**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**DIVISION OF JUDGES**
**SAN FRANCISCO BRANCH OFFICE**

**KAUAI VETERANS EXPRESS CO.**
**Respondent**

**and**

**Cases**
**20-CA-193339**
**20-CA-203829**
**20-CA-204839**
**20-CA-209177**

**OPERATING ENGINEERS**
**LOCAL UNION NO.3**
**Charging Party**

*Meredith A. Burns Esq.,* for the General Counsel.
*Jeffrey S. Harris Esq.,* and *Christine K.D. Belcaid, Esq., (Torkildson, Katz, Hetherington, Harris & Knorek),* for the Respondent.
*Gening Liao, Esq*., for the Charging Party.

# DECISION

## STATEMENT OF THE CASE

**Dickie Montemayor, Administrative Law Judge.** This case was tried before me on December 11-12, 2017, in Kauai, Hawaii. Charging Party (Union) filed charges on February 17, August 7 and 22, October 30, and November 2, 2017. The charges alleged violations by Kauai Veterans Express Co. (Respondent) of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (the Act). The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs which were received on February 15, 2018. I carefully observed the demeanor of the witnesses as they testified and I rely on those observations in making credibility determinations. I have studied the whole record, the posttrial briefs, and the authorities cited. Based on the detailed findings and analysis below, I conclude and find the Respondent violated the Act essentially as alleged in the complaint. [1]

[1] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

## FINDINGS OF FACT

### I. JURISDICTION

The complaint alleges, and I find that

1. (a) At all material times, Respondent has been a corporation with a place of business in Lihue, Kauai, Hawaii, and has been engaged in the business of providing trucking and hauling services.

   (b) In conducting its operations during the 12-month period ending October 31, 2017, Respondent provided services in excess of $50,000 to Young Brothers, Ltd. Young Brothers Ltd., has been engaged in inter-island freight transportation of freight and cargo with corporate offices in Honolulu, Hawaii, and operations located within the state of Hawaii.

   (c) In conducting its operations during the 12-month period ending October 31, 2017, Young Brothers, Ltd., purchased and received at its Hawaii facility goods valued in excess of $50,000 directly from points outside the state of Hawaii.

   (d) 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.

2. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.
3. The following employees of Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

   All Truck Drivers, Tractor Trailer Drivers, Tandem Dump Truck Drivers, Freight Truck Drivers, and Mechanics employed by the Employer at its Lihue, Kauai facility.

Since about 2002, Respondent has recognized the Union as the exclusive collective-bargaining representative of the unit based on Section 9(a) of the Act. This recognition has been embodied in a recognition agreement dated February 28, 2002.

Respondent and the Union are parties to a collective-bargaining agreement with effective dates from July 1, 2014, to June 30, 2019.

At all material times the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

(a) Stanley Morinaka, Sr., President
(b) Haku Rivera- Operational Manager
(c) Susan Taniguchi- Office Manager

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. Background

Kauai Veterans Express Co. (KVE) is a trucking company that provides trucking services and has been in existence for approximately 20 years. The company was established by Stan Morinaka who currently serves as its president. The company is a relatively small operation that employs a general manager, Haku Rivera , an office manager, Susan Taniguchi and during the periods relevant to this case, eleven truck drivers. Since 2002, KVE has recognized Charging Party as the exclusive representative of KVE bargaining unit employees. On September 2, 2016, the Union filed a grievance alleging that three bargaining unit employees were laid off in violation of Section 16.00.00 of the Kauai Trucking agreement. (GC Exh. 7.) On December 15, 2016, Pane Meatoga Jr., the Union's district representative, submitted an information request to KVE addressed to its President Stan Morinaka. (GC Exh. 8.) The request specifically asked for the following information:

> 1. Company records for all hauling, delivering and/or trucking activity for all trucks in Kauai Veterans Express' fleet from January 1, 2016 to the present, including the name and classification of the driver of each truck engaged in any hauling, delivering or trucking activity.
>
> 2. The specific trucking activity performed by Kauai Veterans' Express, if any, that Kauai Veteran's Express is claiming is not covered bargaining unit work.
>
> 3. A list of all non-union employees who are engaged in any trucking activity, the employee's classification and the dates and hours of work performed by each such employee. (GC Ex. 8).

