

Dover Hospitality Services, Inc., a/k/a Dover Caterers, Inc., a/k/a Dover College Services, Inc. and Local 1102 of the Retail, Wholesale & Department Store Union, United Food & Commercial Workers Union. Case 29–CA–030591

July 12, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On September 28, 2011, Administrative Law Judge Steven Fish issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Acting General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs¹ and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Dover Hospitality Services, Inc., a/k/a Dover Caterers, Inc., a/k/a Dover College Services, Inc., Plainview, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ We deny the Acting General Counsel's request that the Respondent's exceptions and brief be rejected, as they are "substantially compliant" with the requirements of Sec. 102.46 of the Board's Rules and Regulations. See generally *Metta Electric*, 338 NLRB 1059 (2003), *enfd.* in part sub nom. *JHP & Associates, LLC v. NLRB*, 360 F.3d 904 (8th Cir. 2004).

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

In finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to furnish the Union with the requested financial information, we reject the Respondent's argument that, by waiting 8 months after the Respondent's claim of inability to pay before making its request, the Union waived its right to the information. At the time of the request, the parties were still bargaining and were not at an impasse. Further, the information was relevant to the Respondent's bargaining position, which was premised on its asserted inability to pay the amounts sought in the Union's proposal.

Nancy Reibstein, Esq., for the General Counsel.
Jeffrey A. Meyer, Esq. (Kaufman, Dolowich, Voluck & Gonzo),
of Woodbury, New York, for the Respondent.
Dennis J. Romano, director of collective bargaining, for the
Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges filed by Local 1102 of the Retail, Wholesale & Department Store Union, United Food & Commercial Workers Union (the Union or the Charging Party), on January 18, 2011,¹ the Acting Regional Director for Region 29 issued a complaint and notice of hearing on April 14, alleging that Dover Hospitality Services, Inc., a/k/a Dover Caterers, Inc., a/k/a Dover College Services, Inc. (Respondent), violated Section 8(a)(5) and (1) of National Labor Relations Act (the Act) by failing to furnish the Union with information necessary and relevant to the Union's performance on the exclusive representative of certain employees of Respondent.

The trial with respect to the allegations in the above-mentioned complaint was held before me on July 26 in Brooklyn, New York.

Briefs have been filed by the General Counsel and Respondent and have been carefully considered. Respondent's brief was due on August 23. Respondent's counsel mailed its brief to both the General Counsel and the Division of Judges on August 23. The briefs were received by the General Counsel and the Division of Judges on August 26.

On September 1, the General Counsel filed a motion to reject Respondent's brief as untimely since it was not mailed on the day before it was due or properly served in any other manner as required by Section 102.111(b) of the Board's Rules and Regulations. *Northwest Graphics, Inc.*, 343 NLRB 84, 86 (2004).

I issued an order dated September 6 finding that although counsel for the General Counsel was correct in her assertion that Respondent's brief was untimely, I accepted and considered the brief using my discretion since no prejudice was shown by the General Counsel. *Altercare of Wadsworth Center for Rehabilitation*, 355 NLRB 565, 571 (2010); *Barstow Community Hospital*, 352 NLRB 1052, 1055 fn. 4 (2008); *WGE Federal Credit Union*, 346 NLRB 183 (2005).

I also in my order granted the General Counsel's alternative request to file a reply brief in order to correct alleged "gross misrepresentations of record evidence and Board law." The General Counsel filed such a reply brief, which has also been carefully considered.

Based upon the entire record, including my observation of the demeanor of the witnesses, I issue the following

¹ All dates hereinafter referred to are in 2011, unless otherwise indicated.

DOVER HOSPITALITY SERVICES

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation, with its principal office and place of business in Plainview, New York, with operations at Suffolk County Community College's campuses in Selden and Brentwood, New York, where it is engaged in providing retail food services.

During the past year, Respondent derived gross revenues in excess of \$500,000 and purchased at its New York locations goods valued in excess of \$5000 from other enterprises located within the State of New York, each of which other enterprises had received those goods directly from point located outside the State of New York.

It is admitted, and I so find, that Respondent is and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

It is also admitted, and I so find, that the Union is and has been a labor organization within the meaning of Section 2(5) of the Act.

