

American Polystyrene Corporation and International Chemical Workers Union Council of the United Food & Commercial Workers International and its Local 1C. Case 31–CA–25761

March 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

This case presents the issues of whether the Respondent claimed a present inability to pay the Union's bargaining demands during collective-bargaining negotiations and whether the Respondent violated Section 8(a)(5) of the Act by refusing to furnish the Union with requested financial information.¹ The judge found that the Respondent communicated a present inability to pay at the April 29, 2002² bargaining session, and that the Respondent's subsequent statements on the matter did not serve to retract its initial claim of inability to pay. The judge concluded, therefore, that the Respondent's refusal to supply the requested financial information violated Section 8(a)(5). Having considered the decision and the record in light of the exceptions and briefs, we find that the Respondent almost immediately retracted any claim of inability to pay and was not, therefore, obligated to furnish the Union with the requested financial information. Accordingly, we have decided to affirm the judge's rulings, findings,³ and conclusions only to the extent consistent with this Decision and Order.

Facts

On April 22, the parties began bargaining for a successor contract to their 1999–2002 agreement. The Union presented a proposal that called for wage increases and increased employer contributions to employee 401(k) plans. On April 23, the Respondent proposed smaller wage increases, a suspension of the Respondent's matching 401(k) payments for an unspecified period of time, and the elimination of employer-provided meals. At the April 29 bargaining session, the Respondent specified a

1-year period for the suspension of its matching 401(k) payments. According to the credited testimony, the Union's chief negotiator, Jeffrey Ferro, asked the Respondent's general manager and chief negotiator, Carolyn Tan, if "things were really that bad." After Tan said things were tough, Ferro asked if Tan was saying that she could not afford the Union's proposals. Tan replied, "No, I can't. I'd go broke."⁴

At the end of the April 29 bargaining session, Ferro composed and hand-delivered a letter to Tan saying that Tan claimed that the Respondent could not afford the union proposals and asking to have the Union's accountant review the company's books. On April 30, Tan responded in a hand-delivered letter stating in relevant part: "I am rejecting this request. While I have told you that we are a small company and times are tough, at no time have I ever told you 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." Following subsequent discussions in which the parties argued their positions concerning whether the Respondent had claimed an inability to pay for the union proposals, the Union gave the Respondent a letter on May 14 reiterating its allegation that the Respondent claimed an inability to pay and demanding access to the Respondent's financial records. Tan responded by letter on the same date, denying that she said that the Respondent could not afford the Union's proposals and denying access to the financial records.

On June 18, the Union filed an unfair labor practice charge with the Board regarding its information requests. On August 1, the Respondent informed the Union that, due to poor sales and rising inventories, it planned to lay off employees as of August 30 for about 90 days. On August 30, the Respondent laid off seven of the eight unit employees.⁵ In a September 4 letter, the Union cited the layoffs and the bargaining history and again requested access to the Respondent's financial records to aid the parties in bargaining. In a September 6 letter, the Respondent again denied the Union's request.

The Judge's Decision

The judge found that the Respondent claimed an inability to pay when Tan responded to the Union's question about whether she could afford the Union's proposals by stating, "No, I can't. I'd go broke." The judge concluded that the Respondent, therefore, was obligated to provide information to substantiate its claim. See

¹ On January 24, 2003, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief; and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

² All subsequent dates refer to 2002 unless specified otherwise.

³ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

⁴ Tan testified that she said things were tough, but denied stating she could not afford the Union's proposals. As noted, the judge discredited Tan's testimony on this matter.

⁵ There is no allegation that these layoffs were discriminatory.

NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956) (an employer is obligated to provide information to substantiate a claim that it cannot afford to agree to bargaining demands); *Nielsen Lithographing Co.*, 305 NLRB 697, 700 (1991), *affd. sub nom. Graphic Communications Local 508 v. NLRB*, 977 F.2d 1168 (7th Cir. 1992) (assertion of inability to pay triggers duty to disclose financial information, while assertion of unwillingness to pay does not).

