UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-72270

INTERNATIONAL CHEMICAL WORKERS UNION COUNCIL OF THE UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL AND ITS LOCAL 1C

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of the International Chemical Workers Union Council of the United Food & Commercial Workers International and its Local 1C ("the Union") to review an order of the National Labor Relations Board ("the Board"), dismissing an unfair labor practice complaint against American Polystyrene Corporation ("the Company"). The Board's Decision and

Order issued on March 30, 2004 and is reported at 341 NLRB No. 67. (ER 75-82.)[1] The Board's order is final with respect to all parties.

The Board had jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"), which empowers the Board to prevent unfair labor practices. This Court has jurisdiction under Section 10(f) of the Act (29 U.S.C. § 160 (f)), as the complaint alleged that an unfair labor practice was committed in Torrance, California. The Union's petition for review, filed on April 30, 2004, was timely because the Act places no time limitation on the filing of petitions for review.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board rationally concluded that the Company disavowed any claim of an inability to pay for wage and benefit increases proposed by the Union, and therefore did not violate the Act by refusing to furnish the Union with financial information.

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[1] "ER" refers to the Excerpts of Record volume filed by the Union, which includes the decisions of the Board and the administrative law judge. "Tr." refers to the transcript of the hearing before the administrative law judge, which is reproduced in "minuscript" at pages 29-60 of the Excerpts of Record. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE CASE

The Company and the Union have a collective-bargaining relationship. During the course of bargaining, the Company declined the Union's request for certain financial information. The Union filed an unfair labor practice charge against the Company for refusing to share the information, and the Board's General Counsel issued a complaint alleging that the Company's refusal violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158 (a)(5) and (1)). (ER 79; 18-21.) After conducting a hearing, the administrative law judge issued a decision finding that the Company violated the Act as alleged. The Company filed exceptions, and the Board issued its decision, reversing the administrative law judge and dismissing the complaint in its entirety. (ER 75-82.)[2]

STATEMENT OF FACTS

I. THE BOARD'S FINDING OF FACT

The Company manufactures plastics at its Torrance, California facility. (ER 79; 18, 25.) During the relevant period, the Union represented the Company's production and maintenance employees and was party to a 1999-2002 collective-bargain agreement covering them. (ER 79; 19, 25-26, 31 (Tr. 10-11).)

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[2] The Union filed a motion for reconsideration, which the Board denied. (ER 83-91, 99-100.)

On April 22, 2002, the Company and the Union held their first meeting to negotiate a successor collective-bargaining agreement. Union representative Jeffrey Ferro presented the Union's proposals, which included increases in wages and company contributions to the employee 401(k) plan. (ER 75, 79; 32 (Tr. 13-14).) In response, on April 23, Company General Manager Carolyn Tan proposed smaller wage increases, discontinuation of company 401(k) contributions for an unspecified period, and the elimination of company-provided meals. (ER 75, 79; 32-33 (Tr. 14-17), 55 (Tr. 105), 57 (Tr. 114-15).)

On April 29, the parties held another bargaining session. The Company proposed to limit its discontinuation of 401(k) contributions to a 1-year period. In discussing the Company's other proposals, Ferro asked Tan if "things were really that bad." Tan replied that "things are tough." Ferro asked Tan if she was saying that she could not afford the Union's proposals. Tan replied: "No, I can't. I'd go broke." At the end of the bargaining session, Ferro composed and hand-delivered a note "demand[ing] access to review the Company's books," because Tan had claimed that the Company could not afford the Union's proposals. (ER 75, 79-80; 1, 33 (Tr. 17-19).)

On the following day, Tan responded in a hand-delivered letter rejecting the demand. Tan explained (ER 75, 80; 2.):

> While I have told you that we are a small company and times are tough, at no time have I ever told you that we cannot afford your proposals. Rather, in these uncertain economic times, we believe that we need to take a more cautious approach than what you propose. I hope that this clears up any confusion that you have regarding our responses to your proposals.

At the next bargaining session, on May 2, Ferro asked if business was really that bad. Tan replied, "Have you seen sales lately [?]" (ER 80; 47 (Tr. 73-74).)

At the May 14 bargaining session, Ferro again requested that the Company comply with the Union's information requests. Tan reiterated that the Company was not taking a position of financial hardship. Ferro then asked why the Company had proposed "all those take aways," including the elimination of company-provided meals. Addressing only the meal issue, Tan explained that the Company had discovered that other employers were not providing meal coverage similar to the Company. (ER 75, 80; 33-34 (Tr. 20-21).)

