UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

AFL QUALITY NY, LLC, INC.
d/b/a AFL WEB PRINTING

and Case No. 22-CA-078497

LOCAL ONE-L
AMALGAMATED LITHOGRAPHERS OF
AMERICA, GCC/IBT

Laura Elrashedy, Esq., of Newark, New Jersey,
for the Acting General Counsel.
Christopher Gant, Esq., of New York, NY,
for the Charging Party.
Robert M. Vercruysse, Esq. of Bingham Farms, MI,
for the Respondent-Employer.

DECISION

Statement of the Case

Kenneth W. Chu, Administrative Law Judge. This case was tried on October 10, 11, 2012[1] in Newark, New Jersey pursuant to an Amended Complaint and Notice of Hearing issued by the Regional Director for Region 22 of the National Labor Relations Board ("NLRB") on September 10. The complaint alleges that AFL Quality NY, LLC, Inc. d/b/a AFL Web Printing (the Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act ("NLRA" or "Act") by failing to provide information to the Amalgamated Lithographers of America, GCC/IBT, Local One-L (the Charging Party or Union), which was the certified bargaining representative of an appropriate unit of its employees. The amended complaint further alleges that Respondent implemented its final proposal prior to reaching good-faith impasse. Respondent filed a timely answer to the complaint denying the material allegations in the complaint.

After the close of the hearing,[2] the briefs were timely filed by the Charging Party and

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[1] All dates are in 2012 unless otherwise indicated.

[2] On October 25, Respondent moved to change a single word in the transcript, asserting that the witness' testimony at page 153, line 9, stating "I think that goes beyond my *ken* to answer" should instead be substituted for "I think that goes beyond my *canned* [to] answer." The Acting General Counsel opposed the motion. See, Acting General Counsel's closing brief. I agree with the Acting General Counsel. I find no merit to the Respondent's assertion and the motion is dismissed. My review of this statement, along with the audio CD leads me to believe that the word used by the witness was "ken" and not "canned." The word "ken" means the range of what one can know or understand. See *Webster's Dictionary* (3rd ed.1981). To argue that the witness provided a "canned answer" is nonsensical and flies against the context of his overall testimony.

Acting General Counsel which I have carefully considered. On the entire record, including my observation of the demeanor of the witnesses, I make the following

Findings of Fact

I. Jurisdiction and Labor Organization Status

The Respondent, a New Jersey corporation with a facility in Secaucus, New Jersey, is engaged in the business of printing newspapers and other daily periodicals. During a representative 1-year period, the Respondent received goods at its Secaucus facility valued in excess of $50,000 directly from points outside the State of New Jersey. Accordingly, I find, as the Respondent admits, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[3]

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. The Background History Relating to the Information Request

After a representation election, the Board, on September 15, 2010, certified the Union as the exclusive collective bargaining representative of the Respondent's employees in the following appropriate unit:

All full-time and regular part-time pre-press and pressroom lithographic employees, including first pressmen, second pressmen, roll tenders, press help and output operators employed by the Respondent at its Secaucus, New Jersey facility, but excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

After the Board certification, the Union and the Respondent bargained for the parties' initial collective bargaining agreement from November 5, 2010 to March 12, 2012.[4] There was a total of 30 bargaining sessions[5] (TR. 32). The members of the Union bargaining committee consisted of Susan Jennik, David Cann, Pat LoPresti (Union President), Gene Kreiss (Union Vice-President) and union members who had attended various bargaining sessions.

Jennik and Cann testified on behalf of the Acting General Counsel. Jennik was the chief negotiator for the Union and a partner in the law firm of Kennedy, Jennik and Murray, P.C. The firm represented the Union from the time it was certified and throughout the bargaining sessions. Jennik testified that David Cann, an associate with the law firm, was the designated

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[3] The Respondent argues that the NLRB lacked a quorum at the present time to act due to the recess appointments of Board members made while the Senate was in session. The Board has historically declined to determine the merits of claims attacking the validity of Presidential appointments and has, instead, applied the well-settled presumption of regularity of the official acts of public officials in the absence of clear evidence to the contrary. *Center for Social Change, Inc.,* 358 NLRB No. 24 (2012).

[4] During the organizing drive, a complaint was issued by the Region (Case No. 22-CA-029494). A Board order, issued on May 10, adopted the Administrative Law Judge's findings of unfair labor practices and recommendations for specific remedy.

[5] Testimony is noted as "Tr." (Transcript) and General Counsel's Exhibits are identified as "GC Exh." The exhibits for the Respondent and Charging Party are identified respectively as "R Exh." and "CP Exh."

chief negotiator when she was not available (Tr.30-32).