On December 28, 2016, Respondent's counsel sent union counsel an email with a subject line of "freight hauling question" and attached copies of the 2003 and 2014 bargaining agreements. (GC Exh. 15.) On January 10, 2017, KVE sent a list of KVE drivers along with an Operating Engineers Trust Funds Audit. (GC Exh. 13.) On January 12, 2017, KVE sent union counsel an email contending the contract did not cover freight. (GC Exh. 16.) On January 17, 2016, union counsel wrote Respondent's counsel advising that the Union "has received no response to its information request dated December 15, 2016" and advised it would file an unfair labor practice charge if the information was not provided by January 20, 2017. (GC Exh. 14.) That same day Respondent's counsel responded by indicating that the information sent on January 10 responded to the "first item in the December 15 letter." (GC Exh. 14.) On January 25, union counsel and Respondent's counsel met to discuss issues relating to the pending arbitration and specifically discussed the December 15, 2016 information requests. After the meeting, union counsel sent KVE another information request which included the following:

1. The name of the other company owned, or partially owned, by Mr. Morinaka that performs freight hauling work, and when Mr. Morinaka acquired an interest in this company and the specific nature of his ownership interest in this company.

2. The work hours and type of work performed by all employees who drive for Kauai Veterans Express.

3. Copies of the freight hauling contracts signed by Kauai Veterans' Express from 2008 to the present.

4. Copies of the freight hauling contract signed by the other entity from 2008 to the present. (GC Exh. 17.)

In addition to the above, union counsel reiterated its need for, "the documents requested in its December 15, 2016 information request" and again specifically reiterated its previous request for company records for all hauling, delivering and/or trucking activity. (GC Exh. 17.) On March 2, 2017, counsel for Respondent sent an email to union counsel regarding the December 15, 2016, and January 25, 2017 requests for information. The email asserted inter alia that the union had not indicated that it needed the information, "generally for the performance of its duties as the exclusive collective bargaining representative of the bargaining unit." (GC Exh. 19.) The email went on to request that the Union send, "one letter with an itemized list of all the information the union presently seeks with a logical explanation of the relevancy of the information to either the grievance or to the policing of the collective bargaining agreement." (GC Exh. 19.) On March 7, 2017, Union counsel responded by explaining what information it was seeking, why it believed it was relevant and entitled to receive the information. (GC Exh. 20.) Counsel for the Union ended the correspondence by noting that, "we are just running in circles. Provide the information." (GC Exh. 20.) On April 12, 2017, Respondent's counsel sent an email with the identical information it sent on January 10, 2017. (GC Exh. 21.) The email stated, "you have hours reports attached this covers some of the union's information request. I do not have any of the other information sought." (GC Exh. 21.) On April 12, 2016, union counsel responded by stating, "So are you saying I'm not getting anything else?" (GC Exh. 22.) The following day union counsel emailed Respondent's counsel asking, "am I correct that your client does not intend to provide any additional documents or information?" (GC Exh. 23.) To which Respondent's counsel asserted, "I am still trying to follow up." (GC Exh. 23.) No other information was provided by Respondent in response to the requests.

### B. The Withdrawal of Recognition

On September 1, 2016, the petition set forth below in its original form was circulated among drivers.

KAUAI VETERANS' EXPRESS COMPANY
P.O. BOX 3329
LIHUE, HI 96766
PH# (808) 245-3553

SEPT. 1, 2016

RE: UNION 9-6-2016

FROM: STAN MORINAKA, SR.

PLEASE CHECK IF YOU WOULD LIKE TO BE IN THE UNION:

| | Name | YES | NO | |
|---|---|---|---|---|
| 1 | Palani Correa | | ✓ | PMC |
| 2 | Russell Fernandes | | ✓ | |
| 3 | Alan Jeffries | | ✓ | |
| 4 | Kema Kanahele | | ✓ | K K |
| 5 | Kimo Kanei | | ✓ | |
| 6 | Dana Kaohelaulii | | ✓ | |
| 7 | Eric Medeiros | | ✓ | |
| 8 | James Meyer | | ✓ | |
| 9 | Lito Pigao | | ✓ | |
| 10 | Rysan Sakamoto | | ✓ | |

The memo, drafted on company letterhead, clearly referenced that it was from the president of the company inquiring of employees if they would "like to be in the Union." (GC Exh. 26.) The document was prepared by Susan Taniguchi, the office manager and the handwritten date was that of Morinaka. After Morinaka received the document from Haku Rivera, he forwarded it to the office manager who then forwarded it to Respondent's counsel. (GC Exh. 1z.) On or about January 12, 2017, Taniguchi passed on a message to Morinaka after consulting with Respondent's counsel that:

> the key date for withdrawing from the Union was July 1, 2017; 2) at that time, KVE employees may give Mr. Morinaka a petition signed by a majority of the employees in the bargaining unit saying they want to get out of the Union; and (3) KVE can respond to requests for information on how to word the petition to decertify the Union, but should not initiate, promote, or substantially assist the circulation or signing of the petition. (GC Exh. 1Z).