In a May 14 hand-delivered letter to Tan, Ferro stated that the Union's representatives had reviewed their notes from the April 29 bargaining session. The letter quoted excerpts from those notes indicating that Tan had responded to the Union's question as to whether the Company could not afford the Union's proposals by saying, "No I can't. I'd go broke." The letter stated that it was clear

that Tan had said she could not afford the proposals. The Union "again demand[ed] access to review the Company's [f]inancial [r]ecords." (ER 75, 80; 3, 33-34 (Tr. 20-22).)

In a letter dated the same day, Tan responded to Ferro's claims: "I never said [the quoted] words or anything similar. As I wrote you in my last letter, I have never stated that we could not afford any of your proposals." Tan added that it would therefore "be inappropriate for me to allow you access to our financial records," and denied the request. (ER 75, 80; 4, 34 (Tr. 22-23).)

On June 18, the Union filed an unfair labor practice charge with the Board. The charge alleged, in relevant part, that the Company had refused to supply information to the Union in violation of Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)). (ER 75, 80; 18, 20-21.)

Approximately a month and a half later, on August 1, Tan notified the Union that, "due to unimproved sales and rising inventories," the Company tentatively planned to stop production and lay off employees for approximately 90 days, effective August 30. (ER 75, 80; 5, 33 (Tr. 23.) As predicted, on August 30, the Company laid off 7 of the 8 unit employees. (ER 75, 80; 6, 35 (Tr. 26-27).)

In a letter dated September 4, the Union discussed the layoffs and the Company's prior bargaining positions. The Union again asserted that "the [C]ompany's [f]inancial records must be opened for review," and asked the

Company to "please comply with this request." (ER 75, 80-81; 8.) In a letter dated September 6, the Company again denied the Union's request. (ER 75, 81, 9-10.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Battista and Member Schaumber; Member Walsh dissenting) concluded, in disagreement with the administrative law judge, that the Company lawfully refused to furnish the Union with the requested information. (ER 75-82.) The Board found that the Company disavowed and retracted any claim of an inability to pay for the Union's proposed increases it may have made on April 29. It was therefore under no legal obligation to furnish the Union with information regarding its financial condition. Accordingly, the Board dismissed the complaint. (ER 75-77.)[3]

SUMMARY OF ARGUMENT

When an employer makes a claim during negotiations that it is unable to pay for a union's proposals, it generally incurs an obligation to honor the union's request for financial information. The employer nullifies that obligation, however, where it makes statements effectively disavowing the "inability to pay" claim. In

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[3] Member Walsh would have found that the Company's retraction was invalid due to its "false denials that [it] ever made a claim of inability to pay." (ER 77-78.)

cases where the Board finds no employer obligation to furnish information, that finding must be upheld on review unless it has no rational basis.

Here, the Union has failed to demonstrate the absence of a rational basis for the Board's finding that the Company effectively disavowed an April 29 oral statement that it could not afford certain union proposals. The Company's April 30 letter denied that it had made an "inability to pay" claim and explained that it was simply taking a more cautious approach to negotiations. As the Board concluded, the Company's earlier claim was made orally, in the heat of a negotiation session, and its disavowal letter the very next day unequivocally advised the Union that the Company's ability to pay was not in question.

There is no merit to the Union's contention that company witnesses "lied" by denying making the "inability to pay" statement – and were therefore guilty of unlawful bad faith bargaining – because the administrative law judge discredited their denials. As the Board noted, a witness whose testimony is discredited has not necessarily lied under oath, the judge made no finding that the witnesses herein deliberately lied, and there is nothing to suggest that they were acting in bad faith. There is also no merit to the Union's contention that the Company's letter was not an effective retraction because it denied making the claim rather than retracting it. As the Board noted, the letter made clear that the Company was not unable to meet the Union's demands and its language effectively retracted any claim of inability to

pay. Finally, there is no merit to the Union's suggestion that the Court should apply a less deferential standard of review to the Board's findings of fact because the Board reversed the administrative law judge's findings. The Board did not reverse the judge's credibility findings, but simply drew different derivative inferences from all the relevant evidence.

