocky" Esparza, Mike Kronkrow, 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 Miscal Ramirez, Brandon White, Eracilio "Rocky" Esparza, Mike Kronkrow, 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.