UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

ARLINGTON METALS CORPORATION AND UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO (USW)	Case Nos. 13-CA-122273 13-CA-125255 13-CA-133055

ANSWERING BRIEF OF UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO IN OPPOSITION TO EXCEPTIONS OF ARLINGTON METALS CORPORATION TO THE ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

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INTRODUCTION

Charging Party United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO ("Union") submits this brief in opposition to the extensive exceptions filed by Respondent Arlington Metals Corporation ("Company") to the July 23, 2015 Decision and Recommended Order of Administrative Law Judge Carissimi (the "ALJ"), JD-41-15. We show herein that each of Respondent's 118 exceptions is utterly lacking in merit.

First, we show that the ALJ correctly found that the Company unlawfully refused to provide the Union with requested information to verify specific claims made by the Company during bargaining and made relevant by its plea of poverty. The record shows that, despite the verbal contortions employed by the Company's lead bargainer in order to avoid uttering "magic words" triggering the Company's obligation to open its books to Union inspection, the Company conveyed a present inability to pay through the totality of its bargaining conduct. The Company also consistently maintained that it could not afford to pay for the Union's economic proposals because of poor business conditions and advanced concessionary economic proposals predicated on that bargaining position, which the Union was entitled to substantiate.

Second, we show that the ALJ correctly found that the Company failed to bargain in good faith by its overall conduct, unlawfully engaging in surface bargaining revealing the Company's intention to avoid reaching a collective bargaining agreement with the Union. From the outset, the Company's has evaded its bargaining obligation, showing up to negotiation meetings but refusing to engage in the give-and-take of collective bargaining. The ALJ properly found that the Company's bargaining behavior during the 2013 negotiation sessions – advancing no new proposals, refusing to provide information explaining its insistence on the implemented terms, and refusing to consider the Union's proposals for alternative ways to reach the Company's cost-cutting goals – demonstrated that the Company had no intention of reaching agreement with the Union.

Third, we show that the ALJ correctly found that the Company unlawfully withdrew recognition from the Union in the absence of evidence that the Union had lost majority status based on an unauthenticated employee petition that was also tainted by the Company's numerous, serious unremedied unfair labor practices.

Finally, we show that the ALJ correctly found that the Company unlawfully refused to grant the Union reasonable access to its facility in order to conduct a health and safety inspection based on its unlawful withdrawal of recognition.

The record evidence demonstrates that the Company has engaged in a litany of unfair labor practices in order to frustrate bargaining – revealing the Company's intention to avoid reaching a collective bargaining agreement with the Union – and that the Company has unlawfully withdrawn recognition from the Union. Given the severity and pervasiveness of the Company's violations, the ALJ's decision and proposed order should be upheld by the Board.

STATEMENT OF FACTS

The employer is a steel processing company with a plant in Franklin Park, Illinois. On October 10, 2007, the Board certified the Union as the exclusive collective-bargaining representative of all full-time and regular part-time production, maintenance, and shipping and receiving employees employed by the Employer at its facility located at 11355 Franklin Avenue, Franklin Park, Illinois (CGX 2(a)).

In 2009, the economic position of the Company deteriorated significantly. The Company lost significant business, scaled back its production by approximately one-third of its gross annual tonnage. (Tr. 70). The Company also laid off approximately half of its production and maintenance workforce, reducing its headcount from 48 unit employees in 2007 to 24-26 unit employees in 2013. (Tr. 70, 98-99, 121). The bargaining unit description included in the Union's certification has not changed since 2007. (Tr. 122). Approximately two-thirds of the bargaining unit are native Polish speakers, with limited English language fluency. (Tr. 138).

Eight years since the Union was initially certified, the parties have still not reached a first contract and bargaining unit employees are working under the Last, Best, and Final Offer implemented by the Company in 2009 and re-implemented in 2012.

A. The Bargaining Sessions

Following the Union's certification on October 10, 2007, the parties commenced bargaining, reaching agreement on most of the non-economic subjects in 2007 and early 2008. (Tr. 132). The parties broke off negotiations for several months due to the end-of-year holidays and to the ripple effects of the global economic collapse that occurred in the Fall of 2008.

1. The Company Implements Its Last, Best, And Final Offer

On March 3, 2009, the parties re-convened for collective bargaining. At this and all subsequent bargaining sessions, William Miossi, partner at the law firm Winston & Strawn, served as the Company's chief negotiator and William Gibbons, retired Co-Director of District 7, served as the Union's chief negotiator. At the March 3, 2009, bargaining session the Company and the Union completed their discussion of non-economic issues, achieving agreement on all outstanding non-economic issues. The parties then began to discuss economic issues (Tr. 400).

The Company withdrew its proposal for a wage increase and made a proposal seeking substantial concessions in employee wages and benefits. Miossi explained that the Company was seeking these concessions because the Company's financial situation was "dire" and that the Company was "losing money." (Tr. 404, 407). The Company's proposal included the provision that these wage concessions would be eliminated only if production reached a threshold of 180,000 annualized processed tons of steel (referred to herein as the "180,000 threshold"). (Tr. 401). Miossi explained to the Union that the rational for the Company's proposed 180,000 threshold was that this number represented the point at which the Company believed it would be able to break even and begin to "cover all their […] costs" (Tr. 401-2, 404). This was the first time that the Company introduced the 180,000 figure as a target that must be met in order for the Company to provide a wage increase to unit employees. (Tr. 135).

On May 5, 2009, the Company informed the Union that it had made its Last, Best, and Final Offer and on August 3, 2009, the Company implemented it. (Tr. 411-12, R 3).

2. The Company Seeks Additional Concessions And Implements Again On January 1, 2012.

In 2011, the Company contacted the Union seeking further concessions in wages, hours and terms and conditions of employment. Miossi stated that these concessions were necessary for the Company to remain competitive within the industry. (R 4, Tr. 418). On April 7, 2011, the Company submitted to the Union a proposal which included the following reductions: the establishment of a two tier wage system resulting in wage cuts for bargaining unit employees (R 4, Tr. 413), decreased healthcare benefits (R 4 Tr. 415), the elimination of daily overtime after 8 hours and introduction of weekly overtime after 40 hours (R 4, Tr. 416), the elimination of employees' ten-minute rest break (R 4, Tr. 416), and the elimination of the shift differential (R 4, Tr. 416). The Company refused to consider any of the Union's counter proposals and, on December 7, 2011, the Company declared impasse and announced its intention to implement its last, best, and final offer. (R 4).

On October 5, 2011, the Company provided the Union with a chart in response to the Union's information request listing tonnage, employee count, man hours, and profits/losses per year from 2005 to 2011. (Tr. 409, 453-454, CP 3). The data showed that the Company had been profitable in 2005 and 2006, but that in 2007 it began to sustain the following losses: 2007: $656,442.00, 2008: $965,403.00, 2009: $964,009.00, 2010: $452,170.00, 2011 to date: $361,000.00. (CP 3).

The parties next met on March 15, 2012. (Tr. 419). At this meeting, the Union submitted a counter-proposal which made significant movement towards the Company's position. (Tr. 419, R 8). The Union withdrew its proposal for daily overtime after 8 hours, accepted the Company's proposal on shift differential, reduced the amount of the wage increase it was seeking, and proposed that in exchange for maintaining the PPO and HMO, to the extent that the costs of these plans exceeded the cost of the HSA plan proposed by the Company, employees would pay the difference (Tr. 419-20, R 8). The Union further requested to meet again in June of 2012. (Tr. 421). The Company rejected the Union's March 15 proposal and declined to meet as proposed by the Union in June, claiming that the parties remained at impasse. (Tr. 422).

On March 19, 2012, the Company submitted to the Union a copy of the Amended terms its Last, Best, and Final Offer. (Tr. 129, GCX 4). This offer stated that it was implemented by the Company on January 1, 2012, prior to its submission to the Union. (GCX 4).

3. The Union Wins The Decertification Election

On November 15, 2011, a decertification petition was filed (GCX 2(g)). A Board election was held in July of 2012, which the Union won by a significant majority. On July 31, 2012, the Board certified the Union for a second time as the exclusive collective-bargaining representative of the Unit. (CGX 3(a)).

4. The Certification Year Is Extended

The Company refused the Union's requests to meet for collective bargaining following the re-certification of the Union, claiming that the parties were at an impasse (Tr. 183). The Union filed charges 13-CA-101632 and 13-CA-105007 alleging, among other things, that the Company had violated Section 8(a)(5) by refusing to bargain with the Union. (GCX 3(b), 3(c), 3(d)). The parties did not meet again until after the Board had approved a Settlement of charges 13-CA-101632 and 13-CA-105007 on July 8, 2013, which provided for an extension of the certification year for an additional year and required the Company to provide the Union with access to the Franklin Park, Illinois, facility to conduct health and safety inspections. (Tr. 184, 423-25, CGX 3(e)).

