

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

ELMHURST DAIRY, INC.

Respondent

and

Case No. 29-CA-090017

MILK WAGON DRIVERS AND DAIRY
EMPLOYEES, LOCAL 584, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

Charging Party

**GENERAL COUNSEL'S OPPOSITION TO
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

The undersigned Counsel for the Acting General Counsel hereby opposes Elmhurst Dairy, Inc.'s ("Respondent") Motion for Summary Judgment, filed on December 21, 2012. In its Motion, Respondent asks that the Board defer the allegations in the Complaint pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971), absent dismissal on the merits. Respondent's motion should be denied in its entirety for the reasons set forth below.

**1. Summary Judgment Is Not Appropriate Because There Are
Disputes Regarding Material Facts**

Summary Judgment can only be granted in cases where there is no general dispute as to any material fact. *Milum Textile Services Co.*, 2012 WL 1951990 (NLRB Div. of Judges) quoting Fed Rules of Civil Procedure 56(d). See also *Central Illinois Public Service Company*, 274 NLRB 1292 (1985). Thus, any dispute concerning a material fact in the case properly defeats a summary judgment motion. As is made evident by Respondent's Amended Answer to the Complaint and by its Memorandum of

Law in Support of its Motion for Summary Judgment, material factual disputes exist in this case. Therefore, Respondent's Motion for Summary Judgment must be denied.

A. Respondent's Amended Answer to the Complaint Shows That Material Facts Are In Dispute

The Complaint (attached hereto as Exhibit 1) alleges, *inter alia*, that on September 16, 2012, Respondent laid off 42 bargaining Unit employees, in violation of the parties' seniority provision in its collective bargaining agreement, without prior notice to the Union and without affording the Union the opportunity to bargain with Respondent regarding the effects of the layoff.

In paragraph 9 of its Amended Answer (attached hereto as Exhibit 2), Respondent admits that the language set forth paragraph 9 of the Complaint is language pertaining to layoffs from the parties' "Elmhurst 2010-2015," but Respondent denies that this language covers all Unit employees. This is a material fact that is in dispute.

Paragraph 14 of the Complaint alleges that Respondent laid off the 42 Unit employees without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent regarding the effects of the layoff. Respondent denies this allegation in paragraph 14 of its Amended Answer to the Complaint. Thus, by Respondent's own Answer, it acknowledges that a factual dispute exists regarding whether Respondent gave prior notice to and an opportunity to bargain with the Union regarding Respondent's layoff of 42 Unit employees.

Thus, as Respondent denies various factual allegations in the Complaint, there can be no doubt that this case presents disputes regarding material facts. Therefore, Respondent's Motion for Summary Judgment must be denied.

B. Respondent's Memorandum of Law In Support Of Its Motion For Summary Judgment Establishes That Material Facts Are In Dispute

It is important to note that nowhere in Respondent's Memorandum of Law in support of its Motion for Summary Judgment does Respondent claim that there is no dispute as to any material fact. Instead, Respondent's entire argument is that the case should be deferred to the parties' grievance/arbitration procedures.

In support of its argument that this case should be properly before an arbitrator, Respondent argues that the case demands an "examination of the parties' past practices, including whether any past practices exist concerning the treatment of "Existing Employees" versus "New Hires." (Respondent's Memorandum of Law, page 13). In other words, there is a factual issue in dispute regarding whether the parties had a past practice regarding the application of seniority. Therefore, Summary Judgment cannot be appropriate.

Respondent goes on to state that, "In fact, the parties have consistently differentiated between the two groups for seniority purposes," and that the Acting

General Counsel's assertion in the Complaint that a single seniority provision applies to all unit employees is simply mistaken."

In 2007, the parties agreed to split the Unit employees represented by the Union into two groups: Employees hired prior to July 18, 2007 would have their terms and conditions of employment set forth under the agreement that the Union had with the Milk Industry Labor Association of New York (the "MILA" agreement); employees hired on or after July 18, 2007 would have their terms and conditions of employment set forth under an agreement negotiated directly between the parties (the "Elmhurst" agreement).

