

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

**J.G. KERN ENTERPRISES, INC.
Respondent**

**Cases 07-CA-231802
07-CA-245744
07-CA-252759**

**and
LOCAL 228, INTERNATIONAL UNION,
UNITED AUTOMOBILE, AEROSPACE
AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW), AFL-CIO
Charging Party**

**COUNSEL FOR THE GENERAL COUNSEL'S
BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

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**COUNSEL FOR THE GENERAL COUNSEL'S
BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

Counsel for the General Counsel Kelly Temple respectfully submits this brief to Administrative Law Judge Paul Bogas, who heard this case on August 3, 2020, via Zoom teleconference.

I. Issues Presented

- A. Whether Respondent failed and refused to bargain with the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW)(International Union) and the Charging Party by refusing to meet the Charging Party from early October 2018 to January 2019, and canceling numerous bargaining sessions in November 2018 , in violation of Section 8(a)(1) and (5) of the Act.
- B. Whether Respondent failed and refused to bargain by telling the Charging Party that there was no need for it to make a proposal on provided benefits because Respondent was adhering to its current health insurance plan, in violation of Section 8(a)(1) and (5) of the Act.
- C. Whether Respondent failed and refused to provide health insurance benefit data requested by the International Union on April 17, 2019, in violation of Section 8(a)(1) and (5) of the Act.
- D. Whether Respondent failed and refused to provide insurance benefit data requested by

the Charging Party on July 9, 2019, in violation of Section 8(a)(1) and (5) of the Act.

- E. Whether Respondent unlawfully withdrew its recognition of the Charging Party as the exclusive collective-bargaining representative of the Unit in violation of Section 8(a)(1) and (5) of the Act.

Counsel for the General Counsel respectfully submits that the evidence establishes that Respondent violated the Act in these respects and in all other respects alleged in the Second Amended Consolidated Complaint.

II. Statement of the Case

A. Background

J.G. Kern Enterprises, Inc. (Respondent) is a Michigan corporation engaged in the manufacture, machining, and non-retail sale of automotive parts. (GC 1cc). It has a facility located in Sterling Heights, Michigan. (GC 1cc). Allen Kern Sr., Vice President, Allen Kern Jr., Manager, and Sue Allen, Human Resources Manager, are admitted supervisors/agents within the meaning of Sections 2(11) and 2(13) of the Act. (GC 1cc). In addition, Respondent employed James Teague as a labor consultant beginning about November 2018 and is an admitted Respondent agent. (Tr. 7-8) From about October 15, 2018 through June 2018, Respondent's legal representative was attorney Johnathan Sutton. After Sutton's departure, around July 2019, attorney Christopher McHale became the legal representative of Respondent.

On October 3, 2018, the International Union was certified by the National Labor Relations Board as the collective bargaining representative of the following appropriate unit:

All full-time and regular part-time production and maintenance employees, including quality inspectors, shipping and receiving employees, material handler employees, leaders, environmental assistants, and tool room employees employed by the Respondent at its facility located at 44044 Merrill Road, Sterling Heights, Michigan; but excluding office clerical employees,

professional employees, managers, temporary staffing agency employees, time study engineers, confidential employees, salaried employees, and guards and supervisors as defined by the Act.

(GC 2)

The bargaining unit was compromised of approximately 200 employees in the Unit. (GC 1 a and i) The Charging Party was assigned by the International Union as the designated servicing representative of the Unit. (GC 1cc) Paul Torrente was the president of the Charging Party until August 3, 2020; he thereafter became an International representative. (Tr. 12-13) Diane Virelli was a representative for the International Union until June 30, 2020. (Tr. 41-42) Both were assigned by the Charging Party and International Union, respectively, to negotiate with Respondent on behalf of the represented Unit employees. Torrente was the lead negotiator and Virelli provided assistance and support. (Tr. 55, 56)

B. Respondent's Failure and Refusal to Bargain

On October 8, 2018, a mere five days after the Regional Director for Region Seven certified the Charging Party as the collective bargaining representative, Torrente sent a letter to owner Allan Kern, Sr. asking about bargaining dates. (Tr. 15) Torrente's communication initiated a series of phone calls and emails between he and Respondent attorney Johnathon Sutton regarding possible bargaining dates. (Tr. 16, 17, 36) On October 12, Torrente and Sutton exchanged emails regarding various issues at the facility. (GC 3) On October 15, Torrente emailed Sutton, to advise, among other things, that the Charging Party was available to negotiate at Respondent's earliest convenience and was available at any time to commence negotiations. (GC 3). On October 17, at 5:19 p.m., Sutton sent an email that he would be available November 5 through 7 or November 26 through 28, but that his calendar was subject to change rather quickly. (Tr. 65-66, GC3) Torrente responded the following morning that the Charging Party was ready to meet

on November 5 through 7 and November 26 through 28. (GC 3) Torrente did not receive further correspondence from Sutton. At this point the Charging Party believed the parties were on track to meet on November 5, 2018.