Respondent's bargaining committee consisted of Jerry Dropcho, the Human Resources Director, Manager Raymond McCandless, and Michael Rybecki, who was the chief negotiator. Dropcho and Rybecki testified on behalf of the Respondent. Dropcho testified that he provided advice to Rybecki and prepared the minutes from the bargaining sessions for the Respondent (Tr. 221-223).

From the outset, the Respondent has consistently refused to negotiate any wage increases. The Union submitted its first comprehensive economic proposal to the Respondent on March 23, 2011. Relevant to the issue at hand, the Union proposed a 10% increase in wages for each year in 2011, 2012 and 2013 and for preserving the Inter-Local Pension Fund (U Exh. 119). Jennik testified that the pension is funded exclusively by employees through payroll deductions with no employer contributions (Tr. 35). Respondent responded with no wage increases and refused to provide payroll deductions to the pension fund. The Union was informed that the deductions would result in a loss of net pay to the employees and this would cause dissatisfaction and, in turn, a demand for more wages (CP 1 Exh. at 140). The Respondent's position of no increases in wage and benefits was firmly reflected in the April 20, 2011 bargaining notes (R. Exh. 4 at 1):

> As the Employer said in its response to the Union's first economic proposal, AFL is in the business of servicing commercial customers, typically newspapers, based on its ability to provide services at a price attractive to those customers, AFL believes that customers and potential customers are generally cost sensitive and therefore is of the opinion that it is not in the best interest of its business to increase labor costs at this time (CP 3 Exh. at 139).

Rybecki testified that it was in the Respondent's business judgment not to increase cost (Tr. 273) and has stated in various written communications (GC Exh. 4) to the Union that:

- As previously stated, the Company's fundamental position is that it does not consider it to be in the best interest of the business to raise labor costs.
- The Company, as a matter of business judgment, believes that its customers are price-sensitive and that keeping our labor costs stable is one way to attract and retain business.
- As it has consistently been stated, the Company's fundamental position with respect to all or any of the Union's economic demands is that it does not consider it to be in the best interest of the business to raise labor costs. The Company, as a matter of its business judgment, believes that its customers are price-sensitive and that keeping our labor costs stable is one way to attract and retain business.
- In this regard, AFL believes it has positioned itself as a cost-effective alternative for newspapers. But the Company believes that further increasing costs would erode its position in the marketplace.

B. The Information Request

The foregoing background set the stage for the Union's November 14, 2011 information request. At the November 14 session, Rybecki repeated the Respondent's fundamental position that it was not in the best interest of the business to raise labor costs and that increasing its costs would erode its position in the marketplace (R Exh. 4 at 80). Rybecki

reiterated that there would be no payroll deduction for the pension fund and proposed to eliminate one of three health plans.[6] Jennik objected to the elimination of Direct Access Plan 1, which had the most comprehensive health coverage of the three plans. A majority of the unit employees were enrolled in this plan (R Exh 4 at 74; CP 3 Exh. at 500; TR. 35-39).

After the November 14 session, the Union emailed Rybecki and requested information for such items as rate of wages, benefits of bargaining and non-bargaining unit employees, any increases in salaries, general labor costs, compensation packages for management employees, and total costs for bargaining and non-bargaining employees in the past two years. The complete written information request (GC Exh. 5; CP 3 Exh. at 506) was as follows:

1. In a meeting of bargaining unit employees held in June or July 2011, AFL CEO Antoinette Francechini stated in substance: "As long as things keep going the way they are going, in the beginning of the year, everyone should see more money."
   What did she mean by that statement?
   What needs to happen for employees to see more money in the beginning of the year?
   Has AFL's business changed for the better or worse since that statement?
2. Have costs other than labor costs been stable for the last two years? If not, which costs have increased and which costs have decreased and by how much?
3. Has AFL's customer-base increased in the past year? Who are the new customers of AFL and how much business have they brought to AFL?
4. What has been the turnover of bargaining unit employees in the past two years?
5. Has there been any increase in salary and benefits for non-bargaining unit employees in the past two years. If so, please identify the nature and extent of any increases.
6. For the new management employees, have their compensation packages been higher or lower than that of their predecessors? If so, by how much?
7. What has been the total cost of bargaining unit employees for the last two years?
8. What has been the total cost on non-bargaining unit employees for the last two years?
9. What has been the total non-employment cost for the last two years?
10. Please identify the companies which compete in the marketplace with AFL?

According to Jennik, the information was necessary because the Respondent consistently took the position that there would be no economic improvements in order to keep costs down.[7] Jennik asked at the November 14 session whether cost had increased for non-bargaining unit employees and with the hiring of new managers. Jennik explained that since the Respondent's position at bargaining has always been to keep costs stable, the Union wanted to verify if this was also true with the non-unit employees and with the new managers. Jennik elaborated that if the information requested shows that the Respondent had increased wages of managers and non-unit employees, this would convince the employer to change its position (Tr. 89, 90). Rybecki told Jennik that he was not certain that the Union was entitled to all that information (Tr. 45-49).

