

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

KAG WEST, LLC)	
)	
AND)	CASE NOS. 21-CA-39488
)	21-CA-39665
MISCELLANEOUS WAREHOUSEMEN)	
DRIVERS AND HELPERS, LOCAL 986,)	
INTERNATIONAL BROTHERHOOD OF)	
TEAMSTERS)	
)	

**RESPONDENT KAG WEST, LLC’S EXCEPTIONS TO THE
DECISION AND ORDER OF ADMINISTRATIVE LAW JUDGE WILLIAM G. KOCOL**

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (“NLRB” or “Board”), Respondent KAG West LLC (“KAG West” or “the Company”) excepts to certain findings of fact, rulings and conclusions of law, to the failure to find certain facts and to draw certain legal conclusions, and to the recommended order of Administrative Law Judge William G. Kocol (“ALJ”), as set forth in or omitted from his Decision dated December 30, 2011 (referenced herein as the “ALJD”). In particular, Respondent excepts to:¹

¹ All citations to the ALJ’s December 30, 2011 decision are designated by page and line number as follows: (“ALJD, [page]:[line]”). References to the hearing transcript are designated by page and line number as follows: (“Tr. [page]:[line]”). References to the General Counsel’s Exhibits are designated by exhibit number as follows: (“GC-__”); Respondent’s Exhibits are designated by exhibit number as follows: (“R-__”).

STATEMENT OF THE CASE

1. The assertion the ALJ considered the entire record, including the briefs filed by the parties, in arriving at his decision. (ALJD 1:[unnumbered line; first sentence of the third paragraph].)

FINDINGS OF FACT

II. ALLEGED UNFAIR LABOR PRACTICES

A. BACKGROUND

2. The failure to find that in the course of collective bargaining over an initial labor agreement there was no indication KAG West failed or refused to bargain in good faith regarding wages or any other subject with the Charging Party Miscellaneous Warehousemen Drivers and Helpers, Local 986, International Brotherhood of Teamsters (“Teamsters Local 986” or the “Union”); that after being certified as the employees’ exclusive representative on August 25, 2010 the Union did not specifically request bargaining over the disputed wage increases; and as of the date of the hearing, after approximately fifty bargaining meetings between the parties, the Union had yet to make a bargaining proposal to the Company seeking a wage increase. (ALJD 2:31-32; Tr. 266-268.)

3. The failure to find the talking points document introduced as part of Respondent’s Exhibit 14, from which the ALJ selectively quoted, was itself unrelated to the Company’s decision on whether to grant unilateral wage increases to certain unrepresented employees and defer action on wages for represented employees to the collective bargaining process. (ALJD 2:34-41; Tr. 235-238; R-14 at the fifth page.)

4. The failure to find the talking points document introduced as part of Respondent's Exhibit 14, from which the ALJ selectively quoted, also described for terminal managers, including those outside the Southern California bargaining unit, the Company's intention regarding wage negotiations for represented employees as follows: "Although we were disappointed in the outcome of this election, we respect the decision made by our employees who voted and will move forward in good faith with the collective bargaining process that now begins in this area." (ALJD 2:34-41; R-14 at the fifth page.)

5. The failure to find the post-election talking points document, from which the ALJ selectively quoted, was one of three attachments to an email introduced as Respondent's Exhibit 3, was by itself unrelated to the decision on wages, and other attachments to the same R-3 stated: "Although we were disappointed with the outcome of this election, we respect the decision made by our employees who voted and [we] will move forward in good faith with the collective bargaining process. (ALJD 2:43-51, 3:1-21; Tr. 100-105; R-3 at the fourth and fifth pages.)

B. WAGE INCREASES

6. The failure to limit the finding that in February 2010 KAG West became aware the Union was mounting an organizing drive among the Company's drivers and shop employees to only KAG West's operations in Southern California. (ALJD 3:39-40; Tr. 150-151.)

7. The failure to credit the testimony of Bruce Blaise, then the Executive Vice President of parent company Kenan Advantage Group, Inc.'s ("Kenan") Fuels Delivery Group, of which KAG West is one of seven subsidiaries nationwide, that the improvement in the economy in the spring of 2010 was the motivation for the Company's expressed willingness in March of 2010 to consider making positive wage adjustments for employees by late summer of 2010 if the economy continued to show improvement. (ALJD 3:40-46, 4:1-2, 4:44-47 (at footnote 3); Tr. 88, 93, 130; R-1.)

8. The conclusion that it was the Union’s organizing campaign activities among KAG West’s drivers and shop employees in Southern California “that motivated [KAG West] to begin the process of granting wage increases to employees,” and that “had the employees in [S]outhern California not engaged in union activities [KAG West] would not have begun to consider granting the wage increases at that time.” (ALJD 4:47-51 (footnote 3).)

9. The conclusion that any potential wage increases were “anticipated.” (ALJD 4:3.)

10. The conclusion that the final decision to “grant wage increases to employees” was made prior to August 24, 2010, “[i]n about early August,” prior to the NLRB election “in the midst of the Union’s organizing effort among the drivers in [S]outhern California.” (ALJD 4:5-7.)

11. The finding that on about August 24, 2010 KAG West disseminated to bargaining unit employees in Southern California the wage increase memorandum (GC-2 at Exhibit A; GC-4 at Exhibit 13), which on its face is addressed to all employees in Northern California, Arizona, and Nevada, and to dispatchers and administrative staff in Southern California but makes no mention of the Union or bargaining unit employees. (ALJD 3:23-40, 4:1-19.)