The judge noted that in subsequent discussions and letters on the matter, Tan denied making the “I’d go broke” statement. However, relying on *Lakeland Bus Lines, Inc.*, 335 NLRB 322 (2001),⁶ the judge concluded that Tan’s denials did not demonstrate a sufficient retraction of the Respondent’s claimed inability to pay. The judge found that Tan’s subsequent massive layoff of unit employees lent further support to this conclusion. Accordingly, the judge found the Respondent claimed an inability to pay and violated Section 8(a)(5) by its refusal to provide the requested financial information. We disagree for the reasons that follow.

Analysis

As the judge correctly stated, the law under *Truitt Mfg. Co.* requires that, when an employer asserts a claim that it is unable to afford a union’s proposals, it is obligated to provide the union subsequently requested financial information to substantiate that claim. In *Truitt*, however, the Supreme Court recognized that this general rule is not to be applied mechanically. The Court stated:

We do not hold, however, that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. 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.

Truitt, *supra*, 351 U.S. at 153–154. Further, the judge correctly noted that in certain circumstances the Board has held that an employer is not obligated to provide requested financial information to the union if the employer subsequently makes clear that it is not claiming a present inability to pay. See, e.g., *Advertisers Mfg. Co.*, 275 NLRB 100 (1985) (employer unequivocally disavowed inability to pay

⁶ The Court of Appeals for the District of Columbia Circuit denied enforcement of the Board’s decision, finding, *inter alia*, that the record did not support the Board’s conclusion that Lakeland had not retracted its alleged claim of inability to pay. 347 F.3d 955 (2003). The court stated: “Lakeland responded precisely to the Union’s request for financial information by making it unmistakably clear that it did not rely on an inability to pay to justify its bargaining position.” *Id.* at 964.

with specific written reasons for nonpayment of bonus); and *Central Management Co.*, 314 NLRB 763, 768–769 (1994) (after the employer disavowed an earlier inability to pay statement, the union admitted it was “obvious” employer no longer claimed an inability to pay). We find that the judge failed to apply properly the *Truitt* Court’s caution against automatic application of the general rule and the Board’s precedent concerning the retraction of claims of inability to pay.

Even assuming that Tan’s oral “I’d go broke” statement made during the heat of bargaining rose to the level of a claimed inability to pay, we find that the Respondent effectively retracted any such claim simultaneously with its denial of the Union’s request for information. Citing Tan’s statement, the Union submitted a request for information at the close of the bargaining session. On the very next day, Tan hand-delivered a letter in response denying that she made a claim of inability to pay and clarifying the Respondent’s position that the uncertain economic times called for a more cautious approach than the Union proposed. Thus, the Respondent’s response was made immediately and in writing, and it unequivocally advised the Union that the Respondent’s ability to pay for the Union’s bargaining proposals was not in question. Under the above cited precedent concerning disavowal of claims of inability to pay, the Respondent was not obligated to furnish the requested financial information to the Union.

The judge’s reliance on *Lakeland* is misplaced. In that case, the employer’s alleged claim of inability to pay was made in a letter to unit employees at the end of negotiations.⁷ The letter urged the employees to accept the employer’s final bargaining offer because the employer was “trying to bring the business into the black.” The employer denied the union’s request for financial information some 2 weeks after the union’s request was made, asserting that it never took the position that its financial position precluded it from agreeing to the union’s proposal. In contrast, the Respondent here made the alleged claim of inability to pay orally, during the heat of a negotiating session, not reflectively in a letter. Further, the Respondent denied the Union’s request for information and clarified its bargaining position immediately, within a day of the alleged claim of inability to pay, not 2 weeks later.

The dissent places great emphasis on Tan’s continued denials that she made an inability to pay claim, describing them as “falsehoods.” The dissent overstates the case. To be sure, the judge found that Tan made the “I’d

⁷ We find that it is unnecessary to pass in this case on the validity of the Board’s decision in *Lakeland Bus Lines*. As noted, that decision was reversed on appeal. See fn. 6, *supra*.