5. Bargaining Resumes Following The Board's July 8, 2013, Settlement

Following the July 8, 2013, Settlement, the parties next met on September 12, 2013. (Tr. 426). Mr. Miossi explained at the outset of the meeting that he was only available to meet until noon and the meeting lasted only two hours. (Tr. 144). The parties discussed the termination of Frederico Ceja. (Tr. 352-53, 426).

6. The October 31, 2013, Bargaining Session: The Union Makes Substantial Movement In Its Economic Proposal.

On October 31, 2013, the parties met for the second time since the Board Settlement of July 8, 2013. At this meeting, the Union submitted its Eleventh Economic Proposal to the Company. (Tr. 441, R 7, GCX 5, 8). The meeting lasted only one hour and a half. (Tr. 146). During the bargaining session, Mr. Gibbons explained that the Union had made several modifications to its previous proposal. (GCX 5). The Union stated that it was modifying its overtime proposal (Tr. 192), the Union was willing to accept the Company's vacation proposal, with the proviso that current employees would be grandfathered in with the existing vacation terms (Tr. 192-93), and the Union was willing to make movement towards the Company's position on premium pay (Tr. 194). Mr. Gibbons pointed out that employees had not had a wage increase in 10 years and that the Union was willing to consider a lump sum payment, a profit sharing plan or 401(k) match in lieu of a wage increase. (Tr. 196, 200, GCX 5).

Mr. Gibbons stated that the Union had reviewed the Company's position regarding the 180,000 ton threshold and that the Union believed that tying employee wages to this threshold was unfair and irrelevant given that over the past 16 years, the 180,000 threshold had only been reached 6 times - each time when the Company employed more than 50 production and maintenance employees. (GCX 5). Mr. Gibbons explained that the Union wanted to negotiate a trigger for employee raises that was reasonable and achievable with the current workforce of 24-26 production and maintenance employees. (Tr. 195). Mr. Gibbons further pointed out that the Company had refused to provide the Union with any information indicating that the 180,000 threshold could ever be reached with the current workforce. (Tr. 195).

Mr. Gibbons also provided the Company with a one-page description of the adverse economic impact on employees of the Company's intransigence on wages and other economic conditions of employment. (Tr. 158, GCX 6). Mr. Gibbons explained that as a result of the Company's implementation of wage cuts, the Union calculated that employees had lost approximately $13,000 a year since they had voted for the Union in 2007 (Tr. 187). Mr. Gibbons explained that employee productivity was approximately 40% higher in 2013 than it had been in years in which the Company reached the 180,000 ton threshold. (GCX 5). The Union calculated that in previous years when the 180,000 threshold had been reached, productivity was measured at 3333 tons per employee whereas employees were currently producing 4469 tons per employee. (GCX 5). Based on this, it was the Union's position that employees should receive a fair share of the profit resulting from their increased productivity, and the Union was, therefore, seeking to negotiate a reasonable trigger for a wage increase. (GCX 5). Mr. Gibbons pointed out that the Company had also realized a 50% decrease in labor costs in the years since the 180,000 threshold had been reached. (GCX 5).

7. The Union Requests Relevant Financial Information

Mr. Gibbons further stated that if the Company could not afford the Union's revised proposal, the Union was again requesting information necessary to evaluate the Company's financial condition so that the Union could modify its proposal. (GCX 5, R 15). Mr. Gibbons stated that the Union needed to know what the Company's financial situation was so that the Union could determine how to negotiate for a wage increase for employees, because the Company's position – tying a wage increase to the 180,000 threshold – did not make any sense to the Union and the Union did not believe that the 180,000 threshold was achievable. (Tr. 202)

8. The Company Rejects the Union's October 31, 2013 Proposal And Makes No New Counterproposals

The Company rejected every element of the Union's October 31, 2013, proposal and refused to make any counter to any term proposed by the Union, stating that the Company's counterproposal was the existing implemented terms. (Tr. 442-43, GCX 5, R9). The Company contacted the Union shortly thereafter, stating that it was willing to consider 20 hours a year for Union business leave but reaffirmed its position that "the remaining proposals are not acceptable because they are not reasonable given the state of the business." (Tr. 443, GCX 9). In response to the Union's request for financial information, Miossi stated that the Company would not provide the Union with information about its profits or losses. (GCX 5). Miossi further stated that as a result of the 2008 recession, the Company was suffering deceased demand and pricing erosion, that business was not what it had been, that competitors were going after the Company's business, and that business conditions had not changed since 2009. (GCX 5). Additionally, Miossi stated that the Company was doing the best it could (Tr. 444-445) and that the Company didn't want to agree to any commitments that it might not be able to follow through on. (Tr. 445). Miossi stated that he believed that low attrition among the Company's employees indicated that their compensation was fair. (CGX5).

9. The December 11, 2013, Bargaining Session: The Union States Its Flexibility In Meeting The Company's Bargaining Goals And Reiterates Its Information Request.

The parties met for the third and final time since the July 8, 2013, Settlement on December 11, 2013. The meeting lasted less than one hour. (GCX 10, R 10). Gibbons explained to the Company that the unit employees had suffered significant economic losses, starting with a $0.90 wage cut in 2009 and had received no wage increases since that time. (Tr. 208, GCX 10). Mr. Gibbons asked Mr. Miossi how unit employees could obtain a raise and what the Union could do to meet the Company's demands. (GCX 10). Mr. Gibbons explained that the Union was very flexible about how to achieve an increase in employee compensation and was willing to consider profit sharing or other arrangements, but that the Union needed to know exactly what the financial condition of the Company was in order to make such proposals. (Tr. 220-21, 298-09). The Union reiterated that it was requesting financial information substantiating the Company's bargaining position and stated that it would continue to ask for the financial information because the Union needed this information to respond to the Company's proposals. (Tr. 374).

10. The Company Makes No Movement From The Implemented Terms

At December 11, 2013 meeting, Miossi again offered no counter proposals, and, in response to Gibbons' question about how the Union could obtain a raise for employees, Miossi replied only that the Union could agree to sign the Company's Last, Best, and Final Offer (Tr. 208-09; GCX 10). At this meeting, Miossi further stated that business conditions had not changed since 2009 and "the iceberg we're on is melting." (Tr. 208, 224, GCX 10, R 16).

Between 2009 and 2013, the Company never made a wage proposal that differed from the 2009 Implemented Terms. (Tr. 446). Since 2009, the Company has employed fewer than 50 production and maintenance employees and has not exceeded the 180,000 ton production threshold (Tr. 448-49, CP 1).

Throughout bargaining in 2013, Miossi stated that the Company was insisting on maintaining the 180,000 threshold contained in its 2009 Last, Best and Final Offer, because the economic condition of the employer had not changed since 2009. (Tr. 401). Miossi explained to the Union that "nothing had changed" with regard to the Employer's economic position because "the Company had lost a third of its business since 2009 and had not recovered it" and that since 2009, the Company had seen a reduction in processed tons of steel on an annual basis from 180 tons to 120 tons. (Tr. 451).

B. The Union's Information Requests

At the December 11, 2013, bargaining session, Gibbons submitted an information request to the Company (GCX 11, GCX 10, R10). In this request, the Union asked the Company to provide the following financial information to assess the Company's position that it could not agree to the Union's economic proposals or grant pay increases: (1) Information pertaining to wage increase at the Company's Sawyer, Michigan facility, (2) Audited financial statements for the past four years, (3) Financial reports for the last four years, including management reports and business analyses, (4) Management reports/analyses of business condition for each of the last four years (5) Sales by customer for the last four years, including current and projected sales for the next three years, (6) A description of the actions the Company has taken to secure savings the Company claims are necessary, (7) An explanation of business conditions the Company referred to in bargaining, including specific changes that have occurred and the actual impact of these conditions on the Company's financial condition, (8) A description of any reduction in the compensation of management employees, (9) Federal and State tax returns filed by the Company for the last four years, and (10) Any additional information that would be helpful to the Union in analyzing the Company's financial condition. (GCX 11).

The Company responded to the Union's December 11, 2013 Information Request on December 16, 2013. (GCX 12). The Company objected to the Union's request for information related to its Sawyer, Michigan facility on relevancy grounds. (GCX 12). The Company refused to provide any information responsive to the Union's request for audited financial statements and financial reports on the asserted grounds that the Union was not entitled to such information because the Company "has never asserted a financial inability to meet the Union's wage demands." (GCX 12). The Company refused to provide sales information by customer and instead provided some basic tonnage and revenue data from 2009 through 2013. (GCX 12). The Company provided some examples of cost-cutting measures it had undertaken since 2009. (GCX 12). In response to the Union's request for an explanation of business conditions the Company referred to in bargaining, the Company produced the tonnage information supplied in response to the Union's previous request, and included projected tonnage for 2013. (GCX 12). The Company refused to provide any information about non-unit employee and management compensation, refused to produce its tax returns, and did not provide any information responsive to the Union's request for information that would be helpful to the Union in analyzing the Company's financial condition. (GCX 12).

