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UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION TWENTY FIVE

COUPLED PRODUCTS, LLC,	)	
	)	
	)	Case No. 25-CA-062263
and	)	25-CA-031883
	)	
INTERNATIONAL UNION, UNITED AUTOMOBILE,	)	
AEROSPACE AND AGRICULTURAL IMPLEMENT	)	
WORKERS OF AMERICA, UAW,	)	
	)	
	)	

**RESPONDENT’S ANSWERING BRIEF TO THE UNION’S EXCEPTIONS  
TO THE ADMINISTRATIVE LAW JUDGE’S DECISION**

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COMES NOW Respondent, Coupled Products, LLC (“the Company”), pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, and files its Answering Brief to Charging Party’s Exceptions to the decision of Administrative Law Judge Mark Carissimi, filed by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (“the Union”).<sup>1</sup>

**I. INTRODUCTION**

This case deals with the Union’s unreasonable demands to audit the Company’s books during contract negotiations despite repeated Company representations that it was not claiming to be unable to continue paying the wages and benefits demanded by the Union.

On June 20, 2012, the ALJ held that the Company had not pled an inability to pay the wages and benefits demanded by the Union, and that it did not violate Section 8(a)(5) and (1) of

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<sup>1</sup>In this brief, the Administrative Law Judge will be referred to as “the ALJ.” References to the Administrative Law Judge’s opinion will be referred to as “ALJD.” The General Counsel’s Exhibits will be designated as “GC” followed by the exhibit number. Respondent’s (Coupled Products, LLC)’s exhibits will be designated ALJD followed by the page.

the National Labor Relations Act by refusing to permit the union to audit its financial records. (ALJD at 19). The ALJ also determined that (1) the parties were at a valid impasse when the Company implemented its final offer, and dismissed the complaint allegation that the Company violated Section 8(a)(5) of the National Labor Relations Act when it implemented its final offer; and (2) the Union's strike is an economic strike, rather than an unfair labor practice strike.

The Union filed exceptions to most of the ALJ's factual and legal conclusions, particularly those findings that the Company had no obligation to submit to the audit demanded by the Union, and that it had not committed an unfair labor practice by refusing to submit to such an audit. Further, despite the void of evidence that the Union requested information regarding the Company's competitors, the Union now argues that the Company should have responded to its demands to audit the Company's books by providing the Union with information about the Company's competitors. The Company respectfully submits, as will be shown below, that the findings of the ALJ are supported by credible evidence and case law.

## **II. STATEMENT OF FACTS**

### **A. BARGAINING HISTORY**

The Union is the certified representative of all production and hourly employees employed by the Company at its Columbia City, Indiana facility ("the Columbia City facility").<sup>2</sup> In 2009, the Union and the Company negotiated a CBA, which was effective from June 17, 2009 through June 17, 2011. As of October, 2010, the Company had two production facilities: one in San Luis Potosi, Mexico, and the other in Columbia City, Indiana.<sup>3</sup> (Trans. at 29, 488-89).

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<sup>2</sup> The Columbia City facility was formerly a Dana Corporation facility. The Company purchased the Columbia City facility in 2007. (Trans. at 27).

<sup>3</sup> Throughout 2009 and 2010, the Company consolidated several non-union United States production facilities into its Columbia City facility. (Trans. at 487-88).

In a letter dated October 20, 2010, the Company notified the Union that, due to labor costs and other factors, it would be moving the work performed at the Columbia City facility to Mexico, thus closing the Columbia City facility. (GCX 3). The Company requested that the Union contact its counsel to discuss effects bargaining. (*Id.*). On October 28, 2010, the Company stated that it would move the business to Mexico to realize labor cost savings, and that it would honor the current CBA unless/until it was altered by a subsequent agreement. (GCX 4).

The Company, the Union international representatives, and the Union bargaining committee (“the committee”) engaged in effects bargaining throughout late 2010 and early 2011. In November, 2010, one of the Company’s owners, Brad Ginsberg, and its Director of U.S. Operations, Tina Johnson, met with Union international representatives Jeff Shrock and Ginny McMillin for continued effects bargaining over the proposed closure of the Columbia City facility and transfer of the Columbia City facility’s work to Mexico. At these meetings, McMillin and Shrock convinced the Company to entertain proposals by which it would keep work at the Columbia City facility. The Company responded that it wanted to maintain a United States production presence as both a matter of principle and a marketing tool. (GCX 5; Trans. at 475-76). The Company agreed to entertain Union proposals for cost savings at the Columbia City facility that would persuade it to continue operating the facility. (*Id.*).

In November, 2010, at the Union’s request, the Company provided the Union with the Columbia City facility’s general financial information by way of its Profit and Loss Statement, which detailed its cost of sales and its earnings before interest and taxes from January-October, 2010. (GCX Exh. 5; Trans. at 298; 301-02). This financial statement was the same financial statement that Johnson used to manage the Columbia City facility. (Trans. at 471-72). The

Union did not request any additional financial information throughout the course of the bargaining that occurred from November, 2010 through February 2011. (Trans. at 302).

On many occasions between late 2010 and early May 2011, the Company informed the committee and the Columbia City employees that although the *Company* (Coupled Products, LLC) was profitable, the Columbia City facility was losing money. (Trans. at 474-475, 489-90). The Company explained that it was effectively subsidizing the Columbia City facility with profits from its Mexico facility. (*Id.*). The Company explained to the committee and the Columbia City employees that in order to maintain a manufacturing presence in the United States, it was willing to continue funding the Columbia City facility if it operated at breakeven or a slight of a loss. (*Id.* at 475-76). However, the Company stated that it was unwilling to continue subsidizing the Columbia City facility at the same level it was currently subsidizing the facility. (*Id.* at 475-76).

In January, 2011, the Union membership voted in favor of the committee negotiating with the Company to arrive at a solution where the Company would be willing to continue operating the Columbia City facility. (GCX 6). On January 11, 2011, the Union proposed giving up giving up a ten minute paid lunch, and work from 6:30 A.M. until 2:50 p.m., which it believed would save approximately \$36,000 annually. (GCX 32).

On January 18, 2011, the Company proposed the following items to maintain a presence in Columbia City: (1) contribution from the Union to offset efficiency losses and out-of-pocket expenses related to the Post and Mail matter and related litigation; (2) changing fringe benefits to be consistent with other non-bargaining unit United States employees, including insurance benefits, holiday schedules, eliminating sickness and accident pay, bereavement to be taken as vacation or personal time, eliminating perfect attendance time, eliminating the 10-minute paid

lunch; and requiring vacation pay to be paid as taken, with no cash in lieu of unused vacation; (3) a \$0.75 per hour pay reduction, which was to increase by six cents per hour for every week thereafter until agreement was reached; (4) changing classifications so that temporary transfers were paid for the actual hours worked in the classification, employees would be allowed to bump only into a previously held classification; SSR and platers would become asterisk positions; and seniority would be held for one year; and (5) reducing the amount of notice required for layoffs from 3-5 days to 1-2 days. (GCX 7).

In a letter dated January 24, 2011, the committee indicated that the membership had rejected the proposal. (GCX 8). The committee forwarded the following counterproposal: (1) employees would pay 35% of current premiums, with other benefits remaining the same as of that date; (2) employees would be allowed to take Good Friday off with no pay, Christmas Eve Day and New Years Day off with four hours' pay, and all holidays in the current CBA remaining the same; (3) maximum amount of sickness and accident benefits would be reduced from twenty-six weeks to thirteen weeks; (4) allowing up to six paid days of bereavement time; (5) current CBA terms would be maintained with regards to perfect attendance time, but two hours would be paid and two hours unpaid; (6) vacation time would be paid when taken, with unused vacation days paid at the end of the vacation year; (7) giving up the 10-minute paid lunch and 10-minute paid break; (8) payment for temporary transfer for the actual hours worked in one-hour increments; (9) provision of one to two days' notice for layoffs; and (10) paying overtime at the rate of pay for the classification in which the employee was working. (*Id.*). The Union also offered to help the Company locate other insurance carriers to reduce the cost of medical insurance. (*Id.*). The Union refused the Company's request for contribution for losses associated with the Post & Mail matter. (*Id.*).

On January 25, 2011, the Company made an additional counterproposal. (GCX 9). This counterproposal requested a smaller portion of losses from the Post & Mail matter, dropped the requirement that seniority within a classification be held for one year, dropped the requirement that temporary transfers would be paid only for the actual hours worked in the classification, and dropped the proposed changes to layoff notification. (GCX 9). It also proposed an hourly wage reduction of \$0.87, which would increase by \$0.06 per hour every week until an agreement was reached. (*Id.*). On January 27, 2011, the Company provided the Union with its best and final offer. (GCX 10). In this offer, Johnson stated, “Columbia City from a financial aspect cannot come close to our Mexico labor alternative.” (*Id.*). This best and final offer contained the same terms as the January 25, 2011 offer. (*Id.*). The membership did not accept this offer.

At a plant-wide meeting in January, 2011, Ginsberg again indicated to Columbia City employees that, to maintain a United States presence, the Company was willing to continue operating the Columbia City facility if it could operate at a break-even level, or at a slight loss. (Trans. at 475-76; 489-90). However, Ginsberg indicated that the Company was unwilling to continue subsidizing the Columbia City facility to the same extent that it had been. (*Id.*).

On February 15, 2011, the committee proposed dates to continue bargaining over the closure of the Columbia City facility. (GCX Exh. 11). In a letter dated February 17, 2011, the Company stated that it preferred to wait until closer to the end of the CBA to negotiate, given the significant time that had elapsed since the Company and the Union had first met to discuss the transfer of work. (GCX Ex. 12). At least one committee member understood that the Company had switched gears from wanting to close the facility to looking at ways to continue operating the Columbia City facility. (Trans. at 188).

## **B. MAY AND JUNE, 2011 CONTRACT NEGOTIATIONS**

## 1. INITIAL PROPOSALS

In early May, 2011, prior to the first bargaining meeting, the Union and the Company exchanged contract proposals. Although the Company had expressed throughout effects bargaining that it sought labor cost savings to continue operating the Columbia City facility, the Union's proposal included a wage *increase* of \$0.90 per hour during the first year of the contract, and \$0.75 per hour during the second and third years of the contract, a \$500.00 signing bonus, and an increase in the Company's contribution to health insurance premiums.<sup>4</sup> (GCX Ex. 14). The committee testified that the amounts of the hourly wage increases were selected randomly, without research or analysis of the wages paid to manufacturing employees in the community. (Trans. at 134, 148, 158, 311). The committee presented no information to the Company regarding alternative health insurance carriers. (Trans. at 134-35, 354).<sup>5</sup>

The Company maintained its position that labor costs savings were necessary to warrant the continued operation of the Columbia City facility. Before preparing the Company's proposal, Johnson tasked Human Resources Director RoseAnn Rubrake with researching the wages paid by local manufacturing industry employers. (Trans. at 514). Rubrake contacted several local manufacturing facilities, including Dexter Axle, 80/20, Reelcraft, and People Link,<sup>6</sup> and inquired of their wage scale. (Trans. at 319-322, 455-458). Rubrake also visited the website for the Bureau of Labor Statistics and completed internet searches to determine competitive wages. (Trans. at p. 402-403, 410, R13). Rubrake learned that local manufacturing industry

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<sup>4</sup> Under the 2009-2011 CBA, bargaining unit employees contributed between twenty-one and thirty-five percent of the health insurance premiums. (GCX 2 at p. 64; GCX Exh. 35). Under the Union's proposal, employees would contribute only twenty percent of their health insurance premiums. (GCX at Ex. 14).