III. BARGAINING HISTORY

Since 2005, Respondent has recognized the Union as the collective-bargaining representative of various food service employees employed at the Suffolk County Community College, Selden and Brentwood campuses. Such recognition has been

embodied in successive collective-bargaining agreements, the most recent of which was effective from February 1, 2007, to January 31, 2010.

Isaac (Butch) Yamali has been at all times material herein the owner of Respondent, who negotiated all the prior contracts with the Union on behalf of Respondent.

Dennis Romano is and has been the director of collective bargaining for the Union. He was the primary negotiator on behalf of the Union in its prior negotiations with Respondent, including the last contract negotiated by the parties, as detailed above.

IV. THE NEGOTIATIONS FOR A SUCCESSOR AGREEMENT

On November 15, 2009, the Union sent a letter to Respondent requesting that negotiations commence for a successor agreement. Pursuant to that request, the parties met on January 7, 2010, at the Suffolk County Department of Labor. Present on behalf of the Union were Romano, David Brijlall, union representative, Phyllis Steffek, shop steward for the Union, and an employee at Respondent's Selden campus, and Marianne Hurlley, another unit employee of Respondent, who was not a steward or an official of the Union. Yamali was present on behalf of Respondent.

Romano began the meeting by presenting Yamali with the Union's written proposals for a new agreement. The proposals are set forth below:

DOVER HOSPITALITY SERVICES INC. at SCC Selden/BrentwoodCONTRACT PROPOSALS

Duration: Effective February 1, 2010 to January 31, 2013
Article 33

Wages: All Employees shall receive the following wage increases:

Article 5 Section A	Effective:	02/01/10 \$.70	002/01/11 \$.70	02/01/12 \$.70
------------------------	------------	-------------------	--------------------	-------------------

Local 1102 Health and Benefit Fund:
Article 18
Section A

Effective:	Employer Contribution	Employee Co-pay	Total Contribution
02/01/10	\$404.00	\$50.00	\$454.00
02/01/11	\$448.00	\$50.00	\$498.00
02/01/12	\$497.00	\$50.00	\$547.00

Recognition: Delete the words "Casual Employees"
Article 1

Casual Employees: Remove Article
Article 2

Holiday: Add an additional named holiday.

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

Article 8	Holidays shall be paid at the average daily salary of the employee for every holiday earned.
Vacation Article 10	Add Section D. Vacation pay shall be paid at the average weekly salary of the Employee for every week earned.
Sick Leave Article 11	Sick leave shall be paid at the average daily salary of the employee for every sick day earned.
Meals Article 14	Add sentence "Meal Selection to be made by employee."
Local 1102 Retirement Savings Fund Article 19 Section A	Increase to \$.80 per hour or increase employer match with the 401K.
Student Employees Article 20	Limit to 2 students.

The Union reserves the right to add, modify or delete from its proposals during negotiations.

Romano reviewed and explained to Yamali each of the Union's proposals, including increases in wages and contributions to the Union's health and benefit fund and its retirement fund.

Yamali responded that he could not afford the current union contract, let alone any increases in a new contract. Yamali added that he was not "turning" a profit at the college and that his contract with the college was up. Yamali further informed the Union that he would be sitting down with the college to renegotiate Respondent's contract and added that he was paying from 30- to 40-percent commission back to the college.

Yamali then repeated that he could not afford the current contract and asked for a reduction in health contributions. He added that this was one of the reasons that he had been continuously late in contributions on behalf of the employees into the health plan.

Yamali then proposed that he had a health plan through his various entities that was costing him only \$250 per month. Yamali wanted to put Respondent's employees into this plan.

Romano unequivocally rejected Yamali's proposal.²

Yamali responded to Romano's rejection of Respondent's proposal by reiterating that the current contract was not an affordable contract and that he was not able to make money at the college. Yamali concluded the meeting by stating that he would make a decision as to whether he was going to continue operating when he was sitting down with the college to renegotiate Respondent's contract.

The next meeting took place on April 12, 2010, also at the Suffolk County Department of Labor. Romano and Brijlall

were present on behalf of the Union, and Yamali was there on behalf of Respondent.