ARGUMENT

THE BOARD RATIONALLY CONCLUDED THAT THE COMPANY DISAVOWED ANY CLAIM OF AN INABILITY TO PAY FOR WAGE AND BENEFIT INCREASES PROPOSED BY THE UNION, AND THEREFORE DID NOT VIOLATE THE ACT BY REFUSING TO FURNISH THE UNION WITH FINANCIAL INFORMATION

A. Standard of Review

Where, as here, the Board finds that allegedly unlawful conduct does not violate the Act, and accordingly dismisses complaint allegations, judicial review is extremely limited. As the Court has explained, it will uphold the Board's conclusion that a party did not violate the Act unless the Board had no "rational basis" for its decision. *Chamber of Commerce of U.S. v. NLRB*, 574 F.2d 457, 463 (9th Cir. 1978). *Accord Amer. Postal Wrkrs U. v. NLRB*, 370 F.3d 25, 27 (D.C. Cir. 2004) (citation omitted); *see also United Paperworkers Int. U. v. NLRB,* 981 F.2d 861 865 (6th Cir. 1992) ("*Paperworkers")* (applying the "no rational basis" test in upholding the Board's decision to dismiss an allegation that an employer

claimed an "inability to pay" during bargaining). Under the rational basis test, a reviewing court may reverse the Board's dismissal only where the evidence "require[s]" the Board to find a violation of the Act. *Amal. Clothing Wkrs. v. NLRB*, 334 F.2d 581 (D.C. Cir 1964). In short, when reviewing the Board's decision to dismiss a complaint, as here, "[i]t is not necessary that [the Court] agree that the Board reached the best outcome in order to sustain its decisions." *United Steelworkers of America, AFL-CIO-CLC, Local Union 14534 v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993).

As the D.C. Circuit has observed, determining whether a union is entitled to financial information is "particularly within the expertise of the Board." *Crowley Marine Services, Inc. v. NLRB,* 234 F.3d 1295, 1297 (D.C. Cir. 2000). A Board finding regarding a union's entitlement to collective-bargaining information is therefore entitled to "'great weight' on review." *NLRB v. Lumber & Mill Employers Assn.,* 736 F.2d 507, 508 (9th Cir. 1984); *NLRB v. Assoc. Gen. Contractors of California, Inc.,* 633 F.2d 766, 770 (9th Cir. 1980) (citation omitted). *Accord Crowley Marine,* 234 F.3d at 1297 (D.C. Cir. 2000) (giving "great deference" to the Board's determinations). Finally, the Board's underlying factual findings are "conclusive" if they are supported by substantial evidence. Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488, 490 (1951).

B. An Employer May Disavow a Claim of an Inability to Pay for a Union's Proposals

Section 8(a)(5) of the Act (29 U.S.C. § 158(a) (5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees…." The obligation to bargain in good faith includes the duty to provide relevant information needed by a union for the proper performance of its duties as the employees' collective-bargaining representative. *See Detroit Edison Co. v. NLRB*, 440 U.S. 301 303 (1979). In *NLRB v. Truitt Manufacturing Co.,* 351 U.S. 149, 152-53 (1956) ("*Truitt*"), the Supreme Court held that, pursuant to this duty to provide information, an employer can be required to allow a union to examine its financial records.

An employer's duty to provide financial information to a union, however, is triggered only when it has made a claim that it is financially unable to pay for the union's proposals. *Id.* at 153. *Accord Shell Oil Co. v. NLRB,* 457 F.2d 615, 618 (9th Cir. 1972). *See also ConAgra, Inc. v. NLRB,* 117 F.3d 1435, 1439 (D.C. Cir. 1997). Thus, under *Truitt*, there is no obligation to provide financial information where the employer claims an *unwillingness* to pay for the demands, but only where it claims an actual *inability* to pay. *Nielsen Lithographing Co.,* 305 NLRB 697, 700 (1991), *affirmed sub nom. Graphic Communications Local 508 v. NLRB,* 977 F. 2d 1168, 1170-71 (7th Cir. 1992). *Accord United Steelworkers of America,*

Local 14534 v. NLRB, 983 F.2d 240, 243-44 (D.C. Cir. 1993). Consequently, as the Supreme Court cautioned (*Truitt,* 351 U.S. at 153-54):

> Each case must turn on its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met.

