Wayron, LLC *and* International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers of America, Local 104; The International Association of Machinists and Aerospace Workers, AFL–CIO, District Lodge 160, Local Lodge 1350; and The International Union of Painters and Allied Trades, District Council 5. Case 19–CA–032983

August 2, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

This case involves the Respondent's refusal to submit to a financial audit during contract bargaining and the Respondent's unilateral changes to employees' wages and benefits after it terminated the bargaining.[1] Contrary to the judge and the dissent, we find that the Respondent's communications about its financial circumstances, viewed in their entirety and in context, conveyed inability to pay, rather than unwillingness. We therefore conclude that the Respondent acted unlawfully when it refused the Unions' request for a financial audit and that this refusal prevented the parties from reaching a valid impasse. We additionally find that, even assuming, arguendo, that the parties had reached a valid impasse, the Respondent acted unlawfully by unilaterally implementing terms and conditions of employment that did not reasonably fall within its final offer to the Unions. Thus, we reverse the judge's dismissals of those allegations.[2]

Facts

The Respondent owns and operates a metal fabrication shop. It employs metalworkers, mechanics, and painters, represented, respectively, by local affiliates of the Boilermakers, Machinists, and Painters Unions. The parties' most recent collective-bargaining agreement ended by its terms on September 30, 2010.

The parties' negotiations for a new agreement during late 2010 and early 2011[3] were focused almost exclusively on labor costs. Throughout, the Respondent's owners, Jeff Spendlove and Faye Dietz, and its labor consultant, Dean Nordstrom, expressed the Respondent's need to reduce the average per-hour cost of wages and benefits from $30.51 to $24 or less, so that the Respondent could be competitive in bidding for work. The Unions initially demanded an increase of $1.25 per hour, but ultimately they sought only the continuation of the expiring agreement's monetary terms.

It is undisputed that, before and during the negotiations, the Respondent was obtaining few of the jobs that it bid for and had laid off most of its unit employees. In the early bargaining sessions, the Respondent was represented by Dietz and Nordstrom, who provided a September 15 proposal (the "red and blue contract," which was prepared by Spendlove) that reflected drastic changes to both economic and noneconomic terms. The Respondent later calculated that the red and blue contract would have

[1] On March 29, 2012, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The General Counsel 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. The Respondent, by declining to file exceptions or cross-exceptions, has accepted the judge's findings; however, its answering brief to the General Counsel's exceptions describes its conduct in ways that contradict some of the judge's credibility findings. Even if the Respondent's characterization of the facts had been properly raised in the form of exceptions, which they were not, we would find no basis, applying *Standard Dry Wall*, to reverse the judge's findings.

[2] We adopt the judge's findings, to which the Respondent has not excepted, that the Respondent violated Sec. 8(a) (1), (3), and (5) in various respects between February 4 and August 25, 2011. We shall correct the judge's Conclusion of Law 3 and the remedy section of his decision to properly reflect his uncontested finding that the Respondent violated Sec. 8(a)(3) and (1) by terminating the employees and making them reapply for work under the unilaterally changed conditions as a result of the Unions' failure to agree to the Respondent's bargaining demands. Further, in accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall modify the judge's recommended remedy by ordering tax compensation and Social Security reporting remedies. In addition, we shall modify the judge's recommended Order to conform to our findings and the Board's standard remedial language, as described in the Amended Remedy below. Finally, we shall substitute a new notice to conform to the modified Order and the Board's decision in *Durham School Services*, 360 NLRB No. 85 (2014).

In light of our finding that the Respondent failed to reach impasse for other reasons, we find it unnecessary to pass on whether the Respondent violated Sec. 8(a)(5) and (1) by engaging in overall bad-faith bargaining because it would not materially affect the remedy.

We have corrected several inadvertent errors made by the judge in his decision, including misspellings, typographical errors, misnomers, and mistaken references. Those errors have not affected our disposition of this case.

[3] Dates are between September 2010 and August 2011 unless otherwise stated.

reduced average hourly labor costs by $10, nearly a 33 percent reduction. At the September 15 bargaining session and at the next session, on October 6, the parties discussed the terms of their proposals to some extent but mainly spoke about the Respondent's financial hardship and the limited pool of money available for compensation. Nordstrom's bargaining notes from October 6 show that the parties discussed their overall interests: "attract/retain/co[mpany] viability vs. Unions[']concerns for continue[d] employment."[4] Also on that day, in response to the Respondent's question about the employees' financial priorities, the Unions stated that wages were a priority.

The next bargaining session, on November 4, was the first session that Spendlove attended. Speaking for the Respondent, he offered a proposal that would reduce average compensation to $24 per hour and would give the employees the choice of which cost items to cut. Spendlove spoke about the Respondent's difficulties in securing work, because of its increased loss of bids, and in staying competitive. He did not state that the Respondent was unable to fulfill current contractual obligations to actively working employees or unable to pay those employees more money. Rather, he testified, "what I tried to convey was . . . that "Wayron as a company wasn't in jeopardy . . . [but] that what we were not going to be able to provide was jobs" if the company was not competitive. Spendlove also informed the Unions that the Respondent "needed the cost reductions 'in a short term fashion' due to the need to acquire a new line of credit," and that the contract must be signed by February. Machinists Business Representative Gregory Heidal credibly testified that Spendlove stated that the company was "having a hard time, having difficulties" and "that they were looking for a competitive edge or an even playing field, if you will, with his competitors, and that he needed to reduce the costs of the contract." Heidal further testified that "[e]ssentially . . . they had to come to an agreement with the bank and the landlord"[5] and "it was important for us to get on board for them to make some sort of agreement so that they could go to the bank and say, hey, this is where we're at." Heidal added, "I believe Jeff [Spendlove] said they were going to be in financial trouble if they were unable to make some agreement with the bank." As reflected in Spendlove's and Nordstrom's separate bargaining notes for November 4, Spendlove further explained that the Respondent was operating at a financial loss, having earned only $2.5 million that year but needing $4.5 million simply to break even. Spendlove's bargaining notes show he also stated that the Respondent had lost money in 2008, 2009, and 2010 and that it was "out of reserves" and "into debt."[6] Nordstrom's notes similarly reflect that Spendlove said to the Unions that it had "no reserves now – can't borrow in this economy – overheads have been reduced as much as humanly possible." Spendlove told the Unions that he wanted to explain to employees "why such a significant reduction in wages and/or benefits was essential," and the Unions agreed to Spendlove's speaking directly to the employees about the matter.

Spendlove met with unit employees the next day, November 5. He told the employees that he needed them to take a large cut in pay and/or benefits; it was not that the Respondent could not pay, it was that it could not be competitive, and Spendlove was worried about providing jobs. Spendlove said that the Unions and employees could choose how to allocate the necessary reduction of pay and benefits.

On November 9, Boilermakers Assistant Business Manager Lance Hickey, on behalf of the Unions, sent the Respondent a request for access by a union-selected auditor to any financial records that the auditor deemed necessary to substantiate the Respondent's claim of inability to pay. The request characterized the Respondent's bargaining stance as an assertion "that it is financially unable to pay wages and benefits equal to [those] in the expired Collective Bargaining Agreement and . . . that it needs wage and benefit concessions to remain in business."[7] The Respondent responded to the request the next day, declining to allow "access for any audits concerning this matter." It stated that the Respondent was not claiming, and had not claimed, an inability to pay wages and benefits under any contract. Rather, the Respondent reiterated, it was "unable to remain competitive in the current global economic climate, and is seeking methods of reducing costs to continue to secure work."

Negotiations continued with a brief session on December 20. Nordstrom sought to clarify again that the Re-

[4] The Unions' bargaining notes confirm that Nordstrom stated, "the viability of the co[mpany] is always important. So is the retention of employees."

[5] The judge found that the Respondent had already reached an agreement with the landlord to reduce its rent.

[6] The Unions' bargaining notes are consistent with Spendlove's but more detailed. Among other points, they indicate that Spendlove stated that the Respondent had "no contracts on the books" that would reduce its deficit for the year.

[7] The Unions explained at the hearing that they asked to review the finances based on the Respondent's negotiators' statements about its financial predicament. Thus, although Nordstrom said, "you will never hear us say we don't have the ability to pay," the Respondent's consistent refrain that it was not making any money and "can't compete with th[e current] contract," and its claim that it didn't have any new work, caused the Unions to perceive that the Respondent was making a claim of going broke.

spondent had not claimed an inability to pay.[8] Hickey, according to Spendlove's bargaining notes, stated that the Unions "were 'unwilling to take reductions' to the employees – that the Union/employees feel that what they get already is 'inadequate!'" The Respondent rejected Hickey's suggestion that the existing contract be extended for a year.[9] In response to Hickey's assertion that retaining vacation and holidays was significant to employees, the Respondent "asked if holidays and vacation were significant enough to put the Company [out] of business."

The parties met again on January 28, this time with the assistance of an FMCS mediator conducting shuttle negotiations.[10] The Respondent maintained its insistence on a compensation reduction to $24 per hour, while the Unions opposed any reduction below the status quo. The Respondent declined the mediator's proposed 2-week "think about it" period. The mediator informed the parties that they were so far apart that there was no further need for her services. Immediately after that meeting, the Respondent emailed the Unions a notification of its intent to terminate the contract on February 4.

On February 2, by email, Spendlove clarified that the Respondent's best and final offer was the September 15 red and blue contract, with the $6.51-per-hour reduction proposed in November. In response, the Unions proposed a $0.75-per-hour wage increase for each year of the contract, an offer that the Respondent apparently rejected by email the next day. On Friday, February 4, the parties met again. They reviewed the Unions' February 2 offer, but Hickey then proposed simply maintaining the status quo. The Respondent again insisted that it needed the reduction to $24 per hour to match its competitors' compensation levels and to show to the bank in order to get the Respondent's line of credit extended. Spendlove's notes of that day's bargaining state: "Talked about the past/current/future economy & subcontracting work – see one anothers' [sic] position – Wayron stay in business – Union retain pay/benefits for guys & themselves. Last chance to work something out but cannot continue at current cost." The Respondent stated that it would implement new terms and conditions of employment on Monday, February 7.

That afternoon, when the actively working employees went to clock out, Dietz and Spendlove told them not to come in on Monday but to take employment applications and bring them in on Tuesday. At the hearing, Spendlove explained that he and Dietz needed the intervening time to formulate the details of the economic package, that is, to decide on general and job classification-specific and seniority-specific wages and benefits. Over that weekend, Spendlove and Dietz decided, without the Unions' input, on a new wage and benefits package that was intended to conform to the final proposal's average compensation rate of $24 per hour. According to the Respondent, it did so by raising wages; decreasing vacation, holiday, and bereavement benefits; and eliminating contributions to the Unions' pension and health and welfare plans. The record is not clear whether the Respondent also implemented the changes to noneconomic terms that were contained in the red and blue contract proposal.

In letters dated February 7, the Respondent discharged all its employees, including those who were on layoff status at the time. The employees who were working on February 4 reapplied and returned to work on February 8 under the Respondent's new terms and conditions. Based on the discharges and a series of subsequent actions, the judge found that the Respondent violated Section 8(a)(1), (3), and (5) of the Act.[11] As noted above, the Respondent did not file exceptions regarding those findings.

The Regional Director for Region 19 issued the complaint in this case and dismissed pending decertification petitions regarding the Boilermakers and the Machinists, based on which the Respondent had withdrawn recognition from those two unions and refused to negotiate with their representatives. After the Board authorized the General Counsel to seek a 10(j) injunction in this case, the Regional Office and the Respondent entered into a consent agreement on August 26, 2011, under which the Respondent resumed negotiations with all three Unions and reinstated to laid-off status the employees who had not been rehired after the February 7 terminations.

[8] Nordstrom's bargaining notes reflect that he stated: "Clarification point: inabil. to pay is an issue of not being able to meet payroll & pay benefits – we have stated from the start of these neg. that we would never make a claim of inab. to pay – We did, on 11/4/10 make a presentation on the co. ability to compete in the marketplace."

[9] Spendlove testified that Hickey would not give the Respondent a concession because it would lead to a domino effect for all the Unions nationwide. On cross-examination, Hickey agreed that giving one employer concessions would "most likely" lead to others asking for reductions, but he noted that concessions had been granted in other agreements in 2008 and 2009, "but nothing to the extent of what Wayron was proposing."

[10] Nordstrom's bargaining notes reflect that the Respondent again stated its position as follows: "no inability to pay – there simply is no work based on co. inability to compete in the market place – comes down to some [employ]ees at reduced or no [employ]ees at status quo." The notes do not make clear whether the Unions were present for those statements or only the FMCS mediator.

[11] Those violations, including the Respondent's conduct underlying them, are set forth in the judge's decision. Judge's decision, infra, slip op. at 28–30, 32–33.