Yamali reiterated what he had previously stated at the January meeting that he was not able to afford the contract or the increases proposed by the Union. Yamali added that he was not able to make money, there was nothing to give and there was nothing to negotiate.

Romano responded that Yamali's position was unacceptable and the meeting ended.

The parties' third and final negotiation session took place on November 22, 2010. This meeting was held at the Union's office in Westbury, New York. In addition to Romano, the Union's controller, Angelo Cione, and its attorney, Matthew Rocco, were also present. The latter two individuals were there primarily to discuss ongoing litigation between the parties concerning compliance with the collective-bargaining agreement.³

Yamali was accompanied by Jeffrey Meyer, Respondent's attorney, at this meeting. In addition to discussions between the parties concerning the audit and the funds litigation, there was limited discussion vis a vis the contract. Yamali proposed a limited union shop provision limiting the new collective-bargaining agreement to covering four or five employees. Romano rejected that proposal. Romano reiterated the Union's demands with respect to wages and health fund contributions and added that the 9-percent increase requested by the Union was standard in contracts in the area as well as increases into the retirement savings and wage adjustments.

At that point, Yamali walked out of the Union's office while stating, "[T]his is why unions are no fucking good."

² I note that the Union's new proposals called for contributions to be raised to \$454, \$498, and \$547 per employee for each of the 3 years of the contract. The expiring contract provided for health and benefit contributions of \$414 per employee per month as of September 1, 2008.

³ Cione, at the time, was overseeing an audit of Respondent concerning the alleged failure to make contributions to the Union's funds.

DOVER HOSPITALITY SERVICES

My findings with respect to the discussions at these three meetings are based on a compilation of the credited portions of the testimony of Romano, Brijlall, and Steffek. Significantly, Yamali did not testify so the assertions made by the General Counsel's witnesses, as I have detailed above, are un rebutted.

While Brijlall's testimony is not precisely corroborative of Romano's in all respects, he does essentially corroborate the essence of Romano's testimony that Yamali stated at the first two meetings that he couldn't afford to pay the current contract's terms, much less the increases demanded by the Union. Brijlall's recollection also differed from Romano's as to which meeting Yamali proposed reducing health care contributions and placing employees into his (Yamali's) own health insurance plan. I find this discrepancy insignificant, but, as noted above, I credit Romano that these comments were made by Yamali at the first meeting on January 7.

Brijlall also testified that at the first meeting Yamali said that "I'm not sure if I will be able to afford these particular proposals." At the second meeting, Brijlall testified that Yamali said after viewing the Union's proposals that "he's not going to be able to afford what these proposals are."

I find this testimony essentially corroborative of Romano's testimony, which I have credited. Additionally, Steffek, who was also present in January, corroborated Romano by testifying that Yamali stated that he can't afford the Union's contract proposals.

Most significantly of all, as related above, Yamali did not testify so the mutually corroborative testimony of Romano, Steffek, and Brijlall is un rebutted.

Respondent, in its brief, makes the assertion that Yamali stated during bargaining that he "did not want to pay the significant increases sought by the Union as they were not realistic given the current economic climate." There is simply no record testimony supporting Respondent's assertion that Yamali made either of these comments at any bargaining sessions. I note again that absence of any testimony from Yamali whatsoever.

V. THE INFORMATION REQUEST

On January 5, 2011, Romano, on behalf of the Union, sent the following letter to Respondent, requesting certain information. The letter reads as follows:

January 5, 2011
 Dover College Services Inc.
 Butch Yamali
 11 Skyline Drive
 Plainview, N.Y. 11805
 Certified Mail
 Return Receipt Requested
 Dear Butch:

This shall serve as notice that the Union is requesting the following information be provided during the current on-going negotiations between the parties.

1. Annual tax returns Federal/State for years 2005–2009

2. Audited Income statements and balance sheet for years 2005–2009

3. Copy of all W-2/W-3 for years 2005–2009

Again this information is needed to verify your continued position at the bargaining table that the current labor agreement is an impediment to your continued existence at SCC Selden & Brentwood Campuses.

In addition the Union reserves its right to ask for additional information as it deems necessary to support your position in these negotiations.

Once I have had an opportunity to review this information I will provide additional dates for negotiations.

