

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

**AMERICAN POLYSTYRENE CORPORATION**

**and**

**Case 31-CA-25761**

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

**Alice Garfield, Atty.**, of Los Angeles, California,  
Counsel for the General Counsel

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

**DECISION**

**Statement of the Case**

LANA H. PARKE, Administrative Law Judge. This case was tried in, Los Angeles, California on December 9, 2002.<sup>1</sup> 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 of 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 Sections 8(a)(5) and (1) of the National Labor Relations Act (the Act).<sup>2</sup>

**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

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<sup>1</sup> All dates are in 2002 unless otherwise indicated.

<sup>2</sup> 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.

## Findings of Fact

### I. Jurisdiction

5 Respondent is a California corporation manufacturing plastics at its facility in Torrance,  
California (the facility.) During the representative twelve-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  
10 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.<sup>3</sup>

### II. Alleged Unfair Labor Practices

#### A. The Union's request for information

15 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:

20 Production and maintenance employees, including shipping  
and receiving employees and truck drivers 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  
25 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,  
30 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  
35 matching for a one-year period. After discussion of Respondent's counter proposals, Mr. Ferro  
asked if "things," meaning Respondent's financial affairs, were "really that bad."

Ms. Tan said, "Things are tough."

40 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  
45 (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

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

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.

5 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:

10 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.<sup>4</sup>

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

20 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.

25 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.

30 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:

35 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:  
 40 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.

45 \_\_\_\_\_  
 50 <sup>4</sup> 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 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.

...[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.<sup>5</sup>

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

10 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 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.

20 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.

25 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.

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

35 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.

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

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50 <sup>5</sup> 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.

## 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 1169 (7<sup>th</sup> 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 No. 29 (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 slip op. 7, 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 Sections 8(a)(5) and (1) by refusing to furnish requested financial information to the Union.

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### Conclusions 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.

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### 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.

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>6</sup>

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### ORDER

The Respondent, American Polystyrene Corporation, Torrance, California, its officers, agents, successors, and assigns, shall

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1. Cease and desist from
  - (a) Refusing to provide International Chemical Workers Union Council of the United Food & Commercial Workers International and Its Local 1C with the financial information requested in its letter of April 29, 2002.
  - (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act
  - (a) Provide the Union with the financial information requested in its letter of April 29, 2002.
  - (b) Within 14 days after service by the Region, post at its facility in Torrance, California copies of the attached notice marked "Appendix."<sup>7</sup> Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees

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<sup>6</sup> 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.

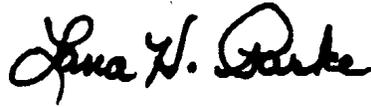
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<sup>7</sup> If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 30, 2002.

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

Dated, at San Francisco, CA: January 24, 2003



Lana H. Parke  
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT refuse to provide International Chemical Workers Union Council of the United Food & Commercial Workers International and Its Local 1C with requested financial information.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL provide International Chemical Workers Union Council of the United Food & Commercial Workers International and Its Local 1C with requested financial information.

AMERICAN POLYSTYRENE CORPORATION  
(Employer)

Dated: \_\_\_\_\_ By: \_\_\_\_\_  
(Representative) (Title)

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 of compliance with its provisions may be directed to the Board's Office, 11150 West Olympic Boulevard, Suite 700, Los Angeles, California 90064-1824. Telephone: 310-235-7123.