

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: November 9, 2011

TO : Rik Lineback, Regional Director
Region 34

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Coupled Products, LLC
Case 25-CA-31883

530-6067-6001-0000
530-6067-6001-3780
530-6067-6067-2000
530-6067-6067-2800

The Region submitted this case to Advice to determine whether the Employer violated Section 8(a)(5) of the Act by refusing to furnish financial information the Union requested during negotiations for a new contract. We conclude that the Employer violated Section 8(a)(5) of the Act because its statements and actions constituted a claim of an inability to pay and therefore the Employer's financial information became relevant to bargaining.

FACTS

The Employer manufactures hose assemblies and fluid lines for the automobile and boat industries. The Union represents a bargaining unit composed of unskilled job classifications in Columbia City, Indiana. The Employer and the Union have a bargaining relationship dating from 1977. Their most recent collective-bargaining agreement expired on June 17, 2011.

On October 20, 2010, the Employer sent a letter informing the Union that it intended to close the plant and move the work performed there to Mexico. The Employer cited labor costs, among other factors, as the basis for this decision. The parties, thereafter, bargained several times regarding concessions that would allow the facility to remain open. During these negotiations, the Employer proposed an across-the-board \$.87 wage reduction for bargaining-unit employees and other modifications to benefits and scheduling. The Union did not agree to any of the Employer's concessionary proposals, but the facility remained open.

On May 17, 2011, the parties began negotiations for a new collective-bargaining agreement.¹ The Employer's

¹ All dates hereafter are in 2011.

initial proposal sought severe concessions from bargaining-unit employees: a \$4.50 an hour wage cut, which was a 30 to 35 percent reduction in wages; the elimination of two paid holidays; the elimination of sick and bereavement pay; the reduction of vacation pay; and the elimination of all Employer subsidies for health-insurance premiums.

The parties bargained on May 17 and May 18 and reached agreement on several issues, including the elimination of two paid holidays. On May 19, the Union made a written request to review the Employer's financial books. In response, the Employer provided the Union with a one-page, unaudited profit/loss statement that purportedly showed financial losses suffered by the Employer.

The parties bargained again on May 20. The union representative began the session by asking the Employer why it sought significantly larger concessions now than during the plant-closure bargaining. The employer representative answered that the Employer was losing money and customers and was not competitive. The employer representative further stated that the Employer could not be profitable without the concessions and identified a customer it had lost to a competitor. The union representative stated that the employees could not accept the Employer's proposals. The employer representative replied that, under the current economic conditions, the employees would accept the concessions if they needed a job.

At the next meeting on May 24, the parties again discussed the Employer's proposed economic concessions. The employer representative said that the Employer would no longer subsidize employee health-insurance costs and that if the employees wanted cheaper insurance, they could search for it. The Union proposed a wage freeze, but the employer representative responded that wage cuts were needed for the Employer to be competitive. The discussion became heated and the union representative asked if the Employer was claiming an inability to pay the current wages. The employer representative responded "yes" and that the Employer was not willing to pay the current wages. The union representative again asked if the Employer was claiming an inability to pay the current wages. The employer representative said that the Union should not put words in her mouth. The union representative then asked to audit the Employer's books. The employer representative refused the request and stated that the Employer was losing money and that she was fighting to keep the jobs in America.

The parties bargained next on May 27. The union representative began the session by stating that the employees could not agree to the Employer's proposed wage

reduction and asking if the Union could audit the Employer's books. The employer representative refused the Union's request. The conversation again became heated and the employer representative accused the union representative of alleging that the Employer cooked its books. The employer representative claimed that the Employer needed to stand firm and be competitive.

The parties met again on June 7, and the Employer gave the Union its last, best, and final offer. The final offer included the elimination of health-insurance subsidies, bereavement and sick pay, and two paid holidays; the reduction of vacation pay from four weeks to two weeks; and a wage reduction of \$4.25. A cover letter accompanied the final offer and stated, "[w]e have provided you with our financials and as you can see we have tremendous losses out of Columbia City.² We believe we have exhausted our thoughts on ways to alter our economic issues and become cost competitive; therefore, we would like to provide you with our final and best offer." The employees rejected the Employer's final offer on June 9.