On November 2, Torrente notified Sutton via email that he had not heard from Sutton since October 17 and was wondering where the parties would meet on November 5 for their scheduled negotiations. (GC 4) On the same date, International representative Diane Virelli also emailed Sutton about bargaining dates. (Tr.44-45, GC 12) On November 5, Sutton advised Torrente, Virelli, and certain other union representatives, via email, that Respondent was canceling all scheduled November negotiation sessions because Sutton was in Guam. He also noted that he sold his home in Houston and could not meet on November 5, nor at any time in November. (Tr. 19, GC 4) Sutton did offer to ask someone else to step in to get things started. (Tr. 37, GC 4) Torrente immediately responded via email that the Charging Party needed to get the ball rolling for the benefit of its members. (Tr. 20, GC16) Torrente asked that someone contact him via telephone or email by no later than November 8 so that the parties could schedule bargaining dates. (Tr. 37, GC 16) Further, Torrente stated that it did not matter to him if Sutton or another representative contacted him. (GC 16) During Sutton's testimony, he testified that after he offered to provide a substitute, Torrente failed to ask that someone else be substituted for Sutton (Tr. 66) Such testimony is disingenuous and clearly contradicted by Torrente's November 8 email he sent Sutton stating the opposite. (GC 16)

After sending this email to Sutton, Respondent's admitted agent James Teague contacted Torrente to advise Torrente that he, Teague, was taking over for Sutton to schedule bargaining. (Tr. 21, 37) Torrente and Teague communicated throughout the month of November via

telephone calls and text messages.¹ (Tr. 21) They scheduled bargaining for November 26 and 27. (Tr. 21) Shortly thereafter, Teague contacted Torrente to cancel the negotiation sessions scheduled for November 26 and 27, stating that the human resources representative was unavailable and on vacation. (Tr. 21, 22) Torrente and Teague agreed to meet on November 30, but again Teague contacted Torrente and canceled stating that his schedule “had flopped.” (Tr. 22) Teague testified that Torrente and he did not discuss bargaining dates. That testimony should not be credited. First, Teague admitted he was hired by Respondent in November 2018 as a labor consultant; Second, Teague admitted he had “some” conversations with Torrente during this time frame; however, he does not elaborate as to what those conversations entailed. But given Torrente’s efforts to schedule bargaining dates, the assertion that Torrente would be suddenly silent with Respondent’s newly hired labor representative about bargaining dates is bold and unbelievable. (Tr. 103)

On November 27, 2018, UAW International representative Virelli sent a certified letter to Respondent’s Sterling Heights facility in which she requested, among other things, bargaining at any time between December 4 and 17, and December 20. (GC 13, Tr.46-47) Respondent failed to respond. (Tr. 47)

Ultimately, in January 2019, over three months after the International Union was certified as the bargaining representative, the Respondent met with the Charging Party to begin bargaining. The parties then negotiated through November 2019.²

¹ Paul Torrente credibly testified that he was unable to produce the text messages that were on his phone due to an issue he had the previous month with his cellular telephone. He lost information contained on his phone, including the text messages from James Teague. (Tr. 21-22)

² Respondent witnesses Sutton and Allen testified about a May meeting where Torrente allegedly walked out the day of negotiations but returned the following day to continue negotiations. Allen testified that the Charging Party representatives left early one day during a June bargaining session. (Tr. 81-82) Regardless of whether these

- C. Respondent tells the Charging Party that there is no need for it to make a proposal on provided benefits because Respondent was adhering to its current plan and fails and refuses to provide requested information on insurance benefits.

On January 10, 2019, the parties began negotiating an initial contract. (Tr. 15, 48) Despite no prior indication, Respondent's John Sutton expected a complete contract proposal from the Charging Party. (Tr. 24, 57-58, 76-77) As the testimony of Virelli and Torrente indicate, the Charging Party and International Union had continuously sought information about insurance benefits in order to prepare proposals. (Tr.24, 47) On April 10, 2019, in response to an unalleged information request regarding insurance benefits, Sutton emailed Torrente that there was no need for the Charging Party to present an insurance proposal because the Respondent would stay with its current plan. (Tr. 29, GC 6)

On April 17, 2019, Virelli sent Sutton a request for information in an effort to find out the economic components of Respondent's current insurance benefit plan. (Tr. 48-49, GC 14) Virelli explained to Sutton that the Charging Party needed this information to formulate and provide proposals. (Tr. 49, GC 14) She requested the following (some portions of the request are omitted because they were not alleged in the consolidated complaint):

BENEFIT DATA

A. General

- 1. Copies of the Summary Plan Descriptions for all benefit programs.*
- 2. Plan documents for all benefit programs.*
- 3. Eligibility criteria and duration of benefit continuation during period of leave, layoff and termination.*
- 4. Cost information on each benefit program. (to the employee)*
- 5. A complete census of the entire bargaining unit showing the following for each Employee:*

a. Date of birth

B. Health Care, what group and coverage

assertions are factually true, there is no allegation of bad faith bargaining against the Charging Party and no outstanding unfair labor practice charges pending. (Tr. 81-82)

For each plan (medical, prescription drug, dental, vision and hearing):

1. By plan, the number of persons participating in each plan by family status (single, couple, family, or however else categorized) separately.