Applying this good faith standard, the Board, with judicial approval, has found that there is no obligation to provide financial information where the employer, despite claims that it is doing poorly or losing money, subsequently disavows or retracts those statements indicating its inability to pay. Indeed, so long as the circumstances indicate that the employer is acting in good faith, it may clarify statements -- rashly or mistakenly made -- that could be misinterpreted as a plea of poverty.[4] In short, an employer's effective disavowals of claims of poverty

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[4] *See Paperworkers,* 981 F.2d at 862-866 (finding that the employer effectively "disavowed any plea of poverty," despite earlier claims that it was "in trouble," because the Board reasonably concluded that the employer subsequently demonstrated that its "demand for concessions was rooted in its desire to maximize profits and not in a 'plea of poverty' "); *Central Management Co.,* 314 NLRB 763, 768-69, 776-77 (1994) (finding that an employer's statement that it "does *not claim* an inability to pay" was a "retraction' sufficient to obviate [an] obligation to furnish information" incurred by an earlier statement that it "could not afford" certain benefits); *Genstar Stone Products Co.,* 317 NLRB 1293, 1300 (1995) (finding that the employer's repeated statements that it was not pleading poverty constituted an effective disavowal of its earlier claim that "the well is dry" and its complaint that the union's demands were "too steep"); *Advertisers Mfg. Co.,* 275 NLRB 100, 101, 125-27 (1985) (concluding that, because the employer "at all times expressed an unwillingness to pay rather that an inability," its claims of a poor "level of business" should not be construed as pleas of poverty).

can nullify them, consistent with good faith bargaining. Applying the foregoing principles of disavowal and retraction to the instant case, the Board found that the Company's April 30 letter effectively nullified any claim of inability to pay that Tan may have made the previous day, and that the Company therefore had no obligation to furnish the Union with the requested financial information. (ER 75.) As we show below, the Board's factual findings are supported by substantial evidence, and the Union has not shown that the Board's dismissal of the complaint has "no rational basis."

C. The Company Disavowed and Retracted Any Claim of Inability to Pay

Substantial evidence supports the Board's reasonable finding that Company General Manager Tan, in good faith, promptly disavowed her April 29 statement that the Company would "go broke" by agreeing to the Union's proposals. As the Board recognized (ER 76), the circumstances surrounding this and other statements by Tan are subject to "the *Truitt* Court's caution against automatic application of the general rule" favoring financial disclosure, and instead require application of the Board's precedent concerning disavowal of claims of inability to pay.

Applying that precedent to the facts here, the Board observed (ER 76) that Tan's "go broke" statement was not made reflectively, but "orally, during the heat of a negotiating session." Indeed, Tan's statement emerged during a fast-paced exchange with Union Official Ferro, coming only after Ferro pointedly asked Tan

whether she was saying the Company "could not afford" the Union's proposals. After Ferro presented the Union's demand for information, Tan responded "the very next day" with a hand-delivered letter "denying that she had made a claim of inability to pay." She then clarified her position by explaining that she was not pleading poverty, but simply taking a "more cautious approach" in negotiations due to uncertain economic times. And, notably, the Company adhered to its clarified position for the duration of bargaining.

These facts fully support the Board's finding (ER 76, 77) that Tan's April 29 response, "made immediately and in writing … unequivocally advised the Union that the [Company's] ability to pay for the Union's bargaining proposals was not in question." For any statement indicating inability to pay was promptly disavowed and accompanied by the Company's good faith explanation of the Company's real motivation for its bargaining position. Indeed, it was rational for the Board to conclude that Tan's statement that the Company would "go broke" if it accepted the Union's proposals was an exaggerated -- and likely forgotten -- response to the Union's negotiating. The Board therefore reasonably concluded that the Company -- which immediately clarified any miscommunication within 24 hours of the Union's information request -- acted in concert with its duty to bargain in good faith.

The Board's decision here is consistent with its decisions in *Advertisers, Genstar,* and *Central Management.* For here and in each of those cases, the Board recognized, consistent with *Truitt*, that employer statements indicating a claim of inability to pay are not to be viewed in isolation and may be clarified by contemporaneous or subsequent statements, so long as the facts demonstrate that the employer acted in good faith. Here, the Board had a "rational basis" for its finding that the Company's statements met that good faith standard.[5]

D. The Union Has Failed to Demonstrate That The Company Did Not Bargain in Good Faith

The Union has not met its heavy burden of showing that the Board had "no rational basis" for determining that the Company effectively disavowed any claim

