

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

WAYRON, LLC

and

Case 19-CA-32983

INTERNATIONAL BROTHERHOOD OF  
BOILERMAKERS, IRON SHIP BUILDERS,  
BLACKSMITHS, FORGERS AND HELPERS OF  
AMERICA, LOCAL 104; THE INTERNATIONAL  
ASSOCIATION OF MACHINISTS AND  
AEROSPACE WORKERS, AFL-CIO, DISTRICT  
LODGE 160, LOCAL LODGE 1350; AND THE  
INTERNATIONAL UNION OF PAINTERS AND  
ALLIED TRADES, DISTRICT COUNCIL 5

**ACTING GENERAL COUNSEL'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Sarah Pring Karpinen  
Counsel for the Acting General Counsel  
National Labor Relations Board, Region 19

## **INTRODUCTION**

Counsel for the Acting General Counsel (CAGC), pursuant to Section 102.46 of the Board's Rules and Regulations, respectfully submits the following Reply Brief in response to certain issues raised by Respondent in its Response to Acting General Counsel's Exceptions to the Decision of the Administrative Law Judge (Answer).

### **I. The CAGC did not fail to disclose the credibility findings of the ALJ to the Board**

In its Answer, Counsel for Wayron asserts that the CAGC "fails to disclose to the Board" in its Brief in Support of Exceptions to the Decision of the Administrative Law Judge (Exceptions) that the ALJ did not credit the testimony of union representatives Lance Hickey or Jeff Brooke to the extent their testimony contradicted that of Machinists representative Greg Heidal. (Answer, p. 6, fn. 4) This is untrue. The CAGC expressly stated in its Exceptions brief that the ALJ "did not credit the testimony of Hickey or Brooke to the extent it differed from that of Heidal." (Exceptions, p. 18)

Respondent further claims that the CAGC "fails to inform the Board that ALJ Wacknov expressly found McCain's and Stone's testimony incredible." (Answer, p. 8, fn. 5) This is also untrue. The CAGC's brief states as follows: "The ALJ completely dismissed testimony from employees [McCain and Stone] that Respondent informed them that it would close its doors if it did not get concessions from employees. The ALJ did not provide a basis for his refusal to credit the employees who testified." (Exceptions, p. 19) Clearly, the CAGC did not fail to disclose the ALJ's credibility

findings from the Board. In fact, the CAGC brought those findings to the Board's attention and challenged them on the grounds that the record did not support them. (Exceptions, pp. 18-21)

**II. The Board should find that Wayron was obligated to turn over its financial records**

Respondent contends that the facts and case law support the ALJ's finding that it was not obligated to turn over its books. There are no "magic words" which are necessary to find that an employer made a plea of financial hardship. Rather, an employer's "words and conduct must be sufficiently specific to link its bargaining position to economic hardship." *E.I. du Pont & Co.*, 276 NLRB 335, 336 (1985). As long as an employer's bargaining position "reasonably interpreted is the result of financial inability to meet with employees' demand rather than simple unwillingness to do so, the exact formulation used by the Employer in conveying the message is immaterial." *Gas Spring Co.*, 296 NLRB 84, 95 (1989), citing *Atlanta Hilton & Tower*, 271 NLRB 1600, 1602 (1984 (internal quotations omitted)).

The reasonable interpretation of Respondent's actions in this case are that it was claiming a financial inability to survive, absent the concessions it sought from the Unions. At the first bargaining session, Respondent presented the Unions with an extremely concessionary proposal that essentially gutted the previous collective bargaining agreement, eliminating just cause, pension, health and welfare, and all semblance of employee control over their own hours of work. In support of that proposal, co-owner Faye Dietz asked the Unions, "How are we going to pay the employees if there is no work? We can't even pay them with a sandwich." (ALJD at 4)

In the bargaining sessions that followed, Respondent told the Unions that it had a deadline with its bank in February, and told the Unions that it needed “cost reductions in a ‘short term fashion’ due to the need to acquire a new line of credit.” (ALJD at 7)