<sup>5</sup> While Kathy Smith contends that she was "pretty sure" that committee members were "making calls" to alternative insurance carriers during negotiations for a new contract, the committee members testified that they "called around" and wrote down information for themselves, but did not present any information to the Company. (Trans. at 134-35; 251).

<sup>6</sup> PeopleLink is a temporary services staffing facility. Several manufacturing companies indicated to Rubrake that they used temporary staffing companies for their unskilled labor needs.

employers were not offering benefits, and that these employers were paying their skilled workers *more* than the Company was paying its skilled workers, but considerably *less* than the Company was paying its unskilled workers. (R10; R11). Thus, if the Company reduced skilled employee wages, its wages would not be competitive with those paid by local employers, making it difficult for the Company to hire and retain these employees. However, it could substantially reduce the wages paid to unskilled employees and still pay a competitive wage. (R11). Using this information, the Company altered its proposal requiring a wage cut from all employees, and instead required a wage cut from the unskilled employees.

The Company's proposal included: a \$4.50 per hour wage reduction for unskilled employees;<sup>7</sup> elimination of sickness and accident pay; reduction in paid vacation; and elimination of paid perfect attendance time. (GCX 13). The Company's proposal also included the elimination of its contribution towards group health insurance premiums.<sup>8</sup> Additionally, the Company's proposal included mandated use of paid vacation time during July and December plant shutdowns; changes to call-in pay; the elimination of triple time for holidays; changes to classifications; elimination of layoff notice and recall; changes to overtime pay and required overtime; and various miscellaneous items. (GCX 13).

## **2. MAY-JUNE 2011 NEGOTIATIONS**

At bargaining sessions, the Company was represented by Rubrake, Stephanie Johnson, and David Jagger, with Johnson serving as its main spokesperson. The Union was represented

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<sup>7</sup> The Union takes issue with the fact that the Company's proposed wage cut during the January 2011 bargaining started with \$.75 per hour, with increasing cuts in each following week. However, after the Company researched wages in the area, it concluded that (1) it could not compete for skilled employees if it cut their wages; but (2) its unskilled workers were paid more than other unskilled workers in the community. Thus, the wage cuts in the May, 2011 bargaining proposal sought roughly the same amount of wage reductions, but from one subset of employees, instead of all employees. Moreover, the Union's own proposals at negotiations in May and June, 2011 were less favorable to the Company than the negotiations than the proposals made during the January bargaining.

<sup>8</sup> This was consistent with an agreement reached with the Union in 2009 that the union membership would have the same health insurance structure as non-bargaining unit employees from time to time. (*Id.*; Trans. at 477). Non-bargaining unit employees paid the full cost of their health insurance premiums.

by its bargaining committee members, Kathy Johnson, Beverly Kohne, Barb West, and Joyce Lane, with international representative McMillin serving as its main spokesperson. All of the committee members held unskilled positions; no employees in skilled positions were on the committee. (Trans. at 159; 222). Bargaining occurred on May 17, May 18, May 20, May 24, May 26, May 27, June 6, and June 15, 2011.

**a. MAY 17-19, 2011.**

During negotiations on May 18, 2011, the Union requested a financial report from the Company. (GCX 31 at 9). Johnson stated that she had previously provided the Union with such a report and that nothing had changed, but that she would discuss it with Ginsberg. (*Id.*).

In a letter dated May 19, 2011, the committee requested from the Company “proof of the companies [sic] finances in all aspects. . . we would also like to remind you that on January 13, 2011, Brad Ginsberg . . . made a statement in front of the entire Bargaining Unit members [sic] during a plant meeting that he had nothing to hide and was willing to open his books to anyone who wanted to see them. Therefore we are requesting to review Coupled Products LLC Financial Books [sic].” (GCX Ex. 19).

**b. MAY 20, 2011**

On May 20, 2011,<sup>9</sup> the Company provided the Union with a profit and loss statement detailing the net income and losses from the Columbia City facility’s operations from January through April 2011. (GCX Ex. 16). This profit and loss statement was the same document that the Company provided to Johnson, and the same statement Johnson used to manage the Columbia City facility. (Trans. at 471-72). Around this time, the Company also provided the Union with payroll records detailing the wages paid to bargaining unit employees. (R15). The

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<sup>9</sup> As discussed in more detail below, the Union also submitted a strike authorization request to the International Union on May 20, 2011. (GCX 41).

Company also provided the Union information regarding its health, life, and dental insurance premiums. (R16-20). The Company also provided the Union with information detailing another health insurance carrier's refusal to insure the Columbia City employees. (R19).

**c. May 24, 2011**

At negotiations on May 24, 2011, the Company discussed its research on wages paid by local manufacturing industry employers. (GCX 31 at 17; GCX 17; R10-13; Trans. at 148-49). Rubrake discussed wages paid by local employers such as Dexter Axle, 80/20, and ReelCraft. (Trans. at 319-22; 455-58, 514). She also explained that some of these employers had told her that they used temporary service agencies to fill unskilled labor positions, and explained her research on the wages paid to temporary employees. (Trans. at 149). The Company offered the Union the documentation of its research on compensation paid by local manufacturing facilities, but McMillin and the committee declined to take or look at the information. (Trans. at 150-151; 444). Neither the committee, nor McMillin, presented any information to refute the Company's position.<sup>10</sup>

The various May 24, 2011 bargaining notes reflect that both the Union and the Company professed that they would not compromise on the monetary issues (meaning the wage and benefit proposals). After Johnson indicated that the monetary proposals had to stand, McMillin asked Johnson if the Company was stating an inability to pay, thus "giving [the Union] permission to audit [its] books." (GCX 31 at 23-24; R4 at 28-29; R9 at 487, 491). According to the Union's "official" notes, Johnson replied, "yes, were [sic] *not willing* to pay." (GCX 31 at 24). (emphasis added). McMillin's account of this conversation, contained in a May 26, 2011 memo, states that

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<sup>10</sup> The committee did no research on what companies in the Columbia City area were paying to skilled or unskilled workers. (Trans. at 222).

Johnson replied, “yes, [sic] am to be competitive, we can no longer pay these wages.”<sup>11</sup> (GCX 39 at 2). According to Rubrake’s bargaining notes, Johnson clarified that the Company was not stating that it could not pay, but that it did not want to pay. (R9 at 487). According to the bargaining notes of both the Union and the Company, immediately after McMillin accused Johnson of stating that the Company was unable to pay, Johnson told McMillin “not to put words into [her] mouth.” (GCX 31 at 24; GCX 39 at 2; R9 at 487). It is undisputed that immediately *after* this exchange, McMillin told the committee that the Company did not legally have to allow the Union to audit its books. (GCX 31 at 24; R4 at 28-29; R9 at 487, 491; Trans. at 359).

**d. MAY 25, 2011**

In a May 25, 2011 e-mail, McMillin demanded, “to audit Coupled Products LLC books and all finances. Per NLRB rulings, when a company is demanding wage reductions on poverty or their inability to pay the wages . . . [w]e as a Union have the right to go over all books pertaining to finances and that is what I am requesting to do.” (GCX Ex. 17).

On May 25, 2011, the Union submitted its counterproposals to the Company. (GCX 18). These counterproposals included a wage freeze; twenty weeks of sickness and accident pay at \$205 per week; employee contribution of 25% of health insurance premiums; vacation pay remaining the same as shown in Vacation Exhibit C, and paid when taken without accrual from year to year; bereavement leave for deaths in the immediate family; perfect attendance time to be earned without pay; making the SSR classification an “asterisk” job; and overtime paid only after an employee reached forty hours of actual work in a week, with some exceptions. (*Id.*).

**e. MAY 26, 2011**

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<sup>11</sup> McMillin’s bargaining notes conveniently exclude the remainder of the exchange she later recounted to Mo Davidson.

In a letter dated May 26, 2011, Johnson told the committee that the Company would not provide an audit because it was privately owned and its books were proprietary. (GCX 19).

On May 26, 2011, McMillin wrote a memo to Mo Davison “requesting assistance from the UAW Research Department with our negotiations for a collective bargaining agreement with Dana Coupled Products. The Company is pleading poverty.” (GCX 39). In this memo, McMillin reported that the Company was requesting a \$4.50 cut in pay (excluding skilled trades) and requiring employees to pay for their entire health insurance premiums, stating, “There is no way these employees can afford this and especially with the pay decrease.” She also stated, “It was just recently that management informed the Committee that they were going to go ahead with negotiations for a new Collective Bargaining Agreement; and that is why the Committee did not have time to request all this information ahead of time.”<sup>12</sup> [ . . . ] I truly believe that this company is very dirty to say the least; and they are playing games.” (*Id.*).

Interestingly, McMillin’s memo reflects her May 24, 2011 exchange with Johnson regarding the Company’s ability to pay the wages and benefits demanded by the Union differently than her bargaining notes. While her notes suggest that Johnson flatly stated that the Company was unable to pay wages at their current levels (*See* R1 at p. 51), McMillin’s memo reads: “I asked the Plant Manager, Tina Johnson yesterday in our meeting point blank, are you telling me the company is stating at this time their inability to pay the wages as they are today. She said, “Yes, [sic] am to be competitive, we can no longer pay these wages.” (GCX 39 at p.2).

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<sup>12</sup> McMillin’s contention that the Company had simply “sprung” the fact that the parties would be bargaining for a new collective bargaining agreement onto the Union is simply untrue. Bargaining committee member Bev Kohne testified as to her understanding that the Company had switched gears from wanting to close the facility to looking at what ways to continue operating the Columbia City facility. (Trans. at 188). In April, 2011, the parties began attempting to schedule negotiations. The Union took a strike vote on May 2, 2011. (GCX 33). The Company sent its first proposal to the Company on May 3, 2011. (GCX 13). The actions of both the Union and the Company demonstrate an understanding that they were attempting to negotiate a new contract.