On January 7, 2014, the Union responded to the Company's reply to the Union's December 11, 2013 information request. (GCX 13). The Union described the relevancy of the Sawyer, Michigan pay rates to the Franklin Park mill. (GCX 13). The Union reiterated its request for the financial information requested by the Union on December 11, including audited financial statements, reports, and business plans, explaining that the request was made by the Union in response to the Company's consistently-stated financial inability to meet any of the Union's economic proposals: "AMC's consistent basis for pay cuts and its position for not being able to provide future economic improvements, including wage increases, are premised on what has been described by AMC as deteriorating business conditions and a reduction in sales and the margins of such sales. AMC has clearly expressed this position and reason for its position regarding economic matters during negotiations. In effect, AMC is claiming a financial inability to pay or provide economic improvements for its employees. Therefore, the Union's request for the Company's financial information is not only appropriate but necessary for the process of good faith negotiations to take place regarding economic matters." (GCX 13). The Union reiterated its request for itemized costs of the sales revenues for each year from 2007 to the present. The Union further explained the relevance of data regarding the compensation of non-bargaining unit employees in support of its request that such data be provided. (GCX 13).

On January 9, 2014, the Company responded to the Union's renewed request of January 7, 2013, reiterating its objections and refusing to provide information not already supplied to the Union other than certain generalized statements about the compensation of non-unit office staff, supervisors, and managers. (GCX 13).

On January 31, 2014, the Union responded to the Company's January 9 refusal to provide information responsive to the Union's requests. (GCX 14). The Union restated its need for audited financial statements and financial reports for the past four years, sales by customer for each of the last four years, an explanation of the Company's business conditions and financial conditions, and federal and state tax returns for the last four years. (GCX 14). The Union explained that this information was needed because "the Company's position regarding economic matters was based on claimed adverse business conditions that resulted in losses or reduce income that prevents the Company from making any economic improvements for employees […] The Company's position has and was actually based on an 'inability to pay.' While the Company has not used those specific terms, the reason and basis for the Company's position as expressed during bargaining and actions taken are the same the 'inability to pay.'" (GCX 14).

On February 3, 2014, the Company refused to provide any information responsive to the Union's renewed request stating, "The Union is not entitled to the private financial records of Arlington Metals, information about its credit relationships, the separate Sawyer facility, the identity of its customers, 'internal work documents' more data concerning non-bargaining unit personnel, etc., etc., beyond what we have already provided." (GCX 14).

On February 5, 2014, the Union replied that the information requested by the Union was "necessary for the Union to carry out its performance and duties as the exclusive bargaining representative of the bargaining unit employees of Arlington Metals." (GCX 14). The Union further stated that the Company's refusal to provide the requested information and Miossi's characterization of the Company's statements during bargaining as not involving an inability to pay, represented an attempt to "ignore the facts and the statements made during our negotiation regarding Arlington Metals' business performance and conditions and the statements expressed by you as the basis and premise for the Company's position regarding economic issues. In effect an 'inability to pay.' While these exact terms may not have been used the reason as expressed are the same. (GCX 14).

The Company responded later in the day on February, 5, 2014, providing no further information and stating that the Company had never asserted an inability pay, nor could such a position be inferred from the Company's conduct at bargaining. (GCX 14).

To date, the Company has failed and refused to provide the requested information to the Union.

C. The Company Unilaterally Withdraws Recognition

On July 10, 2014, despite the pendency of the unfair labor practice charges filed against the Company docketed as Case Nos. 13-CA-119043, 13-CA-122273, and 13-CA-125255, the Company notified the Union that it was withdrawing recognition of the Union based on a petition dated July 9, 2014 which the Company claimed contained the signatures of a majority of bargaining unit employees. (GCX 16, R1, R11). At no time between July 10, 2014 and September 17, 2014 did the Company compare the signatures on the petition with the Employer's on-file signatures for its employees. (Tr. 103-04, GCX 28).

The Company's Executive Vice President Timothy Orlowski, stated that he believed that the signatures appearing on the petition were authentic because he recognized the signatures of his longstanding employees. (Tr. 102, 105-06). Despite this, Orlowski testified that he was not familiar with the signatures of the Company's recently-hired employees and could not recognize the signatures of Brandon Trezzo, Brandon De La Cruz, and other newer employees. (Tr. 109-10).

D. The Company Denies Access To The Facility For The Union To Conduct A Health And Safety Inspection

On July 10, 2014, Jose Gudino, the Union's Subdistrict 1 Director for District 7, contacted Miossi, pursuant to Articles 20 and 21 of the implemented terms, asking for dates to schedule a health and safety inspection by the Union at the Company's Franklin Park, Illinois, facility. (Tr. 246-47, GCX 4, 15). The Union sought the inspection because OSHA had cited the Company with approximately 80-100 violations in September, October, and November, of 2013, and the Union wanted to review the Company's compliance with the abatement dates which fell in the spring of 2014. (Tr. 255, 261-62). Miossi responded that, consistent with the Company's withdrawal of recognition, the Company would not allow the Union access to the facility for a health and safety inspection. (Tr. 246-47, GCX 15).

ARGUMENT

I. STANDARD OF REVIEW

It is the NLRB's established policy not to overrule an administrative law judge's credibility findings unless a clear preponderance of all the relevant evidence convinces the NLRB that the findings are incorrect (*Standard Dry Wall Products, Inc.,* 91 N.L.R.B. 544 (1950)) and these findings are entitled to deference. *Deffenbaugh Industries, Inc. v. N.L.R.B.*, 122 F.3d 582 (8th Cir. 1997). While the Board may draw different inferences from the facts and may reach different legal conclusions (*Pirelli Cable Corp. v. N.L.R.B.*, 141 F.3d 503 (4th Cir. 1998)) it must address the evidentiary questions raised by the administrative law judge's decision, and must articulate reasons for reversing the judge. *Teamsters Local Union 769 v. N.L.R.B.*, 532 F.2d 1385 (D.C. Cir. 1976).

II. THE ALJ'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) BY REFUSING TO PROVIDE REQUESTED FINANCIAL INFORMATION TO THE UNION IS SUPPORTED BY THE RECORD EVIDENCE AND BOARD LAW

A. The ALJ Properly Found That The Company's Bargaining Conduct Demonstrated That It Claimed An Inability To Pay For The Union's Proposals; This Plea Of Poverty Required The Company To Open Its books For Union Inspection.

In its exceptions, the Company for all intents and purposes asks the Board to adopt a requirement in inability to pay cases which it has expressly disclaimed: conditioning the obligation to provide financial information on the Company's recitation of "magic words." The Company's claim, in essence, is that because the Company's lead bargainer Miossi studiously avoided uttering an explicit plea of poverty during the two bargaining session which occurred in October and December of 2013, and provided the Union with an attempted disclaimer in the form of his statement to the Union that the Company was not claiming a financial inability to pay the Union's wage proposals, that the Company thereby relieved itself of its obligation to provide financial information made relevant by the Company's plea of poverty revealed through examination of the totality of the Company's bargaining conduct.

The Company's artful avoidance of terms that explicitly state a claim of inability to pay does not preclude the ALJ's finding that the Company conveyed an inability to pay through its overall bargaining conduct. Nor is the Company's disclaimer of an asserted inability to pay dispositive. *Shell Co.,* 313 N.L.R.B. 133, 134 n. 7 (1993). Instead, in determining whether the Company had asserted an inability to pay, the ALJ properly evaluated the Company's claims "in the context of the particular circumstances in that case." *Stella D'oro Biscuit Co.*, 355 NLRB 769, 770 (2010); *Lakeland Bus Lines*, 335 NLRB 322, 324 (2001), *enforcement denied*, 347 F.3d 955 (D.C. Cir. 2003). Importantly, the Board does not require that the employer use any "magic words" in stating its inability to pay, but only that the employer's statements and actions convey an inability to pay. *See, E.I. Dupont & Co.,* 276 NLRB 335, 336 (1985). ("[n]o magic words are necessary to express ... a plea of inability to pay within the meaning of ***Error! Bookmark not defined.****Truitt ...*"); *see also, Atlanta Hilton & Tower*, 271 NLRB 1600, 1602 (1984) (cautioning against conditioning inability-to-pay analysis on the invocation of "magic words"). Instead, any language asserting, in substance, a present inability to pay, or inability arising within the term of the contract, is sufficient.

Accordingly, in *Stella D'oro Biscuit Co*. 355 NLRB 769 (2010), the Board found that although the employer "did not *expressly* plead an inability to pay," (emphasis in original) its bargaining statements clearly linked the company's survival to obtaining concessions from the union and, therefore, constituted a claim of "inability to pay." *Id.* Likewise, in *ConAgra, Inc.*, 321 NLRB 944 (1996), *enforcement denied*, 117 F.3d 1435 (D.C. Cir. 1997), the Board found that the employer's repeated representations, "although carefully couched in terms of competitive disadvantage, amounted to claims that it could not presently pay and stay in business during the term of the agreement." 321 NLRB at 944. Thus, the employer's statements that "the situation is serious and fragile," "if we are not competitive we cannot survive," and "we must do something to be able to survive" were found to amount to a claim of inability to pay, triggering an obligation to provide the Union with financial information supporting its claim. 321 NLRB at 944. Further, in *Shell Co.*, 313 NLRB 133 (1993), the employer's statements that economic conditions had affected the facility "very badly, very seriously," that present circumstances were "bad," "critical," and a matter of "survival" were found by the Board to constitute a claim of inability to pay because of the "immediacy of [its] claims here concerning the [company's] present survival and 'critical' condition." 313 NLRB at 134.