Taniguchi thereafter spoke with employee James Kanei, III to advise him on the process of creating a petition and getting it signed. Kanei convened a meeting after work with other employees on January 26, 2017. Thereafter, Kanei returned to Taniguchi for assistance in drafting a petition. Kanei described the process as follows:

> Q I'm sorry, did she give you instructions on what to do to prepare?
> A She helped me. I kind of like worked it on my own and she kind of steered me in the right direction.
> Q And her direction was that you should address it to Mr. Harris; is that right?
> A It was on the paperwork but she gave it back to me. She drafted it again matching with mine trying to put it together.
> Q Okay. Okay. I think I -- so you drafted something?
> A Yes.
> Q And then you gave it to Ms. Taniguchi?
> A Yes, and I put in my words the way I speak so it wasn't appropriate, let's put it that way.
> Q Okay. Then you gave it to Ms. Taniguchi?
> A Yes, and she helped me revamp it again, you know.
> Q And then Ms. Taniguchi gave you some instructions?
> A She gave me advice, you know, what to do, or wording or some way to understand. (Tr. 255-257).

After Taganuchi and Kanei were finished creating the document, it was presented to employees for their signature. After the document was signed it was turned over to Taganuchi on January 28, 2017. (GC Exh. 1z.) The document, in its original format, is set forth below for ease of reference.

Mr. Jeffery S. Harris Esq.
700 Bishop Street, 15th Floor Topa Building
Honolulu Hawaii, 96813-4187

Dear Mr. Harris,

On January 26, 2017 a meeting between Shop Steward James K. Kanei 3rd, other employee was conducted in which they decided that they no longer desired to be a part of the Operating Engineers Local Union #3.

They decided to withdraw their membership from the union immediately upon your approval of the proper correspondence to facilitate their request to the union so they can stop further financial contributions to the Operating Engineers Local Union #3.

Below, is the list of employees requesting to cease their membership in the Operating Engineers Local Union #3.

| Name | Leave | Remain | Signature | Date |
|---|---|---|---|---|
| James K. Kanei 3rd | ✓ | | | 1/27/17 |
| Palani Correa | ✓ | | | 1/27/17 |
| Russell Fernandes | ✓ | | | 1-28-17 |
| Alan Jeffries | ✓ | | | 1-27-17 |
| Leonard Kanahele | ✓ | | Leonard Kanahele | 1-27-17 |
| Eric Medeiros | ✓ | | | 1-27-17 |
| James Meyer | ✓ | | | 1-27-17 |
| Carlito Pigao | ✓ | | | 1-27-17 |
| Rysan Sakamoto | ✓ | | Ryan K. Sakamoto | 1/24/17 |

*My initial and signature above indicates my desire individual desire to participate as a member of Operating Engineers Local Union #3. This choice was made of my own free will and desire and was not coerced in making my decision.*

As is evident from the last paragraph, the document contained contradictory language some language indicating a desire to "withdraw membership" from the union and other language expressing a clear "desire to participate as a member." (GC Exh. 24.) Thereafter on February 1, 2017, Respondent's counsel sent union counsel an email advising:

> Kauai Veterans Express withdraws recognition of Operating Engineers based on the attached evidence the union has lost majority support. The withdrawal will be effective July 1, 2017, three years after the effective date of the memorandum of agreement. (GC Exh. 24).

### C. Polling of Employees

On August 18, 2017, as part of a reply in support of motion for partial summary judgment KVE attached declarations from some employees who signed the January 2017, petition. The declarations were prepared by Respondent's counsel on or about August 15, 2017. In drafting the declarations, Respondent's counsel spoke with Kanei and prepared the declarations based upon the conversations with him. (Tr. 2; 157-165.) At no time was the Union notified that declarations regarding their union sentiments were being drafted. After the declarations were prepared they were emailed directly to Kanei. The declarations of these employees had identical

language stating "I no longer wished to be represented by the Union, when I signed the petition, and I no longer wish to be represented by the Union today." The declarations were prepared on Respondent counsel's pleading paper which contained a business heading identifying Respondent counsels as "Attorneys for Respondent Kauai Veterans Espress Co." (GC Exh. 1m.) On August 18, 2017, Respondent's counsel received signed declarations from employees Kanei, Palani Correa, Russel Fernandes, Allan Jeffries, Eric Mederos, and Rysan Sakamoto. The declarations were transmitted to Respondent's counsel by Taniguchi. (Tr. 162).

