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Arlington Metals Corp. and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO (USW). Cases 13–CA–122273, 13–CA–125255, and 13–CA–133055.

September 13, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN
AND EMANUEL

On July 23, 2015, Administrative Law Judge Mark Carissimi issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Union each filed an answering brief, and the Respondent filed reply briefs. The Respondent also filed a motion to reopen and supplement the record, the General Counsel filed an opposition, and the Respondent filed a reply.¹

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

The Board has considered the decision and the record in light of the exceptions, the motion to reopen and supplement the record, and briefs and has decided to affirm the judge’s rulings, findings,² and conclusions only to the extent consistent with this Decision and Order.

This case involves various bargaining-related allegations arising from the parties’ negotiating sessions in 2013. The judge found that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by (1) refusing to provide the Union with requested information; (2) engaging in surface bargaining; (3) withdrawing recognition from the Union; and (4) denying the Union access, after the withdrawal, to its premises to conduct a health and safety inspection. As ex-

¹ An individual, Brendon de la Cruz, filed a motion to intervene before the hearing and subsequently filed exceptions to Administrative Law Judge David I. Goldman’s denial of that motion along with a supporting brief. The General Counsel filed an answering brief, and de la Cruz filed a reply brief. We find the judge’s denial of the motion to intervene was not an abuse of discretion, as it falls within established precedent concerning decertification petitioners’ requests to intervene in unfair labor practice proceedings. See Sec. 102.29 of the Board’s Rules and Regulations.

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

plained below, we reverse each of these findings and dismiss the complaint.

I. BACKGROUND

The Respondent processes steel at a facility in Franklin Park, Illinois, where the Union represents a unit of its employees. The parties had been bargaining for a first contract since the Union’s initial certification in 2007. From the beginning, the Union demanded increases to employee compensation, and the Respondent opposed the proposals on the ground that it has been suffering annual declines to its business. After extensive bargaining, the Respondent declared impasse and unilaterally implemented final offers in both mid-2009 and early 2012. The General Counsel has never alleged that those unilateral actions were unlawful.

A decertification petition was filed with the Board in 2012. The Union prevailed in the resulting election and was certified again. The Respondent first resisted continuing bargaining after the election because it claimed circumstances had not sufficiently changed to break the earlier impasse. After charges were filed with the Board, the Respondent entered into a unilateral informal settlement agreement where, without admitting the allegations, it agreed to resume bargaining. The agreement was approved by the Regional Director for Region 13 on July 8, 2013. The parties thereafter had two bargaining sessions on October 31, 2013, and December 11, 2013. At the December 11 meeting, the Union presented the information request at issue in this case, and the meeting and subsequent bargaining halted when the Union required the Respondent to furnish the requested information before it would continue bargaining. On July 10, 2014, the Respondent received a decertification petition purporting to bear the signatures of 16 employees from the 26-employee unit, and it withdrew recognition that day.

II. THE DECEMBER 11, 2013 INFORMATION REQUEST

A. Facts

At the October 31, 2013 meeting, the Union presented an economic proposal that included wage increases, expanded overtime compensation, and improved vacation policies. There was a lengthy discussion about how the Union thought it was unfair that employees had not received raises in the past few years, and the Respondent defended that its wages fit the business environment. Specifically, William Miossi, the Respondent’s principal spokesman, provided the following reasons:

- Economic conditions had not changed, but if anything, they were weaker. The Respondent was doing the best it could and had kept every-

one employed. In fact, employee morale had been good, and there had been little turnover.

- Production volume was down, and the Respondent faced increased costs, increased taxes, and downward pressure on pricing.
- Competitors, including “the steel mills,” were attempting to take business away from the Respondent and business was moving to Texas and Alabama.
- Although the Respondent had hoped conditions would improve following the recession, business had softened from 2010 to 2013. The Respondent’s revenue was dependent on the number of tons processed, and business was not what it was 10, 20, or 30 years ago. Both volume and price were down.
- The “iceberg” the Respondent was on “is melting.” The business had changed and businesses that the Respondent competes with had changed.

Miozzi was explicit during these discussions that the Respondent was not and never had claimed it was unable to pay what the Union proposed.

At the parties’ December 11 meeting, the Union presented the following written information request:

Based on the Company’s position, representations and explanation as to why it cannot agree to the Union’s economic proposals and why the Company cannot rescind pay cuts and grant pay increases and other economic improvements to bargaining unit employees, the Union is requesting the following financial and economic information to be provided as soon as possible:

Audited financial reports for the past 4 years. These should include complete balance sheets, income statements, and statements of cash flow together with footnotes and detailed supporting schedules. Supporting schedules should include cost of goods sold, including breakdowns of material costs, manufacturing overhead/burden, labor costs and supervisory, management, Company officers and other non-labor wages and benefits; and selling, general and administrative expenses. The above statement should be certified by an outside CPA.

Provide the following financial reports:

- Detailed income statement.
- Detailed Balance Sheet
- Statement of Cash flows

These reports should cover Actuals for 2010, 2011, 2012 and financial reports year to date 2013.

Sales by customer for each of the last 4 years, current and projected for the next 3 years.

A detailed explanation of the business conditions the Company is referring to and the specific changes that have occurred and the actual impact on the Company’s financial condition. Provide specific data, reports and analyses.

Federal and State tax returns the Company filed for the last 4 years.³

In a December 16, 2013 email, the Respondent declined to produce most of the requested information because it “has never asserted a financial inability to meet the Union’s wage demands.” It did provide a chart setting forth the tonnage of steel processed and revenue data for 2009, 2010, 2011, 2012, and the first 11 months of 2013, which showed a downward trend. In subsequent emails, the Union repeatedly insisted that it was entitled to the information requested because the Respondent was in fact claiming a financial inability to pay.

The judge found that the Respondent’s statements during bargaining amounted to a claim that it was unable to pay the Union’s demands, and therefore, pursuant to *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956), and *Nielsen Lithographing Co.*, 305 NLRB 697 (1992),⁴ the Union was entitled to all of the requested information, and the Respondent violated Section 8(a)(5) and (1) by failing to produce it. In the alternative, the judge stated that he would reach the same conclusion even if the Respondent had not asserted an inability to pay because the facts established that the Respondent refused to provide information that was relevant “to evaluate the accuracy of the Respondent’s assertions and to assist in preparing counterproposals” and thus must be provided under the principles in *Caldwell Mfg. Co.*, 346 NLRB 1159 (2006).

B. Analysis

First, we disagree with the judge’s conclusion that, under *Truitt* and *Nielsen*, the Respondent claimed an inability to pay and therefore was required to open its financial records to the Union. When an employer bases its bargaining position on an asserted inability to pay, the union is entitled to request and review the employer’s financial records to assess the employer’s representations about its

³ The indented material above summarizes the relevant portions of the Union’s December 11, 2013 information request. It is not a verbatim quote of the request, and certain excerpts have been omitted.

⁴ Affd. sub nom. *GCIU Local 508 v. NLRB*, 977 F.2d 1168 (7th Cir. 1992).

dire financial condition. But if an employer claims that concessions from the union are necessary for the employer simply to avoid competitive disadvantage in the marketplace, the employer has no obligation to open its books and provide financial and competitor information when requested by the union. *North Star Steel Co.*, 347 NLRB 1364, 1369–1370 (2006).

Here, we find that the Respondent’s statements during bargaining amounted to an assertion of competitive disadvantage rather than a present inability to pay. See, e.g., *id.* at 1370 (finding no claim of inability to pay where employer cited, as basis for its position, the poor state of the industry, diminishing future orders, and declining prices). In so finding, we observe that in communicating its position, the Respondent focused primarily on external conditions and competitive pressures, i.e., an unfavorable economic climate, increased costs, the emergence of new competitors, and downward pressure on prices. Significantly, the Respondent never stated that it did not currently have sufficient assets to meet the Union’s demands or that it would have insufficient assets to do so during the life of the contract, that it was in imminent danger of closing, or that acquiescence to the Union’s demands would cause it to go out of business. In these circumstances, the judge’s finding that the Respondent asserted an inability to pay cannot stand. See, e.g., *AMF Trucking & Warehousing*, 342 NLRB 1125, 1126 (2004) (finding that the employer did not assert an inability to pay where it pointed to significant economic pressure but never asserted that the survival of the company was at stake).

In finding that the Respondent asserted an inability to pay, the judge relied in part on Miossi’s statement that the “iceberg . . . is melting.” When Miossi made this comment, however, he was speaking about how the Respondent’s business and competitors had changed. In this context, we find that Miossi’s statement was a characterization of the Respondent’s competitive environment rather than a claim of a present inability to pay. Moreover, even if the Respondent’s statements could be interpreted as claiming an inability to pay, the Respondent clarified, explicitly and repeatedly, that it was not in fact claiming an inability to pay, which would negate any need to provide financial information. See *Richmond Times-Dispatch*, 345 NLRB 195, 198 (2005) (the employer effectively contradicted any claim it was unable to pay when it clarified about a week later that “it was not unable to pay the bonus, but that it chose not to pay due to the economic conditions in the market”).

Second, we also disagree with the judge’s alternative conclusion that the Respondent had to provide the requested information under the relevance standard in

Caldwell. Information not pertaining to employees within the bargaining unit, such as the financial information requested here, is not presumptively relevant. *Caldwell*, 346 NLRB at 1159. But employers must still provide such requested information if the union shows relevance. *Id.* at 1159–1160. Information is relevant under *Caldwell* only if the union is seeking “specific information to evaluate the accuracy of the Respondent’s specific claims and to respond appropriately with counterproposals.” *Id.* at 1160.

In response to the Respondent’s largely general statements about the tougher business environment, the Union here requested a broad range of detailed financial information, including an expansive report on business conditions and 4 years of audited financial reports, income statements, balance sheets, cash-flow statements, sales listed by customer, and Federal and State tax returns. The Union’s wide-ranging request cannot be fairly read to request *specific information* to validate *specific claims*. Cf. *A-1 Door & Building Solutions*, 356 NLRB 499 (2011) (requested information relevant where the union sought specific information on bidding after the respondent made specific claims about not being able to win bids against certain companies it had named); *Caldwell*, *supra* at 1159–1160 (requested information relevant where the union sought information such as the cost data of each of the respondent’s plants after the respondent claimed costs were lower at each of its other plants). We find, therefore, that the Union failed to show adequate relevance under *Caldwell*.

Accordingly, we reverse the judge and conclude that the Respondent did not violate Section 8(a)(5) and (1) by failing to provide the requested information.⁵

III. ALLEGED SURFACE BARGAINING

The judge found that under *Mid-Continent Concrete*, 336 NLRB 258 (2001),⁶ and related precedent, the Respondent violated Section 8(a)(5) and (1) by engaging in surface bargaining—bargaining in bad faith without the intention of reaching an agreement. In his assessment of the totality of the circumstances, the judge relied in large

⁵ The judge found, among other things, that the Respondent violated Sec. 8(a)(5) and (1) by providing the Union with “incomplete and misleading” tonnage production and revenue data. We disagree. Although the data the Respondent provided reflected only tonnage and revenue attributable to its “toll processing” work and did not include data for the “metal sales” portion of its business, *all* of the bargaining unit’s work was on the “toll processing” side of the business. The unit employees did not do any “metal sales” work, and there is no evidence that the Union’s bargaining representatives found the Respondent’s tonnage and revenue data to be misleading or incomplete. Accordingly, we reverse the judge’s finding.

⁶ *Enfd. sub nom. NLRB v. Hardesty Co., Inc.*, 308 F.3d 859 (8th Cir. 2002).

part on the Respondent's failure to provide the information requested by the Union (which we have found lawful above), but he also cited what he viewed to be the Respondent's refusal to consider anything more than a minor modification to its previously implemented terms and its failure to provide a reasonable explanation for its position.

We again reverse the judge's conclusion. We do not see any bad faith in the Respondent's bargaining. Initially, we question the focus of the complaint and judge's decision on just two bargaining sessions in 2013. The parties had been in various states of deadlock for years over the course of approximately 37 bargaining sessions, and there is no basis for inferring bad faith by the Respondent for adhering to its prior good-faith bargaining positions. Indeed, the Union did much the same. At the first 2013 bargaining session, the Union presented the Respondent with a proposal that was very similar to what the Union had proposed before the 2012 impasse. During the two bargaining sessions in 2013, the Respondent met with the Union for as long as it wanted, listened, and thoroughly discussed matters. Given the bargaining history and that the parties were still so far apart, the fact that the Respondent made no more than a concession on unpaid time off for union business in two sessions is unsurprising and not indicative of bad faith. The Act, as Section 8(d) cautions, "does not compel either party to agree to a proposal or require the making of a concession," and in this case it is apparent that neither side was willing to make anything more than minor concessions over several years of hard bargaining. Further, there is no evidence that the Respondent was unwilling to continue bargaining if the Union was willing to do so without all of the information requested on December 11, and there are no allegations of unlawful conduct by the Respondent away from the bargaining table that might color our view of its good-faith conduct at the table.

As explained in the prior section, we find that the Respondent had no obligation to furnish the information the Union requested on December 11. Even so, the Respondent substantiated its claims about the tougher business environment by providing data from the last 5 years on the tonnage of steel processed and revenue received. Through this information and other discussion, the Respondent made good-faith attempts to explain its position. We therefore conclude that the Respondent did not violate Section 8(a)(5) and (1) by engaging in bad-faith surface bargaining.

IV. WITHDRAWAL OF RECOGNITION

The judge relied on two grounds in finding that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union in reliance on the

decertification petition it received on July 10, 2014: (1) there was a causal relationship between the unfair labor practices he found (the unlawful failure to provide the requested information and surface bargaining) and the petition, which tainted it under *Master Slack Corp.*, 271 NLRB 78 (1984), and (2) the Respondent failed to prove that the Union had actually lost majority support as required by *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001). Because we do not find the unfair labor practices the judge relied upon in his *Master Slack* analysis, we neither find the petition tainted nor the Respondent's withdrawal unlawful on that basis. The judge's *Levitz Furniture* rationale requires more discussion.

Under *Levitz Furniture*, an employer may withdraw recognition from a union only if it has "objective evidence that the union has lost majority support—for example, a petition signed by a majority of the employees in the bargaining unit." *Id.* at 725. An employer withdraws recognition "at its peril," however, because "[i]f 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." *Id.* "[W]here 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.*, 360 NLRB 911, 925 (2014) (citing *Ambassador Services*, 358 NLRB 1172, 1172 fn. 1, 1182 (2012), incorporated by reference in 361 NLRB 939 (2014)); see also *Flying Foods*, 345 NLRB 101, 103–104 (2005).