While purposefully avoiding an explicit statement of inability to pay during the two bargaining sessions in 2013, the Company's bargaining conduct and statements to the Union about its proposals throughout the entire course of bargaining have consistently asserted that its present financial condition, not merely its competitive position, required it to seek economic concessions. The essential core of the Company's bargaining position as a whole has been that the Company is financially unable to meet the Union's demands.

The ALJ properly considered the entire course of the Company's bargaining conduct in determining whether or not the Company expressed an inability to pay during the statutory period – rather than confining his analysis to the disclaimers uttered by Miossi at the two bargaining sessions in 2013. Based on that evidence, the ALJ correctly found that the Company maintained a consistent bargaining position since bargaining over the economic portions of the contract commenced in 2009: that it was unable to meet the Union's wage and other economic demands because of poor economic conditions affecting the Company's financial situation. At the first bargaining session between the parties on economic issues, on March 3, 2009, Miossi stated that the Company was seeking wage cuts because the Company's financial situation was "dire" and the Company was "losing money." (Tr. 404, 407). When the parties met in 2011, the Company sought further concessions in wages, hours and terms and conditions of employment, claiming that these concessions were necessary for the Company to remain competitive within the industry. (R 4, Tr. 418). In support of its position, the Company provided the Union with a list of annualized production and profits/losses per year from 2005 to 2011 showing that, since 2007, the Company had sustained significant losses (Tr. 409, 453-454, CP 3).

The Company's statements to the Union during bargaining in 2013 provide further evidence in support of the ALJ's finding that the Company's bargaining position was based on an inability to pay. On October 31, 2013, the Company rejected the Union's economic proposal in its entirety stating that its terms were "not acceptable because they are not reasonable given the state of the business." (Tr. 442-43, GCX 5, R9). Miossi further stated at the October 31, 2013 meeting that, as a result of the 2008 recession, the Company was suffering deceased demand and pricing erosion, that business was not what it had been prior to the recession, that competitors were going after the Company's business, and that "nothing had changed" with regard to the Employer's economic position since 2009. (Tr. 401, 451; GCX 5). Thus, just as in 2009 and 2011, in 2013 the Company was still losing money and was still in a dire financial situation. At the parties' final meeting on December 11, 2013, Miossi refused to consider any change to the Company's economic proposal contained in the Last, Best, and Final Offer on the grounds that business conditions had not changed since 2009 and "the iceberg we're on is melting." (Tr. 208, 224, GCX 10, R 16).

The weight of the credited evidence supports the ALJ's finding that these statements – that the Company was "losing money," that its financial situation was "dire" and that the Company was like a "melting iceberg" – made throughout the course of bargaining to justify the Company's inability to meet the Union's wage demands, conveyed a present inability to pay and "could reasonably be construed as statements that the Respondent was currently unprofitable and unable to pay more than its unilaterally implemented offer." (ALJD 22).

The ALJ specifically considered and rejected the Company's argument that Miossi's statements in 2013 – that the Company was not claiming, and had not claimed, an inability to pay in response to the Union's wage and benefit proposal – did not operate as a repudiation of the Company's previously articulated position, relieving the Company of the obligation to provide the Union with requested financial information. Thus, the citations to the record contained in the Company's brief on pages 26 and 27 do not, as the Company argues, demonstrate that the Company "never expressed an inability to pay with respect to the Union's bargaining demands." Rather, the record shows that Miossi artfully evaded invoking any "magic words" during the 2013 bargaining sessions and instead engaged in a variety of verbal contortions to justify the Company's bargaining position.

Further, the Company's reliance on the email exchange between Miossi and Gibbons in February 2014 for the proposition that the Union "conced[ed] that AMC never stated an [in]ability to pay" is entirely misplaced. (AMC Br. p. 27, 29). Gibbons' email of February 5, 2014, does not, as claimed by the Company, demonstrate that the Union "conceded" that the Company had never stated an inability to pay. Rather, the email from Gibbons to Miossi highlights the Union's concern about the gamesmanship being conducted by the Company's bargaining team and supports the Union's contention that the Company purposefully sought to evade its obligation to provide requested financial information to the Union following its effective plea of poverty by avoiding magic words. Thus Gibbons stated:

> "Your comments regarding my reference to the use of the terms 'inability to pay" are unfortunate and represent a further effort on your part to ignore the facts and the statements made during our negotiation regarding Arlington Metals business performance and conditions and the statements expressed by you as the basis and premise for the Company's position regarding economic issues. In effect an "inability to pay." *While these exact terms may not have been used the reason as expressed are the same*."

(GCX14, *emphasis added*).

The ALJ correctly found that, in addition to conveying the Company's inability to pay through the words Miossi used to describe the Company's financial situation at the bargaining table, the Company's bargaining proposals – insisting on a wage proposal tying the elimination of wage cuts to achieving a production threshold of 180,000 annualized processed tons of steel – provide further evidence that the Company's bargaining position was based on an inability to pay. (Tr. 401, 411-12, R 3). By tying the elimination of wage cuts to the 180,000 production threshold and stating that the Company could not cover its costs below this threshold, the Company sought to demonstrate that it could not afford to meet the Union's demands at currently-existing production levels. In other words, the Company was unprofitable and could not afford to pay a wage increase.

In 2009, when the Company first presented this proposal, Miossi explained that this threshold was devised by the Company as a trigger for reinstating previous wage levels because 180,000 tons represented the point at which the Company believed it would be able to break even and begin to "cover all their […] costs" (Tr. 401-2, 404). The ALJ found, based on the hearing testimony of Miossi and Orlowski, that the Company subsequently offered different and inconsistent explanation for this proposal. Thus, while Miossi told the Union in 2009 that the 180,000 threshold represented the Company's break-even point, in 2013 he said that it was related to the operational costs of the business, and Orlowski claimed at the hearing in this case that the 180,000 threshold represented proper utilization of the business' equipment. The ALJ properly concluded, in the face of the Company's equivocation, that these statements attempting to claim that the 180,000 threshold was totally unrelated to the Company's profitability, did not outweigh the evidence showing that the Company's insistence on this threshold was premised on its asserted unprofitability below this production level. Thus, the ALJ properly found that the Company's proposal tying a wage increase to the 180,000 ton production threshold was based on an implicit claim of inability to pay, despite the Company's efforts to characterize it as otherwise. This credibility determination should be upheld.

B. The ALJ Properly Found That The Union Is Entitled To Financial Information Substantiating The Company's Bargaining Claims.

The ALJ rightly found that, even in the absence of a finding of a claim of inability to pay, the Union is entitled to certain financial information substantiating the specific economic claims the Company has made justifying its concessionary proposals.

The ALJ properly relied on *Caldwell Manufacturing Co.*, 346 NLRB 1159 (2006), in finding that the financial information requested by the Union was needed in order for the Union to evaluate the accuracy of the Company's bargaining statements and to respond intelligently and develop its own counterproposals. In *Caldwell Manufacturing* the Board articulated a clear standard requiring the disclosure, in the absence of a claim of inability to pay, of specific financial information to verify a company's stated bargaining position. This standard is a direct extension of the holding in *Truitt*, requiring an employer to provide information to substantiate the accuracy of the statements underpinning its bargaining position, since “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 its accuracy.” *Nat'l Labor Relations Bd. v. Truitt Mfg. Co.*, 351 U.S. 149, 152-53 (1956).

Under this standard, the General Counsel’s burden to show the relevance of information requested by a union to substantiate an employer’s bargaining statements is “not exceptionally heavy,” but rather, “the Board uses a broad, discovery-type of standard in determining relevance in information requests.” *Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006) in which “[r]elevance is broadly construed, and in the absence of a countervailing interest, any requested information that has a bearing on the bargaining process must be disclosed.” *KLB Indus., Inc. v. NLRB*, 700 F.3d 551, 556 (D.C. Cir. 2012), *quoting U.S. Testing Co.v. NLRB,* 160 F.3d 14, 19 (D.C. Cir. 1998). In his decision, the ALJ properly found that the information requested by the Union was necessary in order for the Union to evaluate the Company’s bargaining claims.

The ALJ rightly found that the General Counsel demonstrated the relevance of the Union’s request for information substantiating the Company’s claim that poor business conditions and increases in costs and taxes necessitated the Union’s acceptance of the Company’s concessionary proposals. Throughout bargaining, the Company’s central justification for wage concessions has been that business conditions are poor. The Company repeated again and again at the bargaining table that “business conditions” prevented it from providing a wage increase and that reaching the 180,000 production threshold is necessary in order for the Company to have enough revenue to pay for a wage increase. (Tr. 401-402, 404). Miossi stated that as a result of the 2008 recession, the Company was suffering deceased demand and pricing erosion, that business was not what it had been, and that competitors were going after the

Company's business (GCX 5). Miossi further stated that concessions were necessary because the Company had incurred an increase in taxes and costs and experienced downward pressure on pricing (Tr. 197, 362).