Sincerely,

Dennis J. Romano
 Director of Collective Bargaining

Respondent never responded to the Union's information request and never supplied the Union any of the information requested.

Romano asked for the information in order to verify Yamali's assertions of unaffordability and not making a profit. According to Romano, he consulted with Cione, the Union's controller, before drafting the Union's information request since he (Romano) is not an accountant and Cione would be more familiar with what documents were necessary to verify Yamali's assertions about the unaffordability of the current contract as well as any increases going forward.

VI. ANALYSIS

A. *The 10(b) Issue*

Respondent, during the trial and in its brief, asserted that the complaint must be dismissed based on Section 10(b) of the Act. In this regard, Respondent notes that the meetings, wherein Yamali made his statements about being unable to afford to pay the terms of the current contract or the increases sought by the Union, took place at meetings in January and April 2010, more than 6 months prior to the filing of the instant charge on January 18, 2011. Therefore, Respondent argues that the instant complaint is barred by Section 10(b). *NLRB v. Michigan Rubber Products*, 738 F.2d 111, 113 (6th Cir. 1984).

Respondent's contentions are totally devoid of merit, and its case citation completely inapposite. Contrary to Respondent's arguments, the General Counsel is not alleging that Yamali's pre-10(b) statements concerning Respondent's ability to afford union demands are unlawful.

The violation alleged in the complaint is the refusal by Respondent to supply the information requested. Here, the Union's request for the information was made in January 2011, well within the 10(b) period, and the Respondent's refusal to supply such information occurred thereafter, also within the 10(b) period.

It is well settled that the 10(b) period in information cases begins to run when the Respondent has clearly and unequivocally denied the requested information. *Dodger Theatricals Holdings, Inc.*, 347 NLRB 953, 965–967 (2006); *Quality Building Contractors*, 342 NLRB 429, 431–432 (2004); *California*

Nurses Assn., 326 NLRB 1362, 1367 fn. 10 (1998); *Public Service Electric & Gas Co.*, 323 NLRB 1182, 1188 (1997); *Oliver Insulating Co.*, 309 NLRB 725, 726 (1992), enfd. mem. 995 F.2d 1067 (6th Cir. 1993); *Commercial Property Services*, 304 NLRB 134, 143 (1991).

The fact that some or even all of the evidence that supports the Union's demand for the information (i.e., Respondent's claim of inability to pay) occurred outside the 10(b) period is not conclusive since the pre-10(b) evidence merely sheds light on the violation, which took place within the 10(b) period. *Dodger Theatricals*, supra, 347 NLRB at 966; *Crowley Marine Services*, 329 NLRB 1054, 1059 (1999), enfd. 234 F.3d 1295 (D.C. Cir. 2000); *Union Builders*, 316 NLRB 406, 411 (1995), enfd. 68 F.3d 520 (1st Cir. 1995).

The one case cited by Respondent in support of its 10(b) argument, *Michigan Rubber*, supra, is not to the contrary. While it is true that the court used the phrase quoted by Respondent that "at some point laches would apply against the Board for inordinate delay in bringing an action." Id at 113, the comment had nothing to do with Section 10(b) of the Act. The issue there was the Board's delay in seeking enforcement of a bargaining order, and, in fact, the court, there, held, notwithstanding its comments cited above, that the action was not barred by laches and enforced the Board's order.

Thus, *Michigan Rubber*, supra, provides absolutely no support for Respondent's assertion that the instant complaint is barred by Section 10(b) of the Act.

I, therefore, reject Respondent's affirmative defense that so alleges.

B. The Alleged Inability to Pay

It is well settled that where an employer, either in response to bargaining demands from the union or in support of its own proposal, makes a claim of inability to pay, the union is entitled to request and review the employer's financial records to assess and substantiate the employer's representations about its financial condition. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *North Star Steel Co.*, 347 NLRB 1364, 1369–1370 (2006); *R.E.C. Corp.*, 307 NLRB 330, 332–333 (1992). This is because good-faith bargaining requires that claims made by either bargainer should be honest claims. Thus, if an employer asserts an inability to pay in support of its bargaining position, the Supreme Court observed that "if such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of accuracy." *Truitt*, supra, 351 U.S. at 152–153. Accord: *Lakeland Bus Lines, Inc.*, 335 NLRB 322, 324 (2001), enfd. denied 347 F.3d 955 (D.C. Cir. 2003).