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[5] There is no merit to the Union's attempts (Br 26 n. 13) to distinguish "disavowal" cases like *Advertisers* and *Genstar* (p. 11, above) on the ground that in those cases the employer asserted from the "outset" or "beginning" that it was unwilling, rather than unable, to meet the union's demands. Here, the Company's "immediate and in writing" disavowal of its impulsive oral claim, accompanied by the explanation that it was merely unwilling to pay, is substantially indistinguishable from the employer's conduct in *Advertisers* (275 NLRB at 101-02) and *Genstar* (317 NLRB at 1298, 1300). Similarly, the Union fails (Br 26 n.13) to distinguish the Board's finding of effective retraction in *Central Management* on the ground that the union in that case believed it obvious that there had been a retraction. 314 NLRB at 769. The Board in *Central Management* did not limit its analysis to the fact that the union believed it obvious that the employer was retracting its statement. Rather, the Board noted the clarity of the retraction, other reasons offered by the employer for its unwillingness to accept the union's proposals, and the employer's adherence to the retraction throughout bargaining.

of inability to pay. Its basic contention -- that the Company did not act in good faith because it *disingenuously* retracted Tan's statement -- reads motives into the Company's actions that simply are not there. Instead, the Board's reading of the record, which recognizes Tan's statement as a forgettable quip made in the heat of negotiations quickly retracted, was reasonable and consistent with good faith bargaining. The Union's arguments place form over substance, and ignore *Truitt's* caution against the mechanical application of the rules governing claims of inability to pay.

The Union primarily contends (Br 2, 4, 11, 20-23, 25, 26, 30) that, because the administrative law judge credited testimony that Tan made the April 29 "go broke" statement over her denial, Tan's actions were "lies" indicating unlawful bad faith bargaining. The Union's contention is without merit and was properly rejected by the Board. As the Board stated, "the discrediting of a witness … is not a finding that she lied under oath." (ER 77.) *See, for example, Precoat Metals,* 341 NLRB No. 143, 2004 WL 1664237, *5 (2004) (distinguishing between a witness who has simply been discredited and one that has "deliberately lied").

Here, the administrative law judge made no finding that Tan or her corroborating witness Carl Benninger intentionally lied. Indeed, the judge's credibility determination does not evaluate or discuss their testimony. Instead, it is based on nothing more than the judge's conclusion that Union Representative

Ferro's testimony was "the most persuasive." [6] As the Board observed, "[a] witness can be mistaken or, through faulty recollection, may honestly believe her testimony," and there is "nothing in Tan's denials to suggest that the [Company] was acting in bad faith." Thus, because there is no finding that Tan's denials or the Company's retractions were in bad faith, the Court should not deny enforcement to the Board's decision or order a futile remand directing the judge to make a credibility determination already made.

There is also no merit to the Union's contention (Br 2, 3, 8, 11, 14, 16, 20, 23, 25-28) that Company's April 30 letter did not constitute an effective retraction because the letter denied making the claim rather than seeking to retract it. The Union's mechanical interpretation of the letter's wording ignores its plain meaning. While Tan's letter may have expressed Tan's mistaken but honest belief that she never said "I'd go broke," it also, as the Board noted (ER 77), "made it absolutely clear that [the Company] was not unable to meet the Union's demands" and "effectively retracted any claim of inability to pay…. during the April 29 negotiating session." Concededly, as the Union suggests (Br. 20-21), some discord

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[6] This is in contrast to other cases, in which this same administrative law judge has not hesitated to say so when she thought a witness's testimony was inherently untruthful. *See, for example, Grant Prideco,* 337 NLRB 99, 103 (2001) (discrediting witness on basis of poor memory and testimony "swayed" by others); *Healthcare Employees Union, Local 399*, 333 NLRB 1399, 1400 n.7 (2001) (discrediting testimony as "often confused and sometimes vague").

in negotiations may be the expected result of Tan's unintended statement and faulty memory; however, mere lapses in recall do not rise to the level of bad-faith bargaining.