The record evidence supports the Union's position that it is entitled to information substantiating the Company's claim that "business conditions" including its tax situation were the basis for its wage proposal tying a wage increase to the 180,000 threshold. The Union specifically expressed to the Company in bargaining that it did not believe that the 180,000 threshold was achievable with the current headcount given that over the past 16 years, the 180,000 threshold had only been reached 6 times, each time when the Company employed more than 50 production and maintenance employees. (Tr. 195; GCX 5, R 15). Gibbons stated that the Union believed that tying employee wages to this threshold did not make any sense and was unfair given that production tonnage was not a measure of employee productivity, nor did it correspond to the Company's profits and losses.[1] (Tr. 195, 202; GCX 5, CP 3). Further, Gibbons explained that employee productivity was approximately 40% higher in 2013 than it had been in years in which the Company reached the 180,000 ton threshold. (GCX 5). As a result, the Union stated that it did not understand how the 180,000 production threshold was at all relevant to employee compensation. Gibbons stated that the Union's bargaining position was flexible and

[1] For example, the "7 Year History of Tonnage, Employee Count and Manhours" chart provided to the Union by the Company on October 5, 2011, and introduced into evidence as Charging Party Exhibit No. 3 indicates that in 2005 the Company produced 172,098 tons of steel, resulting in an annual profit of $52,333.00, but in 2006, when the Company produced 201,867 tons of steel, the Company's annual profit was only $1,229.00. Similarly in years subsequent to the 2008 recession, the amount of the Company's annual losses did not correspond to its annual production totals. Thus, in 2008 and 2009 the Company's losses were practically identical ($965,403.00 in 2008 and $964,009 in 2009) despite the Company having produced 143,371 tons of steel in 2008 and only 100,854 tons of steel in 2009. In 2010, when the Company produced 126,912 tons of steel, the Company's losses were inexplicably lower than either 2008 or 2009, at $452,170.00. (CP 3)

that the Union was willing to consider a lump sum payment, a profit sharing plan, or 401(k) match in lieu of a wage increase, but that it needed to know what the Company was basing its wage proposal on so that it could determine how to respond to that proposal. (Tr. 196, 200, GCX 5).

Likewise, the Union is entitled to the requested sales information by customer because the Company's ability to pay a wage increase if the 180,000 production threshold is reached is directly impacted by the nature of its customers and its pricing arrangements with those customers. Moreover, the Company's statement of competitive disadvantage (Tr. 418) triggered an obligation to respond to the union's targeted request for information about customers and sales. *KLB Industries, Inc. v. NLRB*, 700 F.3d 551, 557 (D.C. Cir. 2012). Similarly, the relevance of the Union's request for information regarding measures taken by the Company to secure savings, including the compensation of non-bargaining unit personnel, is established since such information will allow the Union to understand, and respond to, the Company's concessionary wage proposals. *See*, *AFL Quality NY LLC*, 2013 WL 819360 (NLRB Div. of Judges Mar. 5, 2013); *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).

The Company argues that it met its obligation to provide the Union with information substantiating its bargaining statements by supplying annual tonnage and revenue data. The ALJ properly found that this response to the Union's information requests was wholly inadequate under *Caldwell*. The Company's emphasis in its brief in support of its exceptions of the "specific" language in Caldwell does nothing to support its argument. The ALJ found, based on the record evidence, that Miossi supported the Company's intransigent economic bargaining position by claiming that the Company was confronted with increased costs and taxes and that poor business conditions had led to decreased sales and pricing. These were specific claims which the Union was entitled to substantiate. Thus, the ALJ properly determined that the refusal to provide the Union with sales and customer information, federal and state tax returns, and information pertaining to the poor "business conditions" relied upon by the Company in expressing its bargaining position to the Union violated Sections 8(a)(5) and (1).

III. THE ALJ PROPERLY FOUND THAT THE COMPANY ENGAGED IN BAD FAITH SURFACE BARGAINING IN VIOLATION OF SECTION 8(a)(5)

The ALJ properly found that the Company's bargaining conduct demonstrated that it had no intention of reaching an agreement with the Union. The ALJ's conclusion is supported by the record evidence showing that: (1) the Company stood on its implemented term, making only minor modifications to the concessionary terms and refusing to consider the Union's wage proposals despite the Union's willingness to modify its proposals in order to reach agreement, (2) The Company refused to provide the Union with necessary and relevant information needed by the Union to understand the basis for the Company's bargaining position and that the information it did provide, regarding its revenue during the period from 2009 through November 2013, was incomplete and misleading.

A. The ALJ Properly Found That The Company's Bargaining Conduct In 2013 Demonstrated An Intent To Frustrate Bargaining.

The ALJ properly found that in bargaining in 2013, the Company eschewed all offers by the Union to explore alternative avenues of achieving the Company's stated bargaining goals. The Company's flat-out refusal to consider the Union's proposals regarding a lump sum payment, profit sharing plan, or 401(k) match in lieu of a wage increase, indicates an intent, not to maintain a firmly held bargaining goal but, rather, to frustrate bargaining and prevent agreement. Moreover, the Company's rejection of each and every economic proposal made by the Union in the October and December bargaining sessions and Miossi's statement to the Union in bargaining that the only proposal that the Company would accept regarding a wage increase was the Union's agreement to sign the Company's Last, Best, and Final Offer evinces a take-it-or-leave-it bargaining position. The Board has found that an employer's overall conduct was designed to frustrate bargaining where the employer gave no reason for rejecting union's proposals and made no counter proposals of its own. *See, Fairhaven Properties, Inc.*, 314 NLRB 763, 772 (1994) ("[i]n view of the evidence that the Union was willing to discuss the issues, to seek solutions, and to make meaningful concessions, we can only conclude that the Respondent's overall strategy was to avoid reaching an agreement."); *Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991, 994 (9th Cir. 1992) (bad faith bargaining found where employer "refused to make any modification in its only contract proposal, in the face of the Union's willingness to modify its proposals.")

The ALJ's conclusion that the Company "maintained its intransigent position despite the Union's willingness to modify its proposals in order to reach agreement" is based on the record evidence. Following the July 8, 2013, Settlement, the parties met briefly on September 12, 2013 to discuss the termination of union activist Frederico Ceja. (Tr. 144, 426). On October 31, 2013, the parties resumed negotiations over the economic portions of the agreement. The meeting lasted only one hour and a half. (Tr. 146). At this meeting, the Union submitted its Eleventh Economic Proposal to the Company which incorporated substantial modifications to its previous proposal, including: a modified overtime proposal, acceptance of the Company's vacation proposal for new hires, and movement towards the Company's position on premium pay (Tr.

192-94 441; GCX 5, 8). During this bargaining session, Gibbons explained that as a result of the Company's implementation of wage cuts, the Union calculated that employees had lost approximately $13,000 a year since they had voted for the Union in 2007. (Tr. 187). The Union further stated that it wanted to negotiate a trigger for employee raises that was achievable with the current headcount and that the Union was even willing to consider a lump sum payment, a profit sharing plan, or 401(k) match in lieu of a wage increase. (Tr. 195-96, 200, GCX 5).

The Company rejected every element of the Union's October 31, 2013, proposal and refused to counter any term proposed by the Union, stating that the Company's counterproposal was the existing implemented terms. (Tr. 442-43, GCX 5, R9). (The Company contacted the Union shortly thereafter, with the minor concession that it was willing to consider 20 hours a year for Union business leave.) (Tr. 443, GCX 9).

The parties next met on December 11, 2013. The meeting lasted less than one hour. (GCX 10, R 10). At this meeting, Gibbons stated that unit employees had suffered significant economic losses since 2009 and asked Miossi how they could obtain a raise and what the Union could do to meet the Company's demands. (Tr. 208, GCX 10). Gibbons again asserted that the Union remained flexible about how to achieve this and was willing to consider profit sharing or other arrangements. (Tr. 220-21, 298-09). Miossi again offered no counter proposals, and replied that the Union could obtain a raise for represented employees by signing the Company's Last, Best, and Final Offer (Tr. 208; GCX 10). (GCX 10).

Finally, the ALJ properly found that the Company's provision of incomplete and misleading information to the Union regarding its revenues from 2009 through November 2013 was further evidence of bad faith surface bargaining. In response to the Union's request the

Company provided annual tonnage and revenue figures for its toll processing business but left out figures for its metal sales business, resulting in a distorted picture of the Company's revenue streams. The information provided did not represent approximately 20% of the Company's production. The Company's argument that the "bargaining unit work at the Franklin Park facility is on the toll processing side of the business" does not undermine the ALJ's conclusion that the Company provided the Union with information that substantially underreported the Company's overall revenue during this period.