McMillin's memo goes on to describe Johnson's instruction to McMillin to "not put words in her mouth" regarding inability to pay. (*Id.*)<sup>13</sup>

**f. MAY 27, 2011**

Although the contract did not expire until June 17, 2011, McMillin requested the Company's best and final offer on May 27, 2011. (GCX 31 at 30). After requesting the Company's best and final offer, McMillin threatened to file "NLRB charges" because the Company would not let the Union perform an audit. (GCX 31 at 30). McMillin stated that the Union would not support the Company's offer in any way and indicated that there was nothing left to say. When Johnson indicated that she did not want to walk away, McMillin replied that she did not think that the proposal was a win-win situation for anyone. (*Id.*).

As requested by the Union, the Company provided its last, best, and final offer. (GCX 20). This offer proposed a one-year agreement with the following terms: (1) insurance benefits were to be consistent with other non-Union U.S. employees, which required employees to pay their health insurance premiums; (2) reduction in paid vacation time, and a different method of accrual; (3) change in paid holidays; (4) elimination of sickness and accident pay; (5) bereavement days included in paid vacation days; (6) elimination of paid perfect attendance time; (7) elimination of a ten-minute paid lunch, with new plant hours from 6:30 a.m. to 2:50 p.m.; (8) a \$4.25 per hour wage reduction for unskilled labor; and (9) modifying call-in time from four hours to two hours. (GCX 20). The Company's best and final offer also contained various other terms pertaining to classifications, layoffs, overtime, and other miscellaneous provisions. (GCX 20).

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<sup>13</sup> McMillin's memo corroborates the Company's position that it did not state an inability to pay, but stated that a wage reduction was necessary to remain and become competitive. It further suggests that the union's financial request was not made to verify the Company's bargaining position, but to punish the Company for requesting concessions.

**g. JUNE 6-10, 2011**

The Union took issue with the fact that the Company's last, best, final offer was written as a one-year contract instead of a two-year contract and demanded clarifications on the Company's proposal. (Trans. at 230-31). Per the Union's request, on June 8, 2011, the Company re-submitted its last, best, and final offer, written as a two-year agreement and incorporating several clarifications. (GCX 21).<sup>14</sup> The Company's last, best, and final offer included: (1) employees paying 100% of health insurance premiums; (2) reduction of paid vacation time; (3) changes in holiday schedule; (4) elimination of sickness and accident pay; (4) three days of unpaid bereavement leave for family members listed in the current contract; (5) elimination of paid perfect attendance time; (6) \$4.25/hour wage reduction for employees, excluding those within skilled labor classification; (7) modification of call-in pay from four hours to two hours; (8) paying temporary transfer in one-hour increments instead of two hour increments; (9) SSR becoming an asterisk position; (10) requiring employees disqualified from a classification to wait one year to bid again; (11) reduction of notice for layoffs from 3-5 days to 24-hour notice; (12) elimination of 5-day recall rights from layoff to 24 hours after receiving notification; (13) overtime paid after an employee reached forty hours of actual work (excluding vacation, holidays, union business, perfect attendance, jury duty or any other company-driven absence); (14) allowing the company to mandate daily overtime in emergency situations with thirty minute notice; and various miscellaneous provisions. (GCX 21).

At negotiations on June 6, 2011, the Union indicated that it would take the Company's best and final offer to the membership, but would not support its ratification. (Trans. at 331-32). On June 9, 2011, the Union membership voted against ratifying the Company's last, best, and

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<sup>14</sup> On June 7, 2011, the Company provided the Union with the information regarding the accrual of paid vacation under the Company's best and final offer. (R14).

final offer. (GCX 34). In a letter dated June 10, 2011, the Union notified the Company that the membership had voted against ratifying the Company's last, best, and final offer. (GCX Ex. 36). The Union proposed a list of things that its membership "could live with." (GCX 36).<sup>15</sup>

**h. JUNE 15, 2011**

At negotiations on June 15, 2011, the committee, although it had refused to accept the Company's research regarding the wages paid to unskilled workers at local facilities, expressed disbelief that the Company could hire people to do the same job for a lower wage, and requested that the Company "ask people what they make." (R8 at 456). When negotiations drew to a close on June 15, 2011, the Union informed the Company that it would not accept a \$4.25 pay cut for its unskilled workers or the proposed increased contribution to their health insurance premiums, and that it was going on strike. (GCX 31 at 36-37; Trans. at 170). The Union indicated that it was going on the type of strike "where you hold signs." (GCX 31 at 36-37; Trans. at 170). The Union's "official" bargaining notes suggest that the Union was going on an economic strike, which it categorized as the type of strike where contract ends and the Company will not agree to a new contract. (GCX 31 at 36-37). McMillin indicated that the Company should back up the trucks and move to Mexico. (GCX 31 at 36; Trans. at 169-70; R8 at 25).

The Company and the Union were unable to agree on a new Contract. Both the Union and the Company testified that they were too far apart on the economic issues to come to an agreement (Trans. at 169). The Union has not changed its position since the Company provided it with its best and final offer. (*Id.*). The Company has not changed its position, either. (Trans. at 481).

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<sup>15</sup> This list included an extension of the current agreement for one year; a wage freeze for the duration of a new agreement; employee contribution of twenty-five percent of health insurance premiums; vacation time "up front" with pay when taken; twenty weeks of sickness and accident pay; and three days of paid bereavement time for immediate family members. (GCX 36).

### **C. STRIKE VOTE**

On May 2, 2011, prior to the first bargaining session, the Union body voted in favor of a strike. (GCX Ex. 33). On May 20, 2011, after only three days of negotiations, the Union submitted a request for strike authorization to the international union. (GCX Ex. 41). In its strike authorization request, the Union cited the following issues to support its request: wage reduction, vacations, holidays, S & A, bereavement, seniority, and increased insurance premiums. (GCX Ex 41, p. 3).

A second strike vote was not taken. (Trans. at 177). The Union membership voted against ratifying the Company's best and final offer agreement on June 9, 2011. (GCX Ex. 34). At the ratification vote, McMillin told the membership that she thought the Company's offer was bad because the wages were ridiculous, and that she did not recommend accepting it, although the ultimate choice was theirs. (Trans. at 337-339). When addressing the membership, McMillin did not use the term "unfair labor practice strike." (*Id.*). There was no discussion amongst the bargaining committee members as to whether they were going on an economic strike or an unfair labor practice strike. (*Id.* at 246). On June 15, 2011, the Union's International Executive Board issued a strike authorization approval. (GCX Ex. 42).

### **D. UNION STRIKE AND ENSUING ACTIONS**

The Union went on strike on June 17, 2011. In a letter dated June 17, 2011, the first day of the Union's strike, the Union again accused the Company of stating that it could no longer afford or was unable to pay wages at the same rate, stating, "if this is true and you can show us this through your financial books we may be more apt to convince the membership that with these current wages the company would go bankrupt."<sup>16</sup> (GCX Ex. 40). Johnson immediately

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<sup>16</sup> Johnson and McMillin both testified that no one from the Company indicated that the Company was contemplating bankruptcy. (Trans. at 332; 471).

corrected the Union, reiterating that she had not stated that the Company could not continue to pay wages, but that it *would not pay* wages at the current rates because it needed to be competitive. (R5) (emphasis added). Johnson again denied the request for an audit. (*Id.*).

The Company instituted its best and final offer on June 20, 2010. (GCX Ex. 30). On June 20, 2010, the Company notified the Union that it would hire permanent replacement workers. (GCX Ex. 24). As part of an administrative matter before the Indiana Department of Workforce Development that occurred on May 2, 2012, counsel for the striking Union members stipulated, and testified under oath, that the striking Union members had been permanently replaced in June 2011. (R23)

#### **E. PROCEDURAL HISTORY**

On June 17, 2011, the Union filed unfair labor practice charge, Case 25-CA-031883, alleging that the Company had violated Sections 8(a)(1) and (5) of the National Labor Relations Act (“NLRA”) by engaging in surface bargaining, denying the union’s request for financial information necessary for the union to evaluate the company’s assertions regarding its financial health and allow it to develop its own proposals, and taking a position throughout bargaining that was reasonably calculated to prevent the parties from coming to an agreement. (GCX 1(a)). On August 4, 2011, the Union filed a second unfair labor practice charge, Case 25-CA-062263, alleging that the Company had violated Sections 8(a)(1) and (5) of the NLRA by failing to provide the Union with adequate financial information to evaluate the Company’s claims that concessions were necessary, refusing to extend the terms of the previously negotiated bargaining agreement, and implementing its best and final offer before lawful impasse had been reached in negotiations. (GCX 1(c)).<sup>17</sup>

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<sup>17</sup> All of the allegations made in the second unfair labor practice charge would have been known to the Union on June 17, 2012. It is unclear why the second ULP charge was filed on these issues.

On December 28, 2011, the Board's Regional Director for Region 25 issued an Order Consolidating Cases, Consolidating Complaint and Notice of Hearing. (GCX 1(e)). This Order consolidated the aforementioned charges, and issued a Complaint thereon. The Complaint alleges that the Company failed to provide the Union with requested "financial records" that were relevant to its performance of its duties as the exclusive collective-bargaining representative.<sup>18</sup> The Complaint also alleges that the Company altered the terms and conditions of employment without first bargaining with the Union to a good-faith impasse, committed unfair labor practice charges that caused and prolonged the Union's strike; and failed and refused to bargain collectively with the Union.<sup>19</sup> (GCX at 1(e)).

#### **I. ANSWERING UNION'S EXCEPTIONS TO ALJ'S FACTUAL FINDINGS**

Throughout its Exceptions to the ALJ's factual findings, the Union takes extreme liberties in "citing" to the record.<sup>20</sup> Most of the Union's exceptions to the ALJ's factual findings boil down to the Union's disagreement with the ALJ's credibility determinations. The Board's established policy is not to overrule an ALJ's credibility resolutions unless the clear

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<sup>18</sup> The Consolidated complaint alleges, specifically:

(d) Since on or about May 24, 2011,<sup>18</sup> May 27, 2011,<sup>18</sup> and June 17, 2011,<sup>18</sup> the Union verbally and by letter, has requested that the Respondent furnish the Union with Respondent's financial records.

(e) The information requested by the Union, as described above in paragraph 5(d) is necessary for, and relevant to, the Union's performance of its duties as the exclusive bargaining representative of the Unit.

(f) Since about May 24, 2011, Respondent has refused to furnish the Union with information requested by it as described in paragraph 5(d).

<sup>19</sup> At hearing, General Counsel's questioning suggested that the Union was alleging that the Company had engaged in surface bargaining. However, the Complaint states, "By the conduct described above in paragraphs 5(f), 6(a) and 6(c), Respondent has been failing and refusing to bargain collectively with [the Union]." GCX 1(e). Paragraph 5(f) refers to the Company's purported failure to furnish the Union with requested information. (*Id.*). Paragraphs 6(a), and 6(c) refers to the Company's alleged alteration of the terms and conditions of bargaining unit employees without first bargaining to a good-faith impasse with the union. (*Id.*).