### D. KVE Unilaterally Stopped Making Trust Fund Payments and Deducting Dues

As part of its collective-bargaining agreement KVE agreed to make contributions to the Union's pension annuity trust fund. (Tr. 70.) KVE was also required to deduct dues from all union drivers and send the payment to the Union on a regular monthly basis. After July Respondent ceased making the pension annuity contributions and as of August 1, 2017, ceased deducting dues. (GC Exh. 10.) At no time prior to either of these actions did Respondent provide any notice of its intentions to the Union and/or attempt to bargain with the union regarding these changes. (Tr. 70-73.)

### E. Analysis

#### 1. The withdrawal of recognition.

Section 8(a)(5) of the Act requires an employer to recognize and bargain with the labor organization chosen by a majority of its employees. When a union is recognized as the collective-bargaining representative of a unit of employees, that union is entitled to a presumption that it enjoys the support of a majority of the represented employees. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785–787, 116 S.Ct. 1754, 135 L.Ed.2d 64 (1996). The presumption of majority status is irrebuttable during the term of a collective-bargaining agreement, up to three years. Thereafter, the presumption becomes rebuttable. Id. at 786, 116 S.Ct. 1754; *McDonald Partners, Inc. v. NLRB,* 331 F.3d 1002, 1004 (D.C. Cir.2003).

One option available to an employer that questions an incumbent union's majority status is to ask the Board to conduct a decertification election, in which employees cast confidential votes for or against the union. 29 U.S.C. § 159(c)(1); *Levitz,* 333 NLRB 717 (2001). The Board has "emphasize[d] that Board-conducted elections are the preferred method of testing employees' support for unions." Id. at 727.

Alternatively, an employer may withdraw recognition unilaterally. An employer may not "withdraw recognition unless it can prove that an incumbent union has, in fact, lost majority support." *Levitz*, 333 NLRB at 723. In this regard the Board has cautioned:

> We emphasize that an employer with objective evidence that the union has lost majority support ... withdraws recognition at its peril. If the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer

> will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition. Id. at 725.

In order to determine whether the Respondent has in fact rebutted the presumption that the Union enjoyed a majority of support the Board pays particularly close attention to the language of the petition or documents which Respondent relies upon as well as objective evidence to determine if an employer could reasonably conclude that a majority of employees no longer support the Union.

I find that Respondent's reliance on the document is insufficient to carry its burden to rebut the presumption of majority support. The document is clearly contradictory and ambiguous in that it sets forth each employees "individual desire to participate as a member of Operating Engineers Local #3."( GC Exh. 1z.)[2] Even if one were to overlook the apparent contradiction of the last paragraph, the other language in the document is similarly insufficient as it refers only to members wanting to "cease their membership." (GC Exh. 1z.) As noted by the court in *Pacific Coast Supply, LLC v. NLRB*., 801 F.3d 321, 328 (2015):

> The Board has long maintained a distinction between an employee's desire to be represented by a union, and his or her desire to be a member of a union. Whether a union has "majority support turns on whether most unit employees wish to have union representation, not on whether most unit employees are members of a particular union." *Trans–Lux Midwest Corp*., 335 NLRB 230, 232 (2001). Only the desire of a majority not to have union representation warrants withdrawal of recognition. See *R.J.B. Knits, Inc.*, 309 NLRB 201, 206 (1992). Accordingly, the Board has long held that, for employee statements to support the showing an employer must make to warrant withdrawal, such statements "must convey an intent not to be represented by the union as distinguished from a desire not to become members for any of a number of reasons or an inability or unwillingness to pay dues." *Grand Lodge of Ohio*, 233 NLRB 143, 144 (1977). Invoking that line of authority, the ALJ in this case noted that "[t]he Board has held for over 40 years that 'there is no necessary correlation between membership and the number of union supporters since no one could know how many employees who favor union bargaining do not become or remain members thereof.' " *Pacific Coast*, 360 NLRB No. 67, at 6 n. 9 (quoting Terrell Mach. Co., 173 NLRB 1480, 1481 (1969), enf'd, 427 F.2d 1088 (4th Cir.1970)); accord *DaNite Holdings, Ltd*., 356 NLRB No. 124, at 6 (Mar. 31, 2011).