[6] The three health plans were Direct Access 1, Direct Access 10, and POS Design 3 (GC Exh. 3b).

[7] I ruled that the only information that was not provided to the Union was in items five, six and eight (Tr. 139, 278). I note that the amended complaint alleges only request items five, six and eight were still outstanding (GC Exh 1).

C. The Information Relating to Salary and Benefits Increase of Non-Bargaining Unit Employees

Request item five sought information on any salary and benefits increase of non-bargaining unit employees. The request asks for information as to the nature and extent of any increases. Jennik stated that this information was needed in order to bargain from an informed position and to verify the accuracy that the Respondent had kept costs and wages stable with the non-unit employees.

At the November 29, 2011 bargaining session, the Union received a response to request item five regarding any increase in salary and benefits of non-unit employees during the past two years. Rybecki informed Jennik that the non-unit employees had received the same increase and decrease in wages as imposed on the unit employees, which was a five percent decrease in wages two years earlier and an increase of two and half percent in 2010. Jennik was also informed that individual employees would receive additional increases on occasions due to their improvements in skill level or because of a promotion (Tr. 279). Jennik complained that this was a partial response to item five because there were employees who had received additional increases (over five percent) and the information as to the reasons for those increases (e.g. promotions, skills enhancements, merit increases) were not included in Rybecki's response. Rybecki maintained that he had fully provided information on this request item and that Jennik never stated that his was a partial response (Tr. 278).

At the January 3 bargaining session, Jennik testified that the Respondent still refuse to identify the number of employees receiving the additional wage increases and only vaguely identified the increases were due to skill upgrades and promotions (Tr. 58, 138). Jennik also testified that the Respondent had offered a wage increase on January 3 to the bargaining unit employees. The Respondent had previously offered no wage increase but is now proposing an increase, but contingent on non-unit employees receiving an increase (Tr. 66, 74-79; GC Exh. 7 and 8).

Jennik testified that getting a full and responsive answer to item five had renewed urgency because the contingent nature of any wage increases to the non-unit employees requires verification as to when and how much in order that the unit employees receive the same increases (Tr. 59-61; GC Exh. 7). Jennik testified that the Union never received any more information with regard to item five after this bargaining session.

Jennik's testimony was corroborated by Cann, who testified that the Respondent gave a partial response to item five because the Respondent did not provide information on the merit increases given to employees, did not state the amount of increases, and did not identify the titles of the employees receiving increases (TR. 162, 185, 186).

D. The Information Relating to Compensation Packages of Management Employees and Total Cost of Non-Bargaining Unit Employees

Request item six relates to information sought by the Union on the compensation packages given to management employees and whether the compensation has been higher or lower in the past two years. Request item eight relates to information as to the total cost for non-bargaining unit employees in the last two years. Jennik said that such information was relevant in order to verify the Respondent's negotiating position that it wanted to keep labor costs stable. With regard to item six, Jennik testified that inasmuch as the Respondent

premised its refusal to offer a wage increase to the unit employees on keeping costs stable, the Union wanted to know if newly hired managers were receiving higher salaries than former managers (Tr. 49, 50). With regard to item eight, Jennik testified that the information is relevant to verify that the Respondent's total cost for non-unit employees have also been kept stable. Jennik distinguished item five, which was the increases given to non-bargaining unit employees from item eight, which account for increases of benefits to new hires for the prior two years (Tr. 51, 52).

Jennik repine that the Union never received a response to items six and eight, although Rybecki had promised to provide a written response (Tr. 56, 57). The Respondent's bargaining notes of November 29th, as prepared by Dropcho, clearly state "…we will write up responses to other requests in a letter. See attached email for list of questions from the union dated 11/14/11" (R Exh. 4 at 99). Cann stated that Respondent never provided the information for items six and eight (Tr. 186).

At the January 3 bargaining session, Rybecki informed Jennik that the Union was not entitled to request items six and eight (R Exh. 4 at 101; Tr. 58, 59, 63). Rybecki testified that he verbally informed the Union that items six and eight were not presumptively relevant to the bargaining unit employees and insisted that the Union never provided a reason to establish relevancy. He believed that the Union was not entitled to the information because the Respondent never alleged an inability to pay more to the employees, but rather, that it was in the Respondent's subjective business judgment not to increase wages and benefits (Tr. 280, 281-284). Additionally, Dropcho testified that the information on the benefits and wages of non-unit and management employees was confidential. He was concerned that the competition may lure away Respondent's employees if information on the wage and benefits was made public (Tr. 229, 230). Non-unit employees, James Furman and Dennis Jackson, testified that their wages are private matters and would be upset if the information was released (Tr. 260-267).