What Respondent asserts as a "fact," however, is, instead, **the** factual issue that lies at the heart of this case – and that is in dispute. Contrary to Respondent's assertion that the parties have consistently differentiated between the two groups of Unit employees for purposes of the application of seniority, i.e., two separate lines of employees for seniority purposes, Counsel for the Acting General Counsel will prove that the parties have always applied the principles of seniority to the Unit as a whole. In light of this factual dispute regarding how the parties applied seniority to Unit employees, Respondent's Motion for Summary Judgment must be denied.

In addition, Respondent argues that it gave the Union notice of its intent to lay-off employees during the August 29, 2012 meeting it had with the Union, and it contends that it and the Union discussed not only lay-offs but also the extending of COBRA benefits to employees. General Counsel challenges this representation and will proffer evidence establishing that all discussions the Union had with Respondent prior

September 16, 2012, were exclusively focused upon Respondent's financial condition and the steps it was taking to improve its economic outlook. There was no discussion of layoffs until after they had been implemented. Indeed, Respondent's instant motion lays out facts contrary to facts as alleged by the Complaint and Notice of Hearing. In that the parties offer two diametrically opposed versions of events, the matter is best placed before an administrative law judge for resolution.

Based on the foregoing, as there are disputed issues of material fact presented in this case, Respondent's Motion for Summary Judgment must be denied.

2. This Case Is Not Appropriate for Deferral

As established above, Respondent does not contend in its Motion for Summary Judgment that there are no disputes as to material facts in this case. Instead, Respondent argues that the case should be put before an arbitrator¹.

¹ In its Memorandum of Law in Support of Respondent's Motion for Summary Judgment, Respondent erroneously states that the Board has granted a motion for summary judgment seeking deferral of unfair labor practice charges to arbitration (Respondent's Memorandum of Law, page 14), in *Textron Lycoming*, 310 LNLRB 1209 (1993). However, Respondent's representation of the Board's findings and procedural history in *Textron Lycoming* is incorrect. In that case, the complaint alleged that the respondent unilaterally modified that progressive discipline system in the parties' collective bargaining agreement without the Union's consent and without notice to the Union. The respondent filed an answer admitting in part and denying in part allegations in the complaint, and asserting an affirmative defense that the complaint should be deferred. The respondent then filed with the Board a motion to defer. The General Counsel filed an opposition to the respondent's motion to defer. The respondent filed a supplemental brief to the Board, and the General Counsel filed a Cross-Motion for Summary Judgment. The Board found that, based on the facts of that case, that deferral was warranted. The Board granted the respondent's motion for deferral and denied the General Counsel's motion for summary judgment. Thus, contrary to Respondent's claim, this case was not one in which the Board granted a respondent's motion for summary judgment seeking deferral of the Complaint allegations.

Respondent argues that the matter should be placed before an arbitrator in accordance to the grievance arbitration procedures of the collective bargaining agreements. It argues that the Regional Director should have deferred the matter under *Collyer Insulatde Wire*, 192 NLRB 837 (1971). Deferral, however, is not appropriate in this matter for several reasons.

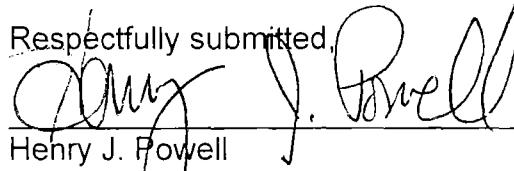
First, the seniority provision referenced above is clear and unambiguous. It clearly provides that all layoffs must be conducted in reverse seniority order,² and there is no need for an arbitrator to interpret its meaning. Respondent argues that the Management Rights clause of the contract gives it an unfettered right to lay-off employees in the manner it proscribes. This clause, however, clearly only applies to the Respondent's ability to decide when lay-offs are necessary but not the manner in which they should be carried out. Respondent's skewed argument about the Management Rights clause would effectively render the layoff clause moot; therefore such an interpretation is not plausible and should not be applied. Next, there is no provision in the collective bargaining agreements regarding COBRA. The Board has found that where there is conduct that is not privileged or referenced in the collective bargaining agreement, deferral is not appropriate. *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063 (1979). Finally, the COBRA issue and the lay-off issue are intertwined and cannot be effectively bifurcated. In such circumstances, where both aspects are inextricably linked, neither can be deferred. *American Commercial Lines*, 291 NLRB 1066 (1988).