The only evidence presented at the unfair labor practice hearing regarding the authenticity of the 16 signatures on the decertification petition, upon which the Respondent relied, was from Executive Vice President Timothy Orłowski. Orłowski testified that the signatures appeared valid to him based on his experience seeing the signatures many times, but he conceded that he was not very familiar with the signatures of some newer employees. The judge found that Orłowski's testimony was only sufficient to confirm the validity of 10 of the signatures and did not prove the authenticity of the other six signatures from new employees Andres Coronel, Brendon de la Cruz, Christopher Keiler, Michael Krasinski, Anthony Menotti, and Brandon Trezzo. The judge therefore found that the Respondent failed to prove that a majority of the 26 employees in the unit signed the decertification petition, and therefore that it violated Section 8(a)(5) and (1) by withdrawing recognition when the Union had not actually lost majority support.

For the following reasons, we find it unnecessary to address the judge's signature-authentication findings. After the issuance of the administrative law judge's decision, the United States District Court for the Northern District of Illinois issued a decision—of which we take judicial notice here—denying the Regional Director's request for injunctive relief pursuant to Section 10(j).⁷ Regarding the administrative law judge's finding that the Respondent unlawfully withdrew recognition, the district court judge found that, before and during the unfair labor practice hearing, counsel for the General Counsel had "repeatedly confirmed that [they were] not challenging the validity of the petition." But on the second and final day of the unfair labor practice hearing, counsel for the General Counsel put the authentication of the signatures at issue. The district court judge concluded that "[counsel for the General Counsel's] shifting stance toward the petition's validity resulted in a lack of relevant evidence before the ALJ and, accordingly, deprived [the Respondent] of the opportunity to present further evidence." In addition, "[t]he ALJ did not have the opportunity to examine the demeanor or review the testimony of any employees before ruling on the petition's validity." The district court judge noted also that, as part of the record in the 10(j) hearing, the Respondent elicited testimony from 10 employees who had signed the petition, 9 of whom testified that they had signed the petition of their own volition, free from input, threats or rewards from the Respondent. This included uncontroverted testimony from the six employees—Coronel, de la Cruz, Keiler, Krasinski, Menotti, and Trezzo—whose signatures Orłowski could not verify at the unfair labor practice hearing.⁸

In light of the district court's finding that the Respondent, at the unfair labor practice hearing, was deprived of a full opportunity to present evidence establishing the validity of the petition, we find it appropriate here to consider the evidence of authentication that the Respondent adduced at the subsequent 10(j) proceeding.⁹ This evidence—in tandem with the administrative law judge's findings—establishes that the Respondent relied upon a valid petition, signed by 16 of 26 unit employees, in withdrawing recognition from the Union. We thus find that the Respondent has proven that the Union had

lost majority support when it withdrew recognition on July 10, 2014, and we reverse the judge's conclusion that the Respondent's withdrawal of recognition violated Section 8(a)(5) and (1).¹⁰

ORDER

The complaint is dismissed.

Dated, Washington, D.C. September 13, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Melinda Hensel and Daniel Murphy, Esqs., for the General Counsel.

William Miossi, Derek Barella, and Benjamin Ostrander, Esqs., for the Respondent.

Stephen Yokich, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Chicago, Illinois, on April 27–28, 2015. The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO (USW) (the Union or International Union), filed the charge in Case 13–CA–122273 on February 10, 2014, the charge in Case 13–CA–125255 on March 26, 2014, and the charge in Case 13–CA–133055 on July 18, 2014. On September 30, 2014, the General Counsel issued an order consolidating cases, consolidated complaint, and notice of hearing (the complaint). On March 12, 2015, the General Counsel issued a first amended consolidated complaint and on April 23, 2015, the General Counsel issued an amendment to paragraph VIII(b) of the complaint. The Respondent filed an answer to the complaint, as amended, denying the substantive allegations of the complaint.

The complaint alleges that the Respondent has violated Section 8(a)(5) and (1) of the Act by: since December 16, 2013,

⁷ See *Ohr v. Arlington Metals Corp.*, No. 15-CV-8885 (N.D. Ill. Dec. 1, 2015) (denying the General Counsel's 10(j) petition).

⁸ Trezzo, in contrast to the other employees, could not remember the circumstances surrounding his signing of the petition, but he confirmed his signature was real and that he does not want to be represented by the Union.

⁹ Because we take judicial notice of the district court decision and accompanying record in the 10(j) proceeding, we find it unnecessary to pass on the Respondent's motion to reopen and supplement the record.

¹⁰ The Respondent relied on the withdrawal of recognition to deny the Union's post-withdrawal request for access to conduct a health and safety inspection. Because we find the withdrawal of recognition lawful and thus the Union had no right of access, we also reverse the judge's finding that the Respondent's denial of access violated Sec. 8(a)(5) and (1).

refusing to provide the following relevant and necessary financial information to the Union: “Audited financial statements for the past 4 years certified by an outside CPA”; “Financial reports for 2010–2013 to date” which include “a detailed income statement, a detailed balance sheet, and a statement of cash flows”; “Sales by customer for each of the last 4 years (2009–2012) and current (2013) and projected sales for the next 3 years (2014–2016); “An explanation of the Employer’s business conditions, including specific changes that have occurred and the actual impact on the Employer’s financial condition. Provide specific data, reports and analysis”; and “Federal and state tax returns for the last 4 years (2009–2012).”

The complaint further alleges that the Respondent violated Section 8(a)(5) and (1) during the period from October 13, 2013, through December 11, 2013, by engaging in “bad faith and/or surface bargaining by, bargaining with no intent to reach agreement, insisting upon the terms of its 2012 implemented contract terms” and refusing to provide the information noted above. Finally, the complaint alleges that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union on July 10, 2014, and, on the same date, refusing to allow the Union access to its facility for the purpose of performing a health and safety inspection.

On the entire record, including my observation of the demeanor of the witnesses,¹ and after considering the briefs filed by the General Counsel, the Respondent and the Union, I make the following

FINDINGS OF FACT

JURISDICTION

The Respondent, an Illinois corporation with an office and place of business in Franklin Park, Illinois, is engaged in the business of steel slitting and blanking. Annually, the Respondent, in conducting its business operations described above, purchases and receives at its Franklin Park, Illinois, facility goods valued in excess of \$50,000 directly from points outside the State of Illinois. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

¹ In making my findings regarding the credibility of witnesses, I have considered their demeanor, the content of the testimony, and the inherent probabilities based on the record as a whole. In certain instances, I credited some, but not all, of what a witness said. I note, in this regard, that “nothing is more common in all kinds of judicial decisions than to believe some and not all” of the testimony of a witness. *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.* 179 F.2d 749, 754 (2d Cir. 1950) revd. on other grounds 340 U.S. 474 (1951). See also *J. Shaw Associates, LLC*, 349 NLRB 939, 939–940 (2007). In addition, I have carefully considered all the testimony in contradiction to my factual findings and have discredited such testimony.

ALLEGED UNFAIR LABOR PRACTICES

Background and Overview

The Respondent is involved in cutting and slitting steel for customers at its two locations in Franklin Park, Illinois and Sawyer, Michigan. This proceeding involves only the Franklin Park, Illinois, facility. According to the testimony of Timothy Orłowski, the Respondent’s executive vice president, at the Franklin Park facility the Respondent’s operations fall into two categories: toll processing and metal sales. In toll processing the Respondent’s customer buys steel coils from a steel mill and the Respondent cuts the coils into specific widths and lengths as specified by the customer. The Respondent is a consignee and does not take title to the steel; rather the Respondent charges a “tolling fee” to cut the steel to the customer’s specifications. Orłowski described metal sales as a process in which the Respondent buys steel from a steel mill and cuts it to specific dimensions and then sells the processed steel to customers. Toll processing comprises approximately 80 percent of the Respondent’s operations, while metal sales constitute the remaining 20 percent.

In 2007, after the Union conducted an organizing campaign at the Respondent’s Franklin Park facility, a Board election was conducted in which the Union received a majority of the valid ballots cast. On October 10, 2007, the Union was issued a certification of representative as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time production, maintenance, and shipping and receiving employees employed by the Employer at its facility currently located at 11355 Franklin Avenue, Franklin Park, Illinois; but excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

At the time of the Union’s certification there were approximately 52 employees in the bargaining unit. After the Union was certified, it assigned the bargaining unit to the United Steel Workers Amalgamated Local 7773 (the Local) as it was within the Local’s jurisdiction. Pursuant to the Union’s² request, collective-bargaining negotiations between the parties began in approximately November 2007. Local president Frank Shubert and representatives from the International Union represented the Union while attorney Greg Malovance was the Respondent’s chief spokesperson. The parties had a number of meetings throughout 2008 that were principally focused on noneconomic items and reached tentative agreement on most of those issues. In November 2008, the parties began to discuss economic issues. In January 2009, Malovance retired and his partner, William Mioffi, became the Respondent’s chief spokesperson.

After the Union’s certification as the bargaining representative in the fall of 2007, the Respondent began to suffer a decline in business because of the recession. According to information provided by the Respondent to the Union in October 2011 (CP Exh. 3; Tr. 409, 453–454) the Respondent suffered

² For the most part, I will refer to the International Union and the Local Union collectively as the Union

losses from 2007 through October 2011. This document reflects that in 2006 the Respondent processed 201,867 tons of steel with 52-unit employees and had a profit of \$1229. In 2007 the Respondent processed 154,307 tons of steel with 48 employees and experienced a loss of \$656,442. In 2008 the Respondent processed 143,371 tons of steel with 40-unit employees and suffered a loss of \$965,403. In 2009 the Respondent processed 100,854 tons of steel with 24-unit employees and suffered a loss of \$964,009. In 2010 the Respondent produced 126,912 tons with 24-unit employees and suffered a loss of \$452,170. In 2011 through October 5, 2011, the Respondent had produced 64,351 tons with 24-unit employees and had incurred a loss of \$361,000. The Respondent projected its annual loss that year to be \$722,000.

The first meeting between the parties in which Miozzi served as the Respondent's principal spokesman occurred in March 2009. William Gibbons, a retired codirector of district 7 of the International Union, also began to attend the negotiation meetings in 2009 pursuant to the request of Jose Gudino, the subdirector of district 7, subdistrict 1 of the International Union. While the Respondent had proposed a wage increase of an undetermined amount in November 2008, in March 2009, the Respondent withdrew that proposal and Miozzi indicated to the Union that the Respondent had to process 180,000 tons of steel before it could give a wage increase.³

Miozzi testified that during meetings held with the Union in the early part of 2009, he told the Union that the Respondent needed to process 180,000 tons a year in order to break even (Tr. 402). Miozzi further testified, that prior to relying that information to the Union, Timothy Orłowski had informed him that the Respondent needed to process 180,000 tons in order to break even, without explaining it in any further detail (Tr. 404). Miozzi admitted that in 2009 he told the Union that the Respondent was losing money (Tr. 407).

In May 2009, after the Union had rejected its final offer, the Respondent declared that the parties were at an impasse. The Respondent unilaterally implemented its final offer on August 3, 2009. In the final offer that was implemented (R. Exh. 3), the Respondent reduced the wages of existing employees and instituted a "Tier #2 Rate" for all employees hired after the implementation of its proposal. The Tier 2 rate was generally lower than the unilaterally implemented rate of pay for current employees. The various rates were set forth in the implemented offer as "Appendix A, Wage and Classification schedule." Footnote (d) of Appendix A indicates:

The Company will re-store (sic) the wage rates in effect immediately prior to the effective date of this Agreement if in a twelve-month period immediately following the effective date of this Agreement the Company processes 180,000 tons of steel.

Lump Sum: The Company will pay each employee a lump-sum bonus on or around the 30th month following the effective date of this Agreement, if during the second full year of

this Agreement the Company processes 180,000 tons of steel. Such lump-sum payment will be equal to 1% of the employee's previous years lowest base rate multiplied by 2080.

While the record reflects that the parties met approximately 35 times in collective-bargaining negotiations between November 2007 and January 1, 2012, there is no record evidence regarding any meetings held in 2010. On April 7, 2011, the Respondent proposed a number of changes to the terms that it had unilaterally implemented in August 2009. The Union requested bargaining over the proposed changes and the parties met 9 times between April 2011 and December 7, 2011. At the meeting held on December 7, 2011, the Respondent declared an impasse and announced its intention to implement the terms of its final offer on January 2, 2012. This final offer amended the 2009 unilaterally implemented terms and conditions of employment.

In a letter to the Union dated December 9, 2011 (R. Exh. 4), Miozzi summarized the changes contained in the Respondent's November 2011 final offer. This letter indicated that the proposal was to be implemented on January 1, 2012, and would eliminate the 10 minute rest period for unit employees that was set forth in article 7.2 of the 2009 unilaterally implemented proposal. The letter further indicated that article 8.2 of the proposal to be implemented on January 1, 2012, would "amend the provisional provision for overtime after working 8 hours in a day if the employee has worked a full 40 hour schedule during that week."⁴ The letter also indicated that the proposal to be implemented on January 1, 2012, would eliminate the shift differential set forth in article 10 of the 2009 implemented proposal. Finally, the December 9, 2011 letter indicated that, effective on January 1, 2012, the Respondent would provide companywide only a Health Savings Account (HSA) option for health insurance. The letter further provided that in an effort to meet the Union's concerns for calendar year 2012 only, the Respondent would continue as options that employees could also elect the existing PPO, and an added HMO option. Employees opting to continue the PPO or selecting the HMO would pay the percentage of the premium stated in appendix B to the implemented terms +100 percent of the total difference between the HMO premiums and the HSA/PPO premiums. Finally, the letter noted all other 2009 implemented terms would remain unchanged. In the letter, Miozzi indicated "so there is no misunderstanding, our final proposal is just that-final. We have done the best we can do to treat and reward our employees fairly, protect their job security and at the same time remain competitive in our industry." On January 1, 2012, the Respondent implemented its final proposal as summarized in

⁴ Art. 8.2 of the 2009 unilaterally implemented proposal provided that:

Time and one-half (1 1/2) the employee's regularly hourly rate shall be paid for all hours worked over eight (8) hours in any workday; provided, however, that the employee must have worked all of his scheduled hours in the workweek. This Section shall only apply when the regularly scheduled workweek consists of five (5) 8 hour work days; provided that an employee will be considered to have worked all of his scheduled hours if the Company decides during any such week less than forty (40) hours of work will be made available.