B. Contrary To The Company's Argument, The ALJ Properly Focused On The Company's Post-Settlement Bargaining Conduct In Evaluating The Surface Bargaining Charge.

The Company's contention that the ALJ erred by basing his decision on the Company's conduct during the bargaining that occurred in 2013 is entirely misplaced. First, it is well settled under the Board's *Hollywood Roosevelt* rule that a Board settlement agreement "disposes of all issues involving presettlement conduct unless … [they] were unknown to the General Counsel, nor readily discoverable…, or specifically reserved from the settlement." *Hollywood Roosevelt Hotel Co.*, 235 NLRB 1397 (1978). In this case, on July 8, 2013, the Board approved a settlement of charges filed by the Union alleging, *inter alia*, that the Company had violated Section 8(a)(5) by failing and refusing to bargain in good faith. (Case Nos. 13-CA-101632 and 13-CA-105007). In this Settlement Agreement the Company specifically agreed: "We will not, upon request, refuse to meet and bargain in good faith" with the Union. (GCX 3(e)). The ALJ, therefore, properly based his analysis of the bad faith surface bargaining allegation before him on the Company's post-settlement bargaining conduct.

Second, the ALJ reasonably confined his review of the Company's bargaining conduct in addressing the surface bargaining allegation to those bargaining sessions that took place in 2013 given that there was a lengthy hiatus in bargaining resulting from the Company's refusal to meet with the Union. The record is clear that the parties did not meet between March 15, 2012, and September 12, 2013. (Tr. 419, 426; R 8). In the intervening time, the Company declined to meet as proposed by the Union, claiming that the parties remained at impasse. (Tr. 419-22). On July 31, 2012, the Board certified the Union for a second time as the exclusive collective-bargaining representative of the Unit (following a Board election, prompted by a decertification petition, which the Union won by a significant majority). (CGX 3(a)). The Company again refused the Union's requests to meet for collective bargaining following the re-certification of the Union. (Tr. 183). Only after the Board approved a settlement of charges filed by the Union against the Company (13-CA-101632 and 13-CA-105007) on July 8, 2013, which provided for an extension of the certification year for an additional year, did the Company finally agree to meet with the Union.

C. The Company's Pre-Settlement Bargaining Conduct Does Not Support The Company's Position That The Totality Of Its Bargaining Conduct Demonstrates Good Faith. Rather It Provides Additional Evidence Of Bad-Faith Surface Bargaining.

Contrary to the Company's argument (AMC Br. 38-40), if the ALJ had considered the bargaining conduct of the Company prior to 2013 in making his determinations regarding the surface bargaining allegation in this case, he would have found even more evidence in support of the General Counsel's and the Union's position that the Company's bargaining conduct violated Section 8(a)(5).

Notwithstanding the Company's argument that its attendance at 39 negotiation sessions is evidence of good faith bargaining (AMC Br. 39), the Board has made clear that mere willingness to talk does not constitute a willingness to bargain collectively. In *NLRB v. Insurance Agents*, 361 U.S. 477, (1960), the Supreme Court recognized that "[c]ollective bargaining… is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it'; it presupposes a desire to reach ultimate agreement, to enter in to a collective bargaining contract." 361 U.S. at 485. The parties are "bound to deal with each other in a serious attempt to resolve differences and reach a common ground." 361 U.S. at 486. Parties must "enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement" (*NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960)), and "approach the bargaining table with an open mind and purpose to reach an agreement consistent with the respective rights of the parties." *Majure v. NLRB*, 198 F.2d 735, 739 (5th Cir. 1952).

Despite making a facial showing of bargaining with the Union by attending negotiation meetings, the Company has not actually engaged in the give-and-take of collective bargaining, refusing to make any significant effort to move towards the Union's proposals on any key economic issues, despite the Union's continued willingness to compromise in an attempt to meet the Company's stated bargaining goals. The duty to bargain requires the parties to participate in negotiations "with a sincere purpose to find a basis of agreement." *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960)). While the Act does not require an employer to make concessions, an employer is obligated to "make *some* reasonable effort in *some* direction to compose his differences with the union, if § 8(a)(5) is to be read as imposing any substantial obligation at all." *Atlanta Hilton & Towers*, 271 NLRB 1600, 1603 (1984) (quoting *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131,134 (1st Cir. 1953)). Accordingly, an employer violates the Act when it "will only reach an agreement on its own terms and none other." *Regency Service Carts, Inc.*, 345 NLRB 671, 671 (2005); *Pease Co.,* 237 NLRB 1069 (1978). A "mere pretense at negotiations with a completely closed mind and without a spirit of cooperation does not satisfy the requirements of the Act." *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), *enforced sub nom. NLRB v. Hardesty Co.*, 308 F.3d 859 (8th Cir. 2002), *quoting NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210 (8th Cir. 1965)). As a result, "where an employer 'conduct[s] negotiations as a kind of charade or sham, all the while intending to avoid reaching agreement...' that employer violates §8 (a)(5) by engaging in surface bargaining." *Radisson Plaza Minneapolis v. NLRB*, 987 F.3d 1376, 1381 (8th Cir. 1993).

Thus, contrary to the Company's assertion, its bargaining conduct prior to the July 8, 2013 Board Settlement is illuminative of the Company's intent to prevent agreement during the post-Settlement bargaining sessions at issue in this case. (Tr. 184, 423-25, CGX 3(e)). The pre-Settlement bargaining history shows a clear pattern of conduct by the Company designed to prevent reaching agreement with the Union. In this regard, the record shows that since 2009, the Company repeatedly: (1) demanded concessions from the Union, (2) refused to consider the Union's proposals or make any significant alterations to its concessionary proposal, (3) declared that the parties are at impasse after a few meetings, and (4) implemented its proposal.

At the parties' first bargaining session addressing economic proposals on March 3, 2009, the Company demanded substantial concessions in employee wages and benefits and proposed that wage levels would only be restored if the Company met the 180,000 production threshold. Two months later, on May 5, 2009, the Company submitted its Last, Best, and Final Offer to the Union; and on August 3, 2009, the Company implemented it. (Tr. 411-12, R 3).

In 2011, the Company contacted the Union seeking further concessions in wages, hours and terms and conditions of employment. On April 7, 2011, the Company submitted to the Union a proposal which included the following reductions: the establishment of a two-tier wage system resulting in wage cuts for bargaining unit employees (R 4, Tr. 413), decreased healthcare benefits (R 4 Tr. 415), the elimination of daily overtime after 8 hours and the introduction of weekly overtime after 40 hours (R 4, Tr. 416), the elimination of employees' ten-minute rest break (R 4, Tr. 416), and the elimination of the shift differential (R 4, Tr. 416). The Company refused to alter its proposal in any way in response to the Union's counterproposals and, on December 7, 2011, the Company declared impasse and announced its intention to implement its last, best, and final offer. (R 4).

The parties next met on March 15, 2012. (Tr. 419). At this meeting, the Union submitted a counter-proposal which made significant movement towards the Company's position. (Tr. 419, R 8). The Union withdrew its proposal for daily overtime after 8 hours, accepted the Company's proposal on shift differential, reduced the amount of the wage increase it was seeking, and proposed that in exchange for maintaining the PPO and HMO, to the extent that the costs of these plans exceeded the cost of the HAS plan proposed by the Company, employees would pay the difference. (Tr. 419-20, R 8). The Union further requested to meet again in June of 2012. (Tr. 421). The Company rejected the Union's March 15 proposal in its entirety and declined to meet as proposed by the Union in June, claiming that the parties remained at impasse. (Tr. 422). Four days later, on March 19, 2012, the Company submitted to the Union a copy of the amended terms of its last, best, and final offer. (Tr. 129, GCX 4). This offer stated that it had been implemented by the Company on January 1, 2012, months before the Company submitted it to the Union, although the Company had previously provided the Union with a copy of the implemented terms which included these changes. (GCX 4).

As the record makes clear, between 2009 and 2013, the Company never made a wage proposal that differed from the Company's Last, Best, and Final Offer. (Tr. 445-46). While

Section 8(d) does not require an employer to make concessions, "rigid adherence to disadvantageous proposals may provide a basis for inferring bad faith" since such bargaining conduct indicates a failure to "make sincere, serious efforts to adjust differences and to reach acceptable common ground." *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1188 (D.C. Cir. 1981), *citing, NLRB v. Insurance Agents' Union*, 361 U.S. 477(1960). When viewed in context with the Company's unwillingness to respond to the Union's proposals seeking alternative ways to reach its stated cost-cutting goals and its refusal to provide the Union with information necessary to understand the Company's proposal and substantiate its bargaining demands, it is clear that the Company's intransigence is not merely the result of "hard bargaining," but, rather, indicative of an intent to frustrate bargaining.

IV. THE ALJ PROPERLY FOUND THAT THE COMPANY UNLAWFULLY WITHDREW RECOGNITION FROM THE UNION

A. The Petition Upon Which The Company Relied To Withdraw Recognition Was Tainted By The Company's Serious, Unremedied Unfair Labor Practices.