go broke” statement in the April 29 negotiations and we do not disavow that finding. The discrediting of a witness, however, is not a finding that she lied under oath. A witness can be mistaken or, through faulty recollection, may honestly believe her testimony. In any event, the issue here is whether, even assuming the “I’d go broke” statement was an inability to pay claim, the Respondent was making that claim at the time the information was allegedly due. Even assuming *arguendo* the information was due one day after a request for it, it is clear that, at that time, the Respondent made it absolutely clear that it was not unable to meet the Union’s demands. Further, unlike our dissenting colleague, we find nothing in Tan’s denials to suggest that the Respondent was acting in bad faith, a conclusion supported by the fact that no claim of bad-faith bargaining was made by the General Counsel. Cf. *Truitt*, supra, 351 U.S. at 153–154 (“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.”). In sum, we find that, regardless of Tan’s denial, the Respondent’s letter of April 30 effectively retracted any claim of inability to pay made by Tan during the April 29 negotiating session.

Our colleague notes that Respondent witness Benninger was discredited as well. However, we do not think that this changes the nature of the case. Inasmuch as Benninger corroborated Tan, the judge’s discrediting of the one necessarily meant the discrediting of the other. There is no finding by the judge that either of the two witnesses intentionally lied. Nor is there a finding that Tan’s letter of April 30 was false. There is only a finding that it was an insufficient retraction under *Lakeland Bus*. As discussed, we believe that *Lakeland Bus* is distinguishable.

Our dissenting colleague would find that the Respondent’s denial that it claimed an inability to pay precluded it from retracting that claim. He reasons that, because the Union knew that Tan had made the “I’d go broke” statement, it would put no trust in any attempted retraction that began with a denial of the statement. We disagree. Assuming that Tan’s statement constituted a claim of the Respondent’s inability to pay, the Respondent may nonetheless demonstrate, as an affirmative defense, that it retracted the claim and thus obviated its obligation to furnish requested financial information. See *Central Mgmt*, supra at 769. The judge’s finding that the statement was made did not prevent the Respondent from asserting such a defense, and we find that the defense is meritorious. As discussed above, regardless of the initial denial of the claim, Tan’s April 30 letter clearly informed the Union that the Respondent was not claiming an in-

ability to pay, and the Union could reasonably have relied on that representation in further bargaining.

For all of the reasons discussed above, we find that the Respondent had no duty to provide the requested financial information. Accordingly, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

MEMBER WALSH, dissenting.

The judge correctly decided that the Respondent claimed an inability to pay the Union’s bargaining proposals, failed to retract its claim, and violated Section 8(a)(5) of the Act by its failure to provide the Union with requested financial information.

According to the credited testimony, when the Respondent’s chief negotiator, Carolyn Tan, was asked if she could not afford the Union’s proposals, she told the Union bargaining team, “No, I can’t. I’d go broke.” This statement, beginning with an admission that the Respondent cannot afford the Union’s proposal and concluding with an emphasizing point that it would “go broke,” is a clear claim of inability to pay. The real question in this case is whether the Respondent’s subsequent statements and actions served to retract its claim. They did not.

Background

The parties began bargaining for a successor contract on April 22, 2002.¹ The Union proposed wage increases and increased contributions to employee 401(k) plans. On April 23, the Respondent proposed smaller wage increases and a suspension of the Respondent’s matching 401(k) payments for an indefinite period. On April 29, the Respondent proposed suspending its 401(k) payments for a 1-year period. According to the credited testimony, the Respondent’s general manager and chief negotiator, Carolyn Tan, told the Union’s chief negotiator, Jeffrey Ferro, that things were tough. When Ferro asked if Tan was saying that she could not afford the Union’s proposals, Tan replied, “No, I can’t. I’d go broke.” Tan testified that she said that things were tough, but that she did not say she could not afford the Union’s proposal. As noted above, the judge discredited Tan’s denial that she had made the “I’d go broke” statement.

On April 29, Ferro hand-delivered a letter to Tan noting Tan’s claim that the Respondent could not afford the Union proposals, and asking to have the Union’s accountant review the company’s books. On April 30, Tan denied the Union’s request in a hand-delivered letter stating, *inter alia*, “While I have told you that we are a small

¹ All dates are in 2002 unless specified otherwise.

company and that times are tough, at no time have I ever told you 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.” On May 14, after further discussions between the parties about the Respondent’s alleged inability to pay, the Union gave the Respondent a letter reiterating its allegation that the Respondent claimed an inability to pay and demanding access to the Respondent’s financial records. Tan responded by letter on the same date, denying that she had made any claim of inability to pay and denying the Union’s request.