³ I base this finding on Shubert's uncontradicted and credited testimony regarding the March 2009 negotiation meeting (Tr. 134-135) and admissions made by Miozzi during his testimony (Tr. 399-401).

Miozzi's December 11, 2011 letter.

The parties met on March 15, 2012, and the Union made a proposal which the Respondent rejected. In June 2012, the Union again requested to meet and bargain, but the Respondent declined the request. The Respondent expressed the position that the parties were in an impasse and that the Respondent did not believe there were sufficiently changed circumstances to break the impasse.

Pursuant to a petition filed in Case 13-RD-068844, an election was conducted at the Respondent's Franklin Park facility in July 2012. The Union received a majority of the valid votes cast and on July 31, 2012, the Union was again certified as the bargaining representative for the employees in the unit described earlier in this decision. In September 2012, the Union requested that the Respondent meet and bargain but the Respondent again declined based on its position that the parties were still an impasse.

Thereafter, the Union filed unfair labor practice charges and on July 8, 2013, Regional Director for Region 13 approved a unilateral informal settlement agreement in Cases 13-CA-90888, 13-CA-101632 and 13-CA-105007. The settlement agreement, which contained a nonadmission clause, provided, *inter alia*, that the Respondent would, upon request, meet and bargain in good faith with the Union and grant access to the Union's representatives, for a reasonable period and at a reasonable time, to investigate health and safety concerns. The settlement agreement also extended the Union's certification year for 1 year from the date of the approval of the settlement agreement.

The September and October 2013 Meetings

In late August 2013, Gudino sent an email to Miozzi asking him to indicate available dates to discuss the recent discharge of the Union's steward at the Franklin Park facility, Frederico Ceja, and to schedule negotiation meetings. The parties agreed to meet on September 12, 2013, to discuss the discharge of Ceja and some insurance issues. The parties also agreed to start the meeting at 8:30 a.m. on September 12, because Miozzi had to leave for another scheduled meeting at noon (R. Exh. 5).

On September 12, 2013, the parties met at the Courtyard Marriott in Elmhurst, Illinois. Present for the Respondent were Miozzi and Sharon Orłowski, who is involved in non-steel purchasing for the Respondent, and functioned as the Respondent's note taker at the meeting. Present for the Union were Gibbons, Gudino, and Shubert. Ceja was also present at the meeting. The meeting was devoted principally to a discussion about the circumstances surrounding Ceja's discharge. Miozzi indicated to the Union that the Respondent would not reinstate Ceja. Gibbons requested that the Respondent agree to arbitrate Ceja's but Miozzi denied the request to arbitrate on the basis that the parties had not reached a collective-bargaining agreement. The parties then discussed insurance issues involving two employees, Szymanski and Fudala, who were not actively working and were on some form of disability status. The parties did not review the status of negotiations as a whole at this meeting. After this meeting, the parties agreed to meet for collective-bargaining on October 31, 2013.

The October 31, 2013 meeting took place at the same loca-

tion as the September 12 meeting. Present for the Union were Shubert, Gibbons, and Gudino. Bargaining unit employees Antoni Golik, and Alfred Karas also attended. Present for the Respondent were Miozzi and Sharon Orłowski.⁵ Gibbons was the chief spokesperson for the Union and Miozzi did all the speaking for the Respondent. The meeting began by Gibbons stating that the parties had not had a collective-bargaining meeting for a long time, and that the Union wanted to negotiate a contract that would be beneficial to both parties. Gibbons stated that the Union had an eleventh proposal to make and that it represented a substantial change in its position, but before he gave it to the Respondent he wanted to share with it documents that he had prepared illustrating the significant and substantial economic losses that the Respondent's employees had suffered in the last couple of years. At this point, Gibbons gave to the Respondent a document that he had prepared entitled "Economic Adverse Impact of AMC'S Proposals on Employees" (GC Exh. 6) which contained the following:

Likelihood that employees will not receive a wage increase in 8 years.

Employees suffered an approximate 90 cents per hour pay cut in 2009.

The economic impact on employees due to inflation-cost-of-living alone from 2006 to 2013 results in over a 13% loss in earning power.

The projected estimated loss in earning due to inflation-cost-of-living will result in an additional 4% loss in earnings if the employees do not receive a wage increase.

The combined economic impact due to the cost-of-living on employee's earnings And spendable income will equal an estimated loss of over 17% or over \$2.50 an hour.

When the impact of the approximate \$.90 per hour pay cut is included the total earnings -income loss is over \$3.40 per hour or over \$7000 per employee per year on a straight time basis.

When the economic adverse impacts of the group insurance premiums are considered there is an estimated loss of an average of over \$.30 per hour in premiums alone. This equals a combined loss of almost \$.00 per hour. When the out-of-pocket costs of the changed Health Care plan (HSA) is considered the cost could exceed \$5000 per year or an additional \$2.40 cents perhour.

The total potential adverse impact of the Company's proposal

⁵ In making my findings regarding what occurred at the bargaining session conducted on October 31, I have relied principally on the credited testimony of Gibbons and Shubert and the contemporaneous notes that Shubert made of the bargaining session (GC Exh. 5). The detailed testimony of Gibbons is corroborated by Shubert's testimony and is consistent with Shubert's notes. I have also relied on the typewritten notes that Sharon Orłowski prepared from handwritten notes that she took at the meeting (R. Exh. 15). Orłowski's notes are generally consistent with the testimony of Gibbons and Shubert and the notes taken by Shubert. To the extent that the testimony of Miozzi conflicts with that of Gibbons and Shubert I do not credit it. Miozzi's testimony was more generalized than that of Gibbons and Shubert and I generally find their testimony to be a more reliable version of the events.

could equal an estimated \$6.40 per hour loss to employees or over \$13,000 per year. (Emphasis in the original.)

The above numbers do not take into consideration that the Company is experiencing an hourly labor cost savings of approximately \$3.67 per hour as a result of the termination of the rest break periods. (Emphasis in the original.)

Gibbons went through each point of the document and further explained how he had calculated the employee losses set forth in the document.⁶ Miozzi told Gibbons that business conditions had not changed; if anything they were weaker and that the Respondent was doing the best it could and had kept everyone employed. Miozzi added that debating these issues does not change the facts.

Gibbons then gave Miozzi a document entitled "Union's Eleventh Economic Proposal October 31, 2013" (GC Exh. 8). Gibbons told Miozzi that this proposal was a modification of the Union's prior proposal. The Union's proposal sought to change article 8, section 2 "Overtime Compensation" of the Respondent's unilaterally implemented 2012 proposal by eliminating the requirement that in order to be eligible for overtime pay for all hours worked on a Saturday, Sunday, or paid holiday, an employee must have worked the required 40 hours per work week in order to qualify for the time and one-half rate. The Union's proposal also sought to include in article 8, section 4, and time off for union business in calculating the hours worked in order to be eligible to receive overtime pay. The Union's proposal also sought enhancements to the implemented vacation proposal in article 22. With respect to wages, paragraph 4 of the Union's proposal provided:

Wages:

Re-storing wages previously in effect: a mathematical formula to be established (sic) to reflect production per employee that is equal to the 180,000 ton average per year based on the average per capita employee count over a more current twelve-month period based on a representative employee head count. When the equivalent tonnage per employee is reached on the average over a consecutive (12) twelve month period the wages previously in effect before the Company reduced such wage rates to be restored-reinstated and replace those currently in effect in addition to any wage increases provided herein. **(Based on the receipt of recent information we need to discuss and review whether or not this number is reasonably attainable and if not what number would be).** (Emphasis in the original.)

Effective upon ratification each bargaining unit employee will be given a \$1000 lump sum payment within seven (7) days

⁶ At the hearing, Gibbons explained that the Respondent's final offer that was unilaterally implemented in 2009, and unilaterally implemented with modifications in 2012 (GC Exh. 4), formed the basis for his assessment that employees had experienced a 90-cent-an-hour pay cut since 2009. (Tr. 189.) Gibbons further explained that according to footnote d of the Wage Appendix attached to the Respondent's unilaterally implemented proposal, in order for the employees to return to the wage schedule in effect in 2007 and 2008, the Respondent would have to process 180,000 tons of steel in the 12-month period immediately following the effective date of the agreement. (Tr. 190.)

following ratification.

Effective 1/1/14: A general wage increase of 35cents per hour.

Effective 1/1/15: A general wage increase of 40 cents per hour.

Effective 11/1/15: A general wage increase of 3%.

d. Modify the starting pay to equal an amount above the State minimum.

The Union's proposal with respect to health care insurance provided that employees have the option to select one of the following plans: a PPO plan with any cost exceeding the cost of the HSA plan to be paid by the employee; and employee HSA savings account in which the Company contributes \$1000 per year; and a HMO plan with any costs that exceeds the cost of the HSA planned to be paid by the employee.

With regard to the Union's wage proposal, Gibbons told Miozzi that based upon the information that the Union had received from the Company regarding the tons of steel processed from 1997 until the present, it showed that the Respondent had only reached the 180,000 ton level on six occasions, with the last two occurring in 2002 and 2006.⁷ Gibbons indicated that he did not think the 180,000 ton trigger made any sense under the circumstances and the parties needed to come up with a reasonable number that was attainable. Gibbons pointed out that the 180,000 ton level of production was obtained with approximately 54 unit employees. Gibbons indicated that on average each employee produced 3333 tons in order to arrive at the 180,000 ton level. Gibbons further indicated if the recent level of production of 116,208 tons of steel processed was divided among the present 26 unit employees, it indicated that each unit employee averaged approximately 4,469 tons of steel processed. Gibbons pointed out that those figures represent a 40 percent increase in productivity. Gibbons stated that, under the circumstances, the formula proposed by the Respondent that there must be 180,000 tons of steel processed annually in order for employees to achieve a wage increase from their present level, did not seem to be relevant and was unfair, as it appeared it would not be met in the foreseeable future.

Gibbons then asked the Respondent to look at a reasonable trigger for the employees to receive a wage increase. Gibbons also stated that the Union did not know what the Respondent's business plan was or whether it was making money or not. Miozzi replied that the level of tons of steel processed was related to the operating costs of the business and it was not related to profit or loss.⁸ Miozzi said the owners of the Respondent

⁷ The notes of Shubert and Orlowski make reference to Gibbons stating the Respondent had exceeded that level six times during that period. Tonnage information provided by the Respondent to the Union (CP Exh. 1 and GC Exh. 12) establishes that the Respondent exceeded the 180,000 ton limit on 6 occasions from 1997 through 2013, with the last two occurring in 2002 and 2006. Accordingly, I do not credit Gibbons's testimony that he told Miozzi that the 180,000 ton level was reached only twice, in 2002 and 2006 (Tr. 194) as it conflicts with the objective evidence and the notes taken by each party.

⁸ At the hearing, Timothy Orlowski testified that he considered the processing of 180,000 tons of steel to be the proper utilization of the

were not applying the same analysis as the Union.

Gibbons pointed out that the Respondent's labor costs were reduced by approximately 50 percent because of the decrease in the number of production employees. Miozzi replied that volume was also down and that the Respondent was confronted with increased costs; taxes had gone up and there was downward pressure on pricing.

Gibbons asked Miozzi to explain how the employees could attain the 180,000-ton threshold in order to receive a wage increase. Miozzi did not respond to this question directly but merely said that business conditions were worse and the Respondent had increased costs and competition. Miozzi added that competitors were attempting to take business away from the Respondent. When Gibbons asked who the competitors were, Miozzi said "the steel mills" and mentioned business being moved to Texas and Alabama.

Gibbons stated that the bottom line was whether the Company was making money and was profitable enough to grant a wage increase. Miozzi replied that business conditions had not changed, business had softened in 2010–2013 and the Respondent was hopeful business would come back, but it had not. Miozzi added that the Union had seen the volume of production. Miozzi also stated that the Respondent was not a "welfare agency." Gibbons asked whether the Respondent was making money and could afford to give a wage increase because employees had their pay cut and had not had a wage increase in 8 to 10 years. Miozzi responded that the Respondent has a right to maintain its profit and loss information privately. Miozzi added that Respondent was not claiming an inability to pay the Union's demands and never had.⁹

Gibbons then stated that the employees were working 40 percent harder and that a basic sense of fairness would indicate a wage increase should be given unless the Respondent cannot pay one. Miozzi replied that their discussion was turning into a debate and that the fundamentals had not changed since 2009. Gibbons stated the Union wanted to have an agreement with the Respondent and would be willing to waive its request for a wage increase and accept a lump-sum payment of 1000 dollars upon ratification of the contract, but that the Union would prefer for employees to have an hourly wage increase. Miozzi replied that the Union is asking the Respondent to make a com-

equipment (Tr. 78). Orlowski further testified that "[A]s the owner, it's in fact my prerogative to want 180,000 tons want to my assets utilized (Tr. 80-81). In his testimony, Orlowski did not relate the processing of 180,000 tons of steel to the operating costs of the business.

⁹ There is no dispute in the testimony of Gibbons, Shubert and Miozzi and the notes of Shubert and Sharon Orlowski regarding the fact that Miozzi stated at the meeting that the Respondent had a right to maintain its profit and loss information privately. Sharon Orlowski's notes specifically indicate that Miozzi also stated that the Respondent was not claiming an inability to pay and never had. (R. Exh. 15, p. 2.) Her notes on this point are corroborated by Miozzi's testimony (Tr. 361). Shubert's notes are not as detailed as Orlowski's on this particular point and neither Gibbons nor Shubert specifically denied that Miozzi made such a statement. I find that since it is undisputed that Miozzi stated that the Respondent had the right to maintain its profit and loss information privately, it is inherently plausible that he also stated, as a basis for this position, that the Respondent was not claiming an inability to pay the Union's wage demands and never had.

mitment not knowing its future revenue and that the Union was not taking a look at the whole picture. Gibbons stated that the reality is whether the Respondent was making money or not and that the Union was willing to look at a profit-sharing agreement. Gibbons again stressed that the employees had not had a wage increase in 10 years. Miozzi replied that the Respondent suffered through the recession and demand had gone down as well as pricing. Gibbons responded that if things do not change the employees will never get a raise. Miozzi replied that revenue is dependent upon the number of tons processed and that business is not what it was 10, 20, or 30 years ago.