Discussion

Request for Financial Audit

Under the rationale of *Nielsen Lithographing Co.*,[12] bargaining claims of an inability to pay differ from bargaining claims of competitive disadvantage: the former require the party making the claim to provide substantiating financial information if requested, while the latter do not. The Respondent contends that it made the latter claim only, and that it therefore was not obligated to submit to the Unions' requested financial audit, and the judge agreed. That is, the judge found that the Respondent never stated or implied that it could not afford the Unions' proposals, and that none of the Respondent's other statements in negotiations could reasonably be understood as asserting an inability to pay. We adopt the judge's credibility-based findings regarding the testimony about statements made by the Respondent's representatives; however, in light of the surrounding facts, we disagree with the judge's conclusions regarding the reasonable implications of those statements. Contrary to the judge, we find that the Unions would reasonably have understood that the Respondent was asserting its inability to continue compensating employees at the expiring contract's rates, let alone at the increased wages and benefits sought by the Unions, and we therefore conclude that the Unions were within their rights to demand an audit of the Respondent's financial records in light of those statements.

Initially, we note that longstanding Board law establishes that our analysis does not turn on whether or not an employer utters particular "magic words." As we explained in *Stella D'oro Biscuit Co.*:[13]

> [i]n determining whether there has been a claim of inability to pay, the Board evaluates an employer's claims "in the context of the particular circumstances in that case." *Lakeland Bus Lines*, 335 NLRB 322, 324 (2001), enf. denied 347 F.3d 955 (D.C. Cir. 2003). The Board does not require that the employer recite any "magic words," but only that its statements and actions be specific enough to convey an inability to pay. *Atlanta Hilton & Tower*, 271 NLRB 1600, 1602 (1984).

Thus, we must look beyond the Respondent's carefully phrased assertions that its position on employee compensation related to competitiveness and that it would never say that it could not afford the Unions' bargaining proposals. Rather, we consider the Respondent's statements and actions in the context of the entire factual picture, drawn not only from the credited testimony but also from the Respondent's bargaining notes, which constitute its contemporaneous record of its (and the Unions') statements during negotiations.[14]

As described above, the Unions made their request for an audit on November 9, after the Respondent had set forth the exigency of its financial circumstances—including telling the Unions on November 4 that it had suffered losses each year since 2008 and was "out of reserves [and] into debt"—and had offered a similar explanation to the employees on November 5. As the judge found, Spendlove "conveyed to the Unions that the Respondent needed the cost reductions 'in a short term fashion' due to the need to acquire a new line of credit."[15] That is, Spendlove directly connected the Respondent's bargaining demand for concessions with its need to demonstrate to the bank that it had reduced expenses and increased income. Spendlove wanted to meet with the employees, he testified, "to explain to them what he had told the Unions, because it was a very significant reduction that they were being asked to accept and he wanted the employees to understand why such a significant reduction in wages and/or benefits was essential."[16] In speaking to the employees on November 5,

[12] 305 NLRB 697 (1991), affd. sub nom. *GCIU Local 508 v. NLRB*, 977 F.2d 1168 (7th Cir. 1992).

[13] 355 NLRB 769, 770 (2010), enf. denied sub nom. *SDBC Holdings, Inc. v. NLRB*, 711 F.3d 281 (2d Cir. 2013).

[14] In contrast, the dissent accepts the Respondent's magic words at face value and rests its conclusion on them. In so doing, it isolates those words from the context that gave them meaning and disregards the conflicting statements in the Respondent's own documents. Although the dissent accuses us of "completely disregarding what was stated and . . . insisting instead that the party must have 'meant' precisely the opposite of what was stated," we simply consider the Respondent's statements in full and in context, as a reasonable listener would.

[15] Judge's decision, infra, slip op. at 26. Similarly, in recounting the Respondent's statements to the Unions and the employees, the Respondent's brief essentially acknowledges that the Respondent communicated to them that the company's access to loans while it operated at a loss depended on its reducing labor costs. See Respondent's Response to the Acting General Counsel's Exceptions at 6, 7, and 22. The dissent suggests that the Unions should have requested communications between the Respondent and the bank, rather than a financial audit. But this suggestion—which, in any event, was never raised by the Respondent—is a red herring. In view of the drastic reductions the Respondent was proposing, the Unions had a reasonable interest in confirming that the Respondent's financial situation was as dire as its representatives claimed. In addition, the requested information would enable the Unions to intelligently evaluate the Respondent's proposal and formulate counterproposals, including seeking financial savings from sources other than the compensation of the employees whom the Unions represented. Copies of the Respondent's communications with the bank would not have served that purpose.

[16] The dissent barely acknowledges the Respondent's November 5 meeting with its employees. Although that meeting was not a negotiating session with the Unions, it was admittedly intended to communicate to employees the Respondent's extreme financial straits, which the Respondent had already communicated to the Unions in the November 4 bargaining session, and to gain employees' support for the drastic

Spendlove "told them that Wayron had to pull 'X' number of dollars per year to cover overhead." Even in the context of Spendlove's further statements that his concern was about being competitive, such explanations would reasonably have conveyed the exigency of the Respondent's need for cost reductions.[17]

In this regard, we observe that "competitive disadvantage" and "inability to pay," although different, are neither mutually exclusive nor separated by a sharp dividing line. The Board acknowledged in *Nielsen*:[18]

> We do not say that claims of economic hardship or business losses or the prospect of layoffs can never amount to a 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 being negotiated.

It is, of course, an entirely unsurprising proposition that competitive disadvantage, if continued at length, may eventually lead to inability to pay—especially when the business is losing money and lacks financial resources to cover its losses.[19] Here, we find that the facts and circumstances establish that the Respondent, despite its surface characterizations to the contrary, was asserting that it could not pay, during the life of the contract being negotiated, the existing (or higher) levels of compensation that the Unions sought.[20] Spendlove himself stated during the February 4 bargaining session that the Respondent's negotiating goal was "to stay in business" and that it "cannot continue at current cost."[21] And the Respondent had raised the company's viability as an issue in negotiations at least as early as October 6.

The facts of *Nielsen*, in which the Board ultimately found that the employer had claimed not an inability to

concessions the Respondent sought in negotiations. Those two meetings with the Unions and the employees immediately preceded the Unions' request for a financial audit.

[17] See *Lakeland Bus Lines*, *Inc.*, 335 NLRB 322, 325 (2001) (employer's statement that it needed to get "back into the black in the short term," combined with its repeated references to financial losses, was "reasonably construed as a statement that the [employer] was presently unprofitable and as such was unable to pay more than that contained in its final offer"), enf. denied 347 F.3d 955 (D.C. Cir. 2003). In denying enforcement, the D.C. Circuit found it significant that the employer identified its loss as "short-term." Here, the Respondent expressly stated that it was suffering its third consecutive year of losses.

In discussing the denial of enforcement in *Lakeland Bus Lines*, the dissent disregards the court's consideration of the short-term losses there, focusing instead on the employer's later clarification of its statements, which the dissent finds comparable to the facts of this case. But, here, although Spendlove responded by repeating the Respondent's magic words, he and the Respondent's other bargaining representatives thereafter continued to make statements undermining their claimed position.

[18] 305 NLRB at 700.

[19] See *Lakeland Bus Lines*, 335 NLRB at 325 (employer "did not qualify any of its claims [regarding its financial circumstances] with statements suggesting that it continued to be profitable or that despite the loss of revenue there existed some alternative means of paying more than its final offer"); see also *Republic Die & Tool Co.*, 343 NLRB 683 (2004) (requested audit must be allowed where employer relied on global competition and company's financial losses as bases for unilaterally cutting employee benefits).

[20] The dissent pulls out of context one sentence of Heidal's explanation for why the Unions requested the audit, suggesting that the Unions made the request with full understanding that the Respondent was asserting only an inability to compete. In context, however, it is abundantly clear that the Unions recognized that the Respondent's communications reflected a more expansive financial inability, even as its representatives strategically insisted that they were asserting only an inability to compete. Thus, Heidal explained:

> Q. And why did you ask for [the audit]?
> A. Well, because it kept -- they weren't crying poverty. In fact, in our first meeting with the company we asked them about that. They were telling us, you know, things were tough. And so we asked them if they were crying poverty. And Dean Nordstrom, I believe, as he said, you will never say -- you will never hear us say we don't have the ability to pay. Okay.
>
> Well, as we continue down this road they continue to beat the same drum that they were not making any money. So at some point you got to go, well, okay, prove it, you know. At this point they're not saying -- they're not crying poverty, but they're telling us they can't afford the contract. They can't compete with that contract. I don't believe they ever said they can't afford the contract.
>
> So, all right, if that's the case, you're telling us you can't compete, then we'll request the financial records. *Where are you at? Are you going broke or not?*
> Q. And weren't they also saying they would go out of business if they didn't get the cuts that they sought?
> A . Yes. They said they were unable to compete and they wouldn't have any work.

(Emphasis added). Heidal's care in articulating the Respondent's precise language bolsters, rather than undermines, his credibility in perceiving that the Respondent's carefully selected competitiveness terminology did not match the overall meaning of its communications. The dissent takes pains to explain why Heidal's final "yes" is entitled to little weight. But as we have explained repeatedly, our analysis does not fixate on one particular word or phrase.

[21] The Respondent's ability to recall a number of its laid-off employees, and to hire new employees, after its implementation of lower compensation, lends support to its claim that the contractual labor costs were an obstacle to winning bids and remaining in business.

The dissent criticizes our reliance on the Respondent's February 4 bargaining notes, finding them too cryptic and too late to support the Unions' November 9 audit request. But, of course, we rely as well on the Respondent's earlier statements, including those referred to in its notes of the bargaining sessions prior to November 9, documents about which the dissent says nothing. We agree that the bargaining notes are not a word-for-word transcript of the negotiations; they are, after all, notes. But our reading of the notes is both objectively reasonable—for example, the Respondent's statement that its goal was to "stay in business" necessarily suggests that it might not be able to do so, despite the dissent's efforts to avoid this obvious conclusion—and consistent with the record as a whole, which confirms the Unions' understanding that the Respondent was claiming it could not remain in business without the concessions it demanded.

pay but only a competitive disadvantage, are distinguishable from this case in several respects. First, in *Nielsen*, the employer never claimed that it was not making a profit; in fact, it insisted that it was profitable.[22] Here, in contrast, the Respondent said to both the Unions and the employees that it was suffering substantial, multiyear losses. Second, in *Nielsen*, the Board found that there was no evidence that competitive disadvantage would lead to inability to pay during the term of the contract being negotiated. Here, the Respondent made it abundantly clear that it needed the wage and benefit concessions to show to the bank by February that it had reduced its labor costs—which the bank was demanding as a condition of extending the Respondent's line of credit. Spendlove communicated on November 4 that the Respondent was "out of reserves," and "in debt."[23] Dietz's testimony that the Respondent would max out its line of credit if it continued operating at a loss, although not discussed by the judge, is uncontroverted. And, in negotiations, Spendlove expressly connected the Respondent's financial difficulties to the company's "viability."[24] Finally, in *Nielsen*, the majority found that the possibility of layoffs was mentioned only as a long-term, amorphous prospect; here, most of the unit employees had already been laid off. The Respondent contends that it was not unable to meet its obligations under the collective-bargaining agreement, because, it asserts, it could continue laying off employees when it could not obtain work.[25] But it had nearly run out of actively working employees to lay off and, in any event, it would still have had to pay fixed costs, such as rent and utilities. This case thus demonstrates, in a way that *Nielsen* did not, a persistent claim of competitive disadvantage that more accurately would have been described as an inability to pay.[26]

Consistent with *Nielsen*, *Shell Co.*, and *Lakeland Bus Lines*, among other precedents, we find that even absent express assertions of an inability to pay, the Respondent's statements demonstrate that it effectively asserted that it could not afford to pay even the wages and benefits of the expiring contract, let alone the increases that the Unions sought in a new contract. The Respondent claimed it had been unprofitable operating with its existing labor costs for several years running; it had no corporate parent willing or able to sustain losses; and its external source of financial resources, the bank that provided its line of credit, was no longer willing to fund such losses without significant cost reductions. In short, the Respondent's demand for concessions in compensation amounted to a claim that it could not pay the existing rates, not that it would not pay them.[27]

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[22] See also *ConAgra, Inc. v. NLRB*, 117 F.3d 1435 (D.C. Cir. 1997) (employer's statements in connection with its demand for wage reductions were not assertions of an inability to pay in the context of its repeated statements that it remained profitable).

[23] This contrasts with *North Star Steel Co.*, 347 NLRB 1364, 1370 (2006), cited by the Respondent. The Board's finding that the employer there had not asserted an inability to pay turned on the fact that its bargaining statements "stayed completely clear of the subject of company assets and its ability to pay employees."

[24] See *Shell Co.*, 313 NLRB 133, 133–134 (1993) (employer "pleaded a present inability to pay" when it stated that it was "losing business" and its financial situation was "bad" and "a matter of survival"). The Respondent and the dissent cite *Richmond Times-Dispatch*, 345 NLRB 195, 197 (2005) and *AMF Trucking & Warehousing*, 342 NLRB 1125, 1126 (2004), in which the Board found no obligation to provide financial information. But in those cases, the Board distinguished *Shell Co.* and *Lakeland Bus Lines*, expressly based on the presence or absence of employer language indicating that the company had insufficient assets to pay and therefore could not survive if it met the union's economic demands.