<sup>20</sup> Many of the "facts" cited by the Union have no support in the record. In many of the instances where the Union does cite to the record, the Union's purported "citation" does not accurately reflect the substance of the record. Many quotations are either taken completely out of context or intentionally misstate the substance of the record.

preponderance of all the relevant evidence convinces it that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3<sup>rd</sup> Cir. 1951). Here, the preponderance of the relevant evidence demonstrates that the Board's credibility resolutions are, in fact, correct. Further, the ALJ correctly applied the law to existing facts.

**A. The ALJ properly found that the Company informed the Union that it was profitable as a whole, but that the Columbia City was not profitable.**

**The Union excepts to the ALJ's**

- 1. factual finding that according to Respondent's representative's uncontroverted testimony, the Union's bargaining committee was informed in late 2010 and early 2011 that while the Respondent as a whole was making a profit, the Columbia City facility was losing money.**
- 2. factual findings to the extent that he credited Respondent representatives' statement that in both 2010 and 2011 the Respondent was profitable.**
- 3. factual findings to the extent he credited the Union with knowledge that Coupled Products, LLC was profitable as a Company**
- 11. implied factual finding that the Respondent clearly communicated to the Union the grounds for the concessions it sought in its proposal at the bargaining table. (ALJD p. 13, ll. 28-30).**
- 12. factual finding that the Respondent distinguished between its overall finances and the finances of the Columbia City facility when communicating with the Union. (ALJD p. 13, ll. 28-30).**

The Union contends that the ALJ incorrectly found that the Company told employees that the Company was profitable, although the Columbia City facility was unprofitable. It relies upon an October 2010 letter to employees that stated:

[ . . . ]

- Coupled Products ownership and management has determined that with the excessive costs, inefficiencies and unplanned expenses, the current Columbia City cost structure is too expensive to maintain.

- Since the San Luis Potosi plant has the ability to produce the parts currently made in Mexico, Coupled Products has no choice but to move the business to Mexico to realize the enormous labor savings available in an effort to be profitable.

(GCX 4). In this letter, the Company discussed the competitive marketplace, the price-sensitive nature of its customers, and the annual savings in labor costs that it could achieve by moving the Columbia City facility's business to its Mexico facility. (*Id.*). The "business" referenced in this letter is the work completed in Columbia City. The evidence is uncontested that the Company did not realize a profit on work completed in Columbia City.

The Union next contends that Johnson did not explicitly state that the Company was profitable at the bargaining table. (Exc. Br. at 15). However, Johnson testified that both she and Ginsberg had told the bargaining committee, during either plant meetings or monthly issues meetings, that the Company was willing to continue operating the Columbia City facility if it could be operated at a break-even point or at a slight loss. (Trans. at 489-90). Further, when Ginsberg addressed the plant at a plant-wide meeting in January, 2011, he indicated that the Company was profitable. (Trans. at 528).

The record is replete with references to the fact that the Union understood that the Company was profitable, although the Columbia City facility was not. Johnson testified that she had never stated that the Company was not profitable, but that she had stated that the Columbia City facility was not profitable. (Trans. at 66-68; 474-75; 489-91). In a letter to the bargaining committee dated January 18, 2011, the Company stated: "As you are well aware we have been operating *Columbia City* with tremendous losses. . . At this time there is no scenario whereby maintaining a presence in Columbia City will be the *more favorable* alternative from an economic standpoint. However, if this proposal is accepted in its entirety, we will maintain a presence in Columbia City..." (GCX 7) (emphasis added). In a letter to the bargaining

committee dated January 27, 2011, the Company stated, “Columbia City from a financial aspect cannot come close to our Mexico labor alternative. If our proposal is accepted it will result in significant losses *for the facility*. . . (GCX 10) (emphasis added). In a letter to the bargaining committee dated June 8, 2011, the Company stated: “. . . as you can see we have tremendous losses *out of Columbia City*.” (GCX 21) (emphasis added). Each of these communications to the bargaining committee communicate that the Company was capable of continuing to operate the Columbia facility and even willing to continue doing so, despite the fact that maintaining the unprofitable facility was not the most profitable option.

The Union contends that “the notes never reflect a statement by any company representative that Coupled Products as a whole was profitable.” (Exc. Br. at 15). However, the record reflects that the Company knew that the Company was profitable. At negotiations on May 27, 2011, McMillin expressed disbelief that Brad [Ginsberg] (one of the Company’s owners) was not making money. (Trans. at 416). Johnson clarified that she *was not* saying that Ginsberg was not making money, but that the *Columbia City facility* was not making money. (R8 at CP 450; R9 at 497-98; R4 at 32; Trans. at 416). (emphasis added). Bargaining notes also reflect that Johnson specified that the Company was looking at all the costs *in the plant* to make it competitive. (R4 at May 20 Notes) (emphasis added). Further, is undisputed that the Company never claimed that it was bankrupt or contemplating bankruptcy. (Trans. at 332, 471). Yet the Union fabricates in its own letter such an allegation.

The Union’s conduct demonstrates its understanding that the financial condition of the Columbia City facility—and not the Company as a whole—was at issue. The Union’s international representative stated that the Company “might as well close” the Columbia City facility, telling the Company to “call the trucks and move to Mexico.” (R8 at CP 0455, 457).

Nothing in the record suggests that the Union understood that the Company as a whole was claiming to be unable to pay the Union's demands. In fact, although the Union claims that the October 2010 letter informed them that the Company was unprofitable, the Union's initial proposal during the 2011 negotiations actually demanded significant *increases* in pay and benefits, and bargaining committee members indicated at negotiations that they did not believe that such increases would bankrupt the Company. (R9 at 483) (emphasis added). Assuming that the Union was bargaining in good faith, it cannot logically contend that it understood the Company to be unprofitable or unable to pay, but demanded a significant increase in wages and benefits.

Johnson's testimony that the Company informed the bargaining committee that the Company was profitable, but that the Columbia City facility was not profitable is not refuted by any evidence in the record. Neither General Counsel nor the Board offered rebuttal evidence to the Company's evidence. Both General Counsel and the Union had the right to examine and cross-examine any of the union bargaining committee members regarding whether they were informed that the Columbia City facility was not profitable, although the Company as a whole was profitable.<sup>21</sup>

**B. The ALJ correctly held that the Company researched the wages paid by local manufacturing sector employees to unskilled workers to support its position that the wages for unskilled workers were not aligned with the local market.**

**The Union excepts to the ALJ's factual findings:**

- 4. that in order to prepare a bargaining proposal, Respondent's representative gathered information on wages paid by manufacturing facilities in the area. (ALJD p. 5, ll. 1-3).**
- 5. that Respondent's representative "used the website for the Bureau of Labor to find comparable wages for area employers" to the extent**

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<sup>21</sup> Even if the ALJ were to find that Johnson stated that the Company itself was unprofitable, a statement of unprofitability does not equate to a statement of inability to pay.

- that he credited the representative's testimony that the employers and the wages were "comparable." (ALJD p. 5, ll. 9-10).**
- 6. to the extent that he found that the information Respondent provided to the Union was useful to the parties' bargaining process or relevant to the claims the Respondent made at the bargaining table. (ALJD p. 5, ll. 8-17)**
  - 7. to the extent that he found the Union was not interested in any relevant information proffered by Respondent at the bargaining table. (ALJD p. 6, ll. 12-16, fn. 9).**
  - 22. that information provided by Respondent regarding wage of unskilled employees in the area supported Respondent's bargaining position.**

The Union excepts to the ALJ's findings regarding the Company's research on wages paid by local manufacturing sector employers, and its efforts to provide this information to the Union. As seen below, however, all of the ALJ's findings were proper

- 1. The Union refused to accept information about local wages paid to local manufacturing employees.**

The Union argues that there is "no basis in the record" for the ALJ's "hypothesis" that McMillin "obtained at least some of the information proffered to her by Rubrake after the meeting and submitted it to Davison." (Exc. Br. at 17). The Union also argues that nothing in the record "indicates that McMillin did not accept relevant information proffered by the Company. Instead it appears that McMillin noted the wage rates and contacts with local business Rubrake told her about during the conversation." (Exc. Br. at 17). Contrary to the Union's exceptions, the ALJ's factual findings regarding McMillin's treatment of the Company's research on wages paid by local manufacturing employers is entirely consistent with the record.

McMillin's notes suggest that she noted some of the wage rates paid by local employers to unskilled workers that were orally conveyed by Rubrake at negotiations on May 24, 2011. (R1 at 39). McMillin's notes, however, do not include all of the information regarding local

manufacturing industry employers that Rubrake provided.<sup>22</sup> (R1 at 39, R10). Rubrake and committee member Kohne testified that McMillin refused to accept the remainder of the information that Rubrake had researched, including statistical reports from the Bureau of Labor Statistics and reports regarding wages paid to workers in similarly titled positions. (Trans. at 150-51; 403-404, 434). McMillin’s testimony does not support the contention that she accepted the documents provided to her. She testified that she, “did not recall saying that [the union did not need to look at the wage information provided by Rubrake]. Obviously, I either looked at them or got the information from her or they wouldn’t be in my notes.” (Trans. at 321).

**2. The information that the Company provided related to comparable employers and was relevant to the claims made at the bargaining table.**

The Union also claims, without citation to the record, that its “position at the table and in this proceeding has consistently been that [the local wage information provided by the Company] [was] not helpful to the Union to evaluate the Company’s claims about competitiveness.” (Exc. Br. at 17). This is a flagrant misstatement of the record.<sup>23</sup> Nothing in the record suggests that the Union has *ever* taken the position that the Company’s provision of documents and information detailing the wages paid to unskilled workers in the Columbia City area was insufficient to allow the Union to evaluate the Company’s claims about competitiveness. In fact, throughout contract negotiations, the Union took the position that the Company was *not* actually claiming a competitive disadvantage, but was actually claiming an inability to pay. (GCX 31 at 23-24, R4 at 28-29; R9 at 487, 491). McMillin demanded “to audit Coupled Products LLC books and all finances. Per NLRB rulings, when a company is demanding wage reductions on

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<sup>22</sup> McMillin’s notes include only references to Dexter Axle, PeopleLink, 80/20, Reel Craft, and Bendix—she did not note the wages paid by USSI or Union Advance. (R1 at 39). The information that Rubrake provided, however, included the wages paid by many other employers, including Employment Plus, IMI, Diverse Staffing, Warner Electric, and ChromaSource. (R11).