Gibbons stated that the Respondent's competitors have granted wage increases. Miozzi responded that the Respondent was paying fixed wages and benefits and was making payroll every week. Miozzi added that the Respondent was not going to grant a wage increase just to get an agreement. Miozzi noted that morale was positive and that few employees had left and that employees had a good relationship with management. Gibbons reiterated that the 180,000 ton threshold before a wage increase would be granted was unrealistic and asked about a profit-sharing program. Miozzi told Gibbons to make a proposal as the Respondent had implemented terms that it believed was the best it could do.

Gibbons then stated that the Union's health care proposal remained the same and asked if anything had changed regarding the premiums. Miozzi replied that he was not sure but would find out. Gibbons then noted that the Respondent had a 401(k) plan but that the Respondent did not make any contributions to the plan. He asked if the Respondent would consider making matching contributions. Miozzi told Gibbons to make a proposal on the issue.

At that point the parties caucused. When Miozzi returned to the meeting, he told Gibbons that he had discussed the Union's proposal with the "owners" and that it had been rejected. Miozzi stated that business conditions had not changed and that the Respondent was confronted with additional downward price pressures, that competitors were going after their business and that the Union's offer was not acceptable. When Gibbons asked Miozzi how the parties were going to get the situation resolved, Miozzi replied that the Union could accept the Respondent's implemented proposal. At that point the parties discussed scheduling another bargaining meeting and agreed to meet on December 11, 2013.

On November 11, 2013, Miozzi sent the following email (GC Exh. 9) to Gibbons and Gudino:

Arlington Metals has considered the proposal you presented at our meeting on October 31. The Company will accept your proposal for unpaid time off for union business, but with the following limitations: it would apply to only one person for a maximum of 20 hours per year. The remaining proposals are not acceptable because they are not reasonable given the state of the business. Arlington Metal stands on the current Implemented Terms. We are available to discuss at our next meeting or you can contact me sooner if you prefer.

There was no further contact between the parties until the scheduled December 11, 2013, collective-bargaining meeting.

The December 11, 2013 Meeting

The December 11, 2013 meeting was held at the same location. Present for the Union were Gibbons, Gudino, and Shubert and employees Golik and Karas, Miozzi, and Sharon Orłowski were present for the Respondent. At the beginning of the meeting, Gibbons gave Miozzi an information request (GC Exh. 11). The portions relevant to this case provide as follows:

Based on the Company's position, representations and explanation as to why it cannot agree to the Union's economic proposals and why the Company cannot rescind pay cuts and grant pay increases and other economic improvements to bargaining unit employees, the Union is requesting the following financial and economic information to be provided as soon as possible:

Audited financial reports for the past 4 years. These should include complete balance sheets, income statements, and statements of cash flow together with footnotes and detailed supporting schedules. Supporting schedules should include cost of goods sold, including breakdowns of material costs, manufacturing overhead/burden, labor costs and supervisory, management, Company officers and other non-labor wages and benefits; and selling, general and administrative expenses. The above statement should be certified by an outside CPA.

Provide the following financial reports:

Detailed income statement.

Detailed Balance Sheet

Statement of Cash flows

These reports should cover Actuals for 2010, 2011 2012 and financial reports year to date 2013.

Sales by customer for each of the last 4 years, current and projected for the next 3 years.

A detailed explanation of the business conditions the Company is referring to and the specific changes that have occurred and the actual impact on the Company's financial condition. Provide specific data, reports and analyses.

Federal and State tax returns the Company filed for the last 4 years.

After Gibbons gave the Union's information request to Miozzi, he replied that the Respondent would review it and respond as appropriate but that the Labor Board had looked at this 15 times and had agreed that the Respondent did not have to provide such information.¹⁰ Gibbons stated that the Union had pointed out at the last meeting the unreasonableness of the Respondent's position on the wage cuts and the lack of a pay increase. Miozzi replied that the Respondent had given the Union a reasonable response to its proposal. Miozzi stated that the

"iceberg" the Respondent was on "is melting" and that business had changed and businesses that the Respondent competes with had changed. Miozzi added that the Respondent honored all its commitments regarding payroll and insurance and that there was no employee turnover. Gibbons replied that turnover was not a barometer of what is fair and that the Respondent was fortunate to have a loyal workforce.

Gibbons stated that the Respondent may never employ 54 employees again but rather stay at 26. Gibbons asked if this meant that employees were not entitled to a wage increase and asked again if the Respondent was making money. Gibbons urged Miozzi to look at the tonnage information since the 180,000 ton level had only been met when the Respondent had twice as many employees. Gibbons stated that employees should get a raise because they were producing more per employee. Gibbons asserted that the Union was not proposing an agreement that was unreasonable and again referred to the significant economic loss that the employees had suffered since 2009. Miozzi replied that the Union could sign Respondent's final offer. Miozzi asserted that it was a fair deal by one measure, since there has been no turnover. Gibbons asked Miozzi when employees can expect to get a raise. Miozzi replied that the 180,000 tons of steel processed figure was one aspect and added that the business available to process has changed in level of volume and price.

Gibbons asked Miozzi what was the logic of the Respondent's position of limiting unpaid time for union business to 20 hours a year. Miozzi replied that there has to be some limits for staffing purposes. Gibbons then asked Miozzi who the Respondent considered its main competitors to be. Miozzi replied that one competitor was the steel mills which were doing more slitting in-house.

The Union then asked for a caucus. Gibbons testified that the Union decided during the caucus not to present another offer but to await a response to its information request. When the union representatives returned from the caucus, Gibbons indicated to Miozzi that the Union would await a response to its information request before deciding whether to make another proposal. At that point the meeting ended.

On December 16, 2013, Miozzi sent an email to the Union containing the Respondent's response to the information request that the Union made on December 11, 2013 (GC Exh. 12). The Respondent indicated it would not produce its audited financial statements or the requested financial reports that the Union had requested in paragraphs 2 and 3 of its information request. The Respondent's reason for not providing the requested financial information requested in those paragraphs was identical: "The Union is not entitled to such information as Region 13 has determined several times, each time affirmed by the General Counsel, because AMC has never asserted a financial inability to meet the Union's wage demands."

With respect to the Union's request for sales by customer for customers for the past 4 years and projections for 3 years in the future (paragraph 5 of the information request), the Respondent replied "AMC will not provide sales information by customer as you request unless you care to explain why the Union is entitled to the information in that particular format. We provide the following tonnage and revenue data from 2009-present.

¹⁰ In making my findings regarding the December 11, 2013 meeting I have again relied on Shubert's contemporaneous handwritten notes of the meeting (GC Exh. 10) and Sharon Orłowski's typed notes of the meeting (R. Exh.16) and the credited testimony of Gibbons and Shubert. I credit the testimony of Gibbons and Shubert over that of Miozzi to the extent it conflicts because their testimony was more detailed and consistent with the notes taken by Shubert and Orłowski.

	Tons	Revenue
2009	100,854	\$2,887,096
2010	126,912	\$3,437,535
2011	121,008	\$3,228,358
2012	121,071	\$3,311,920
2013 (YTD-11 Mo.)	106,471	\$3,007,027 ¹¹

As noted above, the Union made a request for "A detailed explanation of the business conditions the Company is referring to and the specific changes that have occurred and the actual impact on the Company's financial condition please provide specific data, reports and analyses." (par. 7.) The Respondent's responsive email indicated:

The Union is not entitled to the detail and breadth of financial information requested in #7 for the reasons stated above. The business conditions to which the Company has reference (sic) are disclosed in the following data, which is responsive to your request:

2012 Tonnage 121,071
 2013 Tonnage through Nov 13'-106,469
 2013 Projected tonnage 113,011

With respect to the Union's request for federal and State tax returns (par. 9) the Respondent replied, "AMC will not produce its tax returns. The Union is not entitled to such information as Region 13 has determined several times, each time affirmed by the General Counsel."

On January 7, 2014, Gibbons replied by email to Miozzi (GC Exh. 13.) With regard to the information sought in paragraph 2 of the Union's December 11, 2013 information request, Gibbons explained:

In effect AMC's consistent basis for pay cuts and its position for not being able to provided (sic) 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 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.

¹¹ Importantly, at the hearing Timothy Orlowski testified that the information provided to the Union included only the revenue from toll processing and not from metal sales. (Tr. 92-93.) Orlowski further testified that the Respondent's audited financial statements reflect revenue from both metal sales and toll processing in two separate income statements because they constitute separate divisions. Orlowski also testified that the Respondent's profit and loss statement would "break out" the revenue by each division (Tr. 98). As noted at the outset, metal sales comprises approximately 20 percent of the Respondent's production operations. The Union represents a "wall-to-wall" production and maintenance unit in which the employees are engaged in both toll processing and metal sales operations. Orlowski's testimony clearly establishes that the Respondent provided incomplete and misleading information to the Union regarding the revenue it receives from the products produced by unit employees.

With respect to the Union's request for the Respondent's financial reports in paragraph 3 of its information request, the email stated "3. The basis for the Union request has been addressed in the above paragraph."

In further clarification of its request for sales information in paragraph 5, Gibbons' email stated, "5. Please provided (sic) itemized costs (clearly broken down for each expense) of the sales revenues for each of the periods referred to. Also, provide the same information for 2007, and 2008."

Regarding paragraph 7 of its request, Gibbons' email indicated, "7. The Union restates its request based on the explanation stated in paragraph 2 above. The Company's reply is not responsive and does not specifically provide the information requested." With regard to the Union's request for tax returns, Gibbons' email stated, "9. The Union's response in paragraph 2 is the basis for, and relevance for this request which is again restated."

On January 9, 2014, Miozzi replied by email to Gibbons' January 7, 2014 email (GC Exh. 13). The relevant responses are as follows:¹²

As you acknowledge and the NLRB has concluded multiple times, AMC has never asserted an inability to pay as reason for any of its proposals or rejection of the Union's proposals. Volume is down and competition for business is intense. Again AMC will not produce this information because the Union is not lawfully entitled to it.

Same answer as #2.

We provided you responsive and relevant detailed information in response to the request you posed on December 11, 2013 on December 16, 2013. The item below appears to be a new request, but it makes no sense. We do not know what "itemized cost of sales revenues" are; AMC has never heard of such a financial concept, be that as it may, we cannot understand how any data beyond tons/revenue data that we supplied last month and have supplied to you multiple times over the past years, would be relevant.

See answers above and our response December 16, 2013. There is nothing more we can tell you.

See our response December 16, 2013 and #2 above. The Union is not lawfully entitled to the information requested.

On January 31, 2014, Gibbons sent an email (GC Exh. 14) to Miozzi in response to his January 9, 2014 email. As relevant to this proceeding, Gibbons' email stated:¹³

Your argument regarding "inability to pay" is irrelevant. I have clearly stated that the Company's position regarding economic matters was based on claimed adverse business condition(sic) that resulted in losses or reduced income that prevents the Company from making any economic improvements for employees and the basis for substantial economic

¹² The number at the beginning of each response refers to the paragraph number in the Union's original information request.

¹³ The numbers at the beginning of each paragraph refer to the paragraph number in the Union's original information request.

reduction in wages and benefits imposed on employees. The Company's position has and was actually based on "inability to pay". While the Company has not used those specific terms, the reason and basis for the company's position as expressed during the bargaining and actions taken are the same the-"inability to pay".

Notwithstanding, the terminology, in order for the Union to perform its duties as the exclusive representative of bargaining unit employees our information request is relevant and necessary.

Restate our request of December 11, 2013, and for the reasons expressed above.

Again, I will attempt to restate our request in more expanded terms. I believe you understand our information request, (sic) they are very simple, and represented a basic principle regarding sales, cost of sales, revenue, specific costs, profits and losses. This information should include all documents, studies or methodology that the Company uses to calculate and evaluate its variable costs. If such information is not available in the form requested please provide in the form that is available.

The Union restates its request based on the explanation stated in paragraph 2 above. The Company's reply is not responsive and does not specifically provide the information requested.

On February 3, 2014, Miossi replied to Gibbons' January 31, 2014, email as follows (GC Exh. 14):

We have considered each of your requests, and we can detect no new justifications or plausible rationale that merit any different response that we provided to you January 9, 2014 and December 16, 2013. With all due respect, you are simply repeating yourself. 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 nonbargaining unit personnel, etc., etc., beyond what we have already provided. In addition to the repetitiveness of your request, your unsupported claim that the fact that Arlington has never asserted an inability to pay as a reason for any of its proposals "is irrelevant," suggest to us that your purposes is more about creating mischief than engaging in purposeful communication.

In an email dated February 5, 2014, Gibbons replied to Miossi's February 3, email as follows (GC Exh. 14):

I am responding to your email reply to me on February 3, 2014.

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 (sic) as expressed are the same.

Notwithstanding, the information requested is necessary for the Union to carry out its performance and duties as the exclusive bargaining representative of the bargaining unit employees of Arlington Metals.

On February 5, 2014, Miossi replied to Gibbons by email as follows (GC Exh. 14):

Not only have we never asserted an inability to pay for any position AMC has taken since 2007, it up has never been inferred, despite your effort to say otherwise. You have our response to your most recent information request. We have provided all the information to which the Union is lawfully entitled.

No further information has been provided by the Respondent and there has been no further bargaining sessions held between the parties.

The Withdrawal of Recognition Petition

Timothy Orlowski testified that on July 10, 2014, Plant Manager Ron Sowrizol contacted him on his cell phone before Orlowski had arrived at work and informed him that one of the shop employees had given Sowrizol an envelope but that Sowrizol did not know what was in it. Orlowski instructed Sowrizol to put the envelope on Orlowski's desk and he would look at it when he arrived at work.

When Orlowski arrived at work he opened the envelope and saw a document entitled "PETITION TO REMOVE UNION AS REPRESENTATIVE"(R. Exh. 1). The relevant portion of the document indicates:

The undersigned employees of Arlington metals (employer name) do not want to be represented by united still worker 7773(sic) (union name), hereafter referred to as "union".

[S]hould the undersigned employees constitute 50% or more of the bargaining unit represented by the union, the undersigned employees hereby request that our employer immediately withdrawing recognition from the union, as it does not enjoy the support of a majority of employees in the bargaining unit.