3. Conclusion

For the above reasons, the allegations of the Complaint and Notice of Hearing in the above-captioned matter should not be deferred to arbitration nor should they be dismissed. Counsel for the Acting General Counsel requests that Respondent's Motion for Summary Judgment be denied in its entirety and that this matter immediately proceed to hearing before an Administrative Law Judge as set forth in the Complaint and Notice of Hearing.

Dated January 4, 2013, in Brooklyn, New York.

Respectfully submitted,



Henry J. Powell
Counsel for the Acting General Counsel
National Labor Relations Board
Region 29
Two MetroTech Center North, 5th Floor
Brooklyn, New York 11201

² The Elmhurst agreement requires that an employee possess the requisite skill set. This, however, does not alleviate the requirement that seniority be used in determining layoff of those employees with the proper skills set

**UNITED STATES OF AMERICA
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ELMHURST DAIRY, INC.

And

Case No. 29-CA-090017

**MILK WAGON DRIVERS AND DAIRY
EMPLOYEES, LOCAL 584, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**

COMPLAINT AND NOTICE OF HEARING

Milk Wagon Drivers and Dairy Employees, Local 584, International Brotherhood of Teamsters, herein called the Union, has charged that Elmhurst Dairy, Inc., herein called Respondent, has been engaging in certain unfair labor practices affecting commerce as set forth in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151 *et seq.*, herein called the Act. Based thereon, the Acting General Counsel of the National Labor Relations Board, herein called the Board, by the undersigned, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations – Series 8, as amended – issues this Complaint and Notice of Hearing and alleges as follows.

1. (a) The charge in Case No. 29-CA-090017 was filed by the Union, on September 25, 2012, and a copy was served by regular mail on Respondent on September 26, 2012.

(b) A first amended charge in Case No. 29-CA-090017 was filed by the Union on October 11, 2012, and a copy was served by regular mail on Respondent on October 15, 2012.

2. At all material times, Respondent, a domestic corporation with a place of business located at 155-25 Styler Road, Jamaica, New York, herein called its Jamaica facility, and the only location involved herein, has been engaged in the operation of a dairy processing plant.

3 During the past year, which period is representative of its annual operations generally, Respondent, in the course and conduct of its business operations, sold goods valued in excess of \$50,000 directly to customers located outside the State of New York.

4. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

5. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

6. The following employees of the Union, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All utility craft group (utility, pasteurizer, foreman), maintenance craft group (mechanic, apprentice, foreman) employees, employed by Respondent at its Jamaica facility and excluding laboratory employees and all other employees, guards and supervisors, as defined in the Act.

7. At all material times, the Union has been the designated collective-bargaining representative of the Unit. Such recognition has been embodied in successive collective bargaining agreements, the most recent of which expires on August 31, 2015.

8. At all material times, the Union, by virtue of Section 9(a) of the Act, has been the exclusive representative of the Unit, for the purposes of collective bargaining.

9 Paragraph 13 of the collective bargaining agreement referred to above in paragraph 7 states, inter alia:

Layoff and recall shall be in accord with the appropriate company seniority list, provided, however, that the employees have the skills, ability and qualifications to perform the work.

10. On September 16, 2012, Respondent laid off 42 employees in the Unit.

11. The layoff described above in paragraph 10 was not in accord with the contract provision set forth in paragraph 9.

12. On September 16, 2012, Respondent notified employees that it would pay the first six months of the COBRA health insurance premiums for the laid off employees referred to above in paragraph 10.