2. The full premium charge or premium equivalent by category.

4. COBRA premium rates listed by family status for each health plan offered to the membership.

5. Projected 2017, 2018, 2019 and 2020 cost increases, if any.

C. Life Insurance, Accidental Death & Dismemberment and Optional Dependent Insurance

2. List the cost/\$1,000. List the total cost to the Employer.

(Tr. 49, GC 14)

Virelli did not personally receive a response from Respondent. At some point, all parties admit that Respondent presented the Charging Party and International UAW with a copy of its 2018 insurance plan, but it did not provide the requested information of Respondent's "costing."

(Tr. 52) On May 2, 2019, Sutton emailed Torrente stating that the Respondent would not provide the following requested information: cost information for medical, prescription drug, dental, vision and hearing; full premium charge or premium equivalent by category; and COBRA premium rates listed by family status for each health plan offered to the membership, projected 2017, 2018, 219, and 2020 cost increases; total cost to Respondent for life insurance, accidental death and dismemberment and optional dependent insurance. (GC 10)

On July 9, 2019, Torrente sent via to Respondent attorney Christopher McHale, an email wherein he requested the following information:

BENEFIT DATA

A. General

1. Copies of the Summary Plan Descriptions for all benefit programs. What insurance company?

2. Plan documents for all benefit programs.

3. Eligibility criteria and duration of benefit continuation during period of leave, layoff and termination. The Union's copy of the Employee handbook Is not up to date.

4. Cost information on each benefit program (to the employee) Single, parent with children, family, etc.

5. An updated complete census of the entire bargaining unit showing the following for each Employee:

a. Date of birth

B. Health Care, what group and coverage

For each plan (medical, prescription drug, dental, vision and hearing):

- 1. By plan, the number of persons participating in each plan by family status (single, couple, family, or however else categorized) separately.*
- 2. The full premium charge or premium equivalent by category.*
- 4. COBRA premium rates listed by family status for each health plan offered to the membership.*
- 5. Projected 2017, 2018, 2019 and 2020 cost increases, if any.*

C. Life Insurance, Accidental Death & Dismemberment and Optional Dependent Insurance

- 2. List the cost/\$1,000. List the total cost to the Employer.*

(Tr. 24-25, GC 7)

On July 12, McHale responded via email that he would reach out to Sutton to see what Respondent had already provided. (Tr. 24-25, GC 7) On the same day, Torrente replied that the Sutton had refused to provide the requested information. (Tr. 25-26, GC 8) Further, Torrente alerted Sutton as to the Charging Party's statutory right to the information for the purpose of negotiations. (GC 8) On July 17, McHale said he would collect the information from Respondent and provide it once he had it. (Tr 27, GC 9) On July 24, Torrente advised McHale via email that the Charging Party had yet to receive any of the requested information. (Tr. 27-28, GC 10) In response, McHale provided Sutton's April 10 and May 2 emails. (Tr. 28-29, GC 6, 10). As noted above, Respondent's April 10 email merely notified the Charging Party that Respondent need not provide insurance proposals because Respondent was staying with its current plan. In its May 2 email, Respondent failed to provide several requested items, including the cost information for medical, prescription drug, dental, vision and hearing full premium charge or premium equivalent by category, and COBRA premium rates listed by family status for each health plan offered to the membership, projected 2017, 2018, 219, and 2020 cost increases; total cost to Respondent for life insurance, accidental death and dismemberment and optional dependent insurance. (GC 10) Respondent never provided the Charging Party with the twice-requested insurance information.

D. Respondent's unlawful withdrawal of recognition of the Charging Party as the exclusive collective-bargaining representative of the Unit.

On November 25, 2018, around 8:45 a.m., Torrente and Virelli arrived in separate vehicles for negotiations at the Mirage, the location for scheduled negotiations. (Tr. 32, 52) They were parked next to each other. (Tr. 52)

As Torrente and Virelli waited Respondent's attorney Chris McHale and labor representative James Teague approached. (Tr. 32, 53) Teague stated he had good news and bad news. (Tr.53) The good news was that the Union(Charging Party) got the "day off," the bad news was that employees signed a petition that they no longer wished to be represented by the Charging Party. (Tr. 52-53,) McHale handed two documents to Torrente. (Tr. 32, GC 15) One was a letter dated November 25, 2019 stating that on November 22, 2019, the Respondent had been presented with a petition signed by a majority of employees advising that they did not wish to be represented by the Charging Party. (Tr. 53-54, GC 15) The letter further provided that the NLRA prohibits an employer from bargaining with a union where the employer has a good faith certainty that the union does not enjoy majority status and as a result, Respondent had no choice but to withdraw recognition from the Charging Party. (GC 15) McHale then presented Torrente with a blank petition. (Tr 32) Teague stated that the Respondent was no longer going to bargain because employees did not want to be part of the Charging Party (Tr. 32)