<sup>23</sup> This statement evidences a disturbing trend of the Union fabricating statements within its exceptions filings.

poverty or their inability to pay wages. . . [w]e as a Union have the right to go over all books and finances.” (GCX 17). The bargaining committee demanded an audit because “You stated Brad (Coupled Products LLC) can no longer afford, and has the inability to pay the wages where they are at today. You tell us the company is continuously losing money, [sic] if this is true and you can show us through your financial books we may be more apt to convince the membership that with these current wages the company would go bankrupt.” (GCX 40). In a memo to Mo Davison dated May 26, 2011, McMillin stated, “The Company is pleading poverty and I would like to have their financial records researched.” (GCX 39). The Union’s position was that the Company was stating an inability to pay wages/benefits demanded by the Union, and demanded an audit of the Company’s finances, insisting that such an audit was necessary to confirm the Company’s financial ability to pay, and/or convince the members to concede.

Contrary to the Union’s exceptions, the Company’s local wage research was relevant to its bargaining position. The Company was unwilling to continue operating the Columbia City while paying higher than local wages, and thus sought reductions in the cost of labor. The Union insisted throughout negotiations that the Company could not hire someone to do the jobs of its unskilled employees for the reduced hourly wage proposed. (GCX 31 at 23; Trans. at 152-53). Johnson stated that she could hire off the street for the unskilled positions by paying the proposed wage. (GCX 31 at 23). The Company provided information regarding its research on wages paid by Columbia City manufacturing employers to unskilled employees to demonstrate that it could, in fact, hire and retain local employees for the proposed wage. (*Id.*). McMillin testified that the Company had not refused to provide local wage information. (Trans. at 322).

The Union complains that the information on wages paid to unskilled workers in the Columbia City area and reports on wages paid to workers holding similar titles did not “shed

light on the loss of customers or the wages paid to employees similarly situated to the members of UAW Local 2049 who were working at actual competitors.” (Exc. At 17). The Union also complains that Rubrake did not know the specific employers from which the wage data was drawn, the industry in which those employees worked, the machines they operated, or the level of experience of the employees whose wages were referenced. (*Id.*). However, the Company researched the wages necessary to hire and retain employees. The “going rate” for unskilled labor in the manufacturing sector in the area (regardless of the employer), was far less than it was paying. Tthe Union never requested such information from the Company. The bargaining committee simply continued to insist that they could not be replaced for the proposed hourly wage.<sup>24</sup> Moreover, it is unclear how the Union’s bargaining ability would be affected by these perceived flaws in the Company’s research—the bargaining committee members actually testified that they did no research on what the companies in the Columbia City area were paying skilled or unskilled workers before or during negotiations. (Trans. 148; 158-59; 222).

**C. The ALJ correctly found that the Company expressed unwillingness to continue paying the wages demanded by the Union, but did not express an inability to pay.**

**The Union excepts to the ALJ’s factual findings:**

**8. that in a May 24 meeting, Respondent’s representative “said that the Respondent was not willing to pay the existing wages at the Columbia City facility but did not say that the Respondent was unable to pay the existing wages.” (ALJD p. 7, ll. 36-39).**

**9. that “none of the notes introduced in evidence at the hearing indicate that [Respondent’s representative] made a definitive statement regarding the Respondent’s inability to pay existing wages.” (ALJD p. 7, ll. 39-40).**

**10. that direct testimony at the trial did not indicate that Respondent claimed an inability to pay. (ALJD p. 7, ll 40-41).**

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<sup>24</sup> The Company has, indeed, hired and retained unskilled employees for the proposed hourly wage.

Contrary to the Union's exceptions, the record clearly demonstrates that the Company stated at the May 24 meeting that it was not willing to pay the existing wages at the Columbia City facility but did not say that it was unable to pay the existing wages.

Bargaining notes from the May 24 meeting reflect that both the Union and the Company professed that they would not compromise on the wage and benefit proposals. After Johnson indicated that the monetary proposals had to stand, McMillin asked Johnson if the Company was stating an inability to pay, thus "giving [the Union] permission to audit [its] books." (GCX 31 at 23-24; R4 at 28-29; R9 at 487, 491). According to the Union's "official" notes, Johnson replied, "yes, were [sic] *not willing* to pay." (GCX 31 at 24). (emphasis added). McMillin's account of this conversation, contained in a May 26, 2011 memo, states that Johnson replied, "yes, [sic] am to be competitive, we can no longer pay these wages." (GCX 39 at 2). According to Rubrake's bargaining notes, Johnson clarified that the Company was not stating that it could not pay, but that it was unwilling to pay. (R9 at 487). According to the bargaining notes of both the Union and the Company, immediately after McMillin accused Johnson of stating that the Company was unable to pay, Johnson told McMillin "not to put words into [her] mouth." (GCX 31 at 24; GCX 39 at 2; R9 at 487). It is undisputed that immediately *after* this exchange, McMillin—who the Union concedes understood the relevant legal framework for "determining the contours of the Company's obligation to divulge information"—stated that the Company did not legally have to allow the Union to audit its books, indicating that even she did not believe that the Company had stated an inability to pay. (GCX 31 at 24; R4 at 28-29; R9 at 487, 491; Trans. at 359).

McMillin's direct testimony at trial did not suggest that the Company was claiming an inability to pay the wages demanded by the union. McMillin stated that she requested to audit the Company's books because she

“felt like because the company was asking for concessions and that if they would show us their books—if they were saying that they needed to be more competitive, they were losing money, if they would show us our [sic] books [. . . ] it be more to our advantage trying to explain to our membership for all the concessions they were asking for.” (Trans. at 268).

McMillin stated that she wanted to audit the books so that she could persuade her members to take steep concessions. (Trans. at 317). Nowhere in her direct testimony did McMillin state that the Company had claimed to be unable to pay.

**D. The ALJ correctly held that the Company repeatedly and consistently emphasized its need to be competitive.**

**The Union excepts to the ALJ’s factual finding:**

- 21. that Respondent’s representative repeatedly emphasized that the Respondent needed concessions in order to be competitive.**
- 23. that the Respondent’s communications to the Union were specific and consistent throughout negotiations**

Contrary to the Union’s exceptions, the Company repeatedly stated that it sought concessions in order for the Columbia City facility to be competitive. (GCX 31 at 12, 14, 30, 36; R8 at 434, 437, 440, 446, 455-56; R9 at 475, 481, 507-09; Trans. at 107,140, 204). The Company also consistently maintained its belief that wages for its unskilled employees under the current contract were higher than local market wages, and that it could hire and retain unskilled employees with a significantly lower hourly wage, and offered the Union its research on the wages paid locally to unskilled workers. (GCX 31 at 17; Trans. at 153).

**II. Exceptions to Legal Conclusions**

**A. The Company did not state an inability to pay and was not obligated to “open its books” to the Union or submit to an audit.**

**The Union excepts to the ALJ’s :**

- 13. implied conclusion of law that even though the Respondent communicated to the Union it was losing money at the facility, the fact**

that it was not losing money as a whole allowed it to withhold relevant information from the Union (ALJD p. 13, ll. 2-34).

14. conclusion of law that “the Respondent’s Statements that it needed wages and benefit reductions at the Columbia City facility in order to remain competitive does not obligate the Respondent to accede to the Union’s request that it be permitted to audit its general financial records.” (ALJD p. 14, ll. 6-8).
15. failure to find, as a matter of law, that the Respondent’s communications to the Union conveyed an inability to pay their wages.
16. failure to conclude, as a matter of law, that the Respondent’s communications to the Union triggered an obligation to provide relevant data to support those communications.
17. legal conclusion that an explicit assertion of an inability to pay is required to trigger the Respondent’s duty to provide relevant data at the bargaining table. (ALJD p. 14, ll. 10-13).
18. implied legal conclusion that to be required to divulge relevant information, Respondent must have explicitly declared that it would not survive as a business in order to justify its demands at the bargaining table. (ALJD p. 14, ll. 13-25).<sup>25</sup>
19. legal conclusion that under governing legal standards, “it is clear that Respondent never claimed an inability to pay the Union’s demands.” (ALJD p. 14, ll. 24-25).
20. legal conclusion that because Respondent’s representative stated that Respondent was losing money at the Columbia City facility, it had no obligation to turn over relevant financial information to support that claim. (ALJD p. 14, ll. 24-27).
23. legal conclusion that “there is no credible evidence that the Respondent maintained the position that it was unable to pay existing wages and benefits” and that therefore the “Respondent did not violate Section 8(a)(5) and (1) of the act [sic] by refusing the Union’s request to review and audit its general financial records. (ALJD p. 15, ll. 11-14).
32. legal conclusion that the Respondent was not “obligated to provide the Union with information necessary to justify its concessionary proposal.”

The Union claims that the ALJ “erroneously found that the Company never placed its financial health at issue.” (Exc. Br. at 18). The Union insists that the record contains evidence

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<sup>25</sup> This exception purports to take issue with the ALJ’s citation to *Nielsen Lithographing Co.*, 305 NLRB 697 (1991), review denied 977 F.2d 1168 (7<sup>th</sup> Cir. 1992).

that Johnson stated that the Company would go out of business. (*Id.*). It does not. The only item cited by the Union that even remotely suggests that the Company placed its financial health at issue was an October 2010 letter to the Union indicating that it had no choice but to *move the business. . . in an effort to be profitable.* (*Id.*) (emphasis added). However, this letter, in context, refers to the profitability of the business at Columbia City. The Company had expressed a desire to *move* the Columbia City facility's work to Mexico to realize labor cost savings and increase profits. The Company did not, at any time, indicate that it would cease operating or declare bankruptcy. (Trans. at 332; 471). Johnson indicated that the Company as a whole was profitable, but that the Columbia City facility was not. (Trans. at 474-75; 489-91). The Company actually expressed willingness to continue operating the Columbia City facility if it could break even or even operate at a slight loss, in order to maintain a presence in the United States. (Trans. at 474-75, 489-91; GCX7; GCX 10; GCX 21).