In determining whether there has been a claim of inability to pay, the Board will evaluate an employer's claims in the context of the particular circumstances in that case. *Stella D'oro Biscuit Co.*, 355 NLRB 769, 770 (2010); *Lakeland Bus*, supra, 335 NLRB at 324. The Board does not require that the employer recite any "magic words," but only that the statements and actions be specific enough to convey an inability to pay. *Stella D'oro Biscuit*, supra; *Atlanta Hilton & Tower*, 271 NLRB 1600, 1602 (1984).

The relevant distinction is between a mere "unwillingness" to pay, which does not trigger an employer's obligation to provide financial information, and an "inability" to pay, which does trigger such an obligation to provide such information. *North Star Steel*, supra, 347 NLRB at 1370; *Richmond Times-Dispatch*, 345 NLRB 195, 197 (2005). Put another way, the crucial distinction is between claims of "can't pay" and "doesn't want to pay" or "cannot" and "will not." *Nielsen Lithographing Co.*, 305 NLRB 697, 700 (1991), affd. sub nom. *Graphic Communications Workers Local 508 v. NLRB*, 977 F.2d 1168 (7th Cir. 1992); *North Star Steel*, supra; *Lakeland Bus*, supra, 335 NLRB at 324.

While the difference between "cannot" and "will not" seems on its face to be a relatively clear and simple distinction, in fact, the Board and court precedent assessing this issue is far from clear and is filled with split and seemingly contradictory Board decisions, frequently reversed by circuit courts on both sides of the issue. Compare *Stella D'oro Biscuit*, supra; *Lakeland Bus*, supra; *Shell Co.*, 313 NLRB 133, 134 (1993); *ConAgra Inc.*, 321 NLRB 944, 945 (1996), enfd. denied 117 F.3d 1435 (D.C. Cir. 1997); *Stroehmann Bakeries*, 318 NLRB 1069 (1995), enfd. denied 95 F.3d 218 (2d Cir. 1996); with *North Star Steel*, supra, 347 NLRB at 1369–1370; *AMF Trucking & Warehousing, Inc.*, 342 NLRB 1125, 1126–1127 (2004); *Richmond Times-Dispatch*, supra, 345 NLRB at 196–199; *Burruss Transfer, Inc.*, 307 NLRB 226, 227–228 (1992); and *Atlanta Hilton*, supra, 271 NLRB at 1602. See also *Chemical Workers Local 1C v. NLRB*, 447 F.3d 1153 (9th Cir. 2006), revg. *American Polystyrene Corp.*, 341 NLRB 508, 509–510 (2004); and *New York Painting Pressmen v. NLRB*, 538 F.2d 496 (2d Cir. 1976), revg. *Milbin Printing, Inc.*, 218 NLRB 223, 223–224 (1975). These two cases involved reversing 2–1 Board decisions, which had found that employers had not pleaded an inability to pay.

The ultimate determination in all of these cases centers on what kinds of claims of economic hardship and business losses can effectively be considered to be a claim of inability to pay. *Lakeland Bus*, supra, 335 NLRB at 324; *AMF Trucking*, supra, 342 NLRB at 1126. In that connection, the issue is further defined as whether the employer "presently has insufficient assets to pay or that it would have insufficient assets to pay during the life of the contract being negotiated." *AMF Trucking*, supra, 342 NLRB at 1126; *Nielsen Lithographing*, supra, 305 NLRB at 700.

While as I have observed, the resolution of the issues described above are frequently difficult and involve reconciling several conflicting cases on very similar facts, fortunately these issues are not present here.