Next, the Court should reject the Union's suggestion (Br. 17-20) that it should apply a less deferential standard of review to the Board's interpretation of the facts than the substantial evidence standard because the Board reversed the finding of the administrative law judge. To the contrary, as the Court stated in *Penasquitos Village, Inc. v. NLRB,* 565 F.2d 1074, 1076-80 (9th Cir. 1977) *("Penasquitos"),* the substantial evidence standard "is not modified in any way when the Board and its [administrative law judge] disagree." 565 F.2d at 1076 (citation omitted). *Accord NLRB v. Brooks Cameras, Inc.,* 691 F.2d 912, 917 (9th Cir. 1980). Rather, while an administrative law judge's recommended decision may be considered in determining how substantial the Board's findings are, inferences drawn from the evidence itself ("derivative inferences") are entitled to affirmance by the Court unless those inferences are "irrational," "tenuous," or "unwarranted." *Penasquitos,* 565 F.3d at 1078-79 (citation omitted). *See id.* ("[I]t should be noted that the administrative law judge's opportunity to observe the witnesses' demeanor does not by itself require deference with regard to his or her derivative inferences.")

Here, the Board did not disagree with the administrative law judge's testimonial inferences. Indeed, the Board affirmed the judge's credibility finding that Tan made the statement in question. (ER 75 n.3, ER 77.) The Board went on to recognize, however, that "the issue here" is not the credibility of Tan's testimony regarding the April 29 statement, but whether her letter the following day effectively retracted it. (ER 77.) As demonstrated above, the Board's resolution of that issue was clearly based on a derivative inference from all the relevant evidence, and the Union has failed to demonstrate that the Board's findings are "irrational," "tenuous," or "unwarranted."

Finally, the Union relies upon numerous cases that do not help advance its argument. For example, its citation (Br 23, 26, 27, 28) to *Lakeland Bus Lines, Inc.*, 335 NLRB 322, 322, 326 (2001), *enforcement denied*, 347 F.3d 955 (D.C. Cir. 2003), is misplaced. As the Board noted in distinguishing *Lakeland* (ER 76), the Company's claim here was made "orally" during the heat of negotiations, rather than "reflectively" by letter in *Lakeland.* Also, the Company's denial here was made immediately and with clarification, unlike the *Lakeland* denial letter, which took two weeks and made no attempt to clarify the mistake. The timeliness and accompanying explanation make the Company's disavowal here far more effective than in *Lakeland*, regardless of the absence of formal language acknowledging the earlier statement and formally retracting it.

The Union (Br 27- 28) next cites several cases assertedly involving the Board's rejection of employer "disavowals of poverty" as allegedly similar to the Company's here. Those cases, however, are inapposite to the facts here, which involve the immediate and forceful retraction of a single impulsive claim, accompanied by an explanation to which the Company consistently adhered throughout the remaining bargaining sessions. For instance, in *Cowin & Co.,* 277 NLRB 802, 802 n.1, 804-05, 811, 813, 815 (1985), the Board found that the employer could not negate its written and unwritten statements claiming inability to pay by simply declaring that they did not carry that meaning. In *S-B Mfg Co.*, 270 NLRB 485, 491-92 (1994), the employer's repeated claim that it could not afford the union's requests could not be negated by its use of "magic words" that it was not pleading poverty, particularly in light of its avowed refusal to furnish financial data to the Union "for any reason." In *CB Buick*, 206 NLRB 6, 8 (1973), the employer's repeated assertions during two bargaining sessions that it could not afford the union's demands -- part of a pattern of unlawful attempts to undermine the union -- could not be negated by its "belated retraction" of the claims through an "exercise in semantics." Finally, in *Unoco Apparel, Inc.*, 208 NLRB 601 (1974), *enforced*, 508 F.2d 1368, 1370 (5th Cir. 1975), the employer did not even make, or claim to make, a retraction or disavowal of its claim of inability to pay.

None of the above cases involve facts, as here, indicating a single impulsive plea of poverty that was retracted immediately.[7]

[7] The Union's reliance (Br 27-28) on subsequent company statements and actions to demonstrate that the Company was hiding its inability to pay to shield its books from disclosure is also unavailing. The Company's use of the phrase "times are tough" was limited to its April 29 oral statement; its statement that "sales are down" is inadequate to show inability, rather than unwillingness, to meet the Union's demands; and the subsequent layoff of unit employees took place three months later, necessitated by intervening events such as decreased sales and rising inventories. (ER 5, 6, 48 (Tr. 77), 50-51 (Tr. 87-91), 56 (Tr. 110), 59 (Tr. 123).)

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny the Union's petition for review.

STATEMENT OF RELATED CASES

Board counsel are unaware of any related case pending in this Court.

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National Labor Relations Board
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