In a meeting with employees to explain the need for concessions to them, co-owner Jeff Spendlove said that Respondent “had to pull “X” number of dollars per year to cover overhead.” (ALJD pp. 7-8) Spendlove and Dietz told both employees and the Unions that Respondent’s “break-even” point was \$4.5 million dollars per year, and that the company was short of that figure. (ALJD at 8) The ALJ interpreted that statement as an assertion of lack of competitiveness; he held that it “appears that [with concessions] the Respondent would not have to ask the bank to continue the line of credit based on \$4.5 million gross revenue...but on a much lesser amount, thus being able to request and obtain a substantially reduced line of credit.” (ALJD at 8)

The ALJ’s interpretation of the above facts as merely a statement of lack of competitiveness, rather than a plea of poverty, is strained. According to the ALJ’s own reading of the facts and credibility findings, Respondent told employees and the Unions that it needed to reduce its overhead costs prior to going to the bank to extend its line of credit in February. Even accepting the ALJ’s rejection of testimony from employees and union representatives that Respondent said it would have to close its doors absent concessions, a statement that Respondent would have to reduce overhead in order to extend its line of credit conveys the same message.

It is important to note that this is not a case where Respondent was simply refusing to give in to union demands to increase wages or benefits. Respondent was engaged in an effort to completely gut the collective bargaining agreement. As

Boilermakers representative Lance Hickey noted, “I understand with the economic climate seeking a reduction, but the eliminating all, you know, basically all benefits was something that was out of the norm...we’ve seen some small reductions. I mean, less than a dollar reductions, but something this significant...was unheard of. So...his statement claiming the inability to pay was still in question.” (ALJD at 9)

The cases cited by Respondent in its brief are distinguishable from the facts presented in this matter. (See Answer, p. 24) In *Nielsen Lithographing Co.*, 305 NLRB 697 (1991), the Board found that an employer was not obligated to turn over financial information when it was asserting that it was still profitable, but anticipated problems with labor costs in the future. *Id.* at 701. Here, Respondent told the Unions and employees that it was facing an imminent deadline with its bank, not at some indeterminate point in the future. *Burrus Transfer*, 307 NLRB 226 (1992) and *AMF Trucking & Warehousing* both involved an employer’s refusal to increase wages and benefits, not decrease them, as Respondent did here. In *Stroehmann Bakeries v. NLRB*, 95 F.3d 218, 220 (2d Cir. 1996), the employer expressly asserted that its parent company had deep pockets, preventing it from claiming an inability to pay. *Id.* at 223. In *Lakeland Bus Lines v. NLRB*, 347 F.3d 955, 963 (D.C. Cir. 2003), the employer’s claim of short-term business losses did not amount to an inability to pay. There is no evidence that Respondent told the Unions or employees that its losses were only in the short term.

The facts in this case are more analogous to those in *Republic Die and Tool Co.*, 343 NLRB 683 (2004), where the employer sought to drastically cut wages and benefits, citing “global competition and the company’s financial problems,” as the reason. The union responded that it would not enter into negotiations for concessions unless it could

verify the employer's claims, and asked to audit the books. *Id.* at 684. The Board upheld the ALJ's finding that the employer was obligated to allow the union to do a financial audit. Respondent makes much of the fact that the Union did not want to agree to concessions for fear of a domino effect within other represented units in the industry; however, the Unions' representatives testified that their unions had accepted concessions from employers in the past, but not without those employers providing some financial documents to substantiate their claimed need for concessions. As in *Republic*, the Unions were simply seeking verification of Respondent's claims so that they could make an informed decision in bargaining.

Similarly, in *American Polystyrene Corporation*, 2003 WL 201325, rev'd, 341 NLRB 508 (2004), remanded to the Board to reinstate the ALJ's Decision by *International Chemical Workers Union Council of the United Food & Commercial Workers Int'l Union v. NLRB*, 467 F.3d 742 (9<sup>th</sup> Cir. 2006), the employer sought to cut employee benefits, and told the union it would go broke if it accepted the union's proposals. In subsequent communications, the employer asserted that it was not pleading poverty, but also stated that times were tough, continued to seek concessions, and laid off nearly the entire unit. The ALJ found that the employer had claimed an inability to pay and was obligated to turn over financial information to the union. The ALJ rejected the employer's argument that it had disavowed any plea of poverty, noting that the employer's denial to the union that it had claimed a financial inability to pay was "at odds with its continuing words and conduct and does not constitute a sufficient retraction." *American Polystyrene Corp.*, supra, ALJD at 5.