Thus, while the Board has frequently made it clear that no "magic words" are required to convey an "inability to pay," *Stella D'oro Biscuit*, supra, 355 NLRB at 670; *Atlanta Hilton*, supra, 271 NLRB at 1602, the comments made by Yamali, here, were as close to "magic words" as you can get. Yamali, at two meetings, informed the Union that Respondent could not afford the current union contract, let alone any increases in the new contract. These assertions made on behalf of Respondent have consistently been held to convey an "inability to pay" under *Truitt*, supra. *Central Management Co.*, 314 NLRB 763,

DOVER HOSPITALITY SERVICES

768–769 (1994) (employer representative stated that it “could not afford” to sign pattern agreement; at one meeting and at another meeting, stated that company was losing money and couldn’t afford to pay what they were paying); *Gaucha Food Products*, 311 NLRB 1270, 1272 (1993) (employer representative stated that he could not afford to pay the benefits under 1989–1992 contract and hence could not afford the additional costs evident in the union’s proposal for a new agreement); *R.E.C. Corp.*, 307 NLRB 330, 331 (1992) (employer demanded reduction in wages and referred to several business related problems; union attorney asked if employer was saying that it “could not afford to either grant a wage increase or maintain current wages”; employer representative twice responded yes, that is what he was saying). Indeed, in *Truitt*, itself, the Supreme Court characterized the question presented as whether an employer has not bargained in good faith “where the employer claims that it cannot afford to pay higher wages but refuses requests to produce information substantiating its claim.” 351 U.S. at 150. The court further summarized the facts and that the employer, in response to the union’s wage increase demands, stated “that it could not afford to pay such an increase.” *Id.*

Subsequent Board and court cases often reaching different ultimate conclusions have treated the inability to pay and statements that employers could not afford to pay wages or benefits as functionally equivalent concepts. *AMF Trucking*, supra, 342 NLRB at 1126 (in finding that particular comments made by employer did not amount to a plea of inability to pay, Board majority disagreed with dissent’s contention that respondent “clearly communicated that it could not afford the union’s demands”; majority observed that “the Respondent did not use those words or any words of similar import; the phrase ‘could not afford’ means that the company would not stay in business if it met the Union’s demands. This is not the message that the respondent gave”) *Id.* at 1126; *Lakeland Bus*, supra, 335 NLRB at 323 (Board majority concludes, reversing ALJ and contrary to dissent, that respondent effectively communicated that “it was unable to afford to pay anything more than that contained in its final offer”) *Id.*; *Shell Co.*, supra, 313 NLRB at 134 (Board concludes that the essential core of the respondent’s bargaining position as a whole, as expressed to the union, was grounded in assertions amounting to a claim that it could not economically afford the most current contract), *Id.*; *North Star Steel*, supra, 347 NLRB at 1379–1380 (dissenting member asserts that employer clearly communicated to the union that it could not afford the union’s bargaining demands); *NLRB v. Harvstone Mfg. Co.*, 785 F.2d 570, 577 (7th Cir. 1986) (court equates inability to pay with could not afford in assessing statements made by employer representatives vis a vis claims made of “competitive disadvantage”⁴) *Chemical Workers*, supra, 447 F.3d at 1159 (court in reversing Board’s dismissal of *Truitt* violation observes that “we must determine whether the essential core of the company’s bargaining posture as a whole, as expressed to the union, was grounded in assertions

amounting to a claim that it could not economically afford to pay for the union’s proposals”), *Id.* at 1160, citing *Rivera-Vega v. ConAgra, Inc.*, 70 F.3d 153, 160 (1st Cir. 1995); *NLRB v. Jacob Mfg. Co.*, 196 F.2d 680, 684 (2d Cir. 1952) (court equates inability to pay with assertion that employer could not afford to meet union’s demands); *American Model & Pattern*, 277 NLRB 176, 184 (1985) (contention by employer that it could not afford to pay existing wages and benefits must be substantiated by providing books and records).

Accordingly, the above precedent makes it crystal clear that, where as here, Respondent expressly stated to the Union that it cannot afford to pay the wages and benefits in the expiring contract, much less the increases demanded by the Union for a successor contract that it is pleading to pay under *Truitt* and its progeny. I so find.

C. The Refusal to Supply the Information

Having found that Respondent has asserted an inability to pay in support of its bargaining position, the remaining issues to be decided are whether the requested information is relevant to those issues and whether Respondent complied with the requests.

Here, it is undisputed that the Union requested information in its letter of January 5, 2011, for items that are relevant to the issues raised by Respondent’s bargaining position. Thus, all of the items requested are clearly relevant to issues of substantiating Respondent’s inability to pay assertions.