The ALJ correctly found that the Company unlawfully withdrew recognition from the Union finding that it improperly relied on a decertification petition tainted by the Company's serious, unremedied, pre-withdrawal unfair labor practices. It is well settled that "an employer may not avoid its duty to bargain by relying on any loss of majority status attributable to his own unfair labor practices." *Master Slack Corp.,* 271 NLRB 78, 84 (1984), citing, *Pittsburgh & New England Trucking Co.*, 249 NLRB 833, 836 (1980); See also *NLRB v. Williams Enterprises,* 50 F.3d 1280, 1288 (4th Cir. 1995). Thus, "an employer cannot lawfully withdraw recognition from a union if it has committed as yet unremedied unfair labor practices that could have reasonably tended to contribute to employee disaffection from the Union." *United Supermarkets, Inc. v.*

NLRB, 862 F.2d 549, 553 n.6 (5th Cir. 1989); *accord, Microimage Display Div., Xidex Corp. v. NLRB*, 924 F.2d 245, 254 (D.C. Cir. 1991).

As the Board explained in *Master Slack*, "it is clear that prior unremedied unfair labor practices remove as a lawful basis for an employer's withdrawal of recognition the existence of a decertification petition or any other evidence of loss of union support which, in other circumstances, might be considered as providing objective considerations demonstrating a free and voluntary choice on the part of employees to withdraw their support of the labor organization." *Master Slack Corp.*, 271 NLRB 78, 84 (1984).

Thus, in cases where the employer committed unfair labor practices that are unrelated to the decertification petition but that have contributed to the erosion of support for the union, the Board applies the four-factor test set forth in *Master Slack* to determine the existence of a causal connection between the unfair labor practices and the petition. 271 NLRB at 78 n.1 (1984); *See also, Bentonite Performance Minerals, LLC v. NLRB*, No. 10-1265, slip op. at 2 (Jan. 10, 2012) (recognizing that "the Board ... has applied Master Slack to cases where unfair labor practices not directly related to the decertification process are claimed to have caused the vote in favor of decertification"). Where such a causal connection exists, the Board will find that the petition is "tainted." *See, Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 737-38 (D.C. Cir. 2000) (employer's unlawful discipline and termination of public supporters of the Union contributed to the decertification petition); *East Bay Auto. Council v. NLRB,* 483 F.3d 628, 634 (2007) (petition tainted by Employer's pre-withdrawal unfair labor practices); *NLRB v. Transpersonnel,* 349 F.3d 175, 188 (4th Cir. 2003) (same); *Ryan Iron Works, Inc. v. NLRB*, 257 F.3d 1, 14 (1st Cir. 2001) (same); *Pirelli Cable Corp. v. NLRB,* 141 F.3d 503, 520 (4th Cir. 1998) (same).

The Master Slack factors include: (1) The length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. *Master Slack Corp.*, 271 NLRB 78, 84 (1984).

In this case, the following charges were pending against the Company on July 10, 2014, when it unilaterally withdrew recognition from the Union: (1) Case No. 13-CA-119043, filed on December 16, 2013, and amended on May 29, 2014, alleging that the Company failed and refused to bargain in good faith with the Union and unlawfully terminated a member of the bargaining committee, Federico Ceja, because of his union activities in violation of Section 8(a)(1), (3), and (5). (GCX 3F); (2) Case No. 13-CA-122273, filed on February 10, 2014, alleging that the Company unlawfully failed and refused to provide relevant and necessary information to the Union in violation of Sections 8(a)(1) and (5) of the Act. (GCX 1A); (3) Case No. 13-CA-125255, filed on March 26, 2014, alleging that the Company unlawfully failed and refused to bargain in good faith with the Union in violation of Sections 8(a)(1) and (5) of the Act. (GCX 1C); and, following the Company's withdrawal of recognition, on July 18, 2014, the Union filed the charge in Case No. 13-CA-133055 alleging that the Company unlawfully failed and refused to bargain with the Union, unlawfully refused the Union access to the employer's property to conduct a health and safety inspection, and unlawfully withdrew recognition from the Union in violation of Sections 8(a)(1) and (5) of the Act. (GCX 1E).

1. The length of time between the Company's commission of the unfair labor practices and its withdrawal of recognition was not sufficient to diminish the lasting effects of the Company's unlawful conduct.

The Company withdrew recognition from the Union on July 10, 2014 – six weeks after the Union filed the amended unfair labor practice in Case No. 13-CA-119043 and approximately 11 months after Ceja's termination, five months after the Union filed the charge in Case No. 13-CA-122273, and approximately three-and-a-half months after the Union filed the charge in Case No. 13-CA-125255. These unremedied unfair labor practices are sufficiently close in time to support a finding of a nexus between them and the decertification. The Board has consistently found that the passage of several months does not defeat a finding of a causal connection between an employer's unfair labor practices and the decertification. For example, in *United Supermarkets*, 287 NLRB 119, 120 (1987), where a petition was received five <u>years</u> after the employer's unfair labor practices, including the discharge of union supporters, the Board found that the petition had been tainted by the unremedied unfair labor practices. *See also, Columbia Portland Cement Co. v. NLRB,* 979 F.2d 460, 465 (6th Cir. 1992) (unremedied unfair labor practices within one year of signing decertification petition sufficient to taint petition); *AT Systems West, Inc.,* 341 NLRB 57, 60 (2004) (passage of nine months insufficient to dissipate effects of unfair labor practices); *Beverly Health & Rehab. Servs.,* 346 NLRB 1319, 1328-29 (2006) (passage of 6-8 months did not preclude a finding of a causal connection).

2. The Company's violations of the Act were serious and pervasive, tending to cause employee disaffection.

The Board's determination whether an employer's unfair labor practices reasonably tended to contribute to employee disaffection "is not predicated on a finding of actual coercive effect, but rather on the 'tendency of such conduct to interfere with the free exercise of employee rights under the Act.' " *The Hearst Corp.*, 281 NLRB 764, 765 (1986), enfd. mem. 837 F.2d 1088 (5th Cir. 1988). *See Chicago Magnesium Castings*, 256 NLRB 668, 674 (1981) (test is the "inherent tendency of alleged coercion to produce disaffection"); *NLRB v. Hi-Tech Cable Corp.*, 128 F.3d 271,279 (5th Cir. 1997); *Manna Pro Partners, L.P. v. NLRB*, 986 F.2d 1346, 1354 (10th Cir. 1993).

The record evidence amply demonstrates that the Company's litany of unfair labor practices tended to cause employee dissatisfaction with the Union and led to the success of the decertification petition. The Company's unlawful activity in this case go to the very heart of the Act, undermining employees' faith in their Union and demonstrating that support of the Union would be punished. The Board has consistently held that the unlawful discharge of a Union supporter is a hallmark violation that "is exceptionally coercive and not likely to be forgotten … and reinforces the employees' fear that they will lose employment if they persist in union activity." *Penn Tank Lines,* 336 NLRB 1066, 1068 (2001); *See also Goya Foods of Fla.,* 347 NLRB 1118, 1121-22 (2006) (discharging three union adherents and suspending another were "hallmark violations" that are "highly coercive and likely to remain in the memories of employees for a long time."); *Beverly Health and Rehab. Serv., Inc.,* 346 NLRB 1319, 1328–29 (2006) (discharging active union supporter and unilaterally changing hours and vacation); *Koons Ford of Annapolis*, 282 NLRB 506, 508 (1986), enfd. 833 F.2d 310 (4th Cir. 1987).

The decertification petition was a direct and tainted byproduct of the Employer's serious unfair labor practices and is, therefore, an unreliable indicator of a lack of majority support for the Union. The ALJ properly found that the Company violated the Act by relying upon it to withdraw recognition.

B. The ALJ Properly Found That The Company Failed To Meet Its Burden To Establish That the Union Had Lost Majority Support Due To Its Failure To Authenticate The Signatures Appearing On The Decertification Petition Upon Which It Relied To Withdraw Recognition.

The ALJ properly relied on *Latino Express* and *Levitz* in finding that the Company failed to properly authenticate the signatures on the decertification petition and therefore, lacked evidence of a loss of majority support at the time that it unilaterally withdrew recognition from the Union.

In *Levitz Furniture Co.*, 333 NLRB 717 (2001), the Board set forth a straightforward balancing test providing that:

> "[A]n Employer with objective evidence that the union has lost majority support – for example, a petition signed by a majority of the employees in the bargaining unit – withdraws recognition at its peril. If the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition. If it fails to do so, it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate Section 8(a)(5).

Once that initial burden has been met, *Levitz* goes on to explain in a footnote that:

> An employer who presents evidence that, at the time it withdrew recognition, the union had lost majority support should ordinarily prevail in an 8(a)(5) case if the General Counsel does not come forward with evidence rebutting the employer's evidence. If the General Counsel does present such evidence, then the burden remains on the employer to establish loss of majority support by a preponderance of all the evidence.