[25] The Respondent appears to mistakenly interpret ability to pay as relating to its ability to meet its payroll and benefit obligations on any given day (and the dissent seems to join in that error), rather than whether the Respondent could sustain itself at a proposed compensation level throughout the contract's duration.

Unlike our colleague, we are unpersuaded by the judge's inference that Spendlove discussed the Respondent's $4.5 million break-even point, $2 million deficit, and need to secure a line of credit, not to communicate an inability to pay but to convince the Unions and employees that concessions were needed for the purpose of returning laid-off employees to work. Those purposes are not mutually exclusive, and the difference between them is at most a matter of degree. The General Counsel and the judge each strain to parse the Respondent's interest in "providing jobs" as relating, respectively, to operational viability or to recalling laid-off employees, but their efforts only highlight the lack of a clear dividing line. Further, even the judge's strained interpretation of "providing jobs" as recalling laid-off employees may be read as evidence of an inability to pay. See *Lakeland Bus Lines*, 335 NLRB at 325 (statements regarding retention of employees' jobs, in context, supported finding claim of inability to pay).

[26] This case also differs from *Stella D'oro*, supra, in which the Second Circuit denied enforcement, finding, among other things, that the employer's access to funding by its parent company demonstrated that it was asserting unwillingness, rather than inability, to pay, and that proof of its own financial status would not advance contract negotiations. *SDBC Holdings, Inc. v. NLRB*, 711 F.3d at 288–289. See also *Stroehmann Bakeries, Inc. v. NLRB*, 95 F.3d 218, 223 (2d Cir. 1996) (denying enforcement of Board order where employer's parent company had "deep pockets" that could fund losses but chose not to do so). In contrast with both of those cases, the Respondent's only identified source of funding to absorb its losses was the bank, which was insisting on labor-cost reductions before extending the Respondent's line of credit.

[27] No party has asked us to overrule the Board's inability-to-pay decisions, and we need not revisit that body of law here. Nevertheless, this case illustrates that the Board's post-*Truitt* analytical distinction between inability-to-pay cases and less-than-inability-to-pay cases often leads parties to become preoccupied with "magic words," distracting them from genuine dialogue and information sharing that can lead to productive collective bargaining. In an appropriate case, we would consider how the Board has distinguished between "inability to pay" and "competitive disadvantage" claims in post-*Nielsen* cases and whether these distinctions best serve the Act's goal of promoting good-faith bargaining. See *Chemical Workers v. NLRB*, 467 F.3d 742, 749 fn. 4 (9th Cir. 2006), reversing *American Polystyrene Corp.*, 341

The dissent predicts that today's decision will undermine open communication by parties engaged in bargaining. But collective-bargaining participants will continue to understand that bargaining demands for drastic concessions, like those at issue here, will require justification. The dissent's argument appears to reflect fundamental disagreement with the policy judgment that the Supreme Court articulated 6 decades ago in *Truitt*: if a party seeks to use its financial exigency as a bargaining tool, it must, on request, support the asserted exigency. Similarly, in *NLRB v. American National Insurance Co.*, which the dissent quotes at length, the Court stated that "the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement *and support of* his position." Id., 343 U.S. 395, 404 (1952) (emphasis added). What we find today is simply that the Respondent refused to support, as *Truitt* requires, its central and frankly stated bargaining position that drastic wage and benefit cuts were financially necessary. The dissent would validate the Respondent's apparent belief in magic words. But good-faith bargaining in the context of financial hardship does not follow the rules of the game "Password," such that the Respondent wins if it effectively circles around a key word or phrase, successfully describing it without actually uttering it.

The judge, in an alternative rationale, would not have found the violation even if the Respondent had expressly claimed an inability to pay, because, the judge said, the Unions made it clear that they would not have agreed to concessions in any event and both sides knew that an audit would have been futile. In contrast to the dissent, we reject this analysis. It is true that the Unions expressed concern to Spendlove about the potential domino effect of concessions; however, the judge's finding that the Unions would not have agreed in any event is not supported by the record.[28] The judge's perception that an audit would have been futile is also speculative: there is no way to know what effect an audit may have had on negotiations, because the Respondent unlawfully refused to allow one. If an audit had substantiated the Respondent's claims, it seems unlikely that the Unions would have continued to seek the impossible. Unlike our dissenting colleague, we will not extinguish the Unions' rights based on such vague testimony, counterfactual speculation, and disregard of the reasonable effects of the Respondent's unlawful conduct. In any event, the Board does not divest a party of its right to requested information, if it is otherwise relevant and required to be provided, unless the party sought the information in bad faith.[29] The arguments and evidence offer no basis for such a finding here, and our dissenting colleague's personal belief that the Unions were just engaged in a delaying tactic does not fill that gap.

The Respondent's brief to the Board utterly fails to persuade us that it acted lawfully in refusing the Unions' request for a financial audit. In recounting the facts, the Respondent conspicuously overlooks its representatives' statements in negotiations, described above. Further, the Respondent simply reiterates its initial response to the Unions: that it never stated an "inability to pay." In other words, the Respondent insists, as it has throughout these proceedings, that it did not recite certain "magic words," without which incantation, it contends, no obligation can arise. In short, the Respondent misstates both the facts and the law. For all of the foregoing reasons, we find that the Respondent violated Section 8(a)(5) and (1) as alleged.

Unilateral Implementation of Wages and Benefits

The judge found that the Respondent and the Unions were at impasse on February 4 and that the Respondent therefore acted lawfully in unilaterally implementing new terms and conditions of employment.[30] The judge also rejected the General Counsel's allegation that the Respondent's new terms and conditions had not been specifically proposed to the Unions and thus could not lawfully be implemented. We reverse the judge on both issues.

We do not quarrel with the judge's factual finding that the negotiations were deadlocked in early February, and the General Counsel does not contend that they were not. But "impasse," which privileges the Respondent to unilaterally implement terms and conditions of employment, requires more than the existence of a deadlock: the Re-

NLRB 508 (2004); see also *SDBC Holdings, Inc. v. NLRB*, 711 F.3d at 295 (Cabranes, J., concurring) (suggesting that the Board may wish to reconsider whether the Board's "ability to pay" jurisprudence is consistent with *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956)).

[28] The judge did not specify what evidence he relied on in finding that the Unions made clear that they would not agree to concessions even if the Respondent permitted an audit. Hickey's December 20 statement that he would not take a concessionary proposal to the employees, made shortly after the Respondent had refused the Unions' requested audit, seemingly reflects only the position the Unions would take in light of that refusal. And Spendlove testified that the Unions never said that they would agree to concessions if they received the information, but testimony that they did not say they would agree hardly establishes that they said or implied the opposite.

[29] As explained in *NLRB v. Truitt Mfg.*, the obligation to provide information in bargaining is based on the goal that bargaining be based on "honest claims," i.e., that a claim of inability to pay be substantiated. 351 U.S. at 152–153.

[30] The judge did, however, find that the Respondent committed numerous violations thereafter, some of which, such as the discharges of all the unit employees, occurred even before the Respondent ultimately implemented its terms and conditions on February 8. Judge's decision, infra, slip op. at 32–33.

spondent must not have committed unfair labor practices that substantially affected the course of bargaining.[31] We have found, contrary to the judge, that the Respondent was obligated to allow the Unions to audit its books and that it unlawfully failed to do so. We further find that that violation was neither incidental to the parties' negotiations nor without consequences. The Respondent's financial hardship—and the extreme concessions it needed from the Unions to alleviate that hardship—were indisputably central to the parties' negotiations, and the negotiations ultimately broke down over the parties' inability to reach agreement on employee compensation. Certainty that the audit would have resulted in an agreement is unnecessary; it is sufficient that the lack of an audit, which might have confirmed the Respondent's assertions of dire circumstances and the need to agree to the substantial reductions it sought, frustrated efforts to reach agreement.[32] Because the Respondent refused to provide information that would support its central bargaining demand for drastic concessions, we find that impasse was not reached and the Respondent unlawfully implemented changes to terms and conditions of employment.[33]

Moreover, even assuming, arguendo, that the parties had reached a bona fide impasse, the Respondent could not lawfully implement the terms it imposed on February 8, 2011. The law is clear that an employer's post-impasse changes cannot be substantially different from the terms of its final proposal.[34] Here, the Respondent acknowledges that the actual terms of its final proposal were not determined until after negotiations had ended.[35] Clearly, then, the wages and benefits that the Respondent ultimately implemented were never presented to the Unions for consideration, let alone for discussion, before being implemented. The Unions could have expected the implemented wages and benefits to contain drastic reductions, but they would not have known what particular terms would be cut or by how much, given that the Respondent itself did not know until it formulated specific terms after the parties' last bargaining session.[36] We thus find that the specific terms implemented were not "reasonably encompassed" by the proposal such that the Respondent was legally privileged to implement them.

We reject the Respondent's argument that the Unions' failure to cooperate in choosing which benefits to reduce or eliminate left it no alternative but to unilaterally determine the terms and conditions that would be implemented.[37] An employer may, of course, formulate its bargaining proposals unilaterally. And, if a valid impasse exists, it may unilaterally implement its final proposal. But it may not, consistent with the obligation to bargain in good faith, terminate negotiations and then implement later-formulated terms without having given the union(s) the opportunity to respond to them.

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[31] See, e.g., *E.I. Du Pont de Nemours & Co. v. NLRB*, 489 F.3d 1310, 1315 (D.C. Cir. 2007) (quoting *Decker Coal Co.*, 301 NLRB 729, 740 (1991), for proposition that "a legally recognized impasse cannot exist where the employer has failed to satisfy its statutory obligation to provide information needed by the bargaining agent to engage in meaningful negotiations").

[32] See *E.I. Du Pont de Nemours & Co.*, supra ("As a legal matter, although the Board has consistently suggested the necessity for some causal connection between an unfair labor practice and an interruption in bargaining before declaring impasse, the Board has never required the establishment of 'but for' causation in absolute terms. The Board has, however, repeatedly reiterated the principle that 'a finding of valid impasse is precluded where the employer has failed to supply requested information *relevant to the core issues separating the parties.*' *Caldwell Mfg. Co.,* 346 N.L.R.B. [1159], at [1159, 1170] (2006) (emphasis added); see also *Titan Tire Corp.,* 333 N.L.R.B. 1156, 1159 fn. 11 (2001); *U.S. Testing Co.,* 324 N.L.R.B. 854, 860 (1997) [, enfd. 160 F.3d 14 (D.C. Cir. 1998)].").

[33] See *Monmouth Care Center v. NLRB*, 672 F.3d 1085, 1093 (D.C. Cir. 2012) ("It was . . . reasonable for the Board to conclude that the [employers'] failure to provide information concerning a central point of contention between the parties—indeed, regarding an issue that the [employers] themselves characterize as a 'key bargaining issue' [citation omitted]—frustrated the parties' efforts to reach an agreement and precluded a finding of genuine impasse.").

[34] See, e.g., *Grondorf, Field, Black & Co. v. NLRB,* 107 F.3d 882, 886 (D.C. Cir. 1997) ("When impasse occurs, an employer may implement only those changes reasonably falling within its pre-impasse proposal."); and *Atlas Tack Corp.,* 226 NLRB 222, 227 (1976) (impasse enables an employer to make unilateral changes that are "not substantially different or greater than any which the employer . . . proposed during the negotiations"), enfd. mem. 559 F.2d 1201 (1st Cir. 1977).

[35] Our colleague would also find this conduct to be a violation of Sec. 8(a)(5), although he characterizes the violation differently and would order a more limited remedy for it. His suggestion that we order only notice and an opportunity to bargain over the precise allocation of reductions, without even rescission of the reductions unlawfully implemented, is insufficient to return either the employees or the Unions to the status quo ante. We therefore reject his contention that our standard make-whole remedy, ordering rescission of unlawfully imposed changes, is somehow punitive.

[36] The September 15 "red and blue contract" prepared by the Respondent also stated or implied, among other things, that the employees were no longer union represented and that the just-cause standard for discipline no longer applied. The record is not clear about which noneconomic terms the Respondent actually implemented. The dissent incorrectly contends that the noneconomic terms are not before us. The sole reason that we do not address them is that we need not reach the General Counsel's allegation that the Respondent bargained in bad faith generally. Because we do not reach that allegation, we do not pass on the dissent's assertion that "[o]n the record presented here, nobody can seriously contend that Respondent's wage and benefit proposals were formulated in bad faith."

[37] We similarly reject the dissent's implication that the Unions waived a "contingent right" to choose what benefits should be reduced or eliminated. Absent an impasse after good-faith bargaining, the Unions were under no obligation to choose what form of poison they preferred to administer to the employees they represented. Indeed, placing a union in such a position would seriously undermine it in the eyes of the employees.