The petition contained the handwritten printed name and the signature of 16 employees which were all dated July 9, 2014. The signatures of Harve Neace and Emil Sterczek were on the petition. Orlowski testified that Neace and Sterczek were slitter-operators and working supervisors. On direct examination Orlowski testified that he had known the employees for a long time and had seen their signatures on a multitude of documents, and the signatures looked valid to him. On cross-examination, however, Orlowski admitted that Brandon Trezzo and Brandon De La Cruz were newer employees and that he had not seen their signatures many times prior to July 10, 2014. (Tr. 108-109.) Orlowski further admitted that there were other employee signatures that he had not seen very often because they were newer employees. (Tr. 110.) Orlowski did not check the signatures on the petition by comparing them to the signatures of employees that the Respondent maintained in its files.

At the trial, the Respondent did not introduce payroll records for July 9, 2014, establishing precisely the composition of the unit on that date. Rather, the Respondent introduced an em-

ployee census of the unit employees that it submitted to the Union as an attachment to an email on April 11, 2014. This employee census (R. Exh. 18, p. 3) contains, inter alia, the name, address, hire date, job title and pay rate for 26 employees, including Neace and Sterczek. The document was prepared by Ilona Zelazowska, who maintains the Respondent's payroll records and other employment documents. Zelazowska credibly testified that, pursuant to the instructions of Timothy Orłowski, she prepared the employee census from the payroll and benefit records she maintains for the shop employees. Orłowski testified without contradiction that he asked Zelazowska to prepare the employee census shortly before it was submitted to the Union on April 11, 2014.

The employee census reflects that De la Cruz was hired on February 25, 2013, and Brandon Trezzzo was hired on April 25, 2013. The employee census further reflects the additional employees were hired on various dates in 2013: Andres Coronel, April 8, 2013; Christopher Keiler, July 15, 2013; Michael Krasinski, August 7, 2013; and Anthony Menotti, September 9, 2013. Timothy Orłowski testified without contradiction that from April 11, 2014, through July 9, 2014, none of the employees listed on the employee census submitted to the Union had voluntarily left employment with the Respondent or had been terminated.

After reviewing the decertification petition on July 9, 2014, Timothy Orłowski scanned the petition to an email and sent it to Miossi. On July 10, 2014, Miossi sent the following email to Gudino with a copy of the decertification petition attached:

Please find enclosed a petition dated July 9, 2014, signed by 16 members of the Arlington Metals Corp. bargaining unit, advising they no longer wish to be represented by the United Steel workers as the exclusive bargaining agent. The petition was in no way, directly or indirectly, initiated, supported or encouraged by Arlington Metals management. The 16 employees constitute well more than 50% of the bargaining unit of 24; even if you count Messrs. Gofron, Fudala, and Ceja as part of the bargaining unit, 16 still represents well more than 50% of the unit. Arlington Metals will respect the desire of a majority of the bargaining unit of all, and consistent with federal labor law it withdraws recognition of the United Steelworkers union as the exclusive bargaining agent of the employees located in its Franklin Park plant effective immediately.

The Union's Request to Conduct a Health and Safety Inspection

According to Gudino's uncontradicted testimony, in September, October and December 2013, OSHA issued approximately 80 to 100 citations against the Respondent regarding health and safety matters at the Arlington facility. The abatement date for those citations was sometime in the spring of 2014. In early July 2014, the Union met with some unit employees who informed the Union that certain safety issues still existed at the plant. Gudino testified that the Union wanted to make sure that the Respondent had complied and had remedied the health and safety violations that OSHA had cited and decided it was appropriate to have a union safety expert verify that the violations had been remedied

On July 10, 2014, Gudino sent an email to Miossi requesting that the Respondent provide available dates for the Union to schedule a safety and health inspection to review "the numerous OSHA matters that require abatement and compliance" (GC Exh. 15).¹⁴ Gudino credibly testified that at the time that he made the request to conduct a health and safety inspection to Miossi, he had not seen Miossi's email in which he indicated that the Respondent was withdrawing recognition from the Union. In response to Gudino's email, Miossi again sent the decertification petition to Gudino and reiterated that the Respondent had withdrawn recognition on the basis of the petition and that the Union no longer had a right to conduct a health and safety inspection.

Analysis

Whether the Respondent Violated Section 8(a)(5) and (1) of the Act by Refusing to Provide the Union with the Requested Financial Information Because Its' Conduct Constituted a Claim of an Inability to Pay the Union's Demands.

In *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956), the Supreme Court held that an employer violated Section 8(a) (5) and (1) of the Act by refusing to provide the union with financial information requested by it to support the employer's claim that it could not afford to grant employees the wage increase sought by the union. In so finding, the Court held 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.

[351 US at 152-153.]

....

We do not hold, however that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn on its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met. [351 US at 153-154.]

In *Nielsen Lithographing Co.*, 305 NLRB 697 (1991), and affd. sub nom. *Graphic Communications Local 50B v. NLRB*, 977 F.2d 1168 (7th Cir. 1992), the Board held that the duty to supply financial records applies only where an employer asserts "a present inability to pay, or a prospective inability to pay during the life of the contract being negotiated," not where the employer "is simply saying that it does not want to pay." 305 NLRB at 700. However, the Board was also careful to point out:

¹⁴ Art. 20 of the Respondent's 2012 implemented final offer contains a provision granting the Union access to the Respondent's premises for the purpose of participating in meetings with the Respondent that have been scheduled with prior notice and mutual consent and do not interfere with production. Art. 21 of that proposal provides that the Union shall cooperate with the Respondent in maintaining policies and regulations regarding safety and health. (GC Exh. 4.)

We do not say that claims of economic hardship or business losses with the prospect of layoffs can never amount to claim of inability to pay. Depending on the facts and circumstances of a particular case, the evidence may establish that the employer is asserting that the economic problems have led to an inability to pay or will do so during the life of the contract negotiated.” 305 NLRB at 700

In *Stella D’Oro Biscuit Co.*, 355 NLRB 769,770 (2010), enf. denied 711 F.3d 281 (2d Cir. 2013) the Board reiterated its policy that it “does not require that the employer recite any ‘magic words’ but only that his statements and actions be specific enough to convey an inability to pay.” Accord *Atlanta Hilton & Tower*, 271 NLRB 1600, 1602 (1984). See also, *E. I. DuPont & Co.*, 276 NLRB 335, 336 (1985).

In *Lakeland Bus Lines*, 335 NLRB 322, 324 (2001), enf. denied 347 F.3d 955 (D.C. Cir. 2003), the Board noted that in *Shell Co.*, 313 NLRB 133 (1993), the employer’s duty to disclose relevant financial information was established by the employer’s claims that its present circumstances were “bad” and was a matter of survival and that it was “losing business” and “faced serious regulatory and cost problems.” In *Lakeland Bus Lines*, the Board further noted that:

Consistent with the Board’s acknowledgment in *Nielsen* that certain claims of economic hardship and business losses could amount to a claim of inability to pay, the Board held in *Shell* that the employer had effectively made such a claim. The Board noted that, unlike the claims at issue in *Nielsen*, there was no claim that the employer was still making a profit, and the thrust of the employer’s assertion was its present economic circumstances rather than future economic competitiveness. The Board concluded that in these circumstances the employer’s assertions amounted “to a claim that it could not afford the most recent contract,” and thus warranted a finding that the employer had pleaded a present inability to pay. [*Lakeland Bus Lines* at 324]

In *Lakeland Bus Lines*, the Board concluded that the statements made by the respondent’s president in a letter urging employees to accept its final offer reasonably conveyed that the Respondent was unable to pay more than that contained in the final offer. The Board noted that:

Specifically, the Respondent stated that it was “trying to bring the bottom line back into the black,” that acceptance of the final offer would enable the Respondent to “retain your jobs and get back in the black short-term,” and that [t]he future of Lakeland depends on it.” In context, the statements are the equivalent of the claim in *Shell Co.* that circumstances were bad and were a matter of survival. In both these cases the statements reasonably conveyed a present inability to pay [*Lakeland Bus Lines*, at 324–325.]

In *Dover Hospitality Services*, 358 NLRB 709 (2012), reaffirmed, 361 NLRB 682 (2014), the Board indicated its continued adherence to the principles expressed above.

In the instant case, during a bargaining session 2009, Miossi informed the Union that the Respondent was losing money and that the Respondent needed to process 180,000 tons of steel a year in order to break even. In August 2009, the Respondent

unilaterally implemented its final offer which reduced the wages of existing employees and established a “Tier 2” rate for new employees which was generally lower than the rates paid to existing employees. The unilaterally implemented offer indicated that the Respondent would restore the wage cuts if the Respondent processed 180,000 tons of steel in a 12-month period. On December 9, 2011, the Respondent informed the Union that it would be unilaterally implementing further cuts in wages and benefits, including health insurance coverage. The Respondent’s letter accompanying the announced unilateral changes noted that “So there is no misunderstanding, our final proposal is just that-final. We have done the best we can do to treat and reward our employees fairly, protect their job security and at the same time remain competitive in our industry.” The (R. Exh. 4, p. 2.)

At the October 31, 2013 meeting, after Gibbons gave Miossi a document detailing the economic impact on employees of the concessions that the Respondent had unilaterally implemented, Miossi told Gibbons that business conditions had not changed and that, if anything, they were weaker and that the Respondent was doing the best it could and had kept everyone employed. At this meeting, after Gibbons had given the Respondent a new economic proposal, Gibbons stated that the Respondent’s unilaterally implemented offer requiring that the Respondent process 180,000 tons of steel annually before the wage cuts could be restored did not appear to be reasonable under the circumstances. Gibbons asked the Respondent to look at a reasonable level of production in order for employees to receive a wage increase. Gibbons also stated that the Union did not know whether the Respondent was making money or not. Miossi replied that the level of tons of steel processed was related to the operational of costs of the business and was unrelated to profit or loss. Miossi added that the owners of the Respondent were not applying the same analysis as the Union.¹⁵ When Gibbons specifically asked Miossi whether the Respondent was making money and was profitable enough to give a wage increase, Miossi stated that business conditions had not changed, that business has softened in 2010-2013 and that the Respondent was hopeful that business would come back but that it had not. When Gibbons again asked if the Respondent was making money and could afford to give a wage increase to employees who had not had one in 8 to 10 years, Miossi replied that the Respondent had a right to maintain its profit and loss information privately and that it was not claiming it could not afford to pay the Union’s demands and never had. Later in that meeting Miossi stated that demand has gone down as well as pricing and that revenue was dependent on the number of tons pro-

¹⁵ I find that the Respondent has not been consistent in its explanation regarding the basis for the 180,000 tons of steel processed as the trigger to restore the wage cuts it had unilaterally imposed. In this regard, in 2013 Miossi indicated that that figure was related to the operational of costs of the business. At the hearing, Timothy Orlowski did not relate the 180,000 tons per year to the operational of costs of the business but rather stated he viewed that level of production to constitute a proper utilization of the equipment and that it was his prerogative to want that level of production. I also note that in 2009 Miossi told the Union that the 180,000 tons of steel processed level was the Respondent’s breakeven point based on what Timothy Orlowski had told him.

cessed and business was not what was 10, 20, or 30 years ago.

At December 11, 2013 meeting the Union requested the financial information set forth in the complaint. After receiving the information request, Miozzi indicated that he would review it and respond as appropriate but that the NLRB had previously agreed that the Respondent did not have to provide such information. Miozzi added that the Respondent had given the Union a reasonable response to its new proposal and that the “iceberg” the Respondent was on “is melting” and that business has changed and businesses that the Respondent competed with had changed.

On December 16, 2013, Miozzi replied to the Union’s information request in writing and indicated that the Respondent would not produce its audited financial statements or the other requested financial documents requested by the Union. Miozzi’s letter indicated that the Union was not entitled to such information as Region 13 and the General Counsel has found that the Respondent had never asserted a financial inability to meet the Union’s demands. The Respondent’s letter did provide tonnage and revenue data from 2009 to December 2013 but, as noted above, the information was incomplete and misleading as it did not indicate any of the revenue generated by the 20 percent of the Respondent’s operations that is comprised of metal sales.

It is clear that in 2009, Miozzi specifically told the Union that the Respondent was losing money and needed to process 180,000 tons of steel annually in order to break even. In October 2011, the Respondent gave the Union a summary which purported to show that it had suffered substantial losses from 2007 through October 2011. When the Respondent implemented unilateral cuts in wages and benefits on August 3, 2009, it indicated that the wage cuts would be restored if the facility processed 180,000 tons of steel annually. In October 2013, Gibbons pointed out the difficulty that the Respondent’s unilaterally implemented concessions had imposed on employees and that it was unlikely that it would process 180,000 tons of steel annually during the foreseeable future. Gibbons asked the Respondent to consider a more reasonable trigger to restore the wage cuts and specifically asked if the Respondent was profitable enough to grant a wage increase, Miozzi replied that business conditions had not changed and that the Respondent was hopeful that business would come back but it had not. Finally, at the December 11, 2013 meeting, in defending the Respondent’s rejection of the Union’s latest economic proposal, Miozzi stated that the “iceberg” that the Respondent was on “is melting.”

In my view, the statements made by the Respondent during bargaining could reasonably be construed as statements that the Respondent was currently unprofitable and unable to pay more than its unilaterally implemented offer. Under these conditions, the Union is entitled to information pertaining to the alleged losses and their impact on the employer’s business. In this regard, in 2009, the Respondent informed the Union that it was losing money and needed to process a total of 180,000 tons of steel annually in order to break even. In 2011 the Respondent gave the Union a summary purporting to show that it had suffered substantial annual losses from 2007 to 2011. In October 2013, when asked if the Respondent was profitable enough to

grant a wage increase, Miozzi replied that business conditions had not changed and that the Respondent was hopeful that business would come back, but it had not. Finally, at the last meeting between the parties in December 2013, Miozzi indicated the Respondent would not move from its implemented proposal because the “iceberg” that the Respondent was on “is melting.” There is clearly no evidence that in 2013 the Respondent indicated to the Union that it was, in fact, profitable and was merely unwilling to restore the wage cuts that it had unilaterally implemented.

I find that Miozzi’s statement to Gibbons at the October 2013 meeting that the Respondent had a right to maintain its profit and loss information privately as it was not claiming, and had not claimed, a financial inability to pay the Union’s requested increase in wages and benefits, to be ineffective. Miozzi’s statement is unsupported by, and conflicts with, the weight of the evidence on this point. The evidence summarized above reflecting that the Respondent’s bargaining position was premised on its asserted unprofitability, clearly outweighs what I view as Miozzi’s attempt to preclude the Union from obtaining financial information I believe it is entitled to. For the same reasons, I do not find that Miozzi’s statements in the letters he sent to the Union in December 2013 and January 2014 claiming that the Respondent has never asserted an inability to pay as a reason for its bargaining position to be an effective disclaimer.