Thus, the language which merely references a desire to "cease membership" coupled with the other objective evidence of record is insufficient under well settled Board law. *Anderson Lumber Co*., 360 NLRB 538 (2014).

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[2] Without seeing the original document it is difficult to determine whether the actual document that was signed by the employees actually contained the first three paragraphs of the letter or whether the original document that was signed by employees was a document that contained no language whatsoever referencing any desire to "cease their membership" but was later attached to the letter by scanning or photo-copying.. (GC Exh. 1z.)

In addition, other factors tainted the withdrawal of recognition. The Board has set forth guidance for determining whether, and to what extent, an employer may provide assistance to its employees about resigning their union membership and withdrawing their authorization of union dues deductions. Employers may give employees information on how to resign from a union, without violating the Act, if the help it provides merely concerns the procedure or mechanics of doing so, and does not rise above mere "ministerial" assistance. In *Narricot Industries* 353 NLRB 775, 776 (2009), the Board found that an employer provided more than permissible ""ministerial aid" where an employee asked his HR director "how to oust the union" and the director prepared a petition for the inquiring employee, as well as, two other employees, telling them the number of signatures needed and directing them to return the petitions to him daily). See *Winn-Dixie Stores, Inc*., 128 NLRB 574, 588 (1960) (finding a violation of the Act where the employer prepared a form resignation from the union letter, addressed the envelopes to send the letters, and, saw to the mailing of the resignation letters to the union). An employer may not lawfully encourage or solicit employees to withdraw or resign from the Union. *Erickson's Sentry of Bend*, 273 NLRB 63, 64 (1984) (employer conduct, found to impair employee free choice in violation of the Act, where store manager, upon request of an employee, provided language for a petition to resign from the union, which the employee copied, signed and gave to the manager in the manager's office; and, the manager discussed with the employee which other employees the manager might approach about resigning from the union, calling those employees' to his office; thereby, gave the appearance the employer favored the petition, and, encouraged the employees to sign the petition). An employer may not give advice to employees on how to resign from the union, *Florida Wire & Cable,* 333 NLRB 378, 381 (2001) (solicitation of employees to resign from the union was found where the employer gave employees advice on how to resign from the union, displayed sample resignation letters at a meeting with employees, and, mailed sample letters to employees). *Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 886 (D.C. Cir. 1997) (employer prepared and distributed union resignation forms, obtained signatures of several employees, completed and dated forms, and forwarded the forms to the union's business manager).

Applying the above standards to the facts of this case, it is abundantly clear that Taniguchi, Respondent's Office Manager provided more than "ministerial support." Her actions were in fact similar to those presented in *Narricort* and *Winn- Dixie Stores* and *Ericson's* in that she engaged in drafting of the petition including replacing language, provided advice on obtaining signatures, acted as an intermediary and forwarded the document to Respondent's counsel.[3] Her actions rose above providing mere "ministerial" assistance and were thus contrary to established Board precedent.[4]

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[3] Respondent's own characterization of Taniguchi's assistance makes clear that she provided more than ministerial support. (R. Br. at 9-10.)

[4] Respondent argued that Taniguchi was not Respondent's agent. (R. Br. at 26.) I am not persuaded by Respondent's contention. In analyzing questions of Agency the common law rule traditionally applied by the Board is that of "apparent authority." The test applied is whether "under all the circumstances, the employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management*." Eihorn Enterprises*, 279 NLRB 576 (1986), enfd. 843 F.2d 1507 (2d Cir. 1988). The determination is whether under the circumstances the employee would reasonably believe that the alleged agent was acting on behalf of management. *United Scrap Metal Inc*., 344 NLRB 467 (2005). Her title alone clothed her with the "apparent authority" of act on behalf of management. Moreover, her own declaration makes clear that she did act in such a capacity repeatedly serving as an

I also find that the first petition circulated on company letter head clearly stating that it was " From Stan Morinaka, Sr." was similarly insufficient to meet Respondent's burden and on its own was contrary to well established Board law and tainted the entire withdrawal process. (GC Exh. 26.) The petition was written by KVE's operations manager on KVE letterhead, it was circulated by the manager, there was no confidentiality afforded employees regarding their response to the memo. The Board has long held that such direct involvement by an employer violates the Act. In the first instance, an employer may not 'initiate a decertification petition, solicit signatures for the petition or lend more than minimal support and approval to the securing of signatures and the filing of the petition."' *Sociedad Espanola de Auxilio Mutuo y Beneficencia de PR*., 342 NLRB 458, 459 (2004) (quoting *Eastern States Optical Co*., 275 NLRB 371, 372 (1985)). The facts surrounding the September 1, 2016 petition established that the idea of decertification was not prompted by employees but was initiated by the employer and then proffered to employees. Secondly, circulating a petition on company letterhead with the designation that it was from the President of the company is inherently coercive. See *Placke Toyota, Inc*., 215 NLRB 395 (1974), wherein the Board found that a petition in which, "Respondent put its imprimatur upon the petition at the very outset by permitting it to be circulated as a company document after being typed on Respondent's letterhead" to interfere and coerce employees thereby violating Section 8(a)(1) of the Act.