Thus, even assuming that the Respondent wanted to be flexible in bargaining by allowing the Unions and employees to choose which pay and benefit terms would be cut, and even assuming further that the Unions failed to make that choice,[38] the Respondent was not without options: as the dissent acknowledges, the Respondent could have offered the Unions a final proposal containing specific wage rates and benefit payments, i.e., a proposal capable of being implemented as proposed. Had it done so (in the context of negotiations untainted by other unfair labor practices), it could have compelled the Unions to respond with their own proposal or to accept that the Respondent would unilaterally implement its proposal.[39] But it did not and, therefore, even if its refusal to comply with the Unions' request for a financial audit had not independently precluded the Respondent's reliance on the asserted impasse, it would not have been privileged to unilaterally implement its terms and conditions of employment here.[40]

AMENDED CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1), (3), and (5) of the Act as found herein.

AMENDED REMEDY

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

The Respondent shall be ordered to permit the Unions' auditor to audit its financial records, as the Unions requested on November 9, 2010, to verify the Respondent's claims in bargaining regarding its financial hardship.[41] Having implicitly declared impasse on or about February 4, 2011, when no valid impasse existed, the Respondent shall be ordered to rescind, on the Unions' request, any or all of the unilateral changes to the unit employees' terms and conditions of employment made thereafter and to make the unit employees whole for any loss of earnings and other benefits attributable to its unlawful conduct. The make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

The Respondent also will be required to make all contractually required contributions to the Unions' benefit funds that it failed to make, including any additional amounts due the funds on behalf of the unit employees in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979), and to make the employees whole for any expenses they may have incurred as a result of the Respondent's failure to make such payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). Such amounts shall be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.[42]

The judge found that employees were unlawfully discharged about February 7, 2011, but he did not recommend the Board's standard remedies for that violation. We shall require the Respondent not only to rescind the

[38] The Respondent decided the amounts of individual cost items with no input from the Unions beyond a statement that wages were a priority, a statement that was made in a bargaining session 3 months earlier. We do not find the Respondent's reliance on that statement to be a defense. Cf. *Hoffman Security*, 315 NLRB 275, 276–277 (1994) (employer acted unlawfully in unilaterally discontinuing merit raise program, despite union's proposal, earlier in bargaining, to discontinue it; no agreement had been reached, and union had not agreed to that change absent a full agreement).

[39] The judge found that the wages and benefits implemented were close enough to an overall average compensation of $24 per hour (albeit without stating which party's calculations and total he relied on) to be consistent with the Respondent's proposal. We need not pass on that determination in light of the analysis above. We note, however, that the judge's "close enough" finding relied on the Respondent's uncertainty about which employees would return to work and when. But that uncertainty was created in significant part by the Respondent's own conduct, not only in declaring an impasse on unspecified terms (the lawfulness of which we do not decide), but also in unlawfully terminating all its employees and communicating to them in the rehire process that the Respondent had become a nonunion employer. We would not give the Respondent the benefit of the doubt here. See, e.g., *Whitesell Corp.*, 357 NLRB 1119, 1183 (2011) (citing cases).

[40] In light of our findings that the Respondent's refusal to comply with the Unions' request for a financial audit precluded impasse, and that the terms the Respondent unilaterally implemented were not reasonably encompassed within its pre-impasse proposals, we need not decide whether the Respondent could lawfully insist to impasse on its proposal to reduce wages and benefits by an aggregate amount and, as part of the proposal, to require the Unions to determine where the cuts will be made.

[41] The Respondent's brief states that, on February 6, 2012, the Boilermakers disclaimed interest in representing the employees; however, the record contains no evidence regarding this assertion. We leave to compliance proceedings the determination whether any of the Unions has disclaimed a representational interest.

[42] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

discharges but also to make the employees whole for any loss of earnings and other benefits they suffered as a result of their unlawful discharges.[43] Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. The Respondent also will be required to remove from its files and records any and all references to the unlawful discharges and notify the affected employees in writing that this has been done and that the discharges will not be used against them in any way.

The Respondent additionally shall be ordered to compensate affected employees for any adverse tax consequences of receiving a lump-sum backpay award and file with the Regional Director for Region 19 a report allocating the backpay awards to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

The Respondent also will be ordered to recognize and, on request, bargain with Boilermakers Local 104, Machinists District Lodge 160, Local Lodge 1350, and Painters District Council 5 as the bargaining representatives of the unit employees in their respective crafts with respect to wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document.[44] For the reasons set forth in *Caterair International*, 322 NLRB 64 (1996), we find that an affirmative bargaining order is warranted in this case as a remedy for the Respondent's unlawful withdrawal of recognition. The Board has consistently held that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." Id. at 68. In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required the Board to justify, on the facts of each case, the imposition of an affirmative bargaining order. See, e.g., *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent*, supra at 738, the court summarized its requirement that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: '(1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act.'" Although we respectfully disagree with the court's requirement for the reasons set forth in *Caterair*, supra, we have examined the particular facts of this case and find that a balancing of the three factors warrants an affirmative bargaining order.

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining through their designated representatives by the Respondent's withdrawal of recognition from the Boilermakers and the Machinists and its resultant refusal to bargain collectively with the Unions. It is particularly appropriate here, where the Respondent overrode the unit employees' exercise of their Section 7 rights, in their choice to be represented by the Unions, not only by expressly withdrawing recognition from the Boilermakers and the Machinists and implicitly withdrawing recognition from all three Unions by refusing to schedule bargaining dates, but also by terminating all the unit employees and significantly changing their terms and conditions of employment without notice to or bargaining with the Unions, and by communicating to the employees, in the rehire process, that their workplace would thereafter be nonunion. At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Unions' continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued representation by the Unions. The duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violations. It is only by restoring the status quo ante and requiring the Respondent to bargain with the Unions for a reasonable period of time that the employees will be able to fairly assess the Unions' effectiveness as a bargaining representative in an atmosphere free of the Respondent's unlawful conduct. The employees can then determine whether continued representation by the Unions is in their best interest.

(2) An affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. It removes the Respondent's incentive to delay bargaining in the hope of

[43] The record reflects that the Respondent has already, in compliance with the consent agreement, offered all terminated employees reinstatement, albeit reinstatement to laid-off status in some cases. We leave to compliance proceedings the determination of which losses, if any, are attributable to the unlawful discharges, rather than to layoffs that were not alleged to be unlawful.

[44] The parties at the time of the hearing had resumed negotiations under a consent agreement reached after the Region announced its intention to seek a 10(j) injunction, but the current status or outcome of those negotiations is unknown.

If, as discussed above in fn. 41, one or more of the Unions has disclaimed any representational interest, there shall be no obligation to bargain with such Union(s).

discouraging support for the Unions. It also ensures that the Unions will not be pressured by the Respondent's withdrawal of recognition to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and the issuance of a cease-and-desist order, particularly in the absence of any record evidence of the progress or outcome of their bargaining subject to the consent agreement.

(3) A cease-and-desist order, without a temporary decertification bar, would be inadequate to remedy the Respondent's violations, because it would allow a challenge to the Unions' majority status before the taint of the Respondent's unlawful withdrawal of recognition has dissipated. Such a result would be particularly unfair in circumstances such as those here, where the nature of the Respondent's unfair labor practices has already influenced the filing of at least two decertification petitions (subsequently dismissed) and likely created a lasting negative impression of the Unions in the bargaining unit. We find that those circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose the Unions' continued representation.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the violations in this case.

We also shall order the Respondent to post the Board's standard notice to employees.[45] Consistent with our standard remedial language, we require electronic posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010), and, if the Respondent has gone out of business or its facility has closed, mailing of the attached notice to the Union and to the last known addresses of its former unit employees in order to inform them of the outcome of this proceeding. Additionally, we shall order the Respondent to mail the notices to any unit employee on layoff status as of February 4, 2011. We shall require such mailing because of the lengthy passage of time since the unfair labor practices were committed and because some of the employees who were unlawfully terminated by the Respondent on or about February 7, 2011, were not recalled to work and therefore would not see the notices physically posted at the Respondent's facility. In addition, those employees were unlawfully discharged by mail, making it appropriate that they be notified in a similar manner that the discharges, as well as other actions by the Respondent, were unlawful.

[45] As stated above, we shall substitute new notices in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

ORDER

The National Labor Relations Board orders that the Respondent, Wayron, LLC, Longview, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Boilermakers Local 104, Machinists District Lodge 160, Local Lodge 1350, and Painters District Council 5, or their successors (the Unions) by failing and refusing to promptly furnish them with requested information that is relevant and necessary to the Unions' performance of their duties as the sole collective-bargaining representatives of the Respondent's unit employees described in article 1 of the collective-bargaining agreement that was terminated on February 4, 2011 as:

> [E]ngaged in the fabrication of iron, steel, metal and other products, the machining, repair of machinery or manufacture of products, the preparation of or painting/coating of any product, item, or in the maintenance work in or about the Company's plant(s) located in Longview, Washington or any work undertaken offsite.

(b) Unilaterally implementing changes in the terms and conditions of employment of its unit employees, as provided for in the collective-bargaining agreement that was terminated on February 4, 2011.

(c) Terminating employees and requiring them to reapply because of the termination of the contract and cessation of collective-bargaining negotiations.

(d) Advising employees or causing them to believe that, because of the termination of the contract and cessation of negotiations, they are no longer represented by the Unions.

(e) Failing to notify the Unions of its intent to discharge employees, implicitly withdrawing recognition from the Unions, delaying further bargaining with the Unions, and delaying the furnishing of relevant information to the Boilermakers Union as the collective-bargaining representative of boilermakers employees.

(f) Withdrawing recognition from the Boilermakers Union or Machinists Union pursuant to decertification petitions prior to remedying unfair labor practices that reasonably influenced the filing of such petitions.

(g) 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) Furnish the Unions' auditor the financial information that the Unions requested on November 9, 2010.

(b) On request, meet and bargain with the Unions as the exclusive collective-bargaining representatives of the unit employees in their respective crafts, as described in paragraph 1(a), above, concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement or in signed agreements.

(c) On request by the Unions, rescind any or all changes in the terms and conditions of employment for the unit employees made on and since February 8, 2011, and restore and maintain the terms and conditions of the contract that was terminated on February 4, 2011, unless and until the Respondent has bargained with the Unions in good faith to a new agreement or lawful impasse, or the Unions agree to changes.

(d) Make unit employees whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful unilateral changes to wages and benefits, in the manner set forth in the amended remedy section of this decision.

(e) Make all required pension fund and health and welfare fund contributions that have not been made since February 8, 2011, including any additional amounts due to the funds as set forth in the amended remedy section of this decision.

(f) Reimburse unit employees for any expenses resulting from the Respondent's failure to make the required payments to the funds, with interest, in the manner set forth in the amended remedy section of this decision.

(g) Advise, by letter, all employees employed on February 7, 2011, whether actively working or on layoff status, that their terminations have been rescinded, that they need not reapply for future employment, that their rights and privileges as employees with regard to seniority and recall from layoff have been restored, and that they are still represented by the Union that represented them prior to that date.

(h) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges on or about February 7, 2011, and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(i) Make whole all employees unlawfully discharged on or about February 7, 2011, for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

(j) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(k) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(l) Within 14 days after service by the Region, post at its Longview, Washington facility copies of the attached notice marked "Appendix."[46] Copies of the notice, on forms provided by the Regional Director for Region 19, 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, 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. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If 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 November 9, 2010. In addition, the Respondent shall mail copies of the notice to employees who were on layoff status on February 4, 2011.

(m) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. August 2, 2016

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Mark Gaston Pearce, Chairman

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

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

My colleagues find that the Respondent violated Section 8(a)(5) of the National Labor Relations Act (NLRA or the Act) when it denied the Unions' request for access to its financial records, and they conclude that this violation precluded the parties from reaching a valid bargaining impasse. I disagree with both findings. Applicable precedent distinguishes between claims of inability to pay, which generally trigger a duty to disclose, on request, substantiating financial information, and claims of competitive disadvantage, which do not. Here, the Respondent consistently made clear that it was claiming competitive disadvantage, not inability to pay. Accordingly, the Respondent lawfully denied the Unions' request to audit its financial records. This, in turn, means that the denial of that request did not preclude the parties from reaching a valid impasse in bargaining, and I would adopt the judge's finding that the parties reached impasse on February 4, 2011.

However, I agree with my colleagues' finding that the Respondent violated Section 8(a)(5) of the Act when, postimpasse, it implemented specific wage and benefit changes, although I believe this presents a close question. Having bargained to impasse on an *overall* reduction in labor costs of $6.51/hour (reducing total average wages and benefits, which had been roughly $30.51/hour, to approximately $24/hour), the Respondent then implemented *specific* changes to employees' wages and benefits without first giving the Unions notice and the opportunity for bargaining regarding these specific changes. In doing so, the Respondent violated the Act. I disagree, however, with the remedies my colleagues order for this violation. The parties had reached a valid bargaining impasse over the Respondent's proposal to reduce overall compensation by an average of $6.51/hour, and the changes the Respondent implemented achieved that reduction or came close to doing so.[1] The Respondent's unlawful act only deprived the Unions of an opportunity to bargain over *how* the overall reduction was to be achieved, not over the *amount* of the reduction itself. Thus, I believe that requiring the Respondent to restore the wages and benefits provided for under the terminated CBA and to give its employees more than 5 years' worth the $6.51/hour difference between the contractual terms and the terms the Respondent implemented in February 2011, are remedies that exceed the scope of the violation committed and are therefore impermissibly punitive. Instead, I would require the Respondent to furnish the Unions the opportunity unlawfully denied them—i.e., to request bargaining regarding *how* the $6.51/hour reduction in overall compensation should be allocated.