Levitz finally concludes:

> "We think it entirely appropriate to place the burden of proof on employers to show actual loss of majority support."

Thus, *Levitz* makes clear that the burden rests squarely on the employer who has withdrawn recognition to demonstrate that the union has actually lost majority support. If an employer meets its initial burden of demonstrating a loss of majority support, the General

Counsel may introduce evidence rebutting the employer's initial showing. If the General Counsel introduces such evidence, the burden shifts back again to the employer.

In *Latino Express*, the Board explained how an employer can meet its initial burden where, as in this case, it withdraws recognition claiming a loss of majority support based solely on a decertification petition ostensibly signed by a majority of employees. In *Latino Express*, the Board held that, "where an employer relies on an employee petition for evidence of the union's loss of majority support, it is the Respondent's obligation to authenticate the petition signatures on which it relies." *Latino Express, Inc. & Teamsters Local Union No. 777,* 360 NLRB No. 112 (May 21, 2014) (citing, *Ambassador Services,* 358 NLRB No. 130, slip op. at 1 fn. 1 and 3 (2012)).

The Company's argument that it was not required to undertake any attempt to authenticate the signatures on which it relied to withdraw recognition, claiming that under *Levitz*, "the burden of an employer to present evidence of authentication *only* arises where the General Counsel comes forward with evidence rebutting the employer's initial showing" (AMC Br., p. 48, emphasis in original) leaps two steps ahead in the burden shifting analysis approved by *Levitz* (the Company selectively quotes the Board's analysis found in footnote 49, entirely bypassing the rule stated in the text of the main body of the Board's decision which precedes footnote 49). As *Levitz* makes patently clear, the employer has an *initial* burden to demonstrate an actual loss of majority support. In this case, the Company failed to meet its *initial* burden when the only evidence it produced to support its withdrawal of recognition was a petition containing 16 signatures – 6 of which were not authenticated.[2] The ALJ properly found, based on the

[2] Despite what appear to be typographical errors referring to the existence of 26 signatures on the petition, (appearing in the Decision on page 34 at lines 30 and 34) the Decision is entirely clear that the Company provided evidence establishing the authenticity of at most 10 out of the 16 signatures on the petition and

testimony and evidence presented at the hearing that the Orlowski was not familiar with, and could not authenticate, the signatures of De la Cruz, Trezzo and four other employees hired in 2013. Contrary to the Company's argument, the ALJ was not required to conduct a "burden shifting analysis" in this case because, due to the failure of the Company to meet its initial burden, the burden never shifted.

Further, in arguing that somehow the employer was exempted from meetings its burden of proof because the "General Counsel conceded the Complaint does not challenge the validity of the employee petition" (AMC Br. p. 49), the Company mischaracterizes the record evidence by providing a partial quote which cuts off the General Counsel's clear statement that whether or not the Company had met its initial burden by authenticating the signatures appearing on the petition was at issue:

> Judge Carissimi: "I don't see anything in the complaint that directly challenged the petition."
> Mr. Murphy: "And I am not challenging the petition. *I am challenging the fact that in between the period of time that I started my questions, that the Respondent did not check the signatures.*" (Tr. 107).

The ALJ properly found that the record evidence showed that the Company had not met its burden. Executive Vice President William Orlowski testified that at no time did he or anyone else in the employ of the Company compare the signatures appearing on the petition with employee signatures contained in the employer's business records. (Tr. 10304, GCX 28). [3]

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that this number failed to establish a showing of support for decertification among the employer's 26 bargaining unit employees.

[3] Additionally, the Company made no effort to determine whether or not two high level employees who signed the petition, Harve Neace and Emil Sterczek, were members of the bargaining unit prior to the withdrawal of recognition. Mr. Neace is listed in census documents provided to the Union as a slitter operator and was identified at the hearing by Human Resources Manager Ilona Zelazowska as the Second Shift Supervisor (Tr. 301-02). Mr. Sterczek is listed in census documents provided to the Union as a lead maintenance worker and was identified at the hearing by Ms. Zelazowska as the Maintenance Supervisor

Instead, the Company relied solely on Orlowski's testimony purporting to authenticate the petition signatures based on his stated belief that he was able to recognize the signatures of the Company's longstanding employees: "I've known these guys for a long time. I've seen their signatures on a multitude of documents, and they look good to me […] several of them looked very – looked legit." (Tr. 105-06).

Even taking this undefined and non-specific testimony as providing authentication of the signatures of the Company's longstanding employees, Orlowski admitted at the hearing that his ability to recognize the signatures of the Company's employees did not extend to new hires. (Tr. 109). Thus, Orlowski conceded that he was unable to authenticate the signatures of the Company's employees hired in 2013 whose names appeared on the petition, including, for example, Brandon De La Cruz and Brandon Trezzo. (Tr. 109). Of the 16 names of employees appearing on petition, six were hired in 2013: Andres Coronel, Brandon De La Cruz, Christopher Keiler, Michael Krasinski, Anthony Menotti, and Brandon Trezzo. (R 18). The Company introduced no evidence whatsoever to authenticate these six signatures. Therefore, at most, the Company has verified 10 signatures on the petition – well short of the showing of interest required to allow an employer to unilaterally withdraw recognition. See, *Latino Express*, 360 NLRB No. 112 at 25 (2014) (Employer's withdrawal of recognition was unlawful where it made "no effort to authenticate the petition's signatures […] at trial or, as far as the record reveals, otherwise.").

As a result, the ALJ correctly found that the Company failed to meet its burden of demonstrating that the petition contained valid signatures of a majority of bargaining unit members. This is an independent and sufficient ground supporting the ALJ's finding that the

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(Tr. 302-04). By email dated September 24, 2012, Miossi confirmed that Neace and Sterczek were both excluded from the bargaining unit.

Company violated Section 8(a)(5) of the Act by withdrawing recognition from the Union based solely on the petition.

V. THE ALJ PROPERLY FOUND THAT THE COMPANY'S REFUSAL TO ALLOW UNION ACCESS TO ITS FRANKLIN PARK FACILITY FOR THE PURPOSE OF CONDUCTING A HEALTH AND SAFETY INSPECTION, BASED AS IT WAS ON THE COMPANY'S UNLAWFUL WITHDRAWAL OF RECOGNITION, VIOLATED SECTION 8(a)(1) AND (5) OF THE ACT.

Health and safety conditions are a term and condition of employment about which an employer is obligated to bargain on request. *Holyoke Water Power Co.*, 273 NLRB 1369, 1370 (1985), *enforced* 778 F.2d 49 (1985); *Minnesota Mining Co.*, 261 NLRB 27 (1982). The Board has consistently held that, in furtherance of a union's representational duties, an employer may be required to provide a union's representatives with access to its property in order to investigate health and safety conditions. In assessing a union's right of access to an employer's property, the Board balances the representational rights of employees with the property rights of the employer, and has found that employer property rights "must yield" where necessary for a union to conduct a health and safety inspection to "ascertain the extent of the hazard and to suggest means of ensuring that employees are properly protected." *Holyoke Water Power Co.*, 273 NLRB 1369, 1370 (1985). As the Board has noted,

> "there can be no adequate substitute for the Union representative's direct observation of the plant equipment and conditions, and employee operations and working conditions, in order to evaluate matters such as […] safety concerns"

C.C.E., Inc., 318 NLRB 977, 978 (1995).

In this case, Gudino contacted Miossi on July 10, 2014, requesting dates to schedule a health and safety inspection by the Union at the Company's Franklin Park, Illinois facility. (Tr. 246-47, GCX 4, 15). In its request, the Union indicated that it was seeking to perform an on-site inspection in order to review the Company's compliance with abatements arising out of the numerous citations issued by OSHA against the Company for violations in September, October, and November, of 2013. (Tr. 255, 261-62). Given the serious health and safety issues involved, the Union's right to access the Company's facility for purposes of determining whether the Company had complied with the OSHA abatement dates falling in the spring of 2014, clearly outweighs the Company's property rights in this case.

The Company's stated reason for refusing to grant the Union access was that due to the Company's withdrawal of recognition, the Union no longer represented unit employees. (Tr. 246-47, GCX 15). As the ALJ properly found, the Company's withdrawal of recognition was based on a showing of interest petition tainted by the Company's serious, unremedied unfair labor practices, and lacking verified majority support, is an insufficient grounds for denying the Union's request for access to the Company's facility. As a result, the ALJ's finding that the Company violated Section 8(a)(5) and (1) by failing and refusing to grant the Union access for the purpose of conducting a health and safety investigation should be upheld.

CONCLUSION

For the foregoing reasons, the Company's exceptions to the ALJ's Decision must fail, and the Board should adopt the findings, conclusions, remedy and order of the ALJ.

Dated: October 2, 2015 Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Katharine J. Shaw, do hereby certify that on October 2, 2015, a copy of the foregoing document was filed electronically with the Office of the Executive Secretary of the National Labor Relations Board in Washington, DC and copies were served via e-mail and U. S. Mail, first-class postage prepaid, on the following:

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