13. The subjects set forth above in paragraph 10 and 12 relate to wages, hours and other terms and conditions of employment of the Unit and are mandatory subjects for the purpose of collective bargaining.

14. Respondent engaged in the conduct described above in paragraph 10 without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to the effects of the conduct set forth in paragraph 10.

15. Respondent engaged in the conduct described above in paragraph 12 without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to the conduct set forth in paragraph 12.

16. About September 16, 2012, Respondent failed to continue in effect all the terms and conditions of the agreement described in paragraph 7 by laying off unit

employees as described above in paragraph 10, in violation of paragraph 13 of the parties' collective bargaining agreement, as set forth in paragraph 9.

17. Respondent engaged in the conduct described above in paragraph 16 without the Union's consent.

18. By the conduct described above in paragraphs 10, 12, 14 and 15, Respondent has failed and refused to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of the Unit, has undermined the Union's status as Section 9(a) representative and thereby has been engaging in unfair labor practices within the meaning of Sections 8(a)(1) and (5) of the Act.

19. By the conduct described above in paragraph 10, Respondent has failed and refused to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of the Unit within the meaning of Section 8(d) of the Act, has undermined the Union's status as Section 9(a) representative and thereby has been engaging in unfair labor practices within the meaning of Sections 8(a)(1) and (5) of the Act.

20. The unfair labor practices of Respondent, described above, affect commerce within the meaning of Sections 2(6) and (7) of the Act.

As part of the remedy for the unfair labor practices alleged above in paragraph 10, the Acting General Counsel seeks an order requiring reimbursement of amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there be no discrimination.

The Acting General Counsel further seeks, as part of the remedy for the allegations in paragraph 10, that Respondent be required to submit the appropriate

documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods. Acting General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an Answer to the Complaint. The Answer must be **received by this office on or before December 18, 2012, or postmarked on or before December 17, 2012.** Unless filed electronically in a pdf format, Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An Answer may also be filed electronically by using the E-Filing system on the Agency's website. In order to file an Answer electronically, access the Agency's website at <http://www.nlr.gov>, click on the E-Gov tab, select E-Filing, and then follow the detailed instructions. The responsibility for the receipt and usability of the Answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the Answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an Answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the Answer being filed electronically is a pdf

document containing the required signature, no paper copies of the document need to be transmitted to the Regional Office. However, if the electronic version of an Answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such Answer containing the required signature be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing.

Service of the Answer on each of the other parties must be accomplished in conformance with the requirements of Section 102.114 of the Board's Rules and Regulations. The Answer may not be filed by facsimile transmission. If no Answer is filed or if an answer is filed untimely, the Board may find, pursuant to Motion for Default Judgment, that the allegations in the Complaint are true.

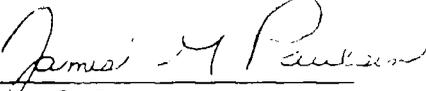
Any request for extension of time to file an Answer must, pursuant to Section 102.111(b) of the Board's Rules and Regulations, be received by close of business, December 14, 2012. The request should be in writing and addressed to the Regional Director of Region 29.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on Tuesday, January 22, 2013, at 9:30 a.m. at Two MetroTech Center, Suite 5100, Brooklyn, New York, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, each Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this Complaint. The procedures to be followed at the hearing are

described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated at Brooklyn, New York, December 4, 2012.


James G. Paulsen
Regional Director, Region 29
National Labor Relations Board
Two MetroTech Center, 5th Floor
Brooklyn, NY 11201

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 29

ELMHURST DAIRY, INC.,

Respondent,

v.

MILK WAGON DRIVERS AND DAIRY
EMPLOYEES, LOCAL 584, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,

Charging Party.