After leaving, Torrente emailed McHale and asked for a copy of the petition that was signed by a majority of employees. (Tr. 33, GC 11) McHale provided a copy of the letter he was presented but stated he was obligated to protect the identity of the employees who signed the petition. (Tr. 33-34, GC 11) Torrente responded that even if there was an uncoerced majority that signed the petition, the various unfair labor practices committed by Respondent would

prohibit it from withdrawing recognition from the Charging Party. (Tr. 34, GC 11) McHale responded that Respondent's hands were tied, and it must respect the employees' Section 7 rights. (GC 11) Despite the outstanding ULPs Respondent committed, it withdrew recognition from the Charging Party.

III. Arguments and Analysis

A. Respondent failed and refused to bargain with the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW)(International Union) and the Charging Party by refusing to meet the Charging Party from early October 2018 to mid-January 2019, and canceling numerous bargaining sessions in November 2018, in violation of Section 8(a)(1) and (5) of the Act.

An employer's bargaining obligation attaches no later than the date that its employees' union is certified by the Board. *See e.g., Beird Industries., Inc.*, 313 NLRB 735, 736 (1994). In the case at hand, that obligation began on October 3, 2018; but as the evidence established, Respondent delayed initial face-to-face bargaining for over three months. *Fruehauf Trailer Services, Inc.*, 335 NLRB 393 (2001) (Respondent's delay of three months before meeting with the Charging Party for an initial bargaining session was background evidence shedding light on Respondent's overall conduct. See fn 5).

After agreeing to meet on November 5 through November 7, and November 26 through November 28, Respondent's counsel, Johnathan Sutton, canceled all of the scheduled bargaining sessions, via email, on November 5, the very day bargaining was to begin. Sutton's November 5 email stated that he was out of the country and would be otherwise occupied with the sale of his house. Sutton offered to provide a substitute for future negotiations and Torrente promptly agreed, stating that it did not matter who Respondent utilized for negotiations. Respondent's agent James Teague then contacted Torrente and they scheduled bargaining for November 26 and 27. Teague, much like Sutton, cancelled the November 26 and 27 sessions. Torrente agreed

to reschedule negotiations for November 30, but as November 30 approached, Teague canceled that session as well, noting that his schedule had “flopped.” It was not until December 12 that Sutton and Torrente spoke again. At that time, Sutton stated he could still not meet because of the sale of his Houston home.

Each time a session was scheduled and cancelled by Sutton or Teague; it was because they were busy with other matters. Respondent cannot avail itself of the “busy negotiator” defense as an excuse for its failure to meet at reasonable times. In this regard, it is well settled that an employer's chosen negotiator is its agent for the purposes of collective bargaining, and that if the negotiator causes delays in the negotiating process, the employer must bear the consequences. *See, e.g., O & F Machine Products Co.*, 239 NLRB 1013, 1018-1019 (1978); *Barclay Caterers*, 308 NLRB 1025, 1035-1037 (1992). The reasons of the Respondent’s legal counsel selling his home and being generally unavailable do not absolve the Respondent from its obligation to bargain. *See Camelot Terrace*, 357 NLRB 1934, 1940 (2011), wherein the Board concluded that Respondent violated Section 8(a)(5) of the Act by a course of conduct that included repeatedly canceling scheduled bargaining sessions. Indeed, in that case, the Board noted that on one occasion, the Respondent’s negotiator canceled meetings the day before they were to occur because his son became engaged and because his car was in the shop for repair.

Respondent’s excuses fail as a matter of law because the Board has held that the unavailability of a party’s chosen negotiator does not relieve the party of its duty to bargain. An employer acts at its peril when it chooses as a bargaining agent someone who is encumbered by conflicts. *First Student, Inc.*, 359 NLRB 208, 219–20 (2012), citing *Caribe Staple Co.*, 313 NLRB 877, 893 (1994); *O&F Machine Products Co.*, 239 NLRB 1013, 1019 (1978); and *Imperial Tire Co.*, 227 NLRB 1751, 1754 (1977).

The absence of Respondent's negotiators Sutton and Teague does not excuse Respondent's failure and refusal to meet its obligation to bargain with the Charging Party. Respondent refused to meet and cancelled bargaining sessions with the Charging Party and International Union at a critical stage in the Charging Party's role as the Unit's newly-certified bargaining representative—the beginning. Such conduct violates Section 8(a)(1) and (5) of the Act.