I therefore find that the Respondent's withdrawal of recognition of the Union violated Section 8(a)(5) and (1) of Act.[5]

**2. The failure to provide information**

At the outset, it is important to note that there is no obligation on the part of an employer to supply information after an employer has lawfully withdrawn recognition. *Champion Home Builders Co*., 350 NLRB 788 (2007); *Renal Care of Buffalo, Inc*., 347 NLRB 1284, 1286 (2006). In failing to provide the requested information, Respondent relied upon its withdrawal of recognition. The obvious problem with Respondent's position in this regard is that its withdrawal was unlawful.

If an employer fails to provide the union with requested information that is relevant to the union's proper performance of its collective-bargaining obligations, it violates Section 8(a)(5) and (1) of the Act. *Leland Stanford Junior University & Service Employees Local No. 715, SEIU*, 262 NLRB 136, 138 (1982) (citing *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979)). An employer is obligated under the Act to provide requested information that is relevant to the union's responsibilities regarding both administration and enforcement of an existing collective-bargaining agreement. *NLRB v. Truitt Mfg. Co*., 351 U.S. 149, 152–153 (1956).

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official conduit between the president, Morinaka and Respondent's counsel. (GC Exh. 1z.) Her actions in securing the petition on behalf of Respondent were also done in her capacity as office manager under the apparent authority to do so. See for example *SKC Elec., Inc*., 350 NLRB 857, 862 (2007).

The relevance of any request is ascertained by analyzing the information request against a liberal "discovery" standard of relevance as distinguished from the standard of relevance in trial proceedings. *NLRB v. Acme Industrial Co*., 385 U.S. 432 fn. 6 (1967). The discovery standard for relevance is construed "broadly to encompass any matter that bears on or that reasonably could lead to other matter[s] that could bear on, any issue…" *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978); *Hickman v. Taylor,* 329 U.S. 495 (1947).

The information doesn't have to be dispositive of the issues between the parties; it only has to have some bearing on it. Thus, an employer must furnish information that is of even probable or potential relevance to the union's duties. *Pfizer Inc.,* 268 NLRB 916 (1984); *Conrock Co*., 263 NLRB 1293, 1294 (1982).

A) The Information Requests Were Presumptively Relevant

The evidence of record establishes, and I find, that the information requested by the union was presumptively relevant. More specifically, I find that the information requests set forth herein dated December 15, 2016, and January 25, 2016 were presumptively relevant because on their face both of the requests sought information which directly related to the work performed by KVE drivers, and it pertained to the pending grievance. It is well settled that information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative. See *Southern California Gas Co*., 344 NLRB 231, 235 (2005). Similarly, in *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), the court held that an employer has a duty to furnish information which is necessary to enable the Union to evaluate any grievances filed and thus such information is presumptively relevant. The Board has specifically held that information regarding nonbargaining unit employees can be relevant when necessary for enforcement of the CBA such as in this case where the Union was seeking information regarding whether after a lay off, nonbargaining unit employees were performing work. See *United Graphics*, 281 NLRB 463 (1986), *Boeing*, 364 NLRB No. 24 (2016).

Despite Respondent's assertions that it in fact provided information responsive to the requests, the information actually provided i.e., copies of the parties collective-bargaining agreements and the record of trust fund contributions, simply were not responsive to the specific union requests.

I therefore find that Respondent violated Section 8(a)(5) and (1) of the Act when it failed or refused to provide presumptively relevant information to the Union.

3. Polling

The Board in *Struksnes Construction Co*., 165 NLRB 1062 (1967), held that absent unusual circumstances, the polling of employees by an employer will be violative of Section 8(a)(1) of the Act unless the following safeguards are observed:

> (1) (The purpose of the poll is to determine the truth of a union's claim of majority,
> (2) this purpose is communicated to the employees,

(3) assurances against reprisal are given,
(4) the employees are polled by secret ballot, and
(5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.