Facts

The collective-bargaining agreement (CBA) between Wayron, LLC (Wayron or the Respondent), a metal fabrication shop, and the Unions representing Wayron's employees[2] was set to expire September 30, 2010, and the parties began negotiating for a successor agreement on September 15. Wayron had been experiencing and was continuing to experience a serious decline in business, and its employee complement had been reduced through layoffs. Faye Dietz and Jeff Spendlove—Wayron's co-owners—explained that the layoffs were due to lack of work, the lack of work was due to Wayron's lack of success in bidding for jobs against its nonunion competitors, and its inability to win bids resulted from its comparatively high labor costs. Going into collective bargaining in September 2010, Wayron's primary objective was to lower its labor costs in order to win more bids, secure more work, and bring employees back from layoff.

At the September 15 bargaining meeting, Wayron offered a proposal, called the "red-and-blue contract," that included a $10/hour reduction in labor costs. The Respondent's negotiators said that "times were tough," but its labor consultant and chief spokesman, Dean Nordstrom, told the Unions that "you will never hear us say we don't have the ability to pay."[3] The Unions' initial contract proposal included a $1.25/hour wage increase. On September 20, the parties agreed to extend the expiring CBA on a day-to-day basis until a new agreement was reached and ratified or either party gave the other 5 days' notice of termination. The parties next met on October 6 but made no material progress.

[1] I do not foreclose the possibility that Wayron may have overshot the mark—i.e., implemented wage and benefit terms that achieved a reduction in overall compensation of *more* than $6.51/hour. See fn. 20, infra.

[2] As my colleagues note, Wayron employs metalworkers, mechanics, and painters, represented, respectively, by local affiliates of the Boilermakers, Machinists, and Painters Unions. When Wayron acquired the business from its predecessor, the parties agreed to bargain jointly for a single contract covering all three groups of employees. There is no evidence, however, that the parties intended to merge the employees into a single bargaining unit.

[3] The red-and-blue contract also included some proposed changes to noneconomic terms, but those are not at issue here.

At the parties' next bargaining session on November 4, 2010, Spendlove modified the Respondent's initial proposal, telling the Unions that the Respondent only needed to cut labor costs by $6.51 per hour—i.e., from a current average of $30.51/hour to an average of $24/hour. Spendlove told the Unions they could take the reductions from any cost items the employees chose. Spendlove explained that there was not much work out there, the company was having good years and bad years, and Wayron was looking for a competitive edge and needed to reduce the costs of the contract in order to even the playing field with its competitors. Spendlove also told the Unions that he had made arrangements with Wayron's landlord to reduce the rent and that it was important for the Unions to "get on board" by February so that Wayron could renegotiate its line of credit with the bank. According to the testimony of Gregory Heidal, business representative for the Machinists, Spendlove also said that Wayron was going to be "in financial trouble" if it was unable to reach some kind of agreement with the bank. Nobody asked Spendlove for any information about the line of credit or for any explanation of what he meant by "financial trouble." The judge specifically credited Heidal's testimony that the Respondent was not "crying poverty" but instead said that it "can't compete with that contract." Heidal added: "I don't believe they ever said they can't afford the contract." The following day, November 5, Spendlove met with employees (with the Unions' acquiescence) and explained to them what he had explained to the Unions: that he needed them to accept a significant cut in pay and/or benefits, not because Wayron was unable to pay, but because the cuts were needed to permit Wayron to be competitive with nonunion shops.

On November 9, 2010, the Unions sent the Respondent an information request. Contending that the Respondent had taken the position that "it [was] financially unable to pay wages and benefits equal to the wages and benefits in the expired [CBA]," the Unions requested "[a]ccess to all financial records by an Auditor selected by the affected Unions and any other records deemed necessary by said Auditor to substantiate the Companies [sic] position of inability to pay." Spendlove replied that "Wayron is not, nor has it previously, claimed the inability to pay wages and benefits under any [CBA]," and that "Wayron's position is that it is unable to remain competitive in the current global economic climate and is seeking methods of reducing costs to continue to secure work." Spendlove concluded: "For the reasons stated above, Wayron has no intention of allowing access for any audits concerning this matter."

On December 20, 2010, the Unions suggested extending the CBA for 1 year. It is unclear if this was an actual proposal, but nothing came of it. The parties next met on January 28, 2011, and this meeting was attended by a mediator from the Federal Mediation and Conciliation Service (FMCS). The Respondent held to its proposal of an overall reduction in labor costs of $6.51/hour, and the Union refused to reduce wages and benefits below the status quo. Notably, at no point during negotiations did the Unions express a willingness to consider wage or benefit concessions, much less agree to them. Indeed, on several occasions, the Unions' chief spokesman, Lance Hickey, told Spendlove that the Unions felt that giving Wayron concessions would lead to a domino effect nationwide and they could not do it. The mediator informed the parties that because they were so far apart, there was no further need for her services. Immediately following this bargaining session, Wayron gave notice to the Unions that it was terminating the CBA effective February 4, 2011. On February 2, the Unions proposed a wage increase of $0.75/hour.

The parties scheduled another negotiating session for February 4. That morning, Hickey emailed Spendlove to say that if Wayron's existing proposal was its last, best, and final offer, "nothing productive will result from meeting today." Nonetheless, the parties met. The Unions retracted their proposal for a $0.75/hour wage increase and proposed retaining the status quo. Wayron declined, reiterating its need to get aggregate average labor costs down to $24/hour (i.e., an average wage and benefit reduction of $6.51/hour) to match its competitors and to show the bank in order to secure an extension of its line of credit. According to Hickey's notes, Wayron added that it "would be looking at the terms and conditions for the employees this weekend and will be implementing those terms and conditions on Monday," February 7. The Respondent did not tell the Unions how it would achieve an overall reduction of $6.51/hour. Instead, it stated that it would implement the "red-and-blue" contract with that overall reduction.

Effective Tuesday, February 8, the Respondent unilaterally implemented wage and benefit changes, reducing certain benefits while slightly increasing average wages. Consistent with Respondent's bargaining proposals, the changes reduced Wayron's average wage and benefit costs by approximately $6.51/hour, i.e., from $30.51/hour to approximately $24/hour.[4] The judge de-

[4] By letter dated February 7, 2011, the Respondent discharged all its employees and required them to reapply for their jobs at the new wage-and-benefit levels. There are no exceptions to the judge's findings that these discharges, related statements made by the Respondent, and other post–February 7 conduct of Wayron's violated the Act. For a complete

scribed the process by which the Respondent formulated the changes as follows:

> Spendlove testified the employees were told not to come to work on Monday because he and Dietz did not know at the time whether they could formulate the details of the economic package by then. Thus, in the absence of any guidance from the Unions, they had to decide on the wage/benefit package generally for all employees, and specifically for each employee, depending upon the employee's job classification, seniority and benefits. . . .
>
> Over the weekend the Respondent had decided upon a new wage and benefits package that would conform to its last and final wage and benefits proposal it had offered to the Unions, namely, an average $24-per-hour figure per employee. On Tuesday, February 8, 2011 the employees who were working on the previous Friday were rehired after filling out new employment applications, and began receiving wages and benefits in accordance with the Respondent's newly instituted wage and benefits package.[5]

Discussion

A. Wayron Did Not Claim Inability to Pay, and Wayron Lawfully Denied the Unions' Request to Audit Wayron's Financial Records.

The legal principles that govern union requests for financial information are well established. If an employer, in collective bargaining, claims inability to pay, it *may* be required to provide the union, on request, financial information substantiating its claim. However, "not every claim of inability to pay will result in an obligation to supply substantiating information." *Nielsen Lithographing Co.*, 305 NLRB 697, 699 (1991), petition for review denied sub nom. *GCIU Local 508 v. NLRB*, 977 F.2d 1168 (7th Cir. 1992). Conversely, if an employer makes a claim of competitive disadvantage—i.e., if it claims inability to compete—then if the union requests financial information, "the [employer's] claim does *not* raise any obligation . . . to turn over the requested information." Id. (emphasis added). When evaluating whether an employer has claimed an inability to pay, the Board has held that

> the phrase "inability to pay" means, by definition, that the employer is *incapable of meeting the union's demands*. That is, the phrase means more than the assertion that it would be difficult to pay, or that it would cause economic problems or distress to pay. "Inability to pay" means that the company presently has *insufficient assets to pay* or that it would have *insufficient assets to pay during the life of the contract that is being negotiated*. Thus, *inability to pay is inextricably linked to nonsurvival in business*.

AMF Trucking & Warehousing, 342 NLRB 1125, 1126 (2004) (emphasis added). "Inability to pay need not be expressed with any particular magic words," but the employer's "words and conduct must be specific enough to convey such a meaning." *Atlanta Hilton & Tower*, 271 NLRB 1600, 1602 (1984).

Viewing the facts of this case in light of the applicable standard, I believe Wayron claimed competitive disadvantage, not inability to pay. I would therefore adopt the judge's finding that the Respondent had no duty to grant the Unions' request for access to its financial records.

In my view, this is not a close or difficult issue. Wayron's unvarying message to the Unions was that it was *not* pleading poverty. Rather, Wayron stated that it needed labor-cost concessions in order to be *competitive*—i.e., to bid against its nonunion competitors more successfully so that it could secure more work. There was no question of Wayron claiming to have "insufficient assets to pay." *AMF Trucking*, 342 NLRB at 1126. Rather, Wayron's negotiators referred to the manner in which industry competition works.

At the parties' first negotiating session on September 15, 2010, Wayron's negotiators said that "things were tough," but its chief spokesman, Nordstrom, said that "you will never hear us say we don't have the ability to pay." On November 4, when Wayron first proposed reducing overall compensation by $6.51/hour, co-owner Spendlove told the Unions that there was not much work out there, the company was having good years and bad years, and Wayron was looking for a competitive edge and needed to reduce the costs of the contract in order to even the playing field with its competitors.[6] On November 10, after the Unions requested access to Wayron's financial records, Spendlove replied: "Wayron is not, nor has it previously, claimed the inability to pay wages and benefits under any [CBA]," and "Wayron's position is that it is unable to remain competitive in the current global economic climate and is seeking methods of reducing costs to continue to secure work."

Significantly, the record demonstrates that the Unions *understood* that Wayron was claiming competitive dis-

discussion of these issues, see judge's decision, infra, slip op. at 28–30, 32–33..

[5] Judge's decision, infra, slip op. at 28–29.

[6] Evidence of what Spendlove said at the November 4 bargaining session was furnished by Machinists' business representative Gregory Heidal, who testified that he "remember[ed] pretty detailed what [Spendlove] said," and whose testimony the judge specifically credited. See judge's decision, infra, slip op. at 25.

advantage, not inability to pay. This is apparent from the following credited testimony of Machinists' representative Heidal:

> . . . they weren't crying poverty. In fact, in our first meeting with the company we asked them about that. They were telling us, you know, things were tough. And so we asked them if they were crying poverty. And Dean Nordstrom, I believe as he said, "you will never—you will never hear us say we don't have the ability to pay. Okay."
>
> Well, as we continued down this road they continue to beat the same drum that they were not making any money. So at some point you got to go, well, okay, prove it, you know. At this point they're not saying—they're not crying poverty, but they're telling us they can't afford the contract. *They can't compete with that contract. I don't believe they ever said they can't afford the contract.*
>
> So, all right, if that's the case, you're telling us you can't compete, then we'll request the financial records.

Judge's decision, infra, slip op. at 26 (quoting Heidal's testimony) (emphasis added). The judge credited Heidal's testimony, and Heidal testified with considerable care that Wayron's bargaining team never claimed inability to pay.[7] Heidal's testimony also suggests that the Unions believed, mistakenly, that Wayron's claims of competitive disadvantage entitled the Unions to audit Wayron's books ("you're telling us you can't compete, then we'll request the financial records"). Unlike my colleagues, I believe that when Wayron's representatives claimed that Wayron could not compete if it was required to pay the current contractual wages and benefits, they meant exactly what they expressed and no more. They were *not* claiming an inability to pay. Rather, their statements reflected an awareness of the need to avoid a competitive disadvantage given how their industry works.

[7] As my colleagues' quotation from the transcript shows, Heidal adhered to his testimony that Wayron claimed competitive disadvantage, not inability to pay, despite being asked a leading question on direct examination by the General Counsel's attorney: "Q. And weren't they also saying they would go out of business if they didn't get the cuts that they sought? A. Yes. *They said they were unable to compete* and they wouldn't have any work." (Tr. 141 (emphasis added).) Heidal's initial "yes" in response to the leading question is entitled to little weight—see, e.g., *Soltech, Inc.*, 306 NLRB 269, 270 (1992) (observing that "some testimony elicited in response to leading questions has little probative weight because it amounts to mere agreement with statements by counsel rather than persuasive testimony by the witness")—and the judge omitted it when he quoted from Heidal's testimony in his decision, indicating that he gave it no weight at all.