AMENDED ANSWER

Case No. 29-CA-090017

Respondent, Elmhurst Dairy, Inc. (“Elmhurst”), by its attorneys, Bond, Schoeneck & King, PLLC, hereby amends its Answer to the Complaint filed by Region 29 of the National Labor Relations Board (“Region 29”) as follows:

1. (a). With respect to the allegations contained in paragraph 1(a) of the Complaint, Elmhurst **ADMITS** that Milk Wagon Drivers and Dairy Employees, Local 584, International Brotherhood of Teamsters (“Local 584”) filed an unfair labor practice charge that was dated September 25, 2012 and assigned Case No. 29-CA-090017, but **LACKS KNOWLEDGE OR INFORMATION** sufficient to form a belief as to the exact dates on which that unfair labor practice charge was filed and served.

1 (b). With respect to the allegations contained in paragraph 1(b) of the Complaint, Elmhurst **ADMITS** that Local 584 filed an amended unfair labor practice charge in Case No. 29-CA-090017, and **ADMITS** that it received a copy of that unfair labor practice charge from Region 29 by letter dated October 15, 2012, but **LACKS KNOWLEDGE OR INFORMATION** sufficient to form a belief as to the exact date on which that amended unfair labor practice charge was filed.

2. With respect to the allegations contained in paragraph 2 of the Complaint, Elmhurst **ADMITS** that it is a domestic corporation with a place of business located at 155-25 Styler Road, Jamaica, New York, **ADMITS** that this location engages in the operation of a dairy processing plant, and **ADMITS** that the allegations of Case No. 29-CA-090017 involve only this location, but **DENIES** that Case No. 29-CA-090017 has any merit and further **DENIES** each and every other allegation contained therein.

3. Elmhurst **ADMITS** the allegations contained in paragraph 3 of the Complaint.

4. Paragraph 4 of the Complaint contains conclusions of law that do not require a response from Elmhurst. To the extent a response is required, Elmhurst **ADMITS** that it is an employer engaged in commerce within the meaning of the National Labor Relations Act (the “Act”).

5. Paragraph 5 of the Complaint contains conclusions of law that do not require a response from Elmhurst. To the extent a response is required, Elmhurst **ADMITS** that Local 584 is a labor organization within the meaning of the Act.

6. Paragraph 6 of the Complaint contains conclusions of law that do not require a response from Elmhurst. To the extent a response is required, Elmhurst **ADMITS** that it and Local 584 are parties to a collective bargaining agreement covering the non-supervisory utility, maintenance and pasteurizing employees at its Jamaica, New York location (the “Unit”). Elmhurst further answers paragraph 6 by stating that it and Local 584 agreed to a bifurcated system where Unit employees hired before July 18, 2007 have different terms and conditions of employment than Unit employees hired on or after that date. This agreement is extensively documented throughout Elmhurst and Local 584’s negotiating history, including, most recently,

the collective bargaining agreement between Elmhurst and Local 584 effective from September 1, 2010 through August 31, 2015 (the "Elmhurst 2010-2015 Agreement"), which states:

29. EXISTING EMPLOYEES

Employees who are members of Local 584 on the Employer's payroll prior to July 18, 2007 ("Existing Employees") shall, except, as agreed to by the Union and Elmhurst Dairy as provided in this agreement, continue their employment under the terms and conditions provided for by the collective bargaining agreement between the Union and [the Milk Industry Labor Association of New York ("MILA")] in effect September 1, 2011 to August 31, 2015.

7. Elmhurst **ADMITS** the allegations contained in paragraph 7 of the Complaint.

8. Paragraph 8 of the Complaint contains conclusions of law that do not require a response from Elmhurst. To the extent a response is required, Elmhurst **ADMITS** that Local 584 is the exclusive representative of the Unit for purposes of collective bargaining.

9. With respect to the allegations in paragraph 9 of the Complaint, Elmhurst **ADMITS** that paragraph 13 of the Elmhurst 2010-2015 Agreement includes the referenced language concerning layoffs, but **DENIES** that such language covers all Unit employees. Elmhurst further answers paragraph 9 by stating that, pursuant to its agreement with Local 584, the terms and conditions concerning layoffs of Unit employees hired before July 18, 2007 are prescribed by the current MILA collective bargaining agreement, which states in relevant part:

All layoffs shall be made on the basis of seniority in craft in the branch, plant or depot affected. The employee with the least seniority shall be the employee laid off....