In *Texas Petrochemicals Corp*., 296 NLRB 1057, 1063 (1989), and *Grenada Stamping & Assembly, Inc.*, 351 NLRB 1152 (2007), the Board held that where there is an incumbent union, advance notice of the poll is a required element.

The declarations drafted by Respondent's counsel did not include any assurances against reprisal, the declarations were not done "by secret ballot," and the prior petition submitted on company letterhead arguably created a coercive atmosphere. The facts of this case establish a process that simply did not meet all of the *Struksnes* safeguards and the union did not receive the required notice before the poll was conducted. I therefore find that Respondent violated Section 8(a)(1).[6]

4. **Unilateral changes**

Unilateral changes made to employee's wages, hours, working conditions, or other mandatory topics of bargaining constitute a per se violation of Section 8(a)(5). *NLRB v. Katz*, 369 U.S. 736 (1962); *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991). If an employer wishes to make changes regarding a mandatory subject of bargaining it must first provide the union with notice and an opportunity to bargain regarding any of the proposed changes. *Anheuser-Busch, Inc*., 351 NLRB 644 (2007). It is well established that fringe contributions as well as union security issues are mandatory subjects of bargaining and therefore Respondent was required to bargain over any changes that it wished to make regarding these matters. *Pacific Coast Assn'n of Pulp Mfrs. v. NLRB*, 304 F.2d 760 (9th Cir. 1962). There is no dispute that under the terms of the CBA, KVE was obligated to make trust fund payments for each bargaining unit employee and cease dues deductions only in conformance with the CBA and its limited periods of revocation. Nevertheless, KVE unilaterally stopped making trust fund payments and stopped making dues deductions for Eric Medeiros, Rysan Sakamoto, Alan Jefferies, Russell Fernandes, James Kanei, and Carlito Pigao without notifying the union and/or giving it an opportunity to bargain over these changes. I therefore find that Respondent's actions violate Section 8(a)(5) and (1) of the Act.

## CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, The Operating Engineers Local Union No. 3, is a labor organization within the meaning of Section 2(5) of the Act.

[6] Respondent argued that the application of Board law to the submission of the employee declarations violated the Constitutional guarantees of its right to petition the government. I decline to rule upon the constitutionality of the application of the Act. See *Oestereich v. Selective Service System Local Board No.11, Cheyenne, Wyoming,* 393 U.S. 233 (1968).

3. The Union has been the exclusive representative for the purposes of collective bargaining of the employees in the following bargaining unit pursuant to 9(a) of the Act:

> All Truck Drivers, Tractor Trailer Drivers, Tandem Dump Truck Drivers, Freight Truck Drivers, and Mechanics employed by the Employer at its Lihue, Kauai facility.

4. By refusing to bargain with the Union as the exclusive representative for the purposes of collective bargaining of the bargaining unit employees the Respondent violated Section 8(a)(5) and (1) of the Act.

5. By withdrawing recognition from the Union on July 1, 2017, the Respondent violated Section 8(a)(5) and (1) of the Act.

6. By failing to provide the Union with information that was presumptively relevant, on December 15, 2016, and January 25, 2017, the Respondent violated Section 8(a)(5) and (1) of the Act.

7. By unilaterally ceasing dues deductions, the Respondent violated Section 8(a)(5) and (1) of the Act.

8. By unilaterally ceasing Union Trust fund payments, the Respondent violated Section 8(a)(5) and (1) of the Act.

9. By unlawfully polling employees, the Respondent violated Section 8(a)(1) of the Act.

10. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

**Remedy**

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

a) Respondent will be ordered to recognize and bargain in good faith with the Union as the exclusive bargaining representative of the unit. Further, in the event that Respondent changed the units terms and conditions of employment following its withdrawal of recognition from the Union, upon the Union's request rescind such changes and restore the status quo ante and make whole the unit employees for losses in earnings and other benefits which they may have suffered as a result of such changes.
b) Respondent shall promptly provide the Union with the information requested on December 15, 2016, and January 25, 2017.

c) Having found the Company unlawfully ceased making validly authorized deductions of union dues and fees, and remitting the dues and fees to the Union, I recommend the Company be ordered to promptly submit to the Union an amount equal to the full union dues and Trust Fund fees for the unit employees from July 1, 2017, until the Board's Decision and Order issues, or, at such time as valid revocations are submitted by the employee/members. The amount due the Union shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 501 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1171 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). No portion of the amount may be deducted from the employees/members' wages as the amount owed the Union results directly from the Company's violations of the Act.