I find the instant case to be distinguishable from *American Polystyrene Corp.*, 341 NLRB 508, 508–509 (2004), relied on by the Respondent. In that case, on one occasion, the Respondent’s chief negotiator, Tan, stated the employer could not afford the Union’s proposals and would “go broke” if it agreed to them. The next day Tan delivered a letter advising the union that the employer’s ability to pay for the Union’s bargaining proposal was not question. Under those circumstances, the Board found that the employer effectively disavowed any claim of an inability to pay. In the instant case, the Respondent, in effect, had asserted its allegedly poor financial condition as the basis for its bargaining position from 2009 through 2013. The Respondent also attempted to support this position by giving the Union a summary in 2011 purportedly showing substantial losses from 2007 through 2011. In December 2013, the Respondent also gave the Union incomplete and misleading information regarding its revenues for the period from 2009 to 2013. It was only when the Union pointedly asked if the Respondent was profitable enough to grant a wage increase in October 2013, that Miozzi claimed that the Respondent was not asserting an inability to pay the Union’s requested wage increase and then repeated that statement in the letter exchange following the Union’s request for financial information made in December 2013. In the instant case, the attempted disclaimer is insufficient to outweigh the Respondent’s consistently expressed position that its alleged loss of money was the underlying reason for its unilaterally implemented concessions and its refusal to consider restoring its unilaterally imposed reductions in wages and benefits.

As noted above, on October 31, 2013, the Respondent stated that its economic position had not changed since 2009 and that, if anything, was worse. Given this, I do not find that Miozzi’s statements at the bargaining sessions in 2013 that the Respond-

ent believed that its position was fair because of the lack of the employee turnover are sufficient to overcome the evidence supporting my conclusion that the Respondent had consistently expressed that its loss of money and poor economic condition was the basis for its bargaining position.

I also find this case to be distinguishable from other cases relied on by the Respondent in support of its position. In *Coupled Products LLC*, 359 NLRB 1443 (2013), the Board found that the employer had not claimed an inability to pay the Union's wage and benefit demands and thus was not obligated to accede to the Union's request to audit its financial information when the employer stated that it was profitable overall but claimed a competitive disadvantage in labor costs at the facility at issue and wish to reduce those labor costs. Clearly, in the instant case the Respondent did not assert that it was profitable and merely wished to reduce labor costs.

I also find the instant case to be distinguishable from other cases relied on by the Respondent. In *North Star Steel*, 347 NLRB 1364 (2006), the Board found that the employer was not obligated to provide the detailed financial information sought by the union. In that case, in explaining its position regarding concessions that it sought, the employer focused on diminishing future orders and declining prices. The employer also linked its anticipated low upcoming profit figures to bad market conditions. The Employer downplayed to some extent its financial difficulties and drew a distinction between itself and some competitors who were in worse financial shape. Unlike the instant case, the employer relayed the message that it would not pay, as opposed to could not pay, in order to stay competitive. In *AMF Trucking & Warehousing*, 342 NLRB 1125 (2004), the employer stated that the company had been in distress for a year and a half and that it was "fighting to[stay] alive" and was "weaker this year" than it had been in previous years. The Board found that such statements were not synonymous with an assertion that the employer had, or would have, insufficient assets to pay the union's demands. As set forth in detail above, in the instant case, the Respondent's statements over a sustained period from 2009 to 2013 could be fairly construed as establishing that its bargaining position was premised on an inability to pay the Union's demand for a wage increase.

On the basis of the foregoing, I find that the Respondent has asserted an inability to pay the Union's wage and benefit demands and has therefore violated Section 8(a)(5) and (1) of the Act by refusing to provide the information requested in paragraphs 2, 3, 5, 7, and 9 of Union's December 11, 2013 information request, as set forth in the complaint.

If a Conclusion is Reached that the Respondent did not Claim an Inability to pay the Union's Demands, Whether the Respondent violated Section 8(a)(5) and (1) of the Act by Refusing to Provide the Union with Requested Information to Verify Specific Claims the Respondent Made During Bargaining

Both the General Counsel and the Union assert an alternative argument that, even if a conclusion is reached that the Respondent was not obligated to provide the requested information because it had not claimed an inability to pay the Union's demands, the facts of this case establish that the Respond-

ent refused to provide requested relevant information supporting its specific claims regarding its bargaining position in violation of Section 8(a)(5) and (1) of the Act. I recognize that the Board's decisions regarding the obligation to provide requested financial information under the inability to pay line of cases often draw fine distinctions and that, if exceptions are taken to my decision, the Board may disagree with my application of the principles expressed in those cases. I therefore believe that it is appropriate to consider the alternative argument advanced by the General Counsel and the Union in case that should occur.

In *Caldwell Mfg. Co.*, 346 NLRB 1159 (2006), the Board noted that under *Truitt* supra, an employer has a general duty to provide information to a union that is necessary and relevant to assess claims made by an employer in contract negotiations. Such information is not presumptively relevant but the burden to establish relevance is not "exceptionally heavy" and the Board uses a "broad discovery type of standard in determining relevance in information requests." In *Caldwell*, the Board noted that "When there has been a showing of relevance, the Board has consistently found a duty to provide information such as competitor data, labor costs, production costs, restructuring studies, income statements, and wage rates for non-unit employees." Id. at 1160 (Citations omitted.) Applying that standard, in *Caldwell* the Board found that the union's request for detailed information involving costs, productivity, and competitor performance were relevant where the employer asserted that concessions were necessary in order to make a less competitive facility more competitive in the industry. In *A-1 Door Building Solutions*, 356 NLRB 499 (2011), an employer explained its bargaining position in seeking a substantial reduction in profit sharing and a reduction in wages by claiming that its wages and benefits affected its ability to be competitive. The employer specifically discussed competitiveness in its ability to obtain jobs it had bid on. The union requested specific information regarding job bidding which the employer refused to provide. Relying on *Caldwell*, the Board found that the employer violated Section 8(a)(5) and (1) by refusing to provide the requested information.

As set forth above, *Caldwell* specifically indicates that an income statement is the type of information that an employer is obligated to produce, on request, if it is relevant to its bargaining position. In *Litton Systems*, 283 NLRB 973, 974-975 (1987), enf. denied on other grounds 868 F.2d 854 (6th Cir. 1989) the Board found that the respondent was obligated to produce requested information regarding its financial condition, including market share and profit and loss information. In that case, the respondent relocated work from one of its facilities to another and had claimed during bargaining that it was losing \$3 million a year by producing the product at the plant the work and been transferred from. In finding that the Respondent had violated Section 8(a)(5) and (1) by refusing to provide the requested information, the Board found that the Union had demonstrated the probability that the desired information was relevant and would be useful in determining the meaning of the information that had been provided and would be of assistance in developing reasonable bargaining proposals.

In the instant case, in October 2013, the Respondent rejected the Union's proposal to increase wages and maintained its posi-

tion that it would not move from the terms of its unilaterally implemented proposal. Miozzi told the Union that he had discussed the Union's proposal with the "owners", and that it was rejected as business conditions had not changed and that the Respondent was confronted with additional downward price pressures and that competitors were going after their business. During the meeting, Miozzi told the Union that the level of tons of steel processed was related to the operating costs of business and added cryptically that the owners of the Respondent were not applying the same analysis regarding the 180,000 tons of steel processed as the level that must be met before the Respondent would restore the unilateral wage cuts as was the Union. At the bargaining table, Miozzi did not further explain his statement. As noted above, however, at the trial, Timothy Orłowski did not specifically relate the 180,000 ton trigger to operating costs, but rather stated it was his prerogative to want that level of production from his assets. In addition, as noted above, in December 2013, the Respondent provided incomplete and misleading information regarding its revenues as it did not include the approximately 20 percent of its business that was comprised of metal sales. Timothy Orłowski further testified that the Respondent's audited financial statements reflect revenue from both metal sales and toll processing in separate income statements.

At the meeting held in October 2013, Gibbons indicated that the Union did not know if the Respondent was making money or not. Gibbons added that if the Respondent was not making money, the Union was willing to move from its position that the wages of employees should be increased by specified amounts but rather would consider a profit-sharing agreement. The financial information sought by the Union would clearly have assisted it in assessing the accuracy of the Respondent's position and developing its own counterproposals. The financial information is clearly relevant to the Respondent's claim that business conditions had not improved since 2009. In addition, the provision of this information would set forth the tonnage and revenue information clearly and allow the Union to knowingly and intelligently assess the Respondent's position that the restoration of wage cuts was dependent upon reaching the 180,000 tons of steel processed level.

Although the financial information requested by the Union is not presumptively relevant, the General Counsel established that the requested financial information would assist the Union in assessing the accuracy of the Respondent's position and developing counterproposals. Applying the principles expressed in the Board's decisions in *Caldwell* and *Litton Systems*, I find that the Union is entitled to the financial information that it requested.

With regard to the Union's request for information regarding the Respondent's sales to customers, during bargaining Miozzi specifically indicated that business conditions had softened in 2010–2013 and that demand had gone down as well as pricing. The Union's request for information for the Respondent's sales by customer for the years 2009 through 2013 and its projected sales for the period of 2014 through 2016 would obviously allow it to determine the accuracy of the claims made by Miozzi during bargaining. The request for such sales information would assist the Union in determining whether Respondent's

statements regarding the factors supporting its bargaining position were supported by objective evidence.

Applying the principles expressed in *Caldwell*, I find that the Respondent is obligated to provide the requested information regarding customers to the Union. The Board has found in similar situations that employers have had the obligation to provide such information. In *National Extrusion & Mfg. Co.*, 357 NLRB 127 (2011), the Respondent proposed a 12 percent reduction in wages over 3 years. In support of its position the employer stated it needed to make its facility more competitive. In particular, the employer asserted that it was faced with competition from Asia and its production costs had increased while its production levels had diminished. In addition, the Respondent claimed that it had lost a large customer the year prior to the negotiations. The union requested information regarding the employer's currently customers, job quotes, outsourcing, pricing structure, market studies and competitors in order to evaluate the employer's claims. The Board found that the union was entitled to the information sought, including the information regarding customers, in order to evaluate the Respondent's claims regarding the necessity for concessions. Similarly, in *Tom Ryan Distributors*, 314 NLRB 600 (1994), the Board found that the employer violated Section 8(a)(5) and (1) by failing to provide requested information regarding, inter alia, sales to customers, where the employer was seeking to reduce labor costs by virtue of its proposal regarding presell and bulk sales to customers.

In the instant case, the Union also requested information about the "business conditions" relied on by Respondent and the "specific changes that have occurred and the actual impact on the Company's financial condition." Finally, the Union requested that the Respondent provide its Federal and State tax returns for the period from 2009 through 2012. As noted above, in response to Gibbons observation that since 2009 the Respondent had reduced its labor costs by approximately 50 percent by virtue of laying off employees, Miozzi supported the Respondent's bargaining position by claiming that the Respondent was confronted with increased costs, taxes had gone up and there was downward pressure on pricing. Miozzi also referred to competitors attempting to take business from the Respondent and, when asked who the competition was, referred only to "steel mills", and mentioned that business was being moved to Texas and Alabama. Accordingly, by supporting its insistence that it would not move from its position regarding the continued maintenance of its unilaterally implemented concessions, the Respondent relied on poor business conditions, the loss of business to competitors and increased taxes. Again, the Union responded to these claims by requesting information needed to evaluate the accuracy of the Respondent's assertions and to assisted in preparing counterproposals. By flatly refusing to provide any of the requested information, including the tax returns that the Union requested, the Respondent violated Section 8(a)(5) and (1) pursuant to the principles expressed in *Caldwell*, *A-1 Door & Building Solutions*, and *National Extrusion & Mfg. Co.* supra.

Whether the Respondent Violated Section 8(a)(5) and (1) by Engaging in Surface Bargaining Without the Intention of Reaching an Agreement

In *Regency Service Carts*, 345 NLRB 671 (2005), the Board noted the following with respect to the obligation to bargain in good faith under the Act:

Under Section 8(d) of the Act, an employer and its employees' representative are mutually required to "meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment . . . But such obligation does not compel either party to agree to a proposal or require the making of a concession . . ." Both the employer and the union have a duty to negotiate with a "sincere purpose to find a basis of agreement," *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984) (quoting *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir.)), But "the Board cannot force an employer to make a 'concession' on any specific or to adopt any particular position." *Id.* (quoting *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir. 1953), cert.denied 346 U.S. 87 (1953)). The employer is, nonetheless, "obliged to make *some* reasonable effort in *some* direction to compose his differences with the union, if [Section] 8(a)(5) is to be read as imposing any substantial obligation at all." *Ibid.* (Emphasis in original.) Therefore, "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) enfd. 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)). A violation may be found where an employer will reach an agreement on its own terms and none other. *Id.*; *Pease Co.*, 237 NLRB 1069, 1070 (1978).

In *Mid-Continent Concrete*, supra, at 259–260, the Board noted that in determining whether a respondent has bargained in bad faith, it looks at the totality of the circumstances. In this connection, relevant factors include unreasonable bargaining demands,¹⁶ delaying tactics, efforts to bypass the bargaining representative, failing to provide relevant information, and unlawful conduct away from the table. The Board has never held, however, that a respondent must have engaged in each of those factors before concluding that bargaining has not been conducted in good faith. Rather, as noted above, the focus is on the entirety of a respondent's conduct in determining whether the evidence establishes that it intended to avoid reaching an agreement. *Regency Service Carts*, supra at 671; *Altorfer Machinery Co.*, 332 NLRB 130 fn. 2 (2000).

Applying these principles to the instant case, I find that the Respondent's overall conduct during the bargaining that occurred in 2013 violated Section 8(a)(5) and (1) of the Act. Examining the entirety of the Respondent's conduct during this

period, I find that it did not have a sincere purpose to find a basis for an agreement and thus crossed the line from hard bargaining to bargaining without the intention of reaching an agreement. In reaching this conclusion, I rely on the fact, as explained in detail above, that the Respondent failed to provide relevant and necessary information to the Union in violation of Section 8(a)(5) and (1). As set forth above, this is an important factor to consider when determining whether a Respondent has engaged in overall bad faith bargaining.