Analysis

It is well settled that an employer violates Section 8(a)(5) of the Act by refusing to provide the collective-bargaining representative of its employees with requested information to substantiate a claim that it cannot afford to agree to bargaining demands. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). Here, there is no question that the Respondent claimed that it could not afford to meet the Union’s bargaining positions. Tan flatly stated that she could not meet the demands and that she would “go broke” if she had to agree to them. There were no further qualifying statements, which might give these plain words a different meaning.

The Board has held, however, that even if the employer initially claims an inability to pay, no duty to disclose arises if the employer subsequently makes clear that it is not claiming a present inability to pay. See, e.g., *Advertisers Mfg. Co.*, 275 NLRB 100 (1985) (employer unequivocally disavowed inability to pay with specific written reasons for nonpayment of bonus); and *Central Management Co.*, 314 NLRB 763, 768–769 (1994) (union admitted it was “obvious” employer no longer claimed an inability to pay). Tan’s April 30 letter stating that the Respondent was not claiming an inability to pay is not a valid retraction under this precedent, because the letter’s alleged retraction is compromised by Tan’s false denials that she ever made a claim of inability to pay.

Following the Union’s request for financial information, all of the Respondent’s statements about its bargaining position began with a denial that Tan made the “go broke” statement. Because the judge discredited Tan’s denial that she uttered the “go broke” statement, each of the Respondent’s subsequent alleged retractions began with a falsehood. Clearly, lying is a sign of bad-faith bargaining. See *Truitt*, supra, 351 U.S. at 152 (“Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims.”); *Central Management*, supra, 314 NLRB at 770 (“The making of false claims does not serve any legitimate purpose, but

instead serves to impede progress at the bargaining table.”). An effect of lying is to place in doubt the veracity of any subsequent statements about the subject matter of the lie. Here, the Union knew that Tan had said the Respondent would “go broke.” When Tan began her so-called clarification of the Respondent’s bargaining position with a lie about the “go broke” statement, there was no reason for the Union to believe anything else Tan had to say on the matter. In sum, the Union had no basis for believing that the Respondent was acting in good faith when it purported to retract its claim of inability to pay.² Under these circumstances, the Respondent did not unequivocally retract its initial claim.

The judge properly applied *Lakeland Bus Lines, Inc.*, 335 NLRB 322 (2001), enf. denied 347 F.3d 955 (D.C. Cir. 2003), to find that the Respondent failed to retract its claim of inability to pay because the Respondent never acknowledged that it had made such a claim. However, the present matter presents a stronger case that the Respondent’s denial did not serve as an effective retraction. In *Lakeland*, the employer did not deny that it had made statements about business losses; instead, the employer asserted that its statements about business losses did not amount to claims of inability to pay. In contrast, the Respondent here does not attempt to explain or qualify the “go broke” statement and instead denies that it made such a statement.³ Thus, the Respondent remained obli-

² The majority states that the judge’s discrediting of Tan’s testimony is not the same as a finding that she lied: “A witness can be mistaken or, through faulty recollection, may honestly believe her testimony.” Tan, however, was not the only Respondent official discredited by the judge. Carl Benninger, the Respondent’s technical operational manager, also testified that Tan never made the “go broke” statement. Based on demeanor, as well as Ferro’s bargaining notes, the judge credited the two Union witnesses and concluded that Tan did, in fact, state that the Respondent would “go broke” if it agreed to the Union’s proposals. It is highly unlikely that the Respondent’s two witnesses, Tan and Benninger, were both “mistaken” or simultaneously suffering from a “faulty recollection” on such an important matter. It is far more likely that they shaded their testimony to put the Respondent in the best possible legal position. But even if they both honestly believed their testimony, the Union was still asked to accept the Respondent’s alleged retractions that always were prefaced with a statement that the Union knew (and the judge found) was untrue. Thus, the Union still had no basis for believing that the alleged retractions were made in good faith.