E. The Impasse

At the February 21 bargaining session, the parties discussed the Respondent's comprehensive proposal that had been submitted earlier on January 4. Jennik testified that Respondent did not provide any more information for item five and refused to provide any information on items six and eight (Tr. 66). Rybecki opened up the session by offering a one percent increase in wages (Tr. 73; GC Exh. 8a). After a brief caucus, the Respondent returned with a revised economic offer that had increase wages to one and half percent, but contingent upon increases granted to non-bargaining unit employees and states:

It is the Employer's position that if such across the board increases are granted to non-bargaining union employees, this will trigger an obligation to grant a general increase to bargaining unit employees in the manner and at the percentage set forth in the proposal.

The Respondent continued to reject demands for union security, union dues check-off, and the employee contribution to the inter-local pension plan, maintaining its earlier position that they were economic items and would result in a reduced-take-home pay for the employees (Tr. 75, GC Exh. 8b and 8c).

At the following session held on February 22, the Respondent presented its final offer to the Union (GC Exh. 9). Rybecki described the final offer as the "last, best final offer," but informed the Union that the Respondent was not implementing the final offer at that time. Jennik responded that the Union had not received the additional information for request item five and that the Respondent has not provide information on items six and eight (Tr. 77, 78).

The final offer increased wages to two percent, but with the same contingent arrangement noted above. After consideration of the final offer, Respondent was informed that there were three issues important to the Union, to wit: wage increase, dues check-off and union security. Jennik testified that the Union would not recommend approval of any offer without these three items (Tr. 80, 81). The February 22 session ended with the parties at deadlock.

Rybecki contacted Jennik on March 7 and requested a meeting in order to break the deadlock, but denied suggesting to her that the Respondent had another offer to make at their next meeting (Tr. 292-298). The parties met on March 12 and according to Rybecki, the Union asked if there was another proposed offer. Rybecki replied "no" and asked if there was a counter-offer. The Union caucused and returned with a counter offer. Jennik testified that the Union proposed a wage increase of four and half percent and for union security and dues check-off (GC Exh 10 at 628, 629; CP 3 Exh at 842, 843; Tr 82, 83). Rybecki testified that the Respondent had offered a two percent increase, but believe that the parties were too far apart on the wage issue. Rybecki also rejected the Union's demand for security and dues check-off. At this point, Rybecki declared an impasse. According to Rybecki, the Respondent intended to implement the healthcare change (by eliminating the Direct Access 1 health plan), but said most items remain "status quo" (Tr. 299- 301, 323, 324; R Exh. 4 at 121). Jennik objected to the elimination of the health plan and did not agree that the parties were at impasse (Tr. 83). Jennik repine that the Respondent refused to discuss the Union's counter-offer before declaring impasse. Jennik stated that Respondent summarily rejected the Union's counter proposal and proceeded to immediately walk out of the room.

In a letter dated March 14, Jennik reminded the Respondent of the Union's outstanding information request to items six and eight and a partial response to item five (Tr. 84-86; GC Exh 2d). Jennik specifically stated in her letter to Rybecki that:

Information regarding non-bargaining unit costs and Employer's competition are relevant because the Employer has stated on numerous occasions that its refusal to make economic improvements was because of a need to maintain stable costs and remain competitive. The Union is entitled to information to verify the Employer's statements and to enable it to understand the Employer's position.

In a reply letter dated March 21, Rybecki informed Jennik that the Respondent had rejected the Union's March 12 position for a non-contingent wage increase and a demand for union security and dues check-off. Rybecki stated that this left the Respondent with no doubt that the parties were at impasse. With regard to the information requested, Rybecki responded that:

We do not believe that the information requested in presumptively relevant (which the Union appears to concede) or that the Union has established why this employer is under a duty to provide such information. In this regard, all that is offered is the assertion that "the Employer's statements regarding costs and competition demonstrate the information requested is relevant to this case" (GC Exh. 2e).

The parties met once more on May 8, but there were no movement in the negotiations. The parties have not met since May 8 (CP 3 Exh at 846).

III. Discussion and Analysis

The Acting General Counsel contends that the Respondent unlawfully failed and refused to provide the Union with information that was relevant and necessary to the Union during negotiations in violations of 8(a) (5) and (1) of the Act. The Acting General Counsel also

contends that Respondent violated 8(a) (5) and (1) of the Act when it implemented its final offer prior to reaching lawful impasse.

The Respondent argues that the outstanding information request was not presumptively relevant for collective bargaining because the Union was not entitled to the financial information of its non-unit employees. The Respondent also maintains that the financial information regarding the non-unit and management employees was confidential and private. The Respondent contends that it declared impasse after the Union refused to negotiate on the economic issues.