I also considered the fact that in December 2013, the only information that the Respondent did provide to the Union was incomplete and misleading. As set forth in detail above, the information provided to the Union regarding the Respondent's revenue during the period from 2009 through November 2013, included only the revenue it received from toll processing and not from metal sales. Since metal sales comprises approximately 20 percent of the Respondent's production operations, the information provided substantially underreported the Respondent's revenue during that period. The Board has held that furnishing incomplete and misleading information to a union during bargaining is indicative of a lack of good faith. *Northwestern Photoengraving Co., Inc.*, 140 NLRB 24, 49–50 (1962).

With regard to the substance of the negotiations in 2013, following the July 8, 2013 approval of a settlement agreement in which the Respondent agreed to meet and bargain in good faith, the parties met on September 12, 2013, but that meeting was devoted primarily to a discussion of the termination of the union's steward and insurance issues involving two employees. On October 31, 2013, the parties resumed their negotiations to attempt to reach a collective-bargaining agreement and focused on the economic issues on which they had not reached agreement. At this meeting, the Union gave the Respondent a document outlining what it viewed as the adverse economic consequences that unit employees had experienced by virtue of working under the terms of the Respondent's final offer that was unilaterally implemented in 2009 and unilaterally modified on January 1, 2012. The Union then gave the Respondent its eleventh economic proposal which included a proposal to modify the Respondent's unilaterally implemented 2012 terms regarding the ability to receive overtime pay and to include time off for union business in calculating the number of hours worked in order to be eligible to receive overtime pay. In addition, the Union's proposal agreed to the Respondent's implemented proposal for vacation pay for newly hired employees but wanted to allow current employees to have up to the 4 weeks of vacation they previously could attain. With respect to wages, the Union proposed to restore the wages that were previously in effect based on a formula reflecting production per employee that was equal to the 180,000 ton average per year set forth in the Respondent's unilaterally implemented proposal. The Union's proposal also included a \$1000 payment upon ratification and general wage increases for both 2014 and 2015. In effect, the Union proposed to the Respondent that it consider a formula that recognized the increased productivity of employees and would enable them to meet and perhaps exceed the wage rates that were in effect before the Respondent's unilateral implementation of the cuts in 2009. Gibbons pointed out to Miossi that under the present circumstances, the formula implemented

¹⁶ The Board examines proposals when appropriate and considers whether, on the basis of objective factors, bargaining demands constitute evidence of bad-faith bargaining. *Public Service Co. of Oklahoma*, 334 NLRB 487,488 (2001), enfd. 318 F.2d 1173 (10th Cir. 2003); *Reichhold Chemicals*, 288 NLRB 69 (1988), affd. in relevant part 906 F.2d 719 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991).

by the Respondent that there must be 180,000 tons of steel processed annually in order for employees to achieve a wage increase from their present level did not seem to be relevant and was unfair as it appeared that level of production may not be met in the future. Gibbons asked the Respondent to look at a reasonable trigger for the employees to receive a wage increase and stated that the Union did not know whether the Respondent was making money or not. Miossi responded that the level of tons of steel processed was related to the operating costs of the business and was not related to profit or loss and added that the Respondent's owners were not applying the same analysis as the Union. Miossi did not further explain the analysis applied by the Respondent's owners.¹⁷ During the discussions that were held during this meeting the Union further indicated that it was willing to waive its request for a wage increase and accept a lump-sum payment of \$1,000 dollars upon ratification of the contract but that it would prefer for employees to have an hourly wage increase. The Union further indicated that it was willing to look at a profit-sharing agreement dependent upon the Respondent's financial condition. Miossi, indicated that Respondent was not going to grant a wage increase just to get an agreement and that few employees had left and that the terms the Respondent had implemented was the best it could do. In support of the Respondent's position that its unilaterally implemented offer was the best it could do, Miossi indicated that the Respondent was confronted with increased costs; taxes had gone up and there was downward pressure on pricing. He also indicated that business conditions had not changed and, if anything, had worsened. At the conclusion of the meeting, after speaking with the Respondent's owners, Miossi formally rejected the Union's proposal and indicated that the Union could obtain a contract if it accepted the terms of the Respondent's 2012 implemented proposal.

On November 11, 2013, the Respondent indicated it would accept the Union's proposal for unpaid time off for union business but would limit it to one person for a maximum of 20 hours per year. The Respondent indicated that the Union's remaining proposals were not acceptable and that the Respondent stood on the currently implemented terms.

At the next meeting held on December 11, 2013, Gibbons gave Miossi the Union's request for information and that stated that the Union's proposal was not unreasonable and that employees should have the ability to obtain a raise because they were producing more per employee. Miossi again indicated that the Union could sign the Respondent's final offer and that it was a fair deal since there had been no employee turnover. Gibbons then indicated that the Union would not present another offer at that time but would await a response to its information request. Thereafter, the Union requested information in order to verify the accuracy of the claims that Miossi had made during the October 31 meeting and to assist it in developing new proposals. The Respondent refused to provide the request-

¹⁷ As noted previously, Timothy Orlowski did not relate the processing of 180,000 tons of steel to the operating costs of the business but rather stated that he believed the processing of 180,000 tons of steel to be a proper utilization of the equipment and that it was his prerogative to want his assets fully utilized.

ed information except for providing incomplete and misleading summary of information regarding tonnage and revenue for the 2009–2012 period. As noted above, there were no further bargaining meetings between the parties.

The Respondent and the Union had a substantial number of meetings between 2008 and December 2013, and had reached a tentative agreement regarding the noneconomic of a contract. During the two bargaining sessions that occurred in 2013, the Union made a substantial attempt to reach an agreement with the Respondent. The Union's proposal addressed the economic reality that the Respondent produced less processed steel with less employees than it did in 2007, but also sought to restore the wage cuts that the Respondent had unilaterally implemented in 2009 by virtue of the fact that, on a per capita basis, the remaining employees were more productive. The Respondent indicated a complete unwillingness to consider the Union's proposal seeking a formula that could result in employees receiving a wage increase for their increased productivity. The Respondent rejected the Union's proposal and repeatedly indicated that if the Union wanted an agreement it could sign the Respondent's unilaterally implemented proposal. At the same time the Respondent refused to provide the Union with necessary and relevant information that would enable the Union to understand the basis for the Respondent's position on wages and to see if the assertions made by the Respondent as to the underlying basis for that position were substantiated.

I find that during the bargaining that occurred in 2013, the Respondent's refusal to consider making anything more than a minor modification in its unilaterally implemented terms and conditions of employment and its refusal to provide relevant information to justify and explain its position demonstrates a lack of any effort in some direction in order to reach an acceptable common ground with the Union. The Respondent maintained its intransigent position despite the Union's willingness to modify its proposals in order to reach an agreement. I find the conduct of the Respondent establishes that it maintained a predetermined resolve that its unilaterally implemented offer, with the minor modification noted above, constituted the only terms upon which it would enter into a collective-bargaining agreement with the Union.

In *Mid-Continent Concrete*, 336 NLRB 258, 260 (2001), enfd. 308 F.3d 859 (8th Cir. 2002), the Board noted, "Where the proponent of a regressive proposal fails to provide an explanation for it, or the reason appears dubious, the Board may weigh that factor in determining whether there has been bad-faith bargaining." In the instant case, Miossi stated, during bargaining in 2013, that the basis for the position that 180,000 tons of steel had to be processed before the Respondent would restore the wage cuts it had unilaterally implemented was related to the operating costs of the business. In 2009, Miossi indicated during bargaining that the 180,000 tons of steel processed level was the Respondent's breakeven point. Timothy Orlowski's testimony that it is his prerogative to want that level of production in order to fully utilize his assets, without relating that in any way to operating costs, certainly makes the reasons advanced in bargaining appear dubious. The Respondent, of course, refused to provide the information that would perhaps provide an explanation for the Respondent's position. Under

these circumstances I find that Respondent has not provided a reasonable explanation for its unilaterally imposed wage cuts.

The Board has held that it is a significant manifestation of bad faith bargaining for an employer to refuse to budge from an initial bargaining position, refuse to offer reasonable explanations for a proposal and refuse to make any efforts to compromise in order to reach common ground. *Altofer Machinery Co.*, 332 NLRB 130, 150 (2000); *John Asuaga's Nugget*, 298 NLRB 524, 527 (1990), enfd. in pertinent part 968 F.2d 991 (9th Cir. 1992).

On the basis of all of the foregoing, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by engaging in surface bargaining in 2013 with no intention of reaching an agreement. In reaching this conclusion, I have considered the fact that parties had approximately 37 collective-bargaining sessions between November 2007 and December 2013; that the parties reached a tentative agreement on the noneconomic provisions of a collective-bargaining agreement; and that in 2013 the Respondent made a minor compromise with respect to granting 20 hours of unpaid time annually to conduct union business and to consider those hours for purposes of calculating the number of hours worked necessary before an employee would receive overtime pay. However, when I consider the totality of the Respondent's conduct in bargaining during 2013, it convinces me that the Respondent did not bargain in good faith in 2013 with the intention of reaching an agreement with the Union.

Whether the Respondent Violated Section 8(a)(5) and (1) of the Act by Withdrawing Recognition from the Union

As set forth in detail above, on July 10, 2014, the Respondent withdrew recognition from the Union based on a petition purportedly signed by a majority of the unit employees.

The General Counsel and the Union contend that the Respondent's withdrawal of recognition violates Section 8(a)(5) and (1) because it occurred in the context of serious unremedied unfair labor practices and thus the petition cannot serve as a basis for withdrawing recognition from the Union.

The General Counsel and the Union also contend, pursuant to the principles expressed in *Levitz Furniture Co.*, 333 NLRB 717 (2001), and *Latino Express Inc.*, 360 NLRB 911 (2014), that the Respondent did not meet its burden of establishing that the petition demonstrated that the Union had, in fact, lost majority support among unit employees at the time it withdrew recognition from the Union.¹⁸

The Respondent argues that the petition was sufficiently authenticated to establish that the Union had in fact, lost majority support of the time it withdrew recognition from the Union. The Respondent further argues that it has not committed any of the unfair labor practices alleged in the complaint, but even if it

did, those unfair labor practices cannot reasonably be found to have caused employee disaffection from the Union sufficient to taint the withdrawal of recognition.

As noted in substantial detail above, I have found that the Respondent engaged in surface bargaining without the intention of reaching an agreement in October and December 2013 in violation of Section 8(a)(5) and (1). I have also found that since December 16, 2013, the Respondent violated Section 8(a)(5) and (1) by refusing to provide the Union necessary and relevant information in order for it to perform its function as the collective-bargaining representative of the unit employees.

In *Vincent Industrial Plastics, Inc.*, 328 NLRB 300 (1999), enfd. in part 209 F.3d 727 (D.C. Cir. 2000), supplemental decision, 336 NLRB 697 (2001), the Board relied on its previous cases, *Williams Enterprises*, 312 NLRB 937, 939 (1993), enfd. 50 F.3d 1280 (4th Cir. 1995), and *Master Slack Corp.*, 271 NLRB 78, 84 (1984), in holding:

In cases involving unfair labor practices other than a general refusal to recognize and bargain, the Board considers several factors to determine whether there is a causal relationship between unremedied unfair labor practices and the subsequent employee expression of disaffection with the incumbent union. These 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 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. 328 NLRB at 301–302.

In applying those factors to the instant case, I note that respect to the first factor noted above, the Respondent's bargaining in bad faith occurred approximately 8 months prior to the withdrawal of recognition as did its unlawful refusal to provide information. The nature of the Respondent's unfair labor practices are such, however, that they have a lasting effect and would reasonably cause employee disaffection from the Union. In this regard, in *Prentice-Hall, Inc.*, 290 NLRB 646, 672–673 (1988), the Board clearly indicated that bad faith bargaining completely taints an employee petition relied on by an employer to withdraw recognition from an incumbent union. In addition, the Respondent's unlawful refusal to provide information is of a continuing nature since, without that information, the Union is greatly hindered in bargaining in a knowing and intelligent fashion. With respect to the second factor, as noted above, the nature of the Respondent's unlawful conduct in bargaining in bad faith and refusing to provide relevant information related to the bargaining clearly has a greatly detrimental and lasting effect on employees. With respect to the third factor, I find that that the passage of time without any real prospect of reaching a contract, has a substantial tendency to cause employee disaffection from the Union. As noted above, in *Prentice Hall, Inc.*, supra, the Board found that the employer's bad faith bargaining nullified an employee petition expressing employee dissatisfaction with the union. Finally, I find, based on the principles expressed in *Prentice-Hall, Inc.*, that it is manifest that the Respondent's conduct in bargaining

¹⁸ At the trial, counsel for the General Counsel clearly expressed the position, consistent with the allegations of the complaint that, in addition to contending that the Respondent's withdrawal of recognition occurred in the context of unremedied unfair labor practices, the General Counsel was also alleging that the Respondent had not established, by a preponderance of the evidence, that there was an actual loss of majority status at the time it withdrew recognition from the Union. (Tr. 234–235.)

in bad faith and refusing to provide relevant and necessary information would adversely affect employees' desire to engage in activities on behalf of the Union, since such conduct greatly hinders the Union's effectiveness in representing the unit.

I find the cases relied on by the Respondent in support of its position that, if I should find any unfair labor practices occurred here, they are insufficient to conclude that the employee petition was affected by those unfair labor practices, to be distinguishable from the instant case. In *Champion Enterprises Inc.*, 350 NLRB 788 (2007), the Board found that the respondent had refused to provide to the union requested information regarding company procedures regarding handling customer complaints and unilaterally laid off employees in violation of Section 8(a)(5) and (1). The Board further found that the Respondent had also committed two independent violations of Section 8(a)(1). The Board found that the unfair labor practices that occurred were insufficient to cause employee disaffection with the union. In making this finding, the Board specifically noted that there was no evidence that the respondent had engaged in bad-faith bargaining during its negotiations with the union. *Id.* at 792. In the instant case, of course I have found that the Respondent has engaged in bad faith bargaining and *Prentice-Hall, Inc.*, supra, stands for the proposition that it is a given that such conduct has a lasting and negative impact on employees

I also find *Bunting Bearings, Corp.* 343 NLRB 479 (2004), to be distinguishable from the instant case. There, the Board found that two independent violations of Section 8(a)(1), the discharge of one employee in violation of Section 8(a)(3) and (1), and a partial lockout of nonprobationary bargaining unit employees in violation of Section 8(a)(5) and (1) were insufficient to taint the employee petition that the respondent relied on to withdraw recognition from the union. *Id.* at 483 fn. 17. Unlike the instant case, there was no finding that the respondent engaged in a pattern of bad faith bargaining. Again, *Prentice-Hall, Inc.*, makes it clear that an unremedied pattern of bad faith bargaining has the effect of causing employee disaffection from the union.