B. Respondent failed and refused to bargain by telling the Charging Party that there was no need for it to make a proposal on provided benefits because Respondent was adhering to its current plan in violation of Section 8(a)(1) and (5) of the Act.

On April 10, 2019, Respondent's attorney Johnathon Sutton emailed Paul Torrente that "there seems no need for you to put further effort into working up a proposal for union provided benefits. (GC 6) We will stick with the present plan." Respondent told the Charging Party to not even provide a proposal on insurance benefits because it was refusing to change its current plan. Respondent did this without allowing any fruitful negotiations between the parties on this mandatory subject of bargaining. This failure is a violation of Section 8(a)(1) and (5) of the Act. *Camelot Terrace*, 357 NLRB 1934 (2011), involved the parties bargaining for an initial contract, the Board held that the Employer was in violation of Section 8(a)(5) for refusing to bargain over economic subjects.

C. Respondent failed and refused to furnish relevant information requested by the Charging Party in violation of Section 8(a)(5) of the Act.

It is well settled that an employer, on request, must provide a union with information that is necessary and relevant to the carrying out of its statutory duties and responsibilities in representing employees. The duty to provide information includes information relevant to

collective bargaining negotiations, contract administration, and the determination of the merit of grievances filed under that contract. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *Dodger Theatricals*, 347 NLRB 953, 967 (2006); *Curtiss-Wright Corporation, Wright Aeronautical Division v. NLRB*, 347 F.2d 61 (3d Cir. 1965).

Where the requested information concerns terms and conditions of employment within the bargaining unit, the information is presumptively relevant, and the employer has the burden of proving lack of relevance. *AK Steel Co.*, 324 NLRB 173, 183 (1997); *Samaritan Medical Center*, 319 NLRB 392, 397 (1995). Moreover, a union may rely upon the presumption of relevance for information pertaining to employees within the bargaining unit and has no further obligation to explain its significance unless and until the employer establishes legitimate affirmative defenses to the production of the information. *Beverly Health and Rehabilitation Services*, 346 NLRB 1319, 1326 (2006); *River Oak Center for Children*, 345 NLRB 1335, 1336 (2005). *See also Quality Building Contractors*, 342 NLRB 429, 430 (2004) quoting *Commonwealth Communications*, 335 NLRB 765, 768 (2001).

The information requested by the Charging Party in both April and July 2019 pertains to the insurance benefits of the Unit and, as a mandatory subject of bargaining, is presumed to be relevant. Respondent did not provide the information requested on April 17 and July 9, 2019 or give a reason for its failure to provide the information. In response to the April 17 request, Sutton merely told the Torrente on May 2, that it would not provide the cost information for the following: cost information on each benefit program to the employee; the full premium charge or premium equivalent by category; COBRA premium rates listed by family status for each health plan offered to the membership, projected 2017, 2018, 2019, and

2020 cost increases, list of cost/\$1000 to the Respondent.

When the Charging Party again requested insurance benefit information on July 9, 2019, Respondent's McHale first told Torrente he would check with Sutton about what information had been provided, then told Torrente he would provide the information as soon as he received it. Ultimately, McHale resent an April 10 and May 2, 2019 email to Torrente from Sutton, thereby, again refusing to provide the Charging Party with the cost information for the following: cost information on each benefit program to the employee; the full premium charge or premium equivalent by category; COBRA premium rates listed by family status for each health plan offered to the membership, projected 2017, 2018, 2019, and 2020 cost increases, list of cost/\$1000 to the Respondent..

Respondent asserts that at some point during negotiations it provided Torrente with an employee benefits binder, employee health insurance option form, and a list of health insurance options selected by employees. (R ex 1, R ex 2, and R ex 3). As Torrente and Virelli testified, this information did not provide them the costing information the Charging Party needed to develop proposals for insurance benefits plans that might reduce costs to unit employees as well as Respondent. As a result of Respondent's refusal to provide the requested information, the Charging Party continued to ask for the relevant information.

The insurance benefit information Respondent failed and refused to provide to the Charging Party is presumptively relevant. *Southern California Gas Co.*, 344 NLRB 231, 235 (2005); *Curtis-Wright Corp.*, 145 NLRB 152, 156 (1963) (Generally, information concerning wages, hours and terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative and must be provided.) When faced with a request for presumptively relevant information the burden is

placed on a respondent to show that the information is not relevant to the union's duty to represent the respondent's employees. *Leland Stanford Junior University*, 307 NLRB 75, 80 (1992) (When a union requests presumptively relevant information that goes to the core of the employer-employee relationship, no specific showing of relevance is required and the burden falls upon the employer to prove a lack of relevance.)

Here, Respondent has not met its burden to show that the requested information is not necessary and relevant to the Charging Party's duty to represent Respondent's bargaining unit employees. Therefore, Respondent's failure to provide information concerning insurance benefits data for the bargaining unit employees is a violation of Section 8(a)(5) of the Act.