It is also undisputed that Respondent ignored the Union’s request and did not supply any of the items requested.

Respondent’s only alleged defense to its failure to supply this information is without merit. That is Respondent argues in its brief that the Union “has not set forth a scintilla of evidence as to why such information is presumably relevant.” This contention is simply false since in the Union’s letter demanding the information as well as in Romano’s credited testimony, the Union and Romano stated that the information is necessary to verify Respondent’s claims made during negotiations of unaffordability and not making a profit and that the “current contract is an impediment to your continued existence at SCCC Selden and Brentwood Campus.”

Respondent further argues that the Union is really seeking the information not for negotiation purposes, but rather because of the ongoing litigation regarding the affiliated funds’ audit of Respondent. In support of this assertion, Respondent contends that Romano “acknowledged as much” in his testimony.

Respondent’s contention in this regard is a clear misrepresentation of the record since Romano made no such acknowledgement. Indeed, Romano furnished no testimony that the Union’s request for information was made for any other purpose than to verify Respondent’s bargaining position.

While Romano did admit that he consulted with Cione, the Union’s accountant, who had also been involved in litigation between the affiliated funds and Respondent, about what items to request in the Union’s letter, that admission is hardly sufficient to establish that the information request was made in support of the funds litigation.

⁴ I note that the Board in *Nielson Lithographing*, supra, 305 NLRB 697, 699–701, approved the *Harvstone* court’s analysis in changing prior Board law concerning assertions of inability to pay in the context of desire of employer’s to remain competitive.

I, therefore, find that Respondent has not established that the Union's information request was made "not for negotiation purposes, but rather because of ongoing litigation."

The best that can be said for Respondent's evidence (i.e., the pendency of the funds' litigation, Cione's dual role in the litigation and in assisting Romano in formulating the Union's information request and the fact that both bargaining and litigation issues were discussed at the same meeting) is that the Union's request was made for both reasons. That is the request was made to both verify the Respondent's inability to pay assertion and to assist the funds in their litigation.

Such a finding would not be a valid defense to Respondent's failure to turn over the information requested.

It is well settled that relevance of information is not rebutted by a showing that the union also seeks the information for a purpose unrelated to its representative function. *Coca-Cola Bottling Co.*, 311 NLRB 424, 429 (1993); *E. I. Du Pont de Nemours & Co.*, 264 NLRB 48, 51 (1982), enfd. 744 F.2d 536 (6th Cir. 1984) (union also had interest in companywide wage data for disclosure to a second union seeking to organize these facilities). See also *Country Ford Trucks*, 330 NLRB 328 (1999), enfd. 229 F.3d 1184 (D.C. Cir. 2000) (requirement that information request be made in good faith is satisfied if at least one reason for the demand can be justified). Accord: *Island Creek Coal Co.*, 292 NLRB 480, 489 (1989), enfd. mem. 899 F.2d 1222 (6th Cir. 1990).

Further, it is also well established that where a union's request is for a proper and legitimate purpose, it cannot make any difference that there may be other reasons for the request or that the data may be put to other uses. *Coca-Cola Bottling*, supra; *Associated General Contractors of California*, 242 NLRB 891, 894 (1979), enfd. in relevant part and modified on other grounds 633 F.2d 766, 772-773 (9th Cir. 1980) (union had an additional underlying purpose in requesting information to facilitate organizing of nonunion companies); *New York Post Corp.*, 283 NLRB 430, 442 (1987) (fact that union might use information to organize subcontractor employees does not affect obligation to turn over relevant information to union); *White Farm Equipment Co.*, 242 NLRB 1373, 1374 (1979) ("once requested information is found to be relevant, it is not controlling that it might be used for other purposes"); *Westinghouse Electric Corp.*, 239 NLRB 106, 110-111 (1978), enfd. 648 F.2d 18, 25 (D.C. Cir. 1980) (Board rejects defense that union's request for information relating to alleged racial discrimination is barred because union sought to use information to help prosecute Title VII lawsuit against employer; Board holds "that if information is relevant to the collective bargaining, it loses neither its relevance nor its availability merely because a union additionally might or intends to use it to attempt to enforce statutory and contractual rights before an arbitrator, the Board or a court"), Id.; *Utica Observer-Dispatch, Inc.*, 111 NLRB 58, 63 (1955), enfd. 229 F.2d 575, 577 (2d Cir. 1955)⁵ (fact that union wanted wage information in part to collect dues

⁵ The court in enforcing Board's order observed that "where the local's request for relevant data is for a proper and legitimate purpose it cannot make any difference that there may also be other reasons for the request or that the data may be put to other uses." 229 F.2d at 577.

does not detract from its relevance to police contract and bargain intelligently on wages).