12. The conclusion that any potential wage increases were “promised.” (ALJD 5:21.)

13. The conclusion that had the bargaining unit employees voted against the Union they would have received the wage increases announced for certain unrepresented employees on August 24, 2010, including the finding that Blaise admitted the same. (ALJD 5:23-25.)

ANALYSIS

14. The finding that “[t]he timing of the decision to withhold the wage increase occurred near the end of the Union’s successful campaign to become the employees’ collective-bargaining representative.” (ALJD 5:34-36.)

15. The finding that “only those employees voting for the Union did not receive the wage increase.” (ALJD 5:36-37.)

16. The finding that KAG West “admits that it withheld the wage increase because the employees chose to be represented by the Union.” (ALJD 5:37-38.)

17. The finding that the wage increases announced on August 24, 2010 for certain unrepresented employees occurred in the context of KAG West “suddenly deciding to reconsider the earlier wage reduction after employees began seeking union representation.” (ALJD 5:38-40.)

18. The conclusion that the Acting General Counsel met his burden under *Wright Line* to establish a *prima facie* case of unlawful discrimination in violation of Section 8(a)(3) of the National Labor Relations Act (“NLRA” or the “Act”). (ALJD 5:40-41.)

19. The failure to credit the uncontroverted testimony of Blaise, and that of Doug Allen (“Allen”), Ryan Walls (“Walls”), and Calvin Kniffin (“Kniffin”), as well as the supporting documentary evidence introduced at the hearing, establishing that KAG West relied on the advice of legal counsel in taking no action on wages for any employee before the NLRB representation election to avoid the appearance of interfering with the employees’ free election, and after the election deferred any action on adjusting the wages of represented employees to the collective bargaining process with the Union. (ALJD 5:42-46, 6:1; Tr. 98-99, 108-109, 148-149, 154, 165, 167, 205-206, 234-235, 240, 259; R-3, 9, 14; GC-4:14-15, 18-20.)

20. The finding that the testimony of Blaise was “undermined” by the facts described previously in the ALJD. (ALJD 6:1-2.)

21. The conclusion that the facts described through page 5 of the ALJD “establish” that KAG West acted with “unlawful motivation” in regard to its decision to not unilaterally grant employee wage increases prior to the NLRB election, and after the election to defer any action on wage adjustments for newly represented employees to the collective bargaining process. (ALJD 6:2.)

22. The finding that Counsel for the Acting General Counsel did not concede that Blaise's motivation was trying to follow the advice of legal counsel as to the Company's obligations under the Act because she was being "obviously facetious" after Blaise provided the same answer to repeated questioning about his motivation, where Counsel for the Acting General Counsel also conceded in her opening statement that the case involves a "complex area of the law with some discrepancy in it." (ALJD 6:48-51; Tr. 16.)

23. The conclusion that it was KAG West's burden to show that it would not have granted the wage increase to bargaining unit employees even if they had rejected the Union in the representation election. (ALJD 6:4-5.)

24. The finding that KAG West would have granted bargaining unit employees "the wage increase if they had rejected the Union" in the election, including the finding that KAG West admitted it would have done the same. (ALJD 6:5-7.)

25. The conclusion that KAG West failed to meet its burden under *Wright Line* to demonstrate a legitimate non-discriminatory reason for its actions, given the Board's well established line of cases under *Shell Oil Co.*, 77 NLRB 1306 (1948), which hold that an employer is privileged to defer action on new adjustments to wages or other new benefits for represented employees pending collective bargaining negotiations over the same. (ALJD 6:7-43.)

26. The reliance on the Board's inapplicable decision in *Aluminum Casting & Engineering Co.*, 328 NLRB 8, 16 (1999), which involves an employer's withholding of a regular wage increase during a union organizing campaign where the wage increase was reasonably anticipated by employees as part of the employer's "normal practice," and the failure to correctly apply the Board's controlling decisions under the *Shell Oil* line of cases. (ALJD 6:22-40.)

27. The finding that KAG West violated Section 8(a)(3) and (1) of the Act by deferring action on wages for newly represented employees to the collective bargaining process with the Union. (ALJD 6:42-43.)

CONCLUSION OF LAW

28. The conclusion that by not unilaterally granting the new wage increase to represented employees after they selected the Union as their exclusive representative, and instead deferring any such action to collective bargaining with the Union, the Company “engaged in unfair labor practices ... within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.” (ALJD 8:43-46.)

REMEDY

29. The proposed remedy is premised on inappropriate findings of violations of Sections 8(a)(3) and (1) of the Act for the reasons set forth in the exceptions herein. (ALJD 8:50-52, 9:1-5.)

ORDER

30. The recommended Order, including the Appendix (“Notice to Employees”), that in any way conflicts with the exceptions set forth herein. (ALJD 9:7-51, 10:1-17, and Appendix Notice.)

WHEREFORE, Respondent KAG West, LLC respectfully requests that its exceptions to the Administrative Law Judge William G. Kocol's December 30, 2011 Decision and Order be sustained and the Complaint be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true and correct copy of the foregoing Respondent KAG West, LLC's Exceptions to the Decision and Order of Administrative Law Judge William G. Kocol was electronically filed with the National Labor Relations Board using the National Labor Relations Board's internet website, which should automatically forward an electronic copy of the same to the Acting Regional Director of Region 21 of the National Labor Relations Board. In addition, the undersigned certifies that an electronic copy of Respondent KAG West, LLC's Exceptions to the Decision and Order of Administrative Law Judge William G. Kocol was served via email on the following parties of record:

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