D. Respondent unlawfully withdrew its recognition of the Charging Party as the exclusive collective-bargaining representative of the Unit in violation of Section 8(a)(1) and (5) of the Act.

Pursuant to *Master Slack*, 271 NLRB 78 (1984), Respondent could not lawfully withdraw recognition from the Charging Party when there were unremedied unfair labor practices, inasmuch as the unfair labor practices caused employees to doubt and question their union and ultimately to lose their support for the union. Under *Master Slack*, the Board considers the following to determine whether a causal relationship exists between the unremedied ULPs and the loss of union support: (1) the length of time between unfair labor practice(s) and withdrawal of recognition; (2) the nature of the violation(s), including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on the employee morale, organizational activities, and membership in the union. *Id* at 84.

As to the first factor, the withdrawal occurred concurrently with Respondent's unlawful withholding of presumptively relevant information requested by the Charging Party regarding

insurance benefits. As to the second factor, Respondent's unlawful delay in scheduling bargaining dates, coupled with its failure to provide the requested information, hampered the Charging Party's ability to put forth meaningful proposals on the subject. Thus, Respondent's delay had a lasting impact both on unit employees and on the Charging Party, as it was forced to "make up" the lost time by rushing to get proposals together. Additionally, beginning in April 2019 and continuing through Respondent's unlawful withdrawal of recognition, Respondent failed and refused to provide the Charging Party and the International Union with insurance benefit information needed to bargain about benefits and wages. Therefore, the Charging Party's hands were tied when trying to negotiate insurance and wages, again undermining the Charging Party in the eyes of the employees. These subject matters are at the heart of collective bargaining and are the primary reasons why employees opt for collective bargaining representation. As to the third factor, Respondent's unlawful three-month delay in bargaining occurred at a critical time for the Charging Party--the start of its relationship with Unit employees. Indeed, unit employees witnessed the futility of a newly elected representative unable to do perform the most basic of functions: scheduling a meeting with Respondent. See *Northwest Graphics, Inc.*, 342 NLRB 1288, 1289 (2004), enf'd, 156 Fed. Appx. 331 (D.C. Cir. 2005)(An employer's refusal to bargain during part or all of the certification year has taken from the union the opportunity to bargain during the period when unions are generally at their greatest strength). The Charging Party was at a disadvantage when negotiating because of the three-month delay and Respondent's failure and refusal to provide the requested insurance information leading to employee disaffection. Under the last factor, the effect of the conduct on employees is evident by their signing of the disaffection petitions.

Master Slack is an objective standard. Thus, there is no need to question employees as to why they did or did not support the Charging Party. "[I]t is the objective evidence of the commission of unfair labor practices that has the tendency to undermine the union, and not the subjective state of mind of the employees, that is the relevant inquiry in this regard." *Bunting Bearings Corp.*, 349 NLRB 1070, 1072 (2007). The Board has held that "An employer may not lawfully withdraw recognition from a union where it has committed unfair labor practices that are likely to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself." *Id.* quoting *Garden Ridge Mgt.*, 347 NLRB 131, 134 (2006) (citing *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996) (Lee Lumber II). The Board added, "But not every unfair labor practice will taint evidence of a union's subsequent loss of majority support," citing *Lexus of Concord, Inc.* 343 NLRB 851, 852 (2004). The Board then concluded that , "In cases such as this one, where the [ULP] does not involve a general refusal to recognize and bargain with the union, 'there must be specific proof of a causal relationship between the [ULP] and the ensuing events indicating a loss of support.'" *Concord of Lexus* at 852, citing *Lee Lumber II*, 322 NLRB at 177. In the case at hand, Respondent refused to bargain with the Charging Party for the first three months following the certification. This general refusal was during a three-month period that was critical to the Charging Party in establishing itself as the newly elected bargaining representative of the unit employees.

The Board assesses "the tendency of unfair labor practices to cause disaffection, instead of relying' on employees' recollection of subjective motives for withdrawing support from the union." *St. Gobain Abrasive*, 342 NLRB 434, 434 fn2 (2012). Individual employee sentiments cannot negate findings of a causal relationship between Respondent's unlawful conduct and employee disaffection. *Hillhaven Rehabilitation Center*, 325 NLRB 202 (1997), enfd. denied in

part on other grounds, 178 F.3d 1296 (6th Cir. 1999). In the case at hand, Respondent's refusal to bargain with the Charging Party for the first three months after certification, and its refusal to bargain over healthcare, a mandatory subject of bargaining, are objective evidence of taint that undermined the Charging Party.