Furthermore, I conclude that the Union's efforts to assist the funds in their litigation against Respondent for Respondent's failure to make payments required under the contract is part of and consistent with the Union's representative functions. *Westinghouse Electric*, supra, 239 NLRB at 110, 111 (union can enforce contractual rights through various forums, including court arbitration or information requests through the Board).⁶

Further, the fact that other pending litigation already exists (i.e. funds lawsuit against Respondent) does not provide a defense to Respondent's not providing information to the Union. *Westinghouse Electric*, supra, 239 NLRB at 111, citing *Curtiss-Wright Corp.*, 193 NLRB 940 (1971) (Board orders employer to furnish the union information concerning a pension fund despite the fact that union had filed a civil suit seeking an audit of the pension funds).

Therefore, as the above precedent establishes, even if it was concluded that one of the purposes of the Union's request for information was to assist the funds in litigation against Respondent, that finding would not provide a defense to Respondent's obligation to provide clearly relevant information to the Union.

Accordingly, based upon the foregoing analysis and precedent, I conclude that Respondent has violated Section 8(a)(1) and (5) of the Act by failing to supply the information requested by the Union in its January 5, 2011 letter.

CONCLUSION OF LAW

By failing and refusing to provide the Union with the information requested in its January 5, 2011 letter, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) of the Act and Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent had engaged in conduct in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that it cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act.

Having found that Respondent unlawfully refused to supply information set forth in the complaint, it is recommended that Respondent be ordered to furnish such information to the Union.

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended⁷

⁶ The D.C. Circuit in enforcing the Board's order rejected the employer's assertion that it need not supply data for use in union sponsored litigation. The court observed that "whether the requested information might be useful in litigation is irrelevant in determining whether there is a duty . . . to supply the information." 648 F.2d at 25.

⁷ 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.

DOVER HOSPITALITY SERVICES

ORDER

The Respondent, Dover Hospitality Services, Inc., a/k/a Dover Caterers, Inc., a/k/a Dover College Services, Inc., Selden and Brentwood, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with Local 1102 of the Retail Wholesale & Department Store Union, United Food & Commercial Workers Union (the Union) by declining to furnish information relevant and necessary to the Union's performance of its duties as the exclusive representative of its employees in the following appropriate unit:

All regularly employed kitchen, dining room, bar, cafeteria, kiosk and cart employees employed by the Respondent at the Suffolk County Community College Selden Campus and the grill employees employed by the Respondent at the Suffolk County Community College Brentwood Campus, excluding, however, all cooks, custodians, university students, causal employees as defined in Article 2, office and clerical employees, supervisors and guards as defined in the Act.

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

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

(a) Provide the Union with the information requested by its letter of January 5, 2011.

(b) Within 14 days after service by the Region, post at its Selden and Brentwood, New York facilities copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other

⁸ If this Order is enforced by a judgment of a 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."

material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 5, 2011.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain in good faith with Local 1102 of the Retail Wholesale & Department Store Union, United Food & Commercial Workers Union by declining to furnish information relevant and necessary to the Union's performance of its duties as the exclusive representative of our employees in the following appropriate unit:

All regularly employed kitchen, dining room, bar, cafeteria, kiosk and cart employees employed by us at the Suffolk County Community College Selden Campus and the grill employees employed by us at the Suffolk County Community College Brentwood Campus, excluding, however, all cooks, custodians, university students, causal employees as defined in Article 2, office and clerical employees, supervisors and guards as defined in the Act.

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

WE WILL provide the Union with the information requested by its letter of January 5, 2011.

DOVER HOSPITALITY SERVICES, INC., A/K/A DOVER CATERERS, INC., A/K/A DOVER COLLEGE SERVICES, INC.