Even if the October 2010 letter is read to suggest that the Company as a whole was unprofitable, a statement of unprofitability does not equate to a statement of inability to pay. The Board has held that "inability to pay" means that the employer presently has insufficient assets to pay or that it would have insufficient assets to pay during the life of the contract that is being negotiated. *AMF Trucking & Warehousing, Inc*, 342 NLRB 1125, 1126 (2004). It means more than the assertion that it would be difficult to pay, or that it would cause economic problems or distress to pay. *Id.* Inability to pay is inextricably linked to nonsurvival in business. *Id.* An employer's claim of economic disadvantage, however, does not equate to a claim of inability to pay, and a company can lawfully refuse to "open its books" to the union. *Nielsen Lithographing Co.*, 305 NLRB 697 (1991). The relevant test for determining whether an employer has a duty to provide financial information to the union is to ascertain whether the

employer said it “would not” as opposed to “could not” pay the employees’ proposed demands. *NLRB v. Harvstone Mfg. Co.*, 785 F.2d 570, 575-76 (7<sup>th</sup> Cir. 1985)

The Union attempts to equate a statement of “nonsurvival in business” with an employer’s stated desire to consolidate work in the most profitable facility. It claims that there is no legal support for the contention “that threats to close a facility unless wage concessions are granted do not have to be supported by information upon request, if the employer has another profitable facility that it can keep open.” (Exc. Br. at 19). Contrary to the Union’s assertions, an employer who expresses an unwillingness to continue operating an unprofitable facility without changes to its cost structure, or a preference for moving work to a lower-cost facility to maximize profits does not claim an inability to pay, nor do they place the survival of the Company in jeopardy.

The Union argues that the Company put the survival of the Company at issue through (1) the October 2010 letter, which stated that the Company had determined that “with the excessive costs, inefficiencies, and unplanned expenses, the current Columbia City cost structure was too expensive to maintain,” and, “since the [Mexico] plant has the ability to produce the parts currently made in Columbia City, Coupled Products has no choice but to move the business to Mexico to realize the enormous labor savings available in an effort to be profitable;” and (2) statements that the Columbia City facility had to be competitive to keep the doors open. (Exc. Br. at 20). The Union argues that “there was a specific threat stated by the Respondent to the Union that if these employees did not take concessions their facility would close down.” *Id.* This “threat”, however, was not premised on the Company’s *inability* to continue operating the Columbia City facility, but upon its unwillingness to continue operating the facility with its current cost structure.

The Union cites to *AMF Trucking* to support its contention that the Company, by expressing an unwillingness to continue operating the Columbia City facility with its current cost structure, placed the survival of the Company at issue. *AMF Trucking*, however, provides that “inability to pay,” “means more than the assertion that it would be difficult to pay, or that it would cause economic problems or distress to pay. Inability to pay is inextricably linked to nonsurvival in business.” *AMF Trucking*, 342 NLRB 1125, 1126 (2004). It says nothing about a Company’s unwillingness to maintain an unprofitable facility unless it can improve its performance. The Company had expressed willingness to continue operating the Columbia City facility, despite the fact that it was the less profitable option. (GCX 7, GCX10). However, Johnson explicitly stated that the Company was unwilling to continue paying the wages and benefits demanded by the Union. (R9 at CP 487; R5).

**1. The Company did not put its continued survival at issue when it expressed unwillingness to continue operating the Columbia City facility unless its performance improved.**

The Union complains that the ALJ’s decision appears to have adopted a “magic words approach” to determining whether the Company had stated an inability to pay. (Exc. Br. at 21). The Union complains that the ALJ’s finding that the Company had never stated that it was losing money as a whole, or that its survival was an issue was improper “because “the term ‘as a whole’ is a ‘qualifier’ that is not supported by Board Law.” (Exc. Br. at 21). The ALJ’s decision is not based entirely upon the fact that the Company was not losing money as a whole. Instead, the ALJ’s decision is based mostly upon the fact that the Company repeatedly stated that concessions were necessary in order to be competitive—statements that do not obligate an employer to provide a union, upon requests, with records regarding its financial condition, let alone a Union audit. (ALJD at 14, ll. 6-9, 27-35). The ALJ also held, “during negotiations, the

Respondent did not *even* state that it was losing money as a whole. Rather, at the May 20 meeting, Johnson indicated only that Columbia City was losing money and customers.” (ALJD at 14, ll. 25-27) (emphasis added).

Insisting that the ALJ held that “the future of the Company as a whole must be threatened before it is required to divulge financial information,” the Union contends that *ConAgra, Inc.*, 321 NLRB 944 (1996) (enf. denied 117 F.3d 1435 (D.C. Cir. 1997)) directly contradicts the ALJ’s finding. (Exc. Br. at 21). The Union misunderstands the ALJ’s decision, the principles of corporate formation, and misstates both the factual and legal findings in *ConAgra*.

*Con Agra* involved two separate corporate entities who were alleged to be joint employers: ConAgra, and the employer, MPR, which was a wholly-owned subsidiary of ConAgra. MPR consisted of three facilities, and was one of sixty *companies*<sup>26</sup> that made up ConAgra’s Grain Processing Company. At negotiations, an MPR representative stated that he had seen MPR decline over the last 4 years, “the situation is serious and fragile,” “if we are not competitive we cannot survive,” and “we must do something to be able to survive.” MPR’s manager stated that if immediate measures were not taken, it was probable that MPR would not exist in the future. Additionally, MPR stated that small expenses like supplying soap to employees were “what makes us not be competitive and can make us have to close up shop because we cannot compete.” MPR refused the union’s request for MPR’s audited financial records. The Board upheld the ALJ’s decision that, in light of what she characterized as MPR’s “ominous warnings” about the future of MPR, the union was entitled to MPR’s audited financial

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<sup>26</sup>The ALJ in *ConAgra* sometimes referred to the sixty companies comprising ConAgra as sixty plants, and sometimes referenced the union’s purported threats to close MPR as threats to “the plant” or “the mill.” (*Id.* at 949, 950, 955). However, she contended that the Respondents “impl[ied] that MPR might be superfluous.” (*Id.*). In her findings of fact, she describes MPR as one of many companies comprising the ConAgra Grain Processing Company (“ . . . He explained that MPR was now 1 of 60 companies within the new division, the ConAgra Grain Processing Company. He added that henceforth, MPR’s performance would be compared with the other companies in the grain processing division rather than with competitive, unrelated companies on the island. . . .”) (*Id.* at 950).

records.<sup>27</sup> (emphasis added). While the Union contends that all of the evidence in *ConAgra* “indicated that the future of the MPR plant where negotiations were taking place was incidental to ConAgra’s future as a company” and “[. . .] the company’s survival was *assured!*” (Exc. Br. at 24) (emphasis in original), neither the ALJ nor the Board made any such finding.

Unlike the situation in *ConAgra*, which involved “ominous warnings” about MPR’s future and threats that the parent company could “put MPR out of business,” the only employer at issue here is Coupled Products. Coupled Products was admittedly profitable, but indicated an unwillingness to continue operating the Columbia City facility with its then-current labor cost structure because it could realize \$2 million in cost savings by moving the work done at the Columbia City facility to its Mexico facility. While MPR delivered “ominous warnings” to the union about its ability to survive, it was dependent upon parent corporation’s decisions regarding its continued operation. Here, Coupled Products was the sole decision-maker with regards to the continued operation of the Columbia City facility.

The Board’s decision in *Stella D’Oro Biscuit Co.*, 355 NLRB No. 158 (2010) also demonstrates that, to constitute a statement of inability to pay, an employer’s statement must pertain to the continued survival of the Company employing the Union members, and not merely the survival of the specific facility in which the employees work. In *Stella*, the employer’s parent company had expressed willingness to continue funding the employer in the short-term. The employer’s negotiators stated that it would not be able to survive if the Union did not agree to its proposals, that it was losing money, that it required cost savings or it would not be going forward with the business, and that if it did not make a profit, the parent company would take its

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<sup>27</sup> In a lengthy opinion, the Court of Appeals for the District of Columbia refused to enforce the Board’s decision in *ConAgra*. The Court held that because the employer’s representatives repeatedly stated that the company remained profitable, but that it needed concessions to improve its ability to compete, the Board could not find, consistent with its decision in *Nielsen*, that the employer was claiming that it could not afford to pay the union’s demand. *ConAgra, Inc. v. NLRB*, 117 F.3d 1435, 1442-43 (D.C. Cir. 1997).

“toy” and leave. In its decision, the Board specifically pointed out that the dissent had mistakenly stated that the *employer* was willing to fund losses in the short term, while the record actually reflected that the *parent company* was willing to fund losses in the short term, contingent upon demanded labor-cost reductions. *Id.* at 2, n. 6 (emphasis added). The Board noted that this difference was material. *Id.* In holding that the employer had stated an inability to pay, regardless of the parent company’s willingness to fund the operation in the short term, the Board noted that the employer’s bargaining representations suggested that it would *become* unable to pay if the parent company “pulled the plug.” *Id.* at 4. (emphasis added). The Board specifically held that it was the employer’s ability to pay, not the parent company’s ability to pay, that was at issue. *Id.* at \*5.

Here, the Company indicated that it was profitable, and that it was willing to continue operating the Columbia City facility if it could be operated at a break-even level or a slight loss, in order to maintain a presence in the United States. Unlike the employer in *Stella*, who represented at the bargaining table that it required funding from a third party parent company to continue operating, the Company’s willingness to fund continue operating the Columbia City facility in order to maintain a United States presence was not contingent upon the receipt of funding from a separate entity.

Citing no Board precedent for the proposition that an employer’s decision to close an unprofitable facility places the survival of the Company in jeopardy, thus entitling the union to audit the Company’s financial records, the Union urges the Board to “look at the matter from the Union’s perspective” and asks, “What did the Union care whether the Company was making money in Mexico? The Union was negotiating about Columbia City and the future of the employees’ work there.” (Exc. Br. at 20). This Union simply misses the point. It should have

cared very much that the Company was making money in Mexico. The Company expressed willingness to continue operating the Columbia City facility if it broke even or achieved a slight loss *because* of the profits it realized from its Mexico facility.

**2. Governing Board Precedent Does Not Require the Company to Open its Books to the Union.**

The Union contends that the Company's provision of financial statements to the Union, upon the Union's demand, constituted "a claim about the financial condition of the Columbia City plant," and that the Union was entitled, "under the rationale in *Stella D'Oro Biscuit Co.*, to determine what exactly [the financial statements] demonstrated." (Exc. Br. at 26). The issue in *Stella* was whether the union was entitled to its own copy of the employer's financial statement. After finding that the union was entitled to review the employer's financial statement, the Board held that the union was entitled to have its own copy of the statement because it was a complex financial document that did not lend itself to quick and easy comprehension, possession of the statement would allow the union's staff to examine it in detail to advise the union on its bargaining posture, and the cost of photocopying the statement was negligible. Nothing in *Stella* suggests that the Company's provision of financial statements to the Union, upon the Union's demand, required the Company to submit to the Union's demand for an audit.

Again misstating the record, the Union argues, "when the union requested more detail, [about the financial statements] the company refused." (Exc. Br. at 26). No testimony or documents in the record suggest that the Union requested detailed information about how these financial statements were prepared or how the various line items were calculated. The Union cites General Counsel Exhibit 39 and 40 in support of the contention that it requested additional information about how the provided statements were prepared or how the line items were calculated. Exhibit 39 is McMillin's request to the international union to have the Company's

“financial records researched.” (GCX 39). Exhibit 40 is the bargaining committee’s demand that the Company “open their [sic] books to the International Union UAW Auditing Department for review.” (GCX 40). Neither of these exhibits demonstrate that the Union sought more detailed information about how the line items were calculated. They merely demonstrate the Union’s continued demand for an audit.