Respondent may argue that the employees who signed the petition were not aware of Respondent's unfair labor practice and therefore the violation could not have tainted the petition. However, General Counsel does not have to prove that employees actually knew of the unfair labor practices and this assertion is entirely speculative on Respondent's behalf. *Hearst Corporation, San Antonio Light Division.*, 281 NLRB 764, 765 (1986) (The Board is "unwilling to allow the Respondent to enjoy the fruits of its violations by asserting that certain of its employees did not know of its unlawful behavior, but rather shall hold it responsible for the predictable consequences of its misconduct."); *Wire Products Mfg. Corp.*, 326 NLRB 625, 630,

Accordingly, in the face of unremedied unfair labor practices and under a *Master Slack* analysis, Respondent's withdrawal of recognition from the Charging Party was unlawful and a violation of Section 8(a)(1) and (5) of the Act.

IV. **Appropriate Remedies**

A. Extension of certification year under *Mar-Jac Poultry Co*

To ensure that employees are accorded the services of their selected bargaining agent for a period covered by the law, the Board construes the initial period of the certification as beginning on the date the Respondent begins to bargain in good faith with a union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enf'd, 350 F.2d 57 (10111 Cir. 1965).

The Board also recognizes that such a remedy is warranted where an employer's refusal to bargain with a newly certified union during part or all of the year immediately following Certification deprives the union of the opportunity to bargain during the time of the union's greatest strength. *Northwest Graphics, Inc.*, 342 NLRB 1288, 1289 (2004), enf'd, 156 Fed.Appx. 331 (D.C. Cir. 2005), citing *Van Dorn Plastic Machinery Co.*, 300 NLRB 278 (1990), enfd. 939 F.2d 402) (6th Cir. 1991). Here, unit employees were deprived of any representation for the first three months following certification.

Additionally, if the *Mar-Jac* remedy for delay in bargaining is granted because of Respondent's refusal and failure to bargain during the initial three months of the certification year, then Respondent's November 25, 2019 withdrawal of recognition is unlawful as it would have been occurred within the extended certification year. Therefore, if a *Mar-Jac* remedy is granted for a period longer than 53 days, then Respondent unlawfully withdrew recognition during the certification year notwithstanding whether the factors in *Master Slack* have been met.

B. Bargaining Schedule

The Board has held that, in appropriate circumstances, it may order unusual remedial relief to rectify particularly serious unfair labor practices. *Leavenworth Times*, 234 NLRB 649, 649 fn. 2 (1978); *Crystal Springs Shirt Corporation*, 229 NLRB 4, 4 fn. 1 (1977); *Tiidee Products, Inc.*, 194 NLRB 1234 (1972). In cases involving refusals to bargain, the Board has held that the standard for imposing additional remedies is whether there is aggravated unlawful conduct which has "infected the core of the bargaining process." *Camelot Terrace*, 357 NLRB 1934 (2011) (reimbursement for negotiating expenses); *All Seasons Climate Control, Inc.*, 357 NLRB 718, fn 2 (2011), the Board upheld the Judge's remedial order directing extra remedies which included the imposition of a bargaining schedule of 15 hours per

week and monthly progress reports. *All Seasons* involved significantly more instances of unfair labor practices and cumulatively more egregious conduct than this case. Nonetheless, if the measure of the need for extraordinary bargaining is whether a Respondent has struck at the core of the bargaining process, then an additional remedy of a bargaining schedule in the pending case is justified. Respondent delayed three months of bargaining, time that cannot be made up with the extension of the bargaining year. Strict adherence to a bargaining schedule will allow the parties to complete a collective bargaining agreement or reach a good-faith impasse in negotiations.

V. Conclusions of Law

Counsel for the General Counsel respectfully submits that, for all the reasons set forth above, Respondent violated Sections 8(a)(1) and (5) by failing and refusing to bargain with the Charging Party, by failing and refusing to furnish the Charging Party and International Union with information they requested, by telling the Charging Party it need not make a proposal regarding benefits since Respondent was keeping its health insurance plan, and by unlawfully withdrawing recognition.

Further, Counsel for the General Counsel respectfully requests that Your Honor so find and conclude that Respondent remedy its unfair labor practices as described above and in the attached Notice to Employees and recommend all other remedies deemed appropriate.

Dated at Detroit, Michigan this 8th day of September 2020.

A handwritten signature in black ink that reads "Kelly Temple". The signature is written in a cursive style with a large initial "K" and a long, sweeping underline.

Kelly Temple- Counsel for the General Counsel
National Labor Relations Board
Patrick V. McNamara Federal Building
477 Michigan Avenue – Room 05-200
Detroit, Michigan 48226-2569

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.

**SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT, A FEDERAL LAW,
GIVES YOU THE RIGHT TO:**

**THE NATIONAL LABOR RELATIONS ACT, A FEDERAL LAW, GIVES YOU THE
RIGHT TO:**

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT refuse to bargain collectively and in good faith with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (International Union), the exclusive certified representative, and/or Local 228, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (Local 228) as the designated servicing representative of the International Union, of our employees in the following appropriate Unit at our facility located at 44044 Merrill Road, Sterling Heights, Michigan (Unit):

All full-time and regular part-time production and maintenance employees, including quality inspectors, shipping and receiving employees, material handler employees, leaders, environmental assistants, and tool room employees employed by us at our facility located at 44044 Merrill Road, Sterling Heights, Michigan; but excluding office clerical employees, professional employees, managers, temporary staffing agency employees, time study engineers, confidential employees, salaried employees, and guards and supervisors as defined by the Act.