³ Although the court of appeals did not enforce the Board’s order in *Lakeland*, the court’s decision acknowledged that concerns present in this case were not at issue in the matter before it. In finding that the employer’s response to the request for financial information made it clear that the employer was not relying on an inability to pay, the court stated, “[t]here is nothing in the Board’s order or the ALJ’s findings to suggest that these disavowals were made disingenuously or in bad faith.” *Lakeland Bus Lines v. NLRB*, 347 F.3d at 964 (citation omitted). In this case, the credibility findings establish that Tan did claim the Respondent would “go broke” if it paid the Union’s proposals. Accordingly, the Respondent’s subsequent denials of this statement were disingenuous and in bad faith. The Respondent’s denials, therefore, were

gated to provide the requested financial information, and its refusal to do so violated Section 8(a)(5).

Alice Garfield, Atty., for the General Counsel.

David M. Lester, Atty., of Costa Mesa, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. This case was tried in, Los Angeles, California, on December 9, 2002.¹ Pursuant to charges filed by International Chemical Workers Union Council of the United Food & Commercial Workers International and its Local 1C (the Union), the Regional Director for Region 31 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing (the complaint) on October 18. The complaint, as amended, alleges that American Polystyrene Corporation (Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act).²

ISSUES

1. Did Respondent claim financial inability to pay for benefits proposed by the Union during collective bargaining?
2. Did Respondent violate Sections 8(a)(5) and (1) of the Act by refusing to furnish requested financial information to the Union?

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a California corporation manufacturing plastics at its facility in Torrance, California (the facility.) During the representative 12-month period preceding the complaint, Respondent purchased and received at its facility goods and services valued in excess of \$50,000 directly from points outside the State of California. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.³

not trustworthy statements and could not serve to retract its claim of inability to pay.

¹ All dates are in 2002 unless otherwise indicated.

² At the hearing, General Counsel amended the complaint to reflect the correct name of Respondent and the correct titles of Carolyn Tan and Carl Benninger, respectively, as general manager and vice president and technical and operations manager. Respondent's name appears as amended at the hearing.

³ Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, and/or unchallenged credible evidence.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Union's request for information

On April 22, Respondent and the Union commenced negotiations over the terms and conditions of a successor collective-bargaining agreement to cover the following employees: Production and maintenance employees, including shipping and receiving employees and truckdrivers at Respondent's facility. At the initial bargaining session of April 22, Jeffrey P. Ferro (Mr. Ferro), international union representative assigned to service the 1999–2002 labor contract between Respondent and the Union and to conduct successor agreement bargaining, presented the Union's proposals. The Union's proposals included, inter alia, five percent yearly wage increases and increased employer contribution to employee 401K plans. On April 23, the next bargaining session, Respondent, through Carolyn Tan (Ms. Tan), general manager and vice president, proposed to limit wage increases to one and two percent, respectively, in the second and third years of the contract, to discontinue Respondent's match of 401K employee contributions for an unspecified period, and to eliminate the existing meal provisions.

At the April 29 bargaining session, Respondent proposed to discontinue its 401K fund matching for a 1-year period. After discussion of Respondent's counterproposals, Mr. Ferro asked if "things," meaning Respondent's financial affairs, were "really that bad."

Ms. Tan said, "Things are tough."

According to Mr. Ferro, he asked, "Are you saying that you can't afford the Union's proposals," to which Ms. Tan replied, "No, I can't. I'd go broke." While Ms. Tan admitted saying times were tough on or before the April 29 session, she denied saying Respondent could not afford the Union's proposals. Roosevelt Parker (Mr. Parker), long-term employee and negotiating team member, essentially corroborated Mr. Ferro's testimony. Carl Benninger (Mr. Benninger), technical and operations manager, corroborated Ms. Tan's denial. Mr. Ferro and Mr. Benninger kept notes of the bargaining sessions. Both sets of notes are sketchy and almost solely reflect proposal particulars. However, the bargaining notes of Mr. Ferro include the following notation for the bargaining session of April 29: Why the take away—are things this bad—Would go broke if gave unions proposals.