A. The Respondent Violated Section 8(a)(5) and (1) of the Act When it Refused and Failed to Fully Provide the Relevant Information Requested

It is a violation of 8(a)(5) and (1) of the Act when an employer fails or refuses to provide information requested for contract negotiations. *NLRB v. Truitt Mfg., Co.,* 351 U.S. 149 (1956). It is well settled that an employer is obligated to furnish information requested by its employees' collective-bargaining agent that is relevant and necessary to the Union's bargaining responsibilities and contract negotiations. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979). As to information regarding the unit employees, there is a presumption that the information is relevant to the Union's bargaining obligation. When the information requested of an employer is about the employees or operations other than those represented by the Union, it is necessary for the Acting General Counsel to prove relevancy. Relevancy should be broadly construed and absent any countervailing interest, any requested information that has a bearing on the bargaining process must be disclosed. The burden to show relevancy is not exceptionally heavy, "requiring only that a showing be made of a probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *NLRB v. Acme Industrial Co*., 385 U.S. 432, 437 (1967). The standard for relevancy is the same, whether relevancy is presumed or proved by specific evidence. The standard to apply is a liberal discovery-type standard. *Acme Industrial Co.,* supra at 437.

The issue is whether the information sought has any bearing to the bargaining negotiations. Here, the Union was seeking information on three key financial items to the negotiations. The Union needed information on the increases of wages and benefits for non-bargaining unit employees for the past two years; the total cost for non-bargaining unit employees in the last two years; and the compensation packages for new management employees in order to determine if the packages have been higher or lower than that of their predecessors.

Credibility Determinations

I have reviewed the testimony of Jennik and Cann and corroborated the same with the adduced record. I was impressed with their credibility and fully credit their testimony.[8] They testified that the Respondent's position at the bargaining table has always been to refuse any wage increases in order to keep labor costs stable. The Respondent has repeatedly stated that its fundamental position to all of the Union's economic demands is that it does not consider it to

[8] Respondent asserts the Jennik's credibility as a witness must be questioned because she served as the Union's chief negotiator and its legal representative. The Board will not police the canons of ethics of the various bar associations. I ruled at trial that any questions of the ethical propriety of a party's trial attorney testifying at Board proceedings are left to the bar association to decide. *Operating Engineers Local 9 (Fountain Sand Co.)*, 210 NLRB 129, fn. 1 (1974).

be in the best interest of the business to raise labor costs. The Respondent has maintained that as a matter of its business judgment, believes that "…its customers are price-sensitive and that keeping its labor costs stable is one way to attract and retain business." Given this posture, it is not unreasonable for Jennik and Cann to request financial information on the non-unit employees. They credibly testified that such information was necessary in order to verify the truthfulness of the Respondent's statements and had made this known to the Respondent throughout the contract negotiations. For the reasons set forth below, I credit the testimony of Jennik and Cann and, to the extent it conflicts with the testimony of Jennik and Cann, I discredit Rybecki's testimony.

Inability to Pay

The Respondent argued that it was never unable to pay any wage increases and therefore, the financial records should not be made available to the Union. The Board has held that a demand to "open the books" to the union to provide general financial information is relevant if the employer alleges an inability to pay. *Truitt*, 355 U.S. at 153. Here, the Respondent never stated it was unable to pay the demand for increase wages and benefits. In such a situation, a union would not be entitled to general financial information. *Nielsen Lithographing Co*, 305 NLRB 697 (1991). In other words, a company's obligation to open the [financial] books is triggered when it claims an inability to pay and not when it is unwilling to pay. The Respondent had always maintain that it simply did not want to pay and not because it was unable to pay increases in wages and benefits.

However, the Union never demanded full financial disclosure. My review shows that the Union's request for the financial data was narrowly tailored and in response to the Respondent's claim that it wanted to keep costs stable. See, *Caldwell Manufacturing Co.*, 346 NLRB 1159 (2006). In this regard, I credit Jennik's testimony that the information requested was very specific and was in direct response to the Respondent's position that a wage increase for unit employees would be contingent upon an across-the-board increase to non-unit employees.

The Information Sought was Relevant

I find that Respondent violated 8(a) (5) and (1) of the Act when it refused to provide the information requested on items five, six and eight. I find the Union's information request on the three items as it relates to non-unit employees was most relevant. In my opinion, such information is relevant for the Union to negotiate from a knowledgeable position about the wage and benefits increases for its bargaining unit employees. I find that the Union needed the information in order to determine if in fact there were any wage and benefit increases of non-unit employees to verify the accuracy of the Respondent's claim that it wanted to keep costs stable.