10. Elmhurst **ADMITS** the allegations in paragraph 10 of the Complaint. Elmhurst further answers paragraph 10 by stating that it conducted the September 16, 2012 layoff among those Unit employees whose terms and conditions of employment are prescribed by the current

MILA collective bargaining agreement, and that such layoffs were implemented consistent with the terms of that collective bargaining agreement.

11. With respect to the allegations in paragraph 11 of the Complaint, Elmhurst **ADMITS** that the September 16, 2012 layoff was not in accord with the layoff procedure referenced in paragraph 9 of the Complaint, *i.e.*, the layoff procedure included as paragraph 13 of the Elmhurst 2010-2015 Agreement, but **DENIES** that such layoff procedure applies to Unit employees hired before July 18, 2007 and therefore **DENIES** that it was required to conduct the September 16, 2012 layoff in accord with that procedure. Elmhurst further answers paragraph 11 by stating that it conducted the September 16, 2012 layoff solely among the group of Unit employees who were hired prior to July 18, 2007, and that such layoffs were implemented consistent with the current MILA collective bargaining agreement which sets forth the affected employees' terms and conditions of employment.

12. With respect to the allegations in paragraph 12 of the Complaint, Elmhurst **ADMITS** that it notified employees that it intended to pay for the first six months of COBRA health insurance for Unit employees who were laid off on September 16, 2012, but **DENIES** each and every other allegation contained therein. Elmhurst further answers paragraph 12 by stating that, prior to notifying employees that it intended to pay for the first six months of COBRA coverage, it attempted to notify Local 584 representatives of this proposal to no avail, and that it did notify Local 584 representatives once they contacted Elmhurst representatives to discuss the layoff.

13. Elmhurst **ADMITS** the allegations contained in paragraph 13 of the Complaint.

14. Elmhurst **DENIES** the allegations contained in paragraph 14 of the Complaint.

15. Elmhurst **DENIES** the allegations contained in paragraph 15 of the Complaint.

16. Elmhurst **DENIES** the allegations contained in paragraph 16 of the Complaint.
17. Elmhurst **DENIES** the allegations contained in paragraph 17 of the Complaint.
18. Elmhurst **DENIES** the allegations contained in paragraph 18 of the Complaint.
19. Elmhurst **DENIES** the allegations contained in paragraph 19 of the Complaint.
20. Elmhurst **DENIES** the allegations contained in paragraph 20 of the Complaint.
21. Elmhurst **DENIES** each and every other allegation contained in the Complaint

not specifically admitted above.

FIRST AFFIRMATIVE DEFENSE

22. The Complaint ought to be dismissed and deferred to the dispute resolution process negotiated by Elmhurst and Local 584 pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971) and *United Technologies Corp.*, 298 NLRB 557 (1984) since each of the criteria for deferral are present:

(a) Elmhurst and Local 584 have a long and productive bargaining relationship that has resulted in successive collective bargaining agreements, including the Elmhurst 2010-2015 Agreement;

(b) The underlying conflicts arise out of Elmhurst and Local 584's bargaining relationship, and specifically the terms and conditions of employment negotiated by Elmhurst and Local 584 concerning layoffs of Unit employees;

(c) No claim is made that Elmhurst bears animosity towards Unit employees' exercise of protected rights;

(d) The arbitration clause in the Elmhurst 2010-2015 Agreement broadly covers "[g]rievances as to the meaning, interpretation or application of the provisions of [the] Agreement . . .," including, *inter alia*, the "Existing Employees" paragraph (*see supra* at ¶6) and

the “Seniority” provision, which is quoted in paragraph 9 of the Complaint and forms the basis for the Acting General Counsel’s allegation that Elmhurst violated Sections 8(a)(1) and (5) of the Act by laying off certain Unit employees on September 16, 2012.