The parties bargained for the last time on June 17. The Union offered to extend the current collective-bargaining agreement for one year with a wage freeze, but the employer representative replied that a wage freeze would not allow the Employer to remain competitive. The employer representative also rejected the Union's proposal for an extension of the collective-bargaining agreement to continue negotiations.

Also on June 17, the Union requested in writing that the Employer open its books for the Union to review. The Union explained that the Employer had repeatedly claimed that it was suffering losses and that if this was demonstrated through the Employer's financial records, the Union might be more apt to convince the bargaining unit that the cuts were needed. The employer representative denied the request. The Union started a strike that day, and the Employer implemented its final offer. The Employer has continued to operate with a mixture of crossovers and permanent replacements.

ACTION

We conclude that the Employer violated Section 8(a)(5) of the Act by failing to furnish the Union with financial information that the Employer made relevant and necessary

² The Employer was referring to the one page profit/loss statement given to the Union on May 20.

to substantiate its claimed inability to pay more than the concessions it sought in bargaining.

Section 8(a)(5) of the Act requires that an employer bargain in good faith with its employees' collective-bargaining representative. One of the obligations of good-faith collective bargaining is to furnish, upon request, information relevant to the collective-bargaining process.³ Information regarding employer finances is not presumptively relevant, but may become relevant based upon an employer's assertions made during bargaining. In *NLRB v. Truitt Manufacturing, Co.*, the Supreme Court held that an employer violated Section 8(a)(5) of the Act by refusing to provide the union with general financial information needed to substantiate the employer's claim that it could not afford to grant the wage increase sought by the union because such an increase would put the employer out of business.⁴ The Court explained that:

Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. 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.⁵

In determining whether an employer has made an inability-to-pay claim, the Board evaluates the substance of the employer's assertions rather than merely looking to the words used at the bargaining table.⁶ For example, in *Stroehmann Bakeries*, the Board found that the employer made an inability-to-pay claim when it stated that it had suffered huge losses in the preceding year, that it projected heavy losses in the coming year, and that it was proposing drastic reductions in wages and benefits to decrease the losses.⁷ Likewise, in *Lakeland Bus Lines*, the

³ *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-437 (1967).

⁴ 351 U.S. 149, 152-53 (1956).

⁵ *Id.*

⁶ *ConAgra, Inc.*, 321 NLRB 944 (1996), *enf. denied* 117 F.3d 1435 (D.C. Cir. 1999). See also *Lakeland Bus Lines*, 335 NLRB 322, 324 (2001), *enf. denied* 347 F.3d 955 (D.C. Cir. 2003) (the Board does not require the use of any "magic words" but rather evaluates an employer's claims "in the context of the particular circumstances in that case").

⁷ 318 NLRB 1069, 1079 (1995), *enf. denied* 95 F.3d 218 (2nd Cir. 1996). See also *Stella D'oro Biscuit*, 355 NLRB No.

Board found that the employer's statements that the future of the business and the employees' jobs depended upon the acceptance of its proposals, when combined with its statement that it needed to "get back into the black in the short term," amounted to an inability-to-pay claim.⁸

The Board has also articulated a standard for determining an employer's obligation to provide requested information related to its specific economic assertions. In *Caldwell Manufacturing Company*, the Board held that when an employer makes a specific factual assertion during bargaining, information needed to verify the assertion becomes relevant and necessary to bargaining.⁹ Unlike an assertion of "inability to pay," when an employer makes a specific factual assertion regarding finances, the union is entitled to only that information that would allow the union to evaluate and verify the assertion; it is not entitled to general access to the employer's financial records.¹⁰

Here, we conclude that the Employer effectively claimed an inability to pay anything more than that contained in its final offer and that this claim triggered an obligation to furnish the Union with the financial

158 slip op. at 3-4 (2010)(inability-to-pay claim found when employer repeatedly claimed that it was suffering severe financial losses and tied elimination of those losses to the survival of the business).