With regard to information requested for item five, the Respondent only provided a partial answer because it did not include the wage increases and benefits of non-bargaining unit employees. The Respondent contends that it had fully responded to this request. The Respondent notes that Cann had made an earlier request in a letter dated February 17, 2011 for information on the wages of all its employees outside and within the bargaining unit. Among other items, the information request included the titles/classifications, job duties and wage rates of all employees within and outside the bargaining unit since the unit was certified at the Secaucus facility (CP 3 Exh.104). Rybecki replied on March 7, 2011 that he did not see the relevancy for the information relating to the hires outside of the bargaining unit and declined the request (CP 3 Exh. at 108). Rybecki maintains that he nevertheless provided the average wage rates of the employees in the bargaining unit at the Secaucus facility and for the non-bargaining unit in Voorhees, New Jersey on May 26, 2011 (R Exh. 1). Dropcho testified that the

information provided earlier had been responsive to the information request (Tr. 239). However, I find and Rybecki admitted, that the information did not include benefits and had no references to pay increases (Tr. 326, 327).

Throughout the bargaining history of the parties, the Respondent has consistently maintained that it needed to keep labor costs stable. In that regard, the Respondent eliminated one of the more comprehensive health plan to save cost, offered no increase in benefits or wages until much later in the negotiations, and refused to provide union security and dues check-off. In January, the Respondent offered a contingent wage increase. Given the bargaining history of the parties, it would be reasonable for the Union from a bargaining posture to know if there were past increases in wages and benefits of non-bargaining unit employees and to test the veracity of the Respondent's statements that it wanted to keep costs stable. *East Tennessee Baptist Hospital*, 304 NLRB 872 (1991) (Act violated when the Respondent refused to provide wage rates of non-unit employees in order to verify contract compliance).

Respondent contends the Union's request failed to adequately set forth the relevancy for the information requested. I find Respondent's contentions to be without merit. Rybecki said that the Union never told him why the information was relevant. I find this statement as inconsistent with Jennik's credible testimony that wage information for the non-unit employees was relevant to verify that the Respondent was keeping costs stable. Rybecki's testimony is also inconsistent with Jennik's letter of March 14, which articulated the relevancy for the information and with his own letter of March 21 which stated the Union offered as a reason that "the Employer's statements regarding costs and competition demonstrate that the information is relevant to this case" (GC Exh. 2d). However, even assuming that the Union had not fully articulated the relevancy for this information, the Board has made clear that "where the factual basis of a request for non-unit information is obvious from all the surrounding circumstances, the Union's failure to spell it out will not absolve the employer from its obligation under the Act." *Piggly Wiggly Midwest*, 357 NLRB No. 191 (2012). Here, given the fact that the Respondent had proposed to the unit employees a wage increase contingent upon the non-unit employees having received a wage increase, it is obvious from the surrounding circumstances that the Union needed the wage information in assessing the accuracy of the Respondent's proposals and developing its own counterproposals.

Accordingly, although not presumptively relevant, I find that the Union was entitled to the information for request items five, six and eight to verify the company's assertions. In applying the *Acme Industrial Co.* liberal discovery standard, I find that the Acting General Counsel has met its threshold burden of showing "…probability that the information is relevant in order to carry out its statutory duties and responsibilities." Here, the financial information requested which was limited in scope and focus becomes relevant to verify the Respondent's negotiating posture that it wanted to keep costs and benefits stable. Certainly, knowing the wage and benefits of non-bargaining unit employees would allow the Union to bargain intelligently based upon parity for unit employees. Certainly, assessing the veracity of the Respondent's statements of wanting to keep labor costs stable would allow the Union to bargain knowledgeably. Here, as in *Caldwell*, the Union was not seeking general access to financial records; rather the Union's information request was appropriately tailored to the Respondent's factual assertions.

The Confidential Nature of the Information

Having found the information to be relevant to the Union's responsibilities in bargaining, I turn next to the issue of confidentiality. It is well settled that substantial claims of confidentiality may justify refusals to furnish otherwise relevant information. I have considered the

Respondent's contentions that even if the information was relevant (as I found it was), its interest in protecting the confidential information outweighs the need of the Union for the relevant information. I find that it does not.

As the Board explained in *National Steel Corp*., 335 NLRB 747, 748 (2001):

> With respect the confidentiality claim, it is well established than an employer may not avoid its obligation to provide a union with requested information that is relevant to bargaining simply by asserting a confidential interest in the information. Rather, the employer has the burden to seek an accommodation that will meet the needs of both parties.

Relating to the Respondent's refusal to provide the outstanding information because of privacy and confidential concerns, the Supreme Court articulated a balancing test for determining an employer's duty under the Act to furnish information. The party claiming confidentiality has the burden of proving that such interests are so significant as to outweigh the union's need for the information. *Detroit Edison Co.*, supra. It is well settled that even assuming that the Respondent has a legitimate privacy or confidential concern over releasing the information, it was obligated to notify the Union of its concern and to bargain for an accommodation that will satisfy the Union's need for the information and the employer's need to keep the information confidential. In addition, such claims of confidentiality must be timely raised by the employer so that the parties can bargain over an accommodation. *West Penn Co.*, 339 NLRB 585 (2003); *Salem Hospital Corp.,* 358 NLRB No. 95 (2012).