WE WILL NOT refuse to recognize the International Union, the exclusive collective bargaining representative of the Unit, and/or Local 228, the designated servicing representative of our Unit employees employed at our facility located at 44044 Merrill Road, Sterling Heights, Michigan.

WE WILL NOT fail and/or refuse to provide necessary and relevant information requested by the International Union, the exclusive collective bargaining representative of the Unit, and/or Local 228, the designated servicing representative of our Unit employees, in furtherance of their respective duties as the exclusive collective bargaining representative and the designated servicing representative for the exclusive collective bargaining representative of the Unit.

WE WILL NOT inform the International Union and/or Union that there was no need to make a proposal on their benefit plans since we are adhering to our current benefit plans.

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

WE WILL NOT in any like or related manner fail and refuse to bargain collectively and in good faith with the International Union, the exclusive collective bargaining representative of the Unit, and/or Local 228, the designated servicing representative of our Unit employees employed at our facility located at 44044 Merrill Road, Sterling Heights, Michigan.

WE WILL, upon request, recognize and bargain collectively and in good faith with the International Union and/or Local 228 with respect to our unit employees employed at our facility located at 44044 Merrill Road, Sterling Heights, Michigan and **WE RECOGNIZE** that the certification year will be extended for an additional six (6) months from the date that good faith bargaining resumes.

WE WILL meet and bargain collectively and in good faith with the International Union and/or Local 228 in accordance with a bargaining schedule of at least 40 hours per calendar month for at least eight hours per session, until a complete collective-bargaining agreement or good-faith impasse in negotiations is reached.

WE WILL, upon request from the International Union and/or Local 228, rescind our withdrawal of recognition of the International Union and Local 228 in writing, any and all changes to terms and conditions of employment that we made as a result of our withdrawal of recognition; return to the status quo ante; make employees whole for any loss of wages and benefits, with interest and excess tax liability in accordance with Board policy; rescind any disciplines issued as a result of our unlawful withdrawal of recognition; and notify employees in writing that we have done so.

WE WILL provide the International Union and/or Local 228 information responsive to their April 17, 2019, information request pertaining to benefits, including Summary Plan Descriptions for all benefit programs; plan documents for all benefit programs; eligibility criteria and duration of benefit continuation during periods of leave, layoff and termination; employee cost information on each benefit program; employee birth dates; health care groups and coverages; for each plan (medical, prescription drug, dental, vision and hearing):by plan, the number of persons participating in each plan by family status (single, couple, family, or however else categorized) separately; the full premium charge or premium equivalent by category; COBRA

premium rates listed by family status for each health plan offered to the membership; projected 2017, 2018, 2019 and 2020 cost increases, if any; Life Insurance, Accidental Death & Dismemberment and Optional Dependent Insurance costs/\$1,000 and the total cost to us.

WE WILL provide the International Union and/or Local 228 information responsive to their July 9, 2019, information request pertaining to benefits including copies of the Summary Plan Descriptions for all benefit programs and insurance company names; plan documents for all benefit programs; eligibility criteria and duration of benefit continuation during period of leave, layoff and termination; an up to date copy of the Employee hand book; cost information on each benefit program (to the employee) Single, parent with children, family, etc.; an updated complete census of the entire bargaining unit showing the date of birth for each employee; Health Care, what group and coverage-For each plan (medical, prescription drug, dental, vision and hearing) the number of persons participating in each plan by family status (single, couple, family, or however else categorized) separately; the full premium charge or premium equivalent by category; COBRA premium rates listed by family status for each health plan offered to the membership; projected 2017, 2018, 2019 and 2020 cost increases, if any; Life Insurance, Accidental Death & Dismemberment and Optional Dependent Insurance cost/\$1,000 and the total cost to us.

J.G. Kern Enterprises, Inc.

(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. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy 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 or you may call the Board's toll-free number 1-844-762-NLRB (1-844-762-6572). Hearing impaired callers who wish to speak to an Agency representative should contact the Federal Relay Service (link is external) by visiting its website at <https://www.federalrelay.us/tty> (link is external), calling one of its toll free numbers and asking its Communications Assistant to call our toll free number at 1-844-762-NLRB.

Telephone:
Hours of Operation:

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.

CERTIFICATE OF SERVICE

I certify that on the 8th day of September 2020, I served copies of the Counsel for the General Counsel’s Brief to the Administrative Law Judge on the following parties of record electronically:

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/s/ Kelly Temple
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