⁸ 335 NLRB at 324-25. The Board has not been consistent in applying its inability-to-pay standard. *Compare Burrus Transfer, Inc.*, 307 NLRB 226, 228 (1992)(no inability to pay claim where employer said it would "not be able to survive" if it increased wages or benefits), *with Shell Co.*, 313 NLRB 133 (1993)(inability to pay claim made where employer characterized its financial situation as "a matter of survival"). *See also AMF Trucking & Warehousing, Inc.*, 342 NLRB 1125, 1126 (2004)(citing *Lakeland* with approval, but finding no inability-to-pay claim where employer claimed financial distress and that it was "fighting to keep the business alive" but had not specifically claimed insufficient assets to pay during the life of the contract or that the company would have no future if its demands were rejected). This case presents the Board with an opportunity to adopt a more cohesive standard.

⁹ *Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006).

¹⁰ *Id.*; *A-1 Door & Building Solutions*, 356 NLRB No. 76, slip op. at 4 (2011). *See also, General Counsel Memorandum 11-13* (May 17, 2011).

information it requested. Like the employers in *Stroehmann Bakeries* and *Lakeland Bus Lines*, the Employer asserted that it suffered losses, demanded considerable concessions from the Union, and tied the survival of the business to the acceptance of those concessions. Thus, at the May 20 bargaining session, the Employer stated that it was losing money and customers and that it could not be profitable paying the current wages and benefits. At that session the Employer also stated that if the employees wanted to keep their jobs they would accept the concessions sought by the Employer.

Further, at the May 24 session, the Employer stated that it was losing money and fighting to keep the employees' jobs. Also at that session, when asked by the Union if the Employer was claiming an inability to pay, the employer representative initially responded "yes," before telling the Union not to put words in her mouth when asked the question again.

We recognize that throughout bargaining the Employer attempted to couch its need for concessions in terms of remaining competitive. The Board, however, looks past the use of "magic words" to the substance of the employer's assertions.¹¹ And here, as demonstrated by the Employer's claim of severe financial losses, the prior threat to close the plant based at least in part on labor costs, and the Employer's statements that the employees would accept the concessions if they wanted jobs and that it was trying to keep the jobs in America, the thrust of the Employer's assertions was its inability to pay rather than a desire to increase profits through greater economic competitiveness.¹²

In sum, the Employer's statements, coupled with the drastic concessions it sought, conveyed that the Employer would not continue to operate the facility at a loss and would shutter that facility and move elsewhere if the Union did not agree to its concessionary proposals. The Employer therefore claimed an inability to pay and had a duty under the Act to provide the general financial information the Union requested.

Moreover, even if the Employer was not claiming an inability to pay, it was obligated to provide the Union

¹¹ *ConAgra, Inc.*, 321 NLRB at 944.

¹² *Cf. Nielsen Lithographing Co.*, 305 NLRB 697 (1991), *affd. sub nom. Graphic Communications Local 50B v. NLRB*, 977 F.2d 1169 (7th Cir. 1992) (finding no claim of inability to pay where employer acknowledged profitability but indicated desire to increase competitiveness).

with information to substantiate the specific economic claims it made to justify its concessionary proposals. At both the May 20 and May 24 bargaining sessions, the Employer stated that the plant was suffering losses. The Union, on June 17, requested financial information "because [y]ou tell us the company is continuously losing money." The Union, based on *Caldwell*, was therefore entitled to the information necessary to support the Employer's specific financial assertions.¹³

Although the Union's request for the Employer to "open its books" was arguably broader than what it needed to substantiate the Employer's specific claims, the Employer's refusal to provide any further information was not excused because the Union's request was overbroad.¹⁴ Rather, the Employer had the duty to comply with the request to the extent that it encompassed relevant information necessary to verify its assertions.¹⁵

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) of the Act by failing and refusing to provide the Union with information that was relevant and necessary for bargaining.

B.J.K.

¹³ 346 NLRB at 1160. See also *Taylor Hospital*, 317 NLRB 991, 994 (1995) (finding employer's assertion that layoffs were necessary in order for employer to meet budget rendered relevant the information necessary to substantiate the assertion).

¹⁴ See *Keauhou Beach Hotel*, 298 NLRB 702 (1990) (employer may not simply refuse to comply with unclear or overbroad request, but "must request clarification and/or comply with the request to the extent it encompasses necessary and relevant information").

¹⁵ See *Caldwell Mfg. Co.*, 346 NLRB at 1160; *A-1 Door & Building Solutions*, 356 NLRB No. 76 at 4 (2011).