**B. The Company properly denied the Union’s request for an audit, and had no obligation to provide the Union with information that it had not requested.**

**The Union excepts to the ALJ’s legal conclusion:**

- 33. that Respondent had no “duty to comply with the request to the extent that it encompassed relevant information necessary to verify its assertions.**
- 34. that the Union was not entitled to relevant information because “the Union did not make [sic] specific request for information to evaluate the specifics of the Respondent’s claim that it needed concessions in order to make Columbia City more competitive. (ALJD p. 18, ll. 1-5).**
- 35. that the governing legal standard establishes that, as a matter of law, the Union was not entitled to an audit of the Respondent’s financial records “based on the claim that concessions are necessary in order to be competitive.” (ALJD p. 18, ll. 3-5).**
- 37. that the Union was not entitled to relevant information necessary to support Respondent’s position at the bargaining table if the Union makes a general request for financial information. (ALJD p. 18, ll. 27-30).**
- 38. that the standards for providing relevant information in response to a request are different depending on whether the information is “presumptively relevant.” (ALJD p. 18, ll. 31-37).**
- 39. that when a Union makes a request to obtain the employer’s financial records, and the request is overbroad, the proper response is to dismiss the case rather than order the employer to either request clarification or comply with a request to the extent it encompasses necessary and relevant information.**
- 40. that the Union was forcing the Respondent “to guess at what information contained within its financial records could prove helpful to a union in evaluating its assertions made at the bargaining table and to provide such information” and therefore the Union was not entitled to any relevant information.**

The Company stated that the labor cost structure at the Columbia City facility was too expensive to maintain and that it could save a substantial amount on labor by completing the work done at Columbia City in Mexico. (GCX4). The Company expressed willingness to continue operating the Columbia City facility if it could be operated at a break-even point or even at a slight loss, and sought to reduce the Columbia City facility's labor costs. (Trans. at 474-75, 489-91). It researched wages paid to employees working in manufacturing sector in the Columbia City area to determine the "going rate" to hire and retain unskilled employees. (Trans. at 402-03; 514). While the Union insists the Company's position on being "competitive" was unclear, the Union expressed an understanding that the Company's position was that it could retain unskilled employees with a significantly lower hourly wage. (Trans. at 153; 228, 316).

**1. The Union has never requested information on the Company's competitors.**

The Union contends, again without citation to the record,<sup>28</sup> that "[w]hen the Union asked for information about the Company's competitors, Coupled Products did not divulge information on competitors and tried to recast it as a question for wage rates for laborers in the area, providing information from businesses Rubrake 'randomly' selected." (Exc. Br. at 29). This is another blatant misstatement of the record. **Nothing** in the record suggests that the Union has ever requested information about the Company's competitors. Throughout negotiations, the Union has demanded an audit of the Company's books, contending that the Company had expressed an inability to pay. McMillin demanded "to audit Coupled Products LLC books and all finances" because "when a company is demanding wage reductions on poverty or their

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<sup>28</sup> The record citation at the end of the Union's lengthy allegation is a citation to Rubrake's testimony that she did not know if C & A tool did assembly pack locally and that she was "just randomly trying to find businesses to call, because I was asked to get comparisons." (Tr. at 460). Rubrake testified that several of these comparators, including ReelCraft, C&A Tool, PeopleLink, and 80/20, all of which were geographically close to the Columbia City facility. (Trans. at 455-60). Rubrake specifically excluded one comparator from her analysis because they "did nothing at all close to what we did out there." (Trans. at 456). Rubrake also testified that she first called different local places that she knew had business "kind of close to us." (*Id.* at 402).

inability to pay wages. . . [w]e as a Union have the right to go over all books and finances.” (GCX 17). The bargaining committee demanded an audit because “You stated Brad (Coupled Products LLC) can no longer afford, and has the inability to pay the wages where they are at today. You tell us the company is continuously losing money, [sic] if this is true and you can show us through your financial books we may be more apt to convince the membership that with these current wages the company would go bankrupt.” (GCX 40). In an internal Union memo dated May 26, 2011, McMillin stated, “The Company is pleading poverty and I would like to have their financial records researched.” (GCX 39). Both of the Union’s unfair labor practice charges complain that the Company denied its requests for financial information. (GCX 1(b)-(c)). The Consolidated Complaint alleges that the Company has failed to furnish the Union with financial records. (GXC 1(p) at ¶ 5(d), 5(f)). The Union now seeks, at the eleventh hour, to recast its continued demand for an audit into a request about the Company’s competitors.

Although the Union demanded an audit, and did not request information about the Company’s competitors, the Union cites *Caldwell Manufacturing Co.* for the proposition that the Company was required to respond to the Union’s demand for an audit with information about its competitors—information which the Union had not requested. (Exc. Br. at 29). *Caldwell* does not stand for this proposition. In *Caldwell*, the union *requested* specific items, such as cost and productivity information that it claimed was necessary to evaluate the accuracy of the employer’s bargaining claims that its facility was less competitive than its other plants. The union in *Caldwell* did not demand an audit and then, after having been on strike more than a year, insist that the Company should have responded to its audit request with information regarding its competitors, or some other unspecified information.

**2. The Union’s demand for an audit did not require the Company to provide the Union with an entirely different subset of information that it did not request.**

Board decisions demonstrate that when an employer expresses concerns about competitive disadvantage, the Union is entitled, *upon request* to certain types of information to substantiate the Company’s statements. *See Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006). (emphasis added). An employer who claims a competitive disadvantage is not obligated to provide the Union with general access to its financial records. *Id.* Where an employer claims a competitive disadvantage, the Union is entitled, upon request, to a different, more limited set of materials that it believes to be necessary to evaluate the employer’s claims. *Id.* The information a Union is entitled when an employer states an inability to pay is different from the information to which it is entitled when the employer states that it is at a competitive disadvantage.

Although the Union repeatedly demanded “an audit,” or general access to the Company’s financial records, it contends in its exceptions that the Company was required to respond to the Union’s request for an audit with a different set of information—presumably regarding its competitors, which the Union *did not* request. (Exc. Br. at 28-29). As seen below, no Board precedent suggests that an employer has a duty to provide information to the Union, absent a request. Moreover, no Board precedent exists that requires an employer to respond to a union’s audit demand with a different set of information that was not requested.

**a. The ALJ correctly held that Company was not obligated to guess which information the Union was actually requesting when it demanded an audit.**

The Union contends that the ALJ held that standards for providing relevant information in response to the union’s request are different depending upon whether the requested information is “presumptively relevant.” (Exc. Br. at 30). Careful reading of the ALJ’s decision,

however, demonstrates that he found *Keauhou Beach Hotel* to be factually distinguishable, and that he did not establish a different standard depending upon whether the requested information was presumptively relevant. (ALJD at p.18, ll. 26-37)

The Union cites *Keauhou Beach Hotel Co.*, 298 NLRB 702 (1990) for the proposition that a Company who has not stated an inability to pay cannot simply deny a union's request for an audit, but must guess that the Union may actually be requesting an entirely different set of information. In *Keauhou*, the Union requested information about (1) the name, age, classification, wage rates of each covered employee, (2) the weighted average wage rate, (3) total compensable hours for the past year, (4) total cost, on a compensable hour basis of benefits use, and (5) cost per employee per month of the medical, dental drug, vision, and/or life insurance and pension/profit sharing plans. The employer refused to provide the requested information because the Union's information request was ambiguous in that it failed to specify whether it sought information regarding all employees or only unit employees. The Board noted that the employer had not attempted to rebut the presumption that the requested information was relevant. *Id.* at 702. However, the Board held that, even if the Union's request was ambiguous and/or intended to include information about nonunit employees when made, this would not excuse the Respondent's blanket refusal to comply, and that the employer could not simply refuse to comply with a request, but must clarify and/or comply with the request *to the extent it encompasses necessary and relevant information.*" *Id.* at 703 (emphasis added). Importantly, the information requested in *Keahou* was clearly delineated, and the employer was not required to determine the type of information the Union requested.

The Board in *Keauhou* did not hold that the Union can demand to audit the Company's books, and then complain (after being on strike for more than a year) that the Company had not

responded to the audit request with information about its competitors or some other unspecified information that it had not requested. Unlike the union in *Keauhou*, who requested a clearly delineated set of information, but did not specify whether it pertained to bargaining unit members or all employees, the Union here requested to audit the Company's books, but now, more than a year later, insists that the Company should have responded by providing it with different information than that which the Union had requested.

The Union also cites *Barnard Engineering*, 282 NLRB 617, 619 (1987) for the proposition that the Company committed an unfair labor practice by refusing the Union's demand for an audit and/or not responding to its audit demand by providing an entirely different type of information. *Barnard* is also distinguishable. In *Barnard*, the union requested information about corporate entities that it believed to be joint employers. The employer complained that the union had failed to state the basis for request for such information, and that the request was substantially overbroad, overreaching, and vague. The Board found that the Union established a reasonable basis for requesting the information concerning the relationship between the two entities, and held that the mere fact that the union's request for information that the employer was not legally obligated to provide did not exclude the employer from complying with the union's request *to the extent it encompasses information which the employer is statutorily required to provide*. *Id.* at 621 (emphasis added). *Barnard* did not, however, require the employer to respond to the Union's request for information with an entirely different set of information than that which the Union had requested.

The Union also cites to a footnote in *Colgate-Palmolive Co.* for the proposition that the Company was not entitled to issue a "blanket refusal" to its audit demand. The issue in *Colgate* was whether the Company was required to honor the Union's request for various safety and

health data, including a list of ingredients used in the plant. The Company denied the Union's request on the grounds that the information would be burdensome/expensive to produce, was proprietary, and that three to four percent of the ingredients it used would be classified as confidential or a trade secret. The Board noted that the Company had not addressed with the union its concerns about the breadth of the information requested or the expenses associated with producing such materials. *Colgate's* reference to the impermissibility of the Company's "blanket refusal" was in reference to the Company's refusal to produce a huge amount of relevant information, only some of which was proprietary, and without discussing its concerns over the production with the union. *Colgate* did not hold that the employer was required to provide the Union with something it had not requested.