Although the Board reversed the ALJ's decision, the Ninth Circuit granted the Union's request for review and remanded the case to the Board to reinstate the ALJD, noting that was necessary to ascertain the employer's "intent from the substance of the employer's bargaining position, not the formal words used by the employer." *International Chemical Workers Union*, supra at 749, citing *The Shell Co.*, 313 NLRB 133, 133 (1993) (internal quotations omitted). The Ninth Circuit found that the employer's actions in seeking to reduce benefits and laying off employees further demonstrated that the employer had claimed a financial inability to pay, as the employer not only made statements at the table that times were tough, but "its actions were those of a company that could not sustain itself..." The Ninth Circuit agreed with the ALJ that the employer had not disavowed its claim of inability to pay, noting that the employer denied making such a claim, but continued to propose reducing benefits and cite its poor sales as the basis for seeking such concessions. *Id.* at 753.

Here, Respondent's actions in demanding that the Unions accept drastic wage and benefit cuts, coupled with the February deadline with the bank to renew its line of credit, conveyed a clear message that Respondent was asserting an inability to pay. Respondent stated in its response to the Unions' information request on November 10, 2010 that it was not claiming an inability to pay (GC Ex. 9), but it continued to demand concessions from the Unions and link those concessions to its economic condition. Respondent's bargaining notes from December 20 show that Spendlove asked Hickey whether "holidays and vacation were significant enough to put the company out of business." (R Ex. 8, p. 2) On February 4, Spendlove's notes reflect that the bargaining position of

Wayron was to “stay in business” as opposed to the Unions’ position to “retain pay/benefits for buys & themselves.” (R Ex. 8, p. 3)

Good faith bargaining requires that “claims made by either bargainer should be honest claims.” *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956) If a claim of financial inability to pay is important enough to raise at the bargaining table, “it is important enough to require some sort of proof of its accuracy.” *Id.* at 152-53. Respondent demanded that the Unions and its employees accept drastic cuts to wages and benefits. While demanding these cuts, Respondent talked about its imminent need to reduce overhead to obtain a line of credit from its bank. The Unions reasonably asked Respondent to substantiate its claims. By failing to do so, Respondent failed in its obligation to bargain in good faith the Unions representing its employees.

## CONCLUSION

Based on the above and the record as a whole, Counsel for the Acting General Counsel respectfully requests that the Board grant its Exceptions and modify the Administrative Law Judge's Decision accordingly.

Respectfully submitted this 7<sup>th</sup> day of June, 2012.

*Sarah Pring Karpinen*

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Sarah Pring Karpinen,  
Counsel for the Acting General Counsel  
NLRB, Region 19  
Patrick V. McNamara Federal Building  
477 Michigan Avenue - Room 300  
Detroit, Michigan 48226  
(313) 226-3229  
[Sarah.Karpinen@nrb.gov](mailto:Sarah.Karpinen@nrb.gov)

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of Counsel for the Acting General Counsel's Reply Brief in Support of Exceptions to the Decision Administrative Law Judge was served on the 7<sup>th</sup> day of June, 2012 on the following parties by electronic mail:

Kristin L. Bremer, Esq.  
Tonkon Torp LLP  
1600 Pioneer Tower  
888 SW Fifth Avenue  
Portland, OR 97204  
Email: [kristin.bremer@tonkon.com](mailto:kristin.bremer@tonkon.com)

Lance Hickey  
Boilermakers Local 104  
2800 1<sup>st</sup> Ave., Suite 220  
Seattle, WA 98121-1114  
Email: [Lancehickey@msn.com](mailto:Lancehickey@msn.com)

Greg Heidal  
IAM District Lodge No. 70  
3516 S 47th St., Ste 105  
Tacoma, WA 98409-4427  
[greg@iam160.com](mailto:greg@iam160.com)

Jeff Brooke  
Cement Masons Local 528  
11105 NE Sandy Blvd.  
Portland, OR 97220-2579  
[JBrooke@iupatdc5.org](mailto:JBrooke@iupatdc5.org)



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Sarah Pring Karpinen,  
Counsel for the Acting General Counsel  
NLRB, Region 19  
[Sarah.Karpinen@nlrb.gov](mailto:Sarah.Karpinen@nlrb.gov)