Before he left Respondent's facility at the conclusion of the April 29 session, Mr. Ferro composed the following letter (the demand letter) on his laptop computer and hand delivered it to Ms. Tan:

Based on your responses on April 23 and today to Union Proposals . . . and the fact that you claim that things are tough and the Company cannot afford these items, the Union demands access to review the Company's books. Please let us know when they will be available for our review, so we can make arrangements for our accountant's schedule.⁴

⁴ Both Mr. Benninger and Ms. Tan testified that Mr. Ferro handed the demand letter to Ms. Tan at the beginning of the April 29 bargaining session. Ms. Tan testified that she did not read it until after the session. I cannot accept that testimony. I find it implausible that Ms. Tan would fail at least to scan the Union's letter since any letter would

On April 30, Ms. Tan in a hand-delivered letter to the Union responded:

I am in receipt of your letter dated April 29, 2002, in which you request access to the Company's books. I am rejecting this request. While I have told you that we are a small company and times are tough, at no time have I ever told you 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 this clears up any confusion that you have regarding our responses to your proposals.

The parties discussed Respondent's financial condition again during the May 2 bargaining session. Mr. Ferro asked if business was really that bad, and Ms. Tan replied, "Have you seen sales lately?"

At the negotiating meeting of May 14, Mr. Ferro asked that Respondent comply with the Union's information requests. Ms. Tan said that the company was not taking a position of financial hardship. Mr. Ferro asked why the company had proposed "all these take aways." Ms. Tan said that Respondent had looked at other companies that were not providing meal coverage similar to Respondent's. By hand-delivered letter to Ms. Tan dated May 14, Mr. Ferro wrote as follows:

We have reviewed our notes and our understanding of what has been said by you . . . and it is clear that you said you could not afford the Union's proposals or to continue paying meal allowances or matching money on the employees' 401K. During one session our notes reflect the following dialog:

Union: Are things that bad that you can't continue to pay meal allowances and continue to match the 401K plan?

Carolyn: Things are tough.

Union: So are you saying you cannot afford the Union's proposals?

Carolyn: No I can't. I'd go broke

. . . [T]he Union again demands access to review the Company's Financial Records. Failure to comply will result in the filing of Unfair Labor Practice Charges with the National Labor Relations Board.⁵

By letter dated the same day, Ms. Tan responded:

I am in receipt of your letter dated May 14, 2002, that I received today in which you assert that I told you that American Polystyrene could not afford the union proposals. You further contend that your notes reflect that I said, "No I can't. I'd go broke." I never said these words or anything similar. As I wrote you in my last letter, I have never stated that we could

likely relate to negotiations, and it is reasonable to expect that if the letter had been delivered at the beginning of the session, Ms. Tan would have mentioned it during negotiations.

⁵ According to Mr. Ferro, the quoted language in this letter was based on the notes of employee Chris Thomas who was present at the April 29 negotiation. Mr. Thomas later told Mr. Ferro that he had destroyed his notes.

not afford any of your proposals. The fact of the matter is that after I informed you that times are tough, you asked me, "Are things that bad?" I responded, "Have you looked at sales." Because by refusing to provide International Chemical Workers Union Council of the United Food & Commercial Workers Union International Union and Its Local 1C with requested financial information I have never told you that we cannot afford any of your proposals, it would be inappropriate for me to allow you access to our financial records, and hence, I am denying your request.

On June 18, the Union filed an unfair labor practice charge with the Board alleging, in part, that Respondent refused to supply information to the Union in violation of Section 8(a)(5) of the Act.

By email of August 1, Ms. Tan notified the union that due to unimproved sales and rising inventories, Respondent tentatively planned to lay off employees, effective August 30, for approximately 90 days. On August 30, Respondent laid off nearly the entire unit.

By letter dated September 4, the Union again requested access to Respondent's financial records stating, in part, as follows:

In light of the Company's most recent action, "temporarily" discontinuing operations and laying off bargaining unit employees, combined with your proposals to freeze 401K matches for one year, to discontinue meal allowances and your efforts to have non-bargaining unit employees and supervisors do bargaining unit work to avoid paying overtime to the bargaining unit employees, we are confident any reasonable person assigned to look at the evidence in this matter will indeed conclude that the company's financial records must be opened for review by the Union. To avoid the inevitable and to help move negotiations forward, please comply with this request by Friday, September 13, 2002. The providing of solid evidence as to the Company's financial position may provide ample room for more creative, expeditious and positive bargaining.