**b. The Company's "blanket denial" of the Union's audit demand does not constitute an unfair labor practice.**

The Union also insists that the Company's "blanket denial" of its audit demand forced it to "go through the NLRB process to obtain the information." (Exc. Br. at 31). Paradoxically, exactly what information the Union complains that it should have received from the Company remains unclear. Nevertheless, the Company's "blanket denial" of the Union's demand for an audit—to which it was not entitled—did not force the Union to petition the NLRB for relevant information regarding the Company's bargaining position. To date, the Union has never made a request for competitor information, or any other unspecified information for the Company to deny. It has, instead, insisted that the Company was claiming an inability to pay, and demanded to audit the Company's books to establish whether the Company was financially capable of continuing to pay wages at the then-current levels.

The Company employs the Union members—it does not represent them. The Union now advocates for an untenable policy that renders the Company liable for the Union's failure to

request relevant information during negotiations. The Union insists that once it demanded to audit the Company's books (a demand that General Counsel admits was "overbroad"), the Company was obligated to determine that the Union was actually requesting an entirely different set of information regarding its competitors. Using the Union's logic, a union would be well-advised to demand an "audit" or even "every document in your possession" at the beginning of highly-contentious negotiations, thus forcing the employer to attempt to determine what information to actually provide, and providing grounds for an unfair labor practice charge if the employer does not adequately assess the Union's needs for information. While the Union insists that the Company should have attempted to "clarify" the Union's demands, this contention is especially unreasonable when considered in light of the fact that the Union never wavered from its demands for an audit or access to the Company's general financial information, and never made any attempt limit or modify its request.

In the cases cited by the Union, the Board faulted employers for issuing blanket denials to a union's "overbroad" request for information that included both information to which the union was entitled and information to which it is not entitled. In none of these cases, however, did the Board require an employer to respond to a Union's demand for an audit of the employer's financial records by providing different information that the Union had not requested.

**C. Johnson disavowed any statement that could have been construed as a statement that the Company's inability to pay.**

**24. The Union excepts to the ALJ's legal conclusion that Respondent's June 17 letter to the Union dissolved any obligation the Respondent had to provide relevant financial information. (ALJD p. 15, ll. 1-9).**

The Union complains of the ALJ's purported legal conclusion that "even if there had been some uncertainty over the Company's conduct at the table, Johnson clarified it with a June 17 letter to the [U]nion . . ." (Exc. Br. at 31). The ALJ actually cited *Richmond Times-*

*Dispatch* and *American Polystyrene Corp.* for the proposition that even “where an employer has made a claim suggesting that it is unable to pay current wages and benefits, the Board has held that a clarification unequivocally indicating that the employer is not claiming an inability to pay establishes that the employer is not obligated provide general financial information requested by the union.”

The ALJ’s decision clearly states that Johnson denied the Union’s contention that she had stated an inability to pay “in *both* a handwritten and typed letter and reiterated that the Respondent’s economic proposal was based on its need to be competitive.” (ALJD p. 15, ll. 5-9) (emphasis added). The Union, in yet another blatant misstatement of the record, cites only a select portion of one of the two exhibits relied upon by the ALJ, and complains that Johnson’s “June 17 letter. . . did not say the Company ‘will not pay’ the wages, but instead that the company ‘did not say it had the inability to pay and instead said ‘competitive’.” (Exc. Br. at 32). Johnson also responded to the Union in a typed letter, which explicitly states, “Kathy kept trying to use the words ‘no longer afford’ and I repeatedly told her I had said *we would no longer pay* where we were today because ‘we need to be competitive.’” (R5) (emphasis added). In both responses however, Johnson disavows any assertion that the Company had taken the position that it was unable to pay the wages demanded by the Union. (R5, R6).

In addition to the June 17, 2011 responses to the Union, Johnson consistently refuted the Union’s repeated assertions that the Company was stating an inability to pay throughout negotiations. Johnson explicitly stated that the Company was unwilling to pay the wages and benefits demanded by the Union during negotiations on May 24, and repeatedly refuted the Union’s assertions that the Company was claiming to be unable to pay. (Trans at 156-157; 326-

27, GCX 31 at 24; R2; R9 at CP 487). The ALJ correctly found that, even if Johnson had inadvertently stated an inability to pay, she credibly disavowed such a statement.

**D. The ALJ properly found that the parties were at a valid impasse when the Company implemented its final offer. (Exceptions 43-44).**

The ALJ held that the Company did not fail to provide necessary and relevant information in violation of Section 8(a)(5) and (1) of the Act, and consequently found that the parties were at a valid impasse when the Company implemented its final offer. (ALJD p. 19, ll. 19). As discussed above, the Company did not express that it was unable to pay the wages and benefits demanded by the Union. The Union was, therefore, not entitled to audit the Company's financial records. The Company's refusal to provide the Union with an audit—to which the Union was not entitled—did not prevent the parties from reaching valid impasse.

The record shows that the parties had reached a valid impasse. Bargaining committee members testified that the gap between the Union and the Company's position on "monetary issues" was too wide to be resolved, and that negotiations were going nowhere. (Trans. at 169, 230). McMillin told Johnson to "pack up the trucks" and "call Mexico" to tell it that "stuff was on the way," insinuating that the Union preferred closing the Columbia City facility to accepting the Company's best and final offer. (Trans. at 169-70; R8 at 25; GCX 30 at 36).

The NLRA does not require the Company to continue engaging in fruitless discussions with the Union. The Union maintained throughout negotiations that it would never accept the Company's best and final offer, even indicating a preference for closing the Columbia City to accepting the Company's best and final offer. The Company maintained that it was unwilling to maintain the status quo with regards to the payment of wages and benefits. Because both parties refused to depart from their positions on wages and benefits, there was no realistic possibility that continued negotiations after June 15, 2011 would have been fruitful. The Company and the

Union reached legal impasse, and neither party has indicated a change in position that would break the existing deadlock. The Company was entitled to unilaterally implement the terms of its best and final offer.

**E. The ALJ properly found that the Company did not commit any unfair labor practices and that the Union was not on an unfair labor practice strike. (Exceptions 45-46)**

Because the Company did not claim an inability to pay the wages and benefits demanded by the Union, the Union was not entitled to audit the Company's financial information. The Union's persistent demands for an audit also did not obligate the Company to provide the Union with different information that the Union did not request. The Company's refusal to provide the Union with an audit, and failure to determine that the Union's request for an audit was actually a request for competitor information or a request for more limited information do not constitute an unfair labor practice.

**1. Even if the Company's failure to submit to the Union's audit demands constituted an unfair labor practice, the Union's strike was not motivated by the unfair labor practice.**

Even if the Board were to find that the Company's failure to submit to the Union's audit demands constitutes an unfair labor practice, nothing in the record suggests that the Union members are currently engaged in an unfair labor practice strike. Board precedent requires evidence that the strikers themselves were motivated by the employer's unfair labor practices. *See Golden Stevedoring Co.* 355 NLRB at 411-12 (finding it "most significant" that General Counsel failed to offer evidence that unfair labor practices were discussed at strike meeting and rejecting employees' generalized complaints about management "harassment" as proof that unfair labor practices motivated strikers); *C-Line Express*, 292 NLRB 638, 639 (1989) (noting lack of evidence that strikers "were even aware" of alleged refusal to answer information

requests or that unlawful statements to some of their co-workers on the picket line prolonged the strike); *F.L. Thorpe & Co. v. NLRB*, 71 F.3d 282, 290-91 (8<sup>th</sup> Cir. 1995) *denying enf.* 315 NLR 147 (1994) (reinstating ALJ's conclusion that employer's unfair labor practices did not motivate strike when abundant evidence showed that employees were motivated by economic issues, evidence of dissemination was limited to small number of employees, and picket signs never reference the unfair labor practices).

The state of mind of the strikers must be that their concerted work stoppage and strike was, at least in part motivated by their employer's unfair labor practices. *Pennant Foods Co.*, 347 NLRB 460, 469 (2006). Put another way, whenever a reasonable inference may be drawn that an employer's unfair labor practices played a part in the decision of the employees to strike, said concerted work stoppage is an unfair labor practice strike. *Post Tension of Nevada, Inc.*, 352 NLRB 1153, 1162-63 (2008). The burden is on the employer to establish that the strike would have occurred even if it had not committed unfair labor practices. *Id.*

Nothing in the record supports a reasonable inference that the Company's purported unfair labor practices played a part in the Union members' decision to strike. The bargaining unit voted to support a strike on May 2, 2011, prior to the first bargaining session, and prior to any Union request to audit the Company's finances. (GCX Ex. 33). On May 20, 2011, after only three days of negotiations, and before the Company had made any statements that the Union interpreted as pleading inability to pay, the Union submitted a request for strike authorization to the international union. (Trans. at 316; GCX Ex. 41). In its strike authorization request, the Union cited the following issues to support their requested strike: wage reduction, vacations, holidays, S & A, bereavement, seniority, and increased insurance premiums. (GCX Ex 41, p. 3).

A second strike vote was not taken. (Trans. at 177). On June 9, 2011, the Union membership met to vote on the ratification of the Company's best and final offer. (GCX 34). At the ratification vote, McMillin spoke to the membership, explaining that she thought the Company's offer was bad because the wages were ridiculous, and that she did not recommend that they accept it. (Trans. at 337-39). Notably, McMillin's testimony does not suggest that she or any other committee member advised the membership that they should vote against ratifying the Company's best and final offer because the Company refused the Union's audit request. (*Id.* at 337-339). The committee did not speak to the Union membership about whether the Union was going on an unfair labor practice strike or an economic strike. (*Id.* at 246). In fact, nothing in the record suggests that the rank and file membership was even aware of the Company's refusal to allow the Union to audit its books.

While Mike Ailes testified that he made a recommendation to approve McMillin's strike request, and referenced the fact that the Union had not received information pursuant to its requests, the relevant inquiry is whether the Union members were motivated to strike because of the purported unfair labor practice. Nothing in the record suggests that the union members were even aware that the Company had refused to allow the Union to audit its books when they decided to strike. Moreover, after going on strike, the striking members of the Union, through their counsel testifying under oath before the Indiana Department of Workforce Development, stated the Union members had been permanently replaced, a position that is wholly inconsistent with their contention that they are currently engaged in an unfair labor practice strike. (R23).

Even if the Board were to find that the Company's refusal to submit to an audit constitutes an unfair labor practice, the record demonstrates that the unfair labor practice did not motivate the strike.

### **III. Conclusion**

The ALJ correctly found that the Company did not state an inability to pay, that the Union was not entitled to audit the Company's books, and that the Company was not obligated to respond to the Union's audit demand by guessing at what types of information that Union might have deemed relevant. Because the ALJ correctly found that no unfair labor practice had occurred, he correctly found that the parties were at valid impasse, that the Company was entitled to unilaterally alter the terms and conditions of employment, and that the Union is currently engaged in an economic strike. Therefore, the Company respectfully requests that the Board AFFIRM the decision of the ALJ's findings of fact and conclusions of law.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 1st day of August, 2012, I e-mailed a true and correct copy of the above and foregoing to:

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