Applicable precedent supports a finding that Wayron did not claim inability to pay. In *Richmond Times-Dispatch*, 345 NLRB 195 (2005), the Board found that the employer did not claim inability to pay a holiday bonus, even though the employer stated it was "unable to pay" the bonus and had "no choice" but to cancel it, where the larger context surrounding those statements revealed that the employer was *not* claiming it had insufficient assets to pay the bonus or that doing so would threaten its survival. Here, of course, Wayron never even said it was "unable to pay" contractual wages and benefits. In *AMF Trucking & Warehousing*, supra, the Board found no claim of inability to pay where the employer said it was "fighting to keep the business alive." 342 NLRB at 1126. That is a much stronger statement than anything Wayron ever said. The strongest wording Spendlove used was when he said the Respondent was going to be in "financial trouble" if it was unable to reach some kind of agreement with the bank. That is a far less dire statement than "fighting to keep the business alive," which the Board in *AMF Trucking* found was *not* a claim of inability to pay.

My colleagues rely on *Shell Co.*, 313 NLRB 133 (1993). I believe their reliance is misplaced. In *Shell*, the employer characterized its financial situation as "a matter of survival," a claim Wayron never made. My colleagues also rely on *Lakeland Bus Lines*, 335 NLRB 322 (2001), which was denied enforcement by the court of appeals. In *Lakeland*, the Board found that the employer claimed inability to pay when it stated it was "trying to bring the bottom line back into the black" and the "future of Lakeland depend[ed] on" the union's acceptance of its final offer, which would enable the employer to "retain . . . jobs and get back in the black in the short term." When the union requested access to the employer's books, the employer clarified its position and made clear that it was *not* claiming financial inability to pay. The Court of Appeals for the D.C. Circuit refused to enforce the Board's order requiring the disclosure of financial information. "In view of [the employer's] clarifying statements," the court said, "the Board could not plausibly conclude that Lakeland asserted an inability to pay." *Lakeland Bus Lines, Inc. v. NLRB*, 347 F.3d 955, 963 (D.C. Cir. 2003).

I agree with the D.C. Circuit's rejection of the Board's decision in *Lakeland Bus*, and the court's analysis applies with equal force in the instant case. When the Unions requested access to Wayron's financial records, Spendlove responded with "clarifying statements," id., making it clear that "Wayron is not, nor has it previously, claimed the inability to pay wages and benefits under any [CBA]" and that "Wayron's position is that it is unable to

remain competitive in the current global economic climate and is seeking methods of reducing costs to continue to secure work." Here as in *Lakeland Bus*, the Board cannot plausibly conclude that the employer asserted an inability to pay.[8]

I do not find persuasive my colleagues' finding that the Respondent claimed an inability to pay by making reference in bargaining to efforts to secure further bank financing. The judge took this evidence into account and nonetheless found that Wayron claimed competitive disadvantage, not inability to pay. For several reasons, I agree with the judge. First, as summarized above, Wayron's unvarying message was that it was not crying poverty but rather was seeking labor-cost concessions in order to compete. On their face, Wayron's messages communicated competitive disadvantage, not inability to pay. Second, the judge discredited the testimony of Hickey (the Unions' chief spokesman) that either Dietz or Spendlove (Wayron's owners) said that Wayron would go out of business if they did not get the cuts they were requesting. Instead, he credited Heidal's testimony that Spendlove said Wayron was "going to be in financial trouble" if it was unable reach an agreement with the bank. As explained above, this statement fell well short of an inability-to-pay claim. See *AMF Trucking*, supra (no inability-to-pay claim where employer said it was "fighting to keep the business alive"). Third, there is no evidence that the Respondent ever told the Unions it would not be able to make payroll if it did not receive an extension on its line of credit.[9]

Although my colleagues attach significance to Wayron representative Spendlove's bargaining notes of February 2, 2011, I believe that a fair reading of the notes, in context, does not establish that Wayron was claiming inability to pay, and those notes certainly do not establish that Wayron had claimed inability to pay months earlier—i.e., on or before November 9, 2010, the date that the Unions requested access to Wayron's financial records. The February 2, 2011 notes state: "*Talked about the past/current/future economy* & subcontracting work – see one anothers' [sic] position – *Wayron stay in business* – Union retain pay/benefits for guys & themselves. Last chance to work something out but *cannot continue at current cost*" (emphasis added). My colleagues lift the phrases "stay in business" and "cannot continue at current cost" out of context and stitch them together to draw an inference that Spendlove admitted Wayron would go out of business if it did not obtain the concessions it was seeking.[10] However, the notes are a shorthand summary, they plainly do not reflect what words were actually spoken, and I believe they are too cryptic to prove the inference my colleagues draw, particularly given that (i) it is uncontroverted that Wayron repeatedly stated it was *not* claiming inability to pay, and (ii) the credited testimony of Machinists' Representative Heidal, described above, confirms that Wayron did not claim inability to pay. Although my colleagues conclude that "Wayron stay in business" means Wayron indicated it would not "stay in business" without concessions, it is equally reasonable to interpret this notation as a statement that Wayron fully intended to "stay in business"—an interpretation that is consistent with the notation that the parties "[t]alked about the . . . future economy," indicating that Wayron

[8] My colleagues insist, repeatedly, that my analysis rests on "magic words." To the contrary, my analysis involves the English language and well-established legal principles. When someone says he is *not* claiming inability to pay, one cannot reasonably conclude that he is really saying the opposite. To the extent my colleagues derive an inability-to-pay claim from Wayron's representatives' statements that they were *not* claiming an inability to pay, the Board is effectively eliminating the distinction between a claimed inability to compete and an asserted inability to pay, even though this distinction is firmly embedded in relevant Board and court cases. In my view, the majority cannot properly dismiss and recharacterize the Respondent's disclaimers as mere "surface characterizations." The cases in this area clearly turn on what a party stated in bargaining, and the Board cannot appropriately support the finding of a violation by completely disregarding what was stated and by insisting instead that the party must have "meant" precisely the opposite of what was stated. Based on similar reasoning, the Board could disregard and recharacterize material written statements that appear in documentary evidence, where documents stating "X" could be interpreted by the Board as stating "Y." In my view, such reasoning would turn upside down the most basic principles that govern evidentiary proof and would be indefensible given the Act's requirement that Board findings be supported by a "preponderance of the testimony" (Sec. 10(c)) and "substantial evidence on the record considered as a whole" (Sec. 10(e)).

[9] Moreover, the Unions' request for access to Wayron's financial records to perform a full audit would not have shed any light on the Respondent's statements regarding the line of credit. An audit would not have revealed communications between Wayron and the bank. The Unions never asked to see those communications. Instead, they went immediately to a request for access to Wayron's financial records, even though Machinists' Representative Heidal understood that Wayron was claiming competitive disadvantage, not inability to pay ("you're telling you can't compete, then we'll request the financial records"). Moreover, regardless what an audit would have disclosed, the Unions had already decided they could not grant concessions. The credited testimony of Spendlove establishes that Hickey told him *several times* that while the Unions were sympathetic to his position, they felt that giving Wayron concessions would lead to a domino effect down the line for all the unions nationwide and they *could not do it*. In these circumstances, I believe the Unions' request for a full audit was more likely than not a delaying tactic to stave off impasse—which the Unions must have known was imminent—followed by cuts to wages and/or benefits.

[10] Thus, my colleagues find that "the Respondent . . . was asserting that it could not pay, during the life of the contract being negotiated, the existing (or higher) levels of compensation that the Unions sought" partly on the basis that "Spendlove himself stated during the February 4 bargaining session that the Respondent's negotiating goal was 'to stay in business' and that it 'cannot continue at current cost.'"

meant to stay in business. Nor am I persuaded that Wayron claimed an inability to pay based on the notation "cannot continue at current cost" because this phrase does not indicate *what* could not "continue" at the current cost. My colleagues attach their preferred meaning, which is that Wayron stated it "cannot continue *in business* at current cost," but it is at least equally plausible to read the notation as indicating Wayron "cannot continue *to compete* at current cost," particularly since the latter interpretation is consistent with the Respondent's unvarying message throughout the negotiations. Finally, as noted above, these notes pertain to the parties' meeting *on February 2, 2011*. They cannot possibly support a finding that Wayron had claimed inability to pay *on or before November 9, 2010*, when the Unions requested access to Wayron's financial records.

I believe that my colleagues' decision here, which extends *Nielsen Lithographing* to find that Wayron claimed inability to pay, will operate in practice to discourage parties engaged in collective bargaining from providing a good-faith, candid assessment of industry conditions, which is vitally important to employees, unions, and employers alike. A fundamental purpose of the Act is to avoid industrial strife through encouraging collective bargaining, and open communication between the parties in negotiations is precisely what the Act encourages. The majority's decision encourages just the opposite.

In *NLRB v. American National Insurance Co*., 343 U.S. 395 (1952), the Supreme Court described the importance of encouraging open discussion between the parties in bargaining and the very limited role that Congress contemplated for the Board. The Court stated that "[t]he National Labor Relations Act is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers," id. at 401–402, and the Court continued:

> In 1947, the fear was expressed in Congress that the Board "ha[d] gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make."
>
> Accordingly, the Hartley Bill, passed by the House, eliminated the good faith test and expressly provided that the duty to bargain collectively did not require submission of counterproposals. As amended in the Senate and passed as the Taft-Hartley Act, the good faith test of bargaining was retained and written into Section 8(d) of the National Labor Relations Act. That Section contains the express provision that the obligation to bargain collectively does not compel either party to agree to a proposal or require the making of a concession.
>
> Thus, it is now apparent from the statute itself that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position. And it is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.[11]

By holding that employers will be found to have claimed an inability to pay whenever they truthfully describe competitive conditions and volunteer other details such as efforts to secure additional bank financing, my colleagues give employers a strong incentive to provide much less information, or no explanation at all, when the union is making unreasonable demands that may cause severe injury to the business or when the employer seeks concessions in bargaining. On the other hand, the Board has held that the failure of an employer to provide an adequate explanation in bargaining will be considered evidence of a refusal to bargain in good faith in violation of Section 8(a)(5) of the Act. *Apogee Retail, NY, LLC*, 363 NLRB No. 122, slip op. at 1 fn. 3 (2016).[12] As I have stated elsewhere, "[t]he Board cannot reasonably adopt standards that cause parties to be in violation of the Act regardless of the actions they take." *ARC Bridges, Inc.*, 362 NLRB No. 56, slip op. at 11 (2015) (Member Miscimarra, dissenting). In sum, I would adopt the judge's finding that the Respondent did not claim inability to pay and therefore had no duty to grant the Unions access to its financial records.[13]

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[11] 343 U.S. at 404 (footnotes omitted; emphasis added).

[12] In *Apogee Retail*, the majority found that the General Counsel failed to prove the employer had engaged in overall bad faith in bargaining, but stated that "the 'failure to define, explain, or advocate [a] position' during bargaining should be considered as evidence of a party's lack of good faith." 363 NLRB No. 122, slip op. at 1 fn. 3 (citations omitted). I agreed with the outcome in *Apogee Retail* but indicated that the extent to which a party's failure to explain its position would support a finding of bad faith "depends on the circumstances of the particular case," because parties may lawfully "insist on certain proposals that may be deemed critical for reasons that the negotiators may be reluctant or unwilling to disclose, and it is likewise lawful for a party to insist on certain proposals exclusively because it believes sufficient leverage exists to force the other party to agree." Id.

[13] The majority quotes from *NLRB v. American National Insurance*, emphasizing the Court's statement that "the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement *and support of* his position" (emphasis added). To the extent my colleagues suggest that *American National Insurance* imposed an obligation on Wayron to "support" its position by disclosing financial information to the Unions, my colleagues are clearly wrong. Nothing in *American National Insurance* deals with whether or when a

Alternatively, even if Wayron did claim an inability to pay (which is unsupported by a preponderance of the evidence), I would still agree with the judge that Wayron had no obligation to disclose its financial information to the Unions. As noted previously, an inability-to-pay claim does not always compel an employer to grant requested access to its confidential financial records. See *NLRB v. Truitt Mfg. Co.*, 351 U.S. at 153 ("We do not hold . . . 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 upon its particular facts."); *Nielsen Lithographing*, supra, 305 NLRB at 699 ("[N]ot every claim of inability to pay will result in an obligation to supply substantiating information."). In the instant case, the Unions made it clear that they would not agree to concessions *regardless* of Wayron's financial condition. The record establishes that Hickey told Spendlove *several times* that while the Unions were sympathetic to his position, they felt that giving Wayron concessions would lead to a domino effect down the line for all the unions nationwide and they *could not do it*. It is fanciful to think that an audit of Wayron's finances would have been anything other than what the judge termed it—"an unproductive, time-consuming exercise in futility." In these circumstances, Wayron would not have violated Section 8(a)(5) by refusing the Unions' request even if it had claimed inability to pay.