I find that the Respondent failed to timely raise a claim of confidentiality and it never requested to bargain over an accommodation. In applying the balancing test articulated in *Detroit Edison Co*., the Respondent has not met its burden of proving that such interests are so significant as to outweigh the Union's need for the information, as well as a duty to seek an accommodation. *GTE California, Inc*., 324 NLRB 424, 427 (1997). Here, the Union's request was very limited in scope. The record shows it never broadly requested information as to the identities or for specific wages and benefits information of the non-unit employees.

The record also shows that the Respondent first asserted its confidentiality claim at trial. A close review reveals that the Respondent never objected during any bargaining sessions that such information was confidential, a trade secret or private. Dropcho testified that he recall discussing the issue of confidentiality at the January 3 session. However, he was not able to testify as to what was discussed. More importantly, this discussion was not reflected in the Respondent's bargaining notes, which were prepared by Dropcho (Tr. 247-249). Thus, I discredit his testimony in this regard as vague and inconsistent with his own bargaining notes. There is also no evidence that the Respondent timely requested bargaining about measures to protect the confidentiality and privacy of its employees' wages and compensation packages, which would have naturally occurred if in fact the Respondent had raised the issue of confidentiality during bargaining.

Accordingly, I find that Respondent has not met its burden that its confidential concerns are significant enough to outweigh the Union's need for the information or had requested bargaining to accommodate the confidential nature of the information. I also find that the Respondent's untimely assertion of confidentiality prevented the parties from reaching a timely accommodation. *Pacific Bell Telephone Co.*, 344 NLRB 243 (2005); *Allen Storage & Moving Co.*, 342 NLRB 501 (2004).

B. The Respondent Violated Section 8(a)(5) and (1) of the Act
When it Implemented its Final Offer Prior to Reaching Impasse

The core question must be were the parties at impasse on March 12. The Acting General Counsel contends that the Respondent's failure to provide information that is critical to ongoing bargaining precludes a valid impasse and implementation of a final offer. The Acting General Counsel maintains that as long as the information request was outstanding, a valid impasse could not be reached. The Respondent argues that even if the information was provided, the Union's bargaining position on the economic issues would not have changed.[9]

I find that the Respondent's implementation of its final contract proposal violated Section 8(a)(5) and (1) of the Act by unilaterally implementing changes to the employees' terms and conditions of employment and in particular, the elimination of one of the three health plans previously offered to the unit employees, before reaching lawful impasse.

In *Taft Broadcasting Co*., 163 NLRB 475, 478 (1967), the Board defined impasse as a situation where "good-faith negotiations have exhausted the prospects of concluding an agreement." The burden of demonstrating the existence of impasse rests on the party claiming impasse, here the Respondent. *Serramonte Oldsmobile, Inc.,* 318 NLRB 80, 97 (1995). It is clear that during negotiations, an employer may not make a unilateral change to employees' terms and conditions of employment unless there is a valid impasse. It is also clear that the failure to provide information on a subject that is significant to the bargaining process precludes a valid impasse and the implementation of a final offer. *KLB Industries, Inc*., 357 NLRB No. 8 (2011), enfd. 700 F.3d 551 (D.C. Cir 2012); *NLRB v. Katz*, 369 U.S., 736, 743.

I agreed with the Acting General Counsel that the outstanding information requested precluded a lawful impasse. In *Decker Coal*, supra, the Board found that there was no impasse because the employer had not fully complied with the union's relevant information request to the core issue. *Sierra Bullets, LLC*, 340 NLRB 242, 243-244 (2003) (however, an outstanding information request with no relationship to the core issues does not preclude impasse). Here, as in *Decker Coal,* the outstanding information sought focused precisely on the core issue of bargaining, namely, wage and benefits. Inasmuch as the Respondent premised any offer of a wage increase to an "across the board" increase to non-unit employees, it was essential and relevant that the Union have that information. The information the Union sought would reveal how much increases in wages and benefits the non-bargaining unit employees had received in the past two years and may have enable the Union to more fully evaluate its and the Respondent's position on the bargaining issue. Indeed, I credit Jennik's testimony that if armed with the outstanding information, the Union's position may have soften as to wage and benefit increases. Jennik credibly testified that if the outstanding information had shown that Respondent's costs were not stable and it paid more to non-unit employees, then the Union could show that the Respondent's proposals were unfair. Jennik testified that, similarly, if the information supported the Respondent's position of keeping costs stable, the Union might have trusted the Respondent and may have accepted their proposal (Tr. 89, 90, 137).