(e) Local 584, in fact, filed a demand to arbitrate Elmhurst’s September 16, 2012 layoff decision on September 19, 2012.

(f) Elmhurst is willing to arbitrate the underlying dispute concerning the September 16, 2012 layoff decision pursuant to the negotiated contractual procedure, and the parties are proceeding to arbitration regarding the identical dispute.

(g) The dispute concerning the September 16, 2012 layoff is well-suited to resolution by arbitration and would benefit from an arbitrator’s special skill and experience in deciding matters arising out of Elmhurst and Local 584’s bargaining relationship, and the various collectively bargained agreements resulting from that relationship. Specifically, resolution of this dispute requires at least:

(i) Examination of Elmhurst and Local 584’s extensive bargaining history, and the purpose and effect of their decision to divide Unit employees into two discrete groups based on hire date in regards to terms and conditions of employment;

(ii) A determination as to the meaning of several memoranda of agreement which pre-date the Elmhurst 2010-2015 Agreement, distinguish “existing employees” from “new hires,” and state that the former group will remain covered by the terms and conditions of the current MILA agreement while the latter group will have its terms and conditions set in a collective bargaining agreement negotiated between Elmhurst and Local 584;

(iii) A determination as to the meaning of the phrase “the **appropriate** company seniority list” in the Elmhurst 2010-2015 Agreement (*see* Complaint, ¶9) (emphasis added) in relation to whether a single seniority list exists for all Unit employees or whether separate seniority lists exist for Unit employees hired before and after July 18, 2007;

(iv) A determination as to the meaning and effect of the management rights clause in the Elmhurst 2010-2015 Agreement, which provides that Elmhurst “retains the right to exercise the customary functions of management in operating its business and facility,” including the right “to layoff”; and

(v) Whether Elmhurst satisfied its contractual obligations when it laid off certain unit employees on September 16, 2012, including whether it correctly applied the current MILA agreement’s seniority provision and payment-in-lieu-of-notice provision.

23. The Complaint incorrectly focuses solely on the Elmhurst 2010-2015 Agreement’s layoff provision, at the exclusion of: (a) the “Existing Employees” and management rights clauses within that same agreement; (b) the relevant bargaining history; and (c) the current MILA agreement which establishes the terms and conditions for the group of Unit employees affected by the September 16, 2012 layoff decision.

24. By interposing itself in a matter of contractual interpretation, the Board is undermining the collective bargaining relationship between Elmhurst and Local 584.

SECOND AFFIRMATIVE DEFENSE

25. The Complaint ought to be dismissed because Local 584 waived its right to bargain over Elmhurst's September 16, 2012 layoff decision, the effects of that decision, and the extension of six months of COBRA continuation coverage to laid-off employees.

26. The management rights clause contained in the Elmhurst 2010-2015 Agreement clearly and unambiguously confers upon Elmhurst the unilateral authority "to layoff."

27. The process for effectuating layoff decisions also was clearly and unambiguously negotiated by the parties. By extension of the "Existing Employees" provision in the Elmhurst 2010-2015 Agreement (*see supra* at ¶6), the current MILA agreement establishes the terms and conditions concerning any layoff of Unit employees hired before July 18, 2007. Elmhurst conducted the September 16, 2012 layoff consistent with the terms and conditions of the MILA agreement.

28. Further, the current MILA agreement clearly provides that layoff decisions may be made unilaterally by Elmhurst without notice so long as up to one week's compensation is given to affected employees. This payment-in-lieu-of-notice provision would be superfluous if Elmhurst and Local 584 did not agree through collective bargaining that Elmhurst has the unilateral right to make layoff decisions.

29. By agreeing to a management rights clause that gives Elmhurst the right to make layoff decisions without notice, Local 584 waived its right to bargain over such decisions made within the term of the collective bargaining agreement.

30. By agreeing to a procedure for implementing layoff decisions, including the order of layoffs and a payment-in-lieu-of-notice provision, Local 584 waived its right to negotiate over the effects of layoff decisions.