B. Wayron and the Unions Reached a Valid Bargaining Impasse.

In addition to finding that Wayron violated the Act by denying the Unions' request to audit Wayron's financial records, my colleagues find that this precluded the parties from reaching a valid impasse in bargaining. Contrary to my colleagues, as explained above, I would find that Wayron lawfully denied the Unions' audit request. Therefore, in my view, Wayron's denial of the Unions' request for financial information did not prevent the parties from achieving a lawful impasse in bargaining.[14]

In my view, the evidence demonstrates that, by February 4, 2011, the parties had reached a bona fide impasse over Wayron's proposal to reduce wages and/or benefits by an average of $6.51/hour *and* that the impasse on this critical issue had led to a breakdown in the overall negotiations. See, e.g., *CalMat Co.*, 331 NLRB 1084, 1097 (2000) (setting forth the elements of single-issue impasse).[15] Beginning with the very first bargaining session on September 15, 2010, Wayron insisted on steep reductions in labor costs. By November 4, it had settled on a reduction of $6.51/hour, and Wayron held firm to that position thereafter. On the other side, the Unions began by proposing a $1.25/hour wage increase, and they made small up-and-down moves after that—down to the status quo (January 28, 2011); up by $0.75/hour (February 2); down to the status quo again (February 4)—but at no time did the Unions present a concessionary offer, and they made it clear, repeatedly, that concessions were out of the question. As stated above, the Unions' chief spokesman, Hickey, told Wayron co-owner Spendlove *several times* that while the Unions were sympathetic to his position, they felt that giving Wayron concessions would lead to a domino effect down the line for their unions nationwide and they *could not do it*.

At the January 28, 2011 meeting, which was attended by a mediator from FMCS, the Unions proposed retaining the status quo on wages, and Wayron held firm to its position. At the end of that session, the FMCS mediator declared the parties too far apart for her services to be of any further value. On the morning of the next scheduled bargaining session (February 4), Hickey communicated to Spendlove his belief *both* that the parties were at impasse over labor costs *and* that this impasse had produced an overall impasse in negotiations. Hickey emailed Spendlove to say that if Wayron's proposal was its last, best, and final offer, "*nothing productive will result from meeting today*" (emphasis added). Nonetheless, the parties met, the Unions again proposed retaining the status quo, and Wayron stuck to its proposal for reducing overall compensation from $30.51/hour to

party is required to disclose financial information based on a claimed inability to pay. Rather, this issue is governed by the Supreme Court's decision in *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956), and similar Board and court cases. In *Truitt*, the employer responded to the union's proposal for a wage increase of 10 cents per hour by stating that "it could not afford to pay such an increase, . . . and that an increase of more than 2 ½ cents per hour would put it out of business." Id. at 150. Clearly, the employer in *Truitt* claimed inability to pay in its express statements. On those facts, the Court properly concluded that the employer's refusal "to produce some evidence substantiating these statements" violated Sec. 8(a)(5). Id. The facts in the instant case are materially different because Wayron's representatives in bargaining did not assert an inability to pay that triggered an obligation to disclose financial information to the Unions. To the contrary, as explained in the text and in fn. 8, supra, Wayron's representatives repeatedly stated they were *not* claiming inability to pay.

[14] The legality of Respondent's postimpasse implementation presents a close question, which I address more fully in Part C below. For the reasons explained in Part C, I believe the Respondent's postimpasse implementation of wage and benefit changes violated Sec. 8(a)(5), which warrants an appropriate remedy (but not the remedy formulated by my colleagues).

[15] A "single-issue impasse" is a situation in which "'a single issue looms so large that a stalemate as to it may fairly be said to cripple the prospects of any agreement.'" *CalMat*, 331 NLRB at 1097 fn. 49 (quoting *NLRB v. Tomco Communications, Inc.*, 567 F.2d 871, 881 (9th Cir. 1978)).

$24/hour. Wayron's proposal did not specify *where* and *how* this reduction would be achieved—Wayron proposed letting the employees decide that for themselves—but it is not unlawful for an employer to propose that concessionary changes reach a targeted figure while remaining flexible regarding how that target would be achieved.

This brings us to a unique aspect of the impasse that existed in this case. During negotiations, Wayron lawfully proposed wage and benefit concessions that, in the aggregate, would have totaled $6.51/hour, but Wayron also proposed that the employees—through their bargaining representatives—determine what particular changes would be made (e.g., wage reductions versus benefit reductions) to produce the aggregate $6.51/hour savings. As noted above, the Unions were intransigently opposed to any wage or benefit concessions. Therefore, they did not engage in more detailed negotiations regarding precisely how the concessions would be allocated, and they did not exercise their contingent right, as expressed in Respondent's wage and benefit proposal, to determine the allocation of the $6.51/hour reduction. However, this unique aspect of the Respondent's proposal did not preclude the parties from reaching a lawful impasse in bargaining.[16] Nothing in the Act makes it unlawful for a party to propose a specified level of changes in wages and benefits (in this case, an aggregate reduction of $6.51/hour), and as part of the proposal, to give the other party free rein to determine what particular wage and benefit changes will be made to achieve that level. And for the reasons explained above, the record clearly establishes that the parties bargained to impasse over Wayron's wage and benefit proposals and that this impasse had produced an overall impasse in negotiations by February 4, 2011.

[16] My colleagues rest their "no impasse" finding solely on their prior finding that Wayron's refusal to open its books to the Unions precluded a valid impasse. As explained above, I believe Wayron lawfully refused to open its books, and the parties did, in fact, bargain to overall impasse. Preliminarily, there is no question that Respondent's proposed wage and benefit changes involved mandatory bargaining subjects, as to which the parties could bargain to impasse. Sec. 8(d) defines the "duty to bargain" as encompassing the "mutual obligation" of the employer and representative of employees to meet and confer in good faith regarding "wages, hours, and other terms and conditions of employment." See *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). On the record presented here, nobody can seriously contend that Respondent's wage and benefit proposals were formulated in bad faith or failed to come within Sec. 8(d)'s reference to "wages, hours, and other terms and conditions of employment."

C. Wayron Unlawfully Failed to Give the Unions Notice of and Opportunity to Bargain Regarding Specific Proposed Changes Prior to Their Implementation, and the Appropriate Remedy is to Order Such Bargaining.

It is well established that "a union and an employer have a duty to bargain in good faith" concerning mandatory subjects of bargaining, and "[g]enerally, once the parties reach a good-faith impasse, the duty to bargain is at least temporarily suspended, and the parties, typically the employer, may enact any change in a mandatory subject reasonably contained within its final proposal." *NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1157 (D.C. Cir. 1992) (Judge Edwards, concurring); see also *Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 886 (D.C. Cir. 1997); *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967).

As explained above, the parties had reached a lawful impasse in bargaining by February 4, 2011. When an impasse was achieved, the parameters of Respondent's proposal regarding wages and benefits were clear—an overall reduction in total average labor costs of $6.51/hour (from $30.51/hour to $24/hour)—and this proposal had been unequivocally rejected by the Unions.

As noted above, this case involves a close question regarding the legality of Respondent's postimpasse implementation because of one unique aspect of Respondent's wage and benefit proposal. The Respondent proposed to allocate the desired $6.51 average savings in labor costs *whatever way the Unions and employees desired*. See, e.g., judge's decision, infra, slip op. at 25 ("[U]nder the Respondent's proposal, the Unions could take cost-cutting reductions from any cost items the employees chose."); id. at 27 (Spendlove "had given the Unions and the employees the option of deciding where they would be willing to take the cuts."). However, based on the Unions' opposition to *any* wage or benefit concessions, the Unions in bargaining never exercised the discretion offered by Respondent to communicate the precise manner in which the concessions should be allocated between wages and benefits. Likewise, the Respondent, having proposed to adopt whatever allocation was preferred by the Unions and employees, never made a more specific proposal regarding particular changes that would produce the overall $6.51/hour in average wage and benefit savings.

I believe the legality of Respondent's postimpasse implementation presents a close question because the Respondent bargained to a valid impasse over its two-part proposal, where (i) Respondent only cared about the $6.51/hour average wage and benefit savings, and (ii) it was entirely up to *the Unions* how the $6.51/hour savings would be allocated. This is *not* a case where the Re-

spondent desired a particular allocation of wage and benefit changes to achieve a targeted reduction and failed or refused to bargain over it. Nor does Respondent's wage and benefit proposal bear any resemblance to merit pay proposals—contemplating wage changes based on "managerial discretion" exercised during the agreement's term—that prompted the Board majority in *McClatchy* to create an exception to the postimpasse implementation rule.[17] Therefore, based on the Unions' failure to exercise the discretion afforded to them under Respondent's proposal, one might conclude that the Respondent was privileged, after an impasse was reached, to implement an allocation that it deemed appropriate to achieve the proposed $6.51/hour savings in average wage and benefit costs.

Given the unique facts presented here, however, I believe that the Respondent—though privileged to announce the postimpasse implementation of its proposed $6.51/hour reduction in average wage and benefit costs—was required to give the Unions notice of and the opportunity to bargain over the specific allocation of wage and benefit savings ultimately implemented by the Respondent. Contrary to the majority, the Respondent implemented "changes reasonably falling within its preimpasse proposal." *Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d at 886. However, the record reveals that the changes implemented by Respondent required substantial postimpasse work and subjective judgments by Wayron's owners, Spendlove and Dietz. As the judge found, "in the absence of any guidance from the Unions, they had to decide on the wage/benefit package generally for all employees, and specifically for each employee, depending upon the employee's job classification, seniority and benefits."[18] Thus, prior to implementation, I believe Section 8(a)(5) required the Respondent to provide reasonable notice of and the opportunity for bargaining over the wage and benefit changes formulated by the Respondent to effectuate its $6.51/hour average savings. This could have occurred had the Respondent proposed one or more specific potential allocations at the same time it expressed its willingness to adopt any allocation preferred by the Unions and employees. Alternatively, the Respondent could have provided the requisite notice and opportunity for bargaining after reaching an impasse regarding the Respondent's proposal for an overall average savings in wages and benefits of $6.51/hour. It is likely—indeed, on the record before us, perhaps a near certainty—that the Unions would have responded the same way, which was to reject any concessions. However, there are many ways in which wages and benefits may be changed to achieve an overall average savings of $6.51/hour (for example, the Respondent ultimately decided to grant a small wage increase offset by even greater reductions in benefits). Even though bargaining over such details may not produce an agreement, I believe these details are sufficiently distinct from Respondent's proposal for a reduction in total average wage and benefit costs of a certain targeted amount to warrant notice and the opportunity for negotiation prior to their implementation.

However, because the parties were clearly at a valid impasse regarding Respondent's proposed $6.51/hour reduction in average wage and benefit costs—with the Respondent indicating that *any* allocation by the Unions and employees would be acceptable—I believe the Board cannot reasonably order the Respondent to rescind the $6.51/hour in average wage and benefit concessions implemented on February 8, 2011, and restore the wage and benefit levels of the expired CBA. As noted previously, the Respondent's wage and benefit proposal was lawful, it involved mandatory subjects of bargaining, and the record leaves no doubt that the parties were at an impasse, which included an impasse regarding Respondent's proposed $6.51/hour wage and benefit savings. For these reasons, I believe the Board cannot properly "veto" the substance of Respondent's wage and benefit proposal by compelling Wayron to rescind it. *Detroit Typographical Union No. 18 v. NLRB*, 216 F.3d at 119. It is especially unwarranted to award the Respondent's employees 5 years of backpay at the rate of $6.51/hour, plus interest, given that the Board's remedial authority, though broad, is strictly limited to measures that are "remedial."[19] Accordingly, in the unique circumstances presented here, I

[17] See *McClatchy Newspapers*, 321 NLRB 1386 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997). Because the instant case does not involve any merit pay proposal or any other proposal that similarly would have afforded the Respondent discretion to decide for itself, during the term of the agreement, what further changes it might make in wages or benefits, I do not reach or pass on whether the Board's decisions in *McClatchy* and similar cases were correctly decided.

[18] Judge's decision, infra, slip op. at 29.

[19] *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11–12 (1940) (citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235–236 (1938)); *NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 267–268 (1938). The Board is not "free to set up any system of penalties which it would deem adequate" to "have the effect of deterring persons from violating the Act." *Republic Steel*, 311 U.S. at 12. The Board's authority to devise remedies "does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order." *Consolidated Edison*, 305 U.S. at 235–236. As the Supreme Court stated in *Republic Steel*: "We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act." 311 U.S. at 11.

believe the appropriate remedy is an order requiring the Respondent to bargain to impasse or agreement regarding the precise wage and benefit changes to achieve the $6.51/hour reduction in average wage-and-benefit costs.[20]

CONCLUSION

For the reasons stated above, as to the issues presented in this case, I respectfully dissent in part, and I concur in part.