Based on the foregoing I find that a causal relationship existed between the Respondent's unfair labor practices and the petition received by the Respondent on July 10, 2014, and therefore did the Respondent cannot rely on that petition to assert that the Union no longer enjoyed majority status as of that date. Accordingly, I find that the Respondent violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union on and after July 10, 2014.

As noted above, General Counsel and the Union also contend that the Respondent's withdrawal of recognition violated Section 8(a)(5) and (1) because the Respondent did not meet its burden to establish that the Union had, in fact, lost majority support.

In *Levitz*, supra, at 725, the Board held that:

"[A]n employer may rebut the continuing presumption of an incumbent union's majority status, and unilaterally withdraw recognition, only on a showing that the Union has, in fact, lost the support of a majority of the employees in the bargaining unit.

....

We emphasize that an 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 he 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). (Footnote omitted.)

In *Latino Express*, supra, at 15 the Board clearly indicated that when an employer relies on the employee petition to establish the union's loss of majority support it is the employer's obligation to authenticate the signatures on the petition that it relies on.

I find that July 10, 2014, the day the Respondent withdrew recognition, the unit was composed of 26 employees, including Neace and Sterczek. I base this finding on the employee census that was submitted to the Union on April 11, 2014, and Timothy Orłowski's uncontradicted testimony that none of the employees on that list had left voluntarily or been terminated prior to July 9, 2014. The petition that the Respondent relied on to withdraw recognition contained 16 signatures, including those of Neace and Sterczek. Before it withdrew recognition, the Respondent did not undertake any review of employee signatures on personnel records but rather relied solely on Timothy Orłowski's assessment that the signatures appeared valid to him.

In the instant case, the only evidence regarding the authenticity of the signatures on the petition came from the testimony of Timothy Orłowski. The Respondent did not call any employees to testify that they solicited signatures or signed the petition. The Respondent also did not introduce any personnel records with employee signatures in order for me to compare the signatures on the petition to signatures contained within the Respondent's regular business records. On direct examination Orłowski testified that he had known the employees for a long time, had seen their signatures on a multitude of documents, and the signatures looked valid to him. On cross-examination, however, Orłowski admitted that Brandon Trezzo and Brandon de la Cruz were newer employees and that he had not seen their signatures many times prior to July 10, 2014. Orłowski also admitted that there were other employee signatures that he had not seen very often because they were newer employees. As set forth above, there were four other employees in addition to De la Cruz and Trezzo, who were hired in 2013. Coronel was hired on April 8, 2013, approximately 2 weeks before Trezzo. Keiler was hired on July 15, 2013; Krasinski was hired on August 7, 2013; and Mennotti was hired on September 5, 2013.

Timothy Orłowski's admitted at the trial that he was not very familiar with the signatures of De la Cruz and Trezzo and some of the other newer employees. Objective evidence establishes that in addition to Trezzo, four other employees were hired in 2013 after De la Cruz. I find that Timothy Orłowski's testimo-

ny, uncorroborated by any other evidence, establishes that at most, 10 of the 16 signatures on the petition were valid. Given Orłowski's admitted unfamiliarity with the signatures of De la Cruz, Trezzo, and the four other employees hired in 2013, and without any other evidence to establish the validity of those signatures, I find that the Respondent did not carry its burden to establish the authenticity of those six signatures. Since I find that Timothy Orłowski's uncorroborated testimony can only establish the authenticity of 10 of the 16 signatures on the petition, I find that Respondent has not established by a preponderance of the evidence that the Union had, in fact, lost majority status on July 10, 2014.¹⁹ Accordingly, I also rely on this basis to conclude that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union on July 10, 2014.

Whether they Respondent Violated Section 8 (a) (5) and (1) of the Act by denying the Union's Request to Conduct a Health and Safety Inspection

As set forth in greater detail above, on July 10, 2014, the Union requested that the Respondent provide available dates for the union to conduct a safety and health inspection to review the "OSHA matters that require abatement and compliance." The Respondent denied the Union's request to conduct a health and safety inspection on the basis that it had withdrawn recognition.

In *Holyoke Water Power Co.*, 273 NLRB 1369 (1985), enfd. 778 F.2d 49 (1st Cir. 1985), the Board noted that health and safety matters are mandatory subjects of bargaining upon which an employer is obligated to bargain on request. The Board determined that in granting a union access to an employer's property to insure the health and safety of employees, it is necessary to determine that the responsible representation of employees can only be achieved by a union having access to an employer's premises. Under such circumstances, an employer's property rights must yield to grant a union reasonable access to the facility. Applying that test, the Board granted the union reasonable access to the employer's facility in order to conduct a survey of potential health and safety hazards.

In *Standard Motor Products*, 331 NLRB 1466, 1494 (2000), the Board determined that an employer violated Section 8(a)(5) and (1) when it refused to provide the union access to its facility for a health and safety inspection by the union's safety expert, after the union had been presented with the number of complaints by employees regarding safety issues in the plant.

¹⁹ There is no stipulation in the record between the parties regarding the exact number of employees in the bargaining unit on July 10, 2014. At the hearing, the General Counsel and the Union appeared to suggest that Harve and Sterczek are supervisors within the meaning of Section 2(11) of the Act and thus should be excluded from the unit. There is, however, scant evidence in the record regarding the job duties and authority of Harve and Sterczek. Based on the circumstances, I find that it is unnecessary to determine the status of Neace and Sterczek. If Neace and Sterczek are included in the unit the Respondent authenticated 10 signatures in a unit of 26 employees. If Neace and Sterczek are excluded from the unit, the Respondent has only authenticated 8 signatures in a unit of 24 employees. Under either scenario, the Respondent has not established that the Union, in fact, lost majority status in the unit based on the employee petition.

In the instant case, since employees had presented concerns to the Union regarding safety matters in the plant after OSHA had cited the Respondent for safety violations, I find that the Union has demonstrated it was necessary for it to have access to the Respondent's facility in order to determine the status of the Respondent's compliance with the OSHA citations. The fact that a fair reading of the Respondent's implemented offer granted the Union reasonable access to the plant in order to discuss safety matters with the Respondent strengthens the Union's position in this matter.

Since the only basis for the Respondent's refusal to grant the Union reasonable access to its facility in order to conduct a health and safety inspection was its reliance on its withdrawal of recognition on July 10, 2014, the Respondent has violated Section 8(a)(5) and (1) by summarily rejecting the Union's request for a health and safety inspection.

CONCLUSIONS OF LAW

1. The Union is now and, at all material times, has been the exclusive bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time production, maintenance, and shipping and receiving employees employed by the Employer at its facility currently located at 11355 Franklin Avenue, Franklin Park, Illinois; but excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

2. By failing to bargain in good faith with the Union by engaging in surface bargaining without the intention of reaching an agreement, the Respondent violated Section 8(a)(5) and (1) of the Act.

3. By refusing to provide the Union with necessary and relevant information, the Respondent violated Section 8(a)(5) and (1) of the Act.

4. By withdrawing recognition from the Union as the collective-bargaining representative of the above-noted unit on July 10, 2014, the Respondent violated Section 8(a)(5) and (1) of the Act.

5. By denying the Union access to its Franklin Park, Illinois facility to conduct a health and safety inspection, the Respondent has violated Section 8(a)(5) and (1) of the Act.

REMEDY

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

As part of the remedy for the Respondent's unlawful withdrawal of recognition in violation of Section 8(a)(5) and (1) and its failure to bargain in good faith, I shall order the Respondent to on request, recognize and bargain with the Union in good faith. The General Counsel and the Union argue that, under the circumstances present in this case, it is appropriate to extend the Union's certification year pursuant to the principles expressed in *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), and its progeny. In *Dominguez Valley Hospital*, 287 NLRB 149 (1987), the Board explained these principles as follows:

In order to assure a reasonable time for bargaining "without

outside interference or pressure.” The Board has held that “absent unusual circumstances, an employer will be required to honor a certification for a period of one year.” *Mar-Jac Poultry Co.* 136 NLRB 785, 786 (1962) (footnote omitted). As the Board there held, when an employer has, during part or all of the year immediately following the certification, refused to bargain with the elected employee representative and thereby “taken from the Union” the opportunity to bargain during the “the period when Unions are generally at their greatest strength,” the Board will take measures to assure a period of at least a year of year good-faith bargaining during which a bargaining representative need not fend off claims that it has lost its majority support.” Id at 149.

In *Dominguez Valley Hospital*, at 650, the Board reiterated its policy that the certification year begins to run on the date of the parties first bargaining session. The Board has, depending on the circumstances, also extended the certification year for less than a year for what it considers to be a “reasonable period of time *Latino Express, Inc.*, supra, fn. 6 and JD slip op at 17 fn. 21; *Valley Inventory Service*, 295 NLRB 1163, 1167 (1989).

In the instant case, as noted above, pursuant to an election conducted in Case 13–RD–068844, the Union was again certified as the representative of the bargaining unit on July 31, 2012. Pursuant to a settlement agreement approved on July 8, 2013, the Respondent agreed to an extension of the Union’s certification year for 1 year from the date of the approval of the settlement agreement. In late August 2013, the Union contacted the Respondent to discuss the discharge of the Union’s steward at the Franklin Park facility and to schedule negotiation meetings. On September 12, 2013, the parties met to discuss the discharge of the Union’s steward and some insurance issues involving two employees. At that meeting the parties agreed to meet for collective-bargaining on October 31, 2013. As noted above in detail, beginning on October 31, 2013, I find that the Respondent engaged in a course of conduct that established that it was engaging in surface bargaining without the intention of reaching an agreement in violation of Section 8(a)(5) and (1). Thereafter, the Respondent refused to provide the Union with relevant and necessary information in violation of Section 8(a)(5) and (1). There is no contention and no evidence to establish that the Respondent engaged in any unlawful conduct at the meeting held on September 12, 2013. Under these circumstances, I find that it is appropriate to extend the certification year for a 10-month period after the parties have commenced good-faith bargaining.

The General Counsel and Union also request that the Respondent be ordered to post a notice to employees in both English and Polish. When the Union was first certified as the bargaining representative of the unit in 2007, approximately two thirds of the bargaining unit was predominantly Polish speaking. At meetings the Union had to rely on the use of a translator to communicate with a substantial number of unit employees. As late as 2013 approximately two thirds of the remaining 26 unit employees were predominantly Polish speaking. In such circumstances, the Board’s policy is to post a notice in multiple languages in order to fully communicate to employees their rights under the Act. *Alstyle Apparel*, 351 NLRB 1287 (2007). Accordingly, I shall order the notice to be posted in both Eng-

lish and Polish.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁰

ORDER

The Respondent Arlington Metals Corp., Franklin Park, Illinois its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to bargain in good faith with the Union as the collective-bargaining representative of the employees in the following appropriate unit by engaging in surface bargaining without the intention of reaching an agreement. The appropriate unit is:

All full-time and regular part-time production, maintenance, and shipping and receiving employees employed by the Employer at its facility currently located at 11355 Franklin Avenue, Franklin Park, Illinois; but excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

(b) Refusing to provide the Union with necessary and relevant information contained in its December 16, 2013 information request.

(c) Withdrawing recognition from the Union as the collective-bargaining representative of the employees in the unit described above.

(d) Denying the Union access to its Franklin Park, Illinois facility to conduct a health and safety inspection.

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

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

(a) On request, recognize and bargain in good faith with the Union for a reasonable period as set forth in the remedy portion of this decision, as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time production, maintenance, and shipping and receiving employees employed by the Employer at its facility currently located at 11355 Franklin Avenue, Franklin Park, Illinois; but excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

(b) Provide the Union with the following necessary and relevant information it requested on December 11, 2013:

Audited financial statements for the past 4 years (2009–2012) certified by an outside CPA.

Financial reports for 2010–2013 which include a detailed income statement, a detailed balance sheet, and a statement of

²⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

cash flows.

Sales by customer for each of the last 4 years (2009–2012) and current (2013) and projected sales for the next 3 years (2014–2016).

An explanation of the Employer's business conditions, including specific changes that have occurred and the actual impact on the Employer's financial condition.

Provide specific data, reports and analysis.

Federal and state tax returns for the last 4 years (2009-2012).

(c) Provide the Union reasonable access to its Franklin Park, Illinois facility in order to conduct a health and safety inspection.

(d) Within 14 days after service by the Region, post at its facility in Franklin Park, Illinois, copies of the attached notice marked "Appendix"²¹ in both English and Polish. Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 31, 2013.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 23, 2015

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

²¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail to bargain in good faith with the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied, Industrial and Service Workers International Union, AFL-CIO (USW) (the Union), as the collective-bargaining representative of our employees in the following appropriate unit by engaging in surface bargaining without the intention of reaching an agreement. The appropriate unit is:

All full-time and regular part-time production, maintenance, and shipping and receiving employees employed by the Employer at its facility currently located at 11355 Franklin Avenue, Franklin Park, Illinois; but excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

WE WILL NOT refuse to provide the Union with necessary and relevant information contained in its December 16, 2013 information request.

WE WILL NOT unlawfully withdraw recognition from the Union as the collective-bargaining representative of the employees in the unit described above.

WE WILL NOT deny the Union reasonable access to our Franklin Park, Illinois facility to conduct a health and safety inspection.

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

WE WILL, recognize the Union as your collective-bargaining representative, and on request, bargain in good faith with the Union and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit.

WE WILL provide the Union with the following necessary and relevant information it requested on December 11, 2013:

Audited financial statements for the past 4 years (2009–2012) certified by an outside CPA.

Financial reports for 2010-2013 which include a detailed income statement, a detailed balance sheet, and a statement of cash flows.

Sales by customer for each of the last 4 years (2009–2012) and current (2013) and projected sales for the next 3 years (2014–2016).

An explanation of the Employer's business conditions, including specific changes that have occurred and the actual impact on the Employer's financial condition.

Provide specific data, reports and analysis.

Federal and state tax returns for the last 4 years (2009–2012).

WE WILL provide the Union reasonable access to our Franklin Park, Illinois facility in order to conduct a health and safety inspection.

ARLINGTON METALS CORP.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/13-CA-122273 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