31. Moreover, the Elmhurst 2010-1015 Agreement includes a “Complete Agreement” clause pursuant to which Local 584 clearly and unambiguously waived its right to bargain over the terms and conditions set forth therein during the life of the agreement. This includes Elmhurst’s authority to unilaterally implement a layoff decision pursuant to the management rights clause of the agreement. It also includes any effects of a layoff decision not previously agreed upon by Elmhurst and Local 584 and incorporated into the Elmhurst 2010-2015 Agreement by virtue of the “Existing Employees” provision.

32. Local 584 also waived its right to negotiate the effects of Elmhurst’s September 16, 2012 layoff decision by failing to request an opportunity to bargain, which it has not done to date.

33. Local 584 waived its right to negotiate over the six month extension of health insurance benefits to laid-off employees by failing to request an opportunity to bargain over this subject and then implementing the change proposed by Elmhurst.

(a) Elmhurst notified Local 584 of its intention to provide six months of health insurance to affected employees on September 16, 2012.

(b) Because the contractual health insurance benefit was paid up through the end of September, the proposed six-month extension would not become effective until October 1, 2012.

(c) Between September 16, 2012 and October 1, 2012, Local 584 did not request an opportunity to bargain over Elmhurst’s proposal to extend health insurance benefits or even object to the terms of that proposal.

(d) Furthermore, the extended health insurance benefit is provided through a Teamsters trust fund, over which Elmhurst has no control.

(e) Local 584 took affirmative steps to implement Elmhurst's proposed extension of health insurance prior to October 1, 2012, again without requesting an opportunity to bargain over the extension.

(f) On September 18, 2012, Local 584 sent Elmhurst an invoice for the extended health insurance benefit.

(g) Elmhurst sent Local 584 payment for the health insurance benefit on September 19, 2010, which Local 584 accepted.

(h) Local 584 has since implemented the extended health insurance benefit for Unit employees affected by the September 16, 2012 layoff.

34. Local 584's failure to request an opportunity to bargain constitutes a waiver by inaction and warrants dismissal of the claim that Elmhurst failed to bargain collectively over its proposed six-month extension of health insurance benefits to laid-off employees. *See, e.g., Jim Walter Resources, Inc.*, 289 NLRB 1441 (1988) (dismissing Section 8(a)(5) and 8(a)(1) claim when union failed to request bargaining after it learned of the employer's decision to discontinue health insurance during a strike 10 days before that decision was implemented).

THIRD AFFIRMATIVE DEFENSE

35. Assuming *arguendo* that Local 584 did not waive its right to bargain over Elmhurst's September 16, 2012 layoff decision, the effects of that decision, and the extension of six months of COBRA continuation coverage to laid-off employees, the Complaint should nevertheless be dismissed because such matters are covered by the Elmhurst 2010-2015 Agreement.

WHEREFORE, Respondent respectfully requests that the Complaint be dismissed in its entirety.

Dated: December 18, 2012

Respectfully submitted,

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**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 29**

ELMHURST DAIRY, INC.,

Respondent,

v.

MILK WAGON DRIVERS AND DAIRY
EMPLOYEES, LOCAL 584, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,

Charging Party.

AFFIDAVIT OF SERVICE

Case No. 29-CA-090017

STATE OF NEW YORK)
COUNTY OF ERIE) ss:

Deborah L. Ostaszewicz, being duly sworn, deposes and says that she is over 18 years of age and not a party to this action; that on the 18th day of December, 2012, a true and accurate copy of the ***Amended Answer*** was electronically filed through the National Labor Relations Board's electronic filing system and that a copy was served upon the following individuals by first-class mail, addressed as follows:

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/s/ Deborah L. Ostaszewicz
Deborah L. Ostaszewicz

Subscribed and sworn to before
me this 18th day of December, 2012

/s/ Rose M. Hynes
Notary Public

Rose M. Hynes
Notary Public, State of New York
Qualified in Erie County
My Commission Expires 03/05/2015