By letter dated September 6, Respondent again refused the Union's request to see its financial records.

B. Credibility

The only relevant credibility question herein relates to an exchange between Mr. Ferro and Ms. Tan during April 29 negotiations. Mr. Ferro and Mr. Parker testified that Ms. Tan claimed financial inability to fund the Union's proposals. Ms. Tan and Mr. Benninger denied any such assertion. Mr. Ferro's bargaining notes tend to substantiate his version of the exchange. The parties' correspondence following the April 29 negotiating session is essentially consistent with each party's testimony and contributes nothing to resolving credibility. I have largely considered witness manner and demeanor as well as testimony congruity in determining which testimony is the most persuasive. Mr. Ferro's testimony was consistent and detailed, and he appeared to have good recall of events. I credit Mr. Ferro's testimony of the April 29 exchange and conclude

that Ms. Tan did, in fact, state that Respondent could not afford the Union's proposed benefits.

C. Discussion

An employer violates Section 8(a)(5) of the Act by refusing to provide the collective-bargaining representative of its employees with requested information to substantiate a claim that it cannot afford to agree to bargaining demands. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). A claim of financial inability to pay is not the same as a claim of competitive disadvantage. In the former instance the employer claims it cannot pay and in the latter simply asserts it will not pay. *Nielsen Lithographing Co.*, 305 NLRB 697, 700 (1991), *affd. sub nom. Graphic Communications Local 50B v. NLRB*, 977 F.2d 1168 (7th Cir. 1992). An unwillingness to pay does not trigger an employer obligation to turn over financial records. Claims of economic hardship and business losses can reasonably convey "a present inability to pay" and "must be evaluated in the context of the particular circumstances [of the] case." *Lakeland Bus Lines, Inc.*, 335 NLRB 322 (2001), citing *Nielsen Lithographing Co.*, *supra*, and *Shell Co.*, 313 NLRB 133 (1993).

In the instant matter, Respondent's negotiator, Ms. Tan, specifically stated during negotiations that the company could not afford the Union's proposals. Thereafter, in declining to furnish the requested information, Ms. Tan consistently denied making any such statement. Respondent argues that where an employer makes clear that it is not pleading inability to pay or if an employer retracts its claimed inability to pay, the Board will not require the employer to open its books to the Union. In this regard, Respondent cites *Genstar Stone Products*, 317 NLRB 1293, 1298 (1995); *Advertisers Mfg. Co.*, 275 NLRB 100 (1985); and *Central Management Co.*, 314 NLRB 763, 763-769 (1994). The cases are not wholly apposite. In *Genstar Stone Products*, the employer never claimed that a poor economic condition was the reason for proposed reductions and a statement that "the well was dry" was accompanied by an explanation that the bargainer had no authority to offer more. In *Advertisers Mfg. Co.*, the employer expressly and unequivocally disavowed any inability to pay, including providing specific written managerial reasons for nonpayment of a bonus. In *Central Management Co.*, the union admitted that it was "obvious" the employer no longer claimed an inability to pay. Here,

Respondent neither retracted its claim of inability to pay nor asserted an ability to pay the increased benefits proposed by the Union. Rather, Respondent's entire conduct has been consistent with a claim of inability to pay: through Ms. Tan, Respondent proposed reducing contractual benefits; said it would "go broke" if it met the Union's proposals; even while denying the "go broke" statement, said that "things are tough;" and instituted an economic layoff of most of the unit employees. In these circumstances, Respondent's denial that it had expressed any inability to pay is at odds with its continuing words and conduct and does not constitute a sufficient retraction. See *Lakeland Bus Lines, Inc.*, *supra* at 328, in which the Board concluded that the employer had not effectively communicated a retraction of its claimed inability to pay. Accordingly, I conclude that Respondent claimed financial inability to pay for proposed benefits during its collective bargaining with the Union, and violated Section 8(a)(5) and (1) by refusing to furnish requested financial information to the Union.

CONCLUSION OF LAW

By refusing to provide International Chemical Workers Union Council of the United Food & Commercial Workers International and Its Local 1C with requested financial information, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

[Recommended order omitted from publication.]

⁶ 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.