[9] The sole litigated theory of the Acting General Counsel is that the pendency of the Union's information request, involving an issue of bargaining precludes implementation of a final contract offer and not on a different theory, such as the theory that there was still a potential for movement on some of the bargaining issues or that there were unremedied unfair labor practice violations. *Decker Coal*, 301 NLRB 729 (1991). Consequently, it is not necessary to address the Respondent's contentions that there was impasse because the Union had refused to move on the economic issues.

Although the Respondent had provided some information, but as of the date it declared impasse in negotiations and implemented its last, best final offer, the employer had not provided all the information. *United States Testing Co.*, 324 NLRB 854, 680 (1997); enfd. 160F.2d 14 (D.C. Cir. 1998) (Standing alone, the refusal to furnish information about a subject so central to the parties' bargaining could preclude the finding of a lawful impasse).

Conclusions of Law

1. By failing and refusing to fully provide the relevant information to the Union in its November 14, 2011 request, Respondent has committed an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act.

2. By declaring impasse in negotiations at a time when there were unanswered request for relevant information, the Respondent has committed an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act.

3. On or about March 12, and continually thereafter, the Respondent violated Section 8(a) (5) and (1) of the Act by unilaterally cancelling one of the three health plans of the bargaining unit employees that it was obligated to bargain over.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusion of law and on the entire record, I issue the following recommend[10]

Order

The Respondent, AFL Quality New York, LLC, Inc, its officers, agents, successor, and assigns, shall

1. Cease and Desist from

(a) Failing and refusing to provide information requested to the Union that is necessary and relevant to its role as the exclusive representative of the employees in the following unit:

> All full-time and regular part-time pre-press and pressroom lithographic employees, including first pressmen, second pressmen, roll tenders, press help and output operators employed by the Respondent at its Secaucus, New Jersey facility, but excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Failing and refusing to bargain in good-faith with the Union as the exclusive representative of employees in the appropriate unit set forth in 1(a) above by premature

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

impasse declarations, by implementing a last and final contract offer without having reached a valid impasse and by eliminating one of the three health insurance plans previously provided to the unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

(a) Furnish the Union with the full information it requested on November 14, 2011.

(b) Bargain collectively in good faith with the Union as the exclusive representative of the employees in the bargaining unit set forth in subsection 1(a) above, and embody any understanding reached in a signed agreement.

(c) Restore employment terms and conditions of the bargaining unit set forth in subsection 1(a) to the levels prior to March 12, including the restoration of the health plan that was eliminated at the time of impasse, and maintain them until such time as the parties have bargained in good faith and reached agreement, or alternatively, until a valid impasse reached.

(d) The Respondent shall reinstate the health insurance coverage plan (aka Direct Access 1) for unit employees that it had unilaterally terminated at the commencement of the declared impasse on March 12, 2012.

(e) For the employees previously enrolled in the Direct Access 1 health plan, they shall be made whole for any losses or other benefits, suffered, or expenses they may have incurred, including premium costs and interest, if any, which resulted from Respondent's unlawful changes in their preferred healthcare insurance coverage.[11]

(f) Within Fourteen (14) days, post at the Respondent's Secaucus facility, a copy of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, or sold the business or the facilities involved herein, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 14, 2011.

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[11] Make whole amounts owed to employees under this Order are to be computed as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970); interest on such amounts is to be computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical*, 356 NLRB No. 8 (2010).

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

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated: Washington, D.C., March 5, 2013.

_____

Kenneth W. Chu
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT refuse to bargain with the Union (Local One-L Amalgamated Lithographers of America, GCC/IBT) as the exclusive representative of the employees in the following unit:

All full-time and regular part-time pre-press and pressroom lithographic employees, including first pressmen, second pressmen, roll tenders, press help and output operators employed by the Respondent at its Secaucus, New Jersey facility, but excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to bargain with the Union by unilaterally changing, without notice and an opportunity to bargain, terms and conditions of employment that existed as of March 12, 2012.

WE WILL NOT fail and refuse to provide information to the Union that is relevant and necessary to its role as the exclusive bargaining representative of the bargaining unit noted above.

WE WILL NOT unilaterally terminate employees' health insurance coverage without notifying the Union and providing an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the rights guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL furnish the Union with the information it requested on November 14, 2011, which is relevant and necessary to carry out its collective bargaining responsibilities to the extent required by the NLRB decision.

WE WILL restore the employees' group health insurance coverage that we unilaterally terminated in March 2012 and make employees whole for all losses suffered as a result of the termination of the coverage.

WE WILL bargain collectively in good faith with the Union as the exclusive representative of the employees in the bargaining unit noted above and put in writing and sign any agreement reached on terms and conditions of employment.

AFL Quality New York, LLC, Inc d/b/a AFL Web Printing
(Employer)

DATED: _____ BY_____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

20 Washington Place, 5th Floor

Newark, New Jersey 07102-3110

Hours: 8:30 a.m. to 5 p.m.

973-645-2100.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 973-645-3784.