d) Respondent shall schedule a meeting during work hours with its employees and in the presence of a Board Agent read the attached notice to employees in English and the native Hawaiian language spoken by employees. In the alternative, the Respondent shall arrange for a Board agent to read the notice in English and the native Hawaiian language spoken by employees during work hours in the presence of Respondent's supervisors.

e) I also recommend, the Company be ordered, within 14 days after service by the Region, to post an appropriate "Notice to Employees" in order that employees may be apprised of their rights under the Act and the Company's obligation to remedy its unfair labor practices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

**Order**

The Respondent, Kauai Veterans Express Co., Lihue Kauai, Hawaii, its officers, agents, successors, and assigns, shall

1. Cease and desist from engaging in the following conduct

(a) Failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative for the following bargaining unit of its employees:

> All Truck Drivers, Tractor Trailer Drivers, Tandem Dump Truck Drivers, Freight Truck Drivers, and Mechanics employed by the Employer at its Lihue, Kauai facility.

[7] 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.

(b) Interrogating employees about their union activity or support, including interrogating employees in a manner that impliedly solicits their rejection of the Union and/or impliedly reveals surveillance of the union activity of other employees.

(c) Withdrawing recognition of the Union as the exclusive bargaining representative of bargaining unit employees in the absence of objective evidence that the Union has actually lost the support of a majority of bargaining unit employees.

(d) Failing to provide the Union with information that was presumptively relevant, on December 15, 2016, and January 25, 2017.

(e) Unilaterally stopping dues deductions.

(f) Unilaterally stopping Union Trust fund payments.

(g) Unlawfully polling employees.

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

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act.

(a) Recognize the Union as the exclusive collective-bargaining representative of the bargaining unit employees described above.

(b) Upon request of the Union, bargain with the Union as the exclusive bargaining representative of unit employees about terms and conditions of employment. Further, in the event that Respondent changed the units terms and conditions of employment following its withdrawal of recognition from the Union, upon the Union's request rescind such changes and restore the status quo ante and make whole the unit employees for losses in earnings and other benefits which they may have suffered as a result of such changes.

(c) Honor the validly authorized deductions filed with it for union dues and Trust Fund fees, as required pursuant to the parties' collective-bargaining agreement and remit to the union the dues it should have deducted as well as Trust Fund fees, with interest, as outlined in the remedy section of this decision.

(d) Promptly provide the Union will all the information requested on December 15, 2016, and January 25, 2017.

(e) Preserve and, upon request, make available to the Board or its agents for examination and copying, all records necessary to analyze the amount due under the terms of this Order

(f) Within 14 days after service by the Region, post at its facility in Lihue Kauai, Hawaii, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted.

Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings. The Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at that facility at any time since February 17, 2017.

(g) Within 21 days after service by the Region, file with the Regional Director of Region 20 a sworn certificate of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with the provision of this Order.

Dated, Washington, D.C. April 27, 2018

**Dickie Montemayor**
**Administrative Law Judge**

**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.

Operating Engineers Local Union No. 3 is the employee's representative in dealing with us regarding wages, hours, or other working conditions of employees in the following unit:

All Truck Drivers, Tractor Trailer Drivers, Tandem Dump Truck Drivers, Freight Truck Drivers, and Mechanics employed by the Employer at its Lihue, Kauai facility.

**WE WILL NOT** withdraw recognition from the Union or refuse to recognize and bargain with the Union as your bargaining representative.

**WE WILL NOT** fail to provide the Union information it requested on December 15, 2016, and January 25. 2017.

**WE Will NOT** poll employees without complying with the Board's requirements.

**WE WILL** NOT in any like or related manner interfere with your rights under Section 7 of the Act.

**WE WILL** honor the validly authorized deductions for union dues and fees, as required pursuant to the parties' collective-bargaining agreement and remit to the Union the dues we should have deducted, with interest.

**WE WILL** provide the Union information it requested on December 15, 2016, and January 25, 2017.

**WE WILL**, on request, bargain with the Union as your representative.

**KAUAI VETERANS EXPRESS CO.**

_____
(Employer)

**Dated:** _____ **By:**_____
(Representative) (Title)

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

**NLRB Region 20**
**901 Market Street, Suite 400**
**San Francisco, CA 94103**
**(415) 356-5130, Hours: 8:30 a.m. to 5:00 p.m.**

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20-CA-193339 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (628) 221-8875.