Dated, Washington, D.C. August 2, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with Boilermakers Local 104, Machinists District Lodge 160, Local Lodge 1350, and Painters District Council 5, or their successors (the Unions) by failing and refusing to promptly furnish them with requested information that is relevant and necessary to the Unions' performance of their duties as the sole collective-bargaining representatives of our unit employees described in article 1 of the 2006–2010 collective-bargaining agreement as:

> [E]ngaged in the fabrication of iron, steel, metal and other products, the machining, repair of machinery or manufacture of products, the preparation of or painting/coating of any product, item, or in the maintenance work in or about the Company's plant(s) located in Longview, Washington or any work undertaken offsite.

WE WILL NOT unilaterally implement changes in your terms and conditions of employment as provided for in the 2006–2010 collective-bargaining agreement that was terminated on February 4, 2011, until a new contract is concluded or good-faith bargaining leads to an impasse, or the Unions agree to changes.

WE WILL NOT terminate employees and require them to reapply because of the termination of the contract and cessation of collective-bargaining negotiations.

WE WILL NOT advise employees or cause them to believe that, because of the termination of the contract and cessation of negotiations, the Unions no longer represent them.

WE WILL NOT unlawfully fail to notify the Unions of our intent to discharge employees, implicitly withdraw recognition from the Unions, delay further bargaining with the Unions, or delay the providing of relevant information requested by the Boilermakers Union as the collective-bargaining representative of boilermaker employees.

WE WILL NOT withdraw recognition from the Boilermakers Union or Machinists Union pursuant to decertification petitions before we have remedied the unfair labor practices that reasonably influenced the filing of such petitions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL furnish the Unions' auditor the financial information that the Unions requested on November 9, 2010.

WE WILL, on request, meet and bargain with the Unions as the exclusive collective-bargaining representatives of our employees in their respective crafts, as described above, concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement or in signed agreements.

WE WILL, on request by the Unions, rescind any or all changes in the terms and conditions of employment for our unit employees made on and since February 8, 2011, and restore and maintain the terms and conditions of the

[20] As my colleagues note, the judge found that the wage and benefit terms Wayron implemented on February 8, 2011, were close enough to the overall compensation figure of $24/hour to be consistent with Wayron's pre-impasse proposal. The majority does not pass on that finding, and I do not foreclose the possibility that Wayron may have cut more deeply than the $6.51/hour it proposed. If so, I would hold the Respondent liable to make up the difference between $24/hour and any lower overall compensation figure its unilaterally implemented terms may have actually effected, and I would leave the determination of these matters to compliance.

2006–2010 contract that was terminated on February 4, 2011, unless and until we bargain with the Unions in good faith to a new agreement or lawful impasse, or the Unions agree to changes.

WE WILL make unit employees whole for any loss of earnings and other benefits suffered as a result of our unlawful unilateral changes to wages and benefits, plus interest.

WE WILL make all delinquent pension fund and health and welfare fund contributions that have not been made since February 8, 2011, including any additional amounts due the funds as provided for in the Board's Order.

WE WILL reimburse, with interest, any of you who incurred out-of-pocket expenses because of our discontinuation of contributions to health and welfare funds.

WE WILL, within 14 days from the date of the Board's Order, rescind the February 7, 2011 terminations of all employees. You will receive, or have already received, a letter advising you that your terminations have been rescinded, that you need not reapply for future employment, and that your rights and privileges as an employee with regard to seniority and recall from layoff have been restored.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges on or about February 7, 2011, and WE WILL, within 3 days thereafter, notify each discharged employee in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL make employees unlawfully discharged on or around February 7, 2011, whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or by Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WAYRON, LLC

The Board's decision can be found at www.nlrb.gov/case/19–CA–032983 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Sara Pring Karpinen, Esq., for the General Counsel.
Kristen Bremer, Esq. (Tonkon Torp, LLP), of Portland, Oregon, for the Respondent.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to a notice of hearing in this matter was held before me in Vancouver, Washington on October 25, 26, and 27, 2011. The hearing was closed by order dated November 28, 2011. The initial charge was filed by International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers of America, Local 104 (Boilermakers) on March 2, 2011. Thereafter, various amended charges were filed by the Boilermakers on behalf of itself and the International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 160, Local Lodge 1350 (Machinists), and the International Union of Painters and Allied Trades, District Council 5 (Painters). Thereafter, on June 23, 2011, the Regional Director for Region 19 of the National Labor Relations Board (Board) issued a complaint and notice of hearing alleging a violation by Wayron, LLC (Respondent) of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The Respondent, in its answer to the complaint,[1] duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the Acting General Counsel (the General Counsel) and counsel for the Respondent. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a State of Washington corporation with an office and place of business in Longview, Washington, where it is engaged in the fabrication and nonretail sale of metal products. In the course and conduct of its business operations the Respondent annually purchases and receives at its Longview, Washington facility goods valued in excess of $50,000 directly from points outside the State of Washington, and sells and ships from its Longview, Washington facility goods valued in excess of $50,000 directly to points outside the

[1] The Respondent was permitted to amend its answer to the complaint at the hearing.

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

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that the named Unions are, and at all times material herein have been, labor organizations within the meaning of Section 2(5) of the Act,

III. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The principal issues in this proceeding are whether the Respondent has violated and is violating Section 8(a)(1), (3) and (5) of the Act by bad-faith bargaining, refusal to furnish information, withdrawing recognition from certain unions, and discharging employees.

B. Facts

The Respondent, a metal fabrication shop, is owned and operated by Faye Dietz and Jeff Spendlove who purchased the company from its previous owner in 2002. Both were former employees of the predecessor company: Dietz was employed as an engineer and Spendlove was employed as a union painter. Dietz is currently CEO and a 51-percent owner of the Respondent, and continues to perform engineering work; and Spendlove owns the remainder and continues to perform painting work.

The predecessor company was a union shop having three separate labor agreements with the three Unions involved herein, each contract expiring at different times. In order to save time and money the Respondent proposed that one set of negotiations covering all employees in one contract would be a more convenient way to negotiate. The Unions agreed. Both Dietz and Spendlove testified that by creating a "wall to wall" contract they had no intention, nor were there any discussions with the Unions, that the parties intended to merge all the employees into a single bargaining unit. There is no contrary evidence.

The most recent contract extended from the "date of ratification"[2] to September 30, 2010. The recognition/union security clause contained in the contract is, inter alia, as follows:

> The company recognizes the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 104; the International Association of Machinists and Aerospace Workers District Lodge 160, Local Lodge 1350; and the International Union of Painters and Allied Trades District Council Number 5 as the sole bargaining agents for the employees classified herein engaged in the fabrication of iron, steel, metal and other products, the machining, repair of machinery or manufacture of products, the preparation of or painting/coating of any product item, or in the maintenance work in or about the Company's plant(s) located in Longview, Washington or any work undertaken off-site.
>
> It is agreed that all employees under this agreement shall continue to perform their respective craftwork as described by their previously established craft jurisdiction.
>
> Where specific items to a particular craft may be identified, it may be necessary to negotiate a separate understanding.

The union-security clause of the contract provides that all employees shall make application "to join the Union which represents their trade. . . ." The contract provides that each Union may appoint a steward for each shift. There is no restriction in the contract precluding each Union from filing grievances on behalf of the workers it represents. Further, the Respondent agrees to contribute a percentage of gross wages into "the individual Union Pension Trusts."

The contract contains separate articles entitled "Field Work Painters," providing that painters' field work is to be governed in accordance with the current "Master Area Agreement Articles for the painting industry"; "Field Work Boilermakers," providing that the current "Western States Field Agreement Articles shall govern boilermakers. . ."; and "Field Work Machinists," a lengthy article with six sections, inter alia providing for overtime and double time compensation, straight time compensation at 115 percent of normal shop rate, travel pay, vehicle pay, and company-provided arrangements for overnight trips. The contract contains an addendum with different pay scales for different crafts.

The Boilermakers, Machinists and Painters each sent separate contract-reopener letters to the Respondent. The Boilermakers' letter requested information limited to employees represented by that particular union. In addition the Boilermakers and Machinists sent separate FMCS forms to the FMCS with the intention of describing the number of "Bargaining Unit Members" as limited to the employees within their particular craft.[3] Attached to the Machinists' reopener letter is a form submitted to the FMCS specifying that there were 3 "Bargaining Unit Members" and 3 "Total Employees at Affected Location(s)" for which the Machinists Union was bargaining, even though at the time there was a total of some 13 or more working employees covered by the contract. There is no reference in any of the letters that any union is intending to bargain on behalf of employees of any other union. There is no showing that contract ratification voting is conducted among all employees as a single unit; rather, according to Boilermakers' Assistant Business Agent Lance Hickey, the Boilermakers would vote as a separate group and he does not know what would happen if one of the three unions voted the contract down.

With regard to the initial charge in this case, filed by the Boilermakers, Hickey testified the charge was filed only on behalf of the Boilermakers, and that the Painters and Machinists were not included because it was believed "They would file their own [charges] separately."

Counsel for the General Counsel stated:

> Our position is it's a joint unit of all the Unions with separate classifications and the Unions separately representing their classifications, but bargaining as a group for one contract.

The parties began negotiations for a successor agreement on September 15, 2010. Dean Nordstrom, a labor consultant, accompanied by Dietz, was the chief spokesman for the Respondent. Lance Hickey, assistant business manager for the Boiler-

[2] It is unclear whether the ratification took place in 2006 or 2007.

[3] There is no similar FMCS form in the record from the Painters.

makers, was the chief spokesman for the three Unions; Business Representative Gregory Heidal represented the Machinists; Business Representative Jeff Brooke represented the Painters.

At the September 15, 2010 session the Respondent and Unions exchanged their initial proposed contracts. The Respondent's initial proposed contract, *inter alia*, included a proposed $10-per-hour average cut in pay and/or benefits. The Union's initial proposed contract, inter alia, provided for a $1.25 hourly wage increase. Business Agent Hickey testified that at one point during the session, Dietz, who was discussing difficulties the Respondent was having, stated, "How are we going to pay the employees if there is no work? We can't even pay them with a sandwich, or something thereabouts."[4] Also, according to Hickey, "a couple" of contract items proposed by the Unions were discussed.

On September 20, 2010, prior to the next bargaining session, the parties entered into a written agreement extending the contract beyond its September 30, 2010 expiration date; the agreement provides for a day to day extension of the contract until an agreement is reached and ratified, or until either party served on the other party a 5-day notice to terminate the agreement.

The next bargaining session occurred on October 6, 2010. In addition to the aforementioned participants, Bill McCain, the Boilermakers' chief steward was also present. Neither the Respondent nor the Unions deviated from their initial economic proposals. According to Hickey, the parties "reviewed back and forth the proposal from the Unions, and then also from the company."

The next session occurred on November 4, 2010. In addition to the aforementioned participants, Jeff Spendlove was also present. This is the first negotiating session Spendlove attended. At this session Spendlove set out the Respondent's rationale for its revised requested contract concessions, namely a $6.51-per-hour average decrease in wages and/or benefits. Spendlove presented the Unions with a chart which, according to Hickey, "showed the hourly rate, full package, and then where they needed to be at to stay competitive." Thus the Respondent had moved from its initial September 15 proposal of a $10-per-hour average cut in pay and/or benefits, to the $6.51-figure. This would reduce the total compensation package from the current contract compensation package averaging $30.51-per-employee per hour, to a proposed compensation package averaging $24-per-employee per hour; under the Respondent's proposal, the Unions could take cost-cutting reductions from any cost items the employees chose. The extent of Hickey's testimony regarding this presentation by Spendlove, is as follows:

> Basically we sat down and started with [Spendlove] reviewing the company's position, talking about how much they needed to make for—to be competitive. I think $4.5 million. They were at 2.5, so they were 2 million short. There was talk about they were basically working on a line of credit. They were going to have to go see the bank in February. If they couldn't get cuts that they needed that they didn't think they could secure a new loan at that time to continue business.

Painters' business representative Jeff Brooke testified that proposals were exchanged at the September 15, 2010 session, and that Nordstrom discussed the "financial hardship" the company was having. Brooke testified the Respondent's proposal was discussed at the October 6, 2010 negotiating session. At the November 4, 2010 meeting, according to Brooke, Spendlove said that "the company had an amount of money and however it wanted to be broken up from labor's side, this is all they could afford to pay for his employees." At this session, according to Brooke, Spendlove "presented the six dollar and change rollback that he would need to keep the company afloat." According to Brooke, Spendlove said if the company was not able to achieve that $24-per-hour number "they would have to close the doors."

Machinists' Business representative Gregory Heidal was designated as the Unions' "scribe" to memorialize the meetings he attended. Heidal testified that Dietz spoke up "a little bit" at the meetings but for the most part was "pretty quiet." At the September 15, 2010 meeting the parties began to question each other concerning the respective proposals they had exchanged. Nordstrom talked about "the hopper and bucket of money" that was available for the employees, but did not seem to be well acquainted with the Respondents' specific proposals. Heidal does not recall if the Unions asked Nordstrom if he had the authority to agree to contract changes. Dietz, according to Heidal, essentially was claiming that there was no work out there, and stated, "If I was just paying a sandwich and there was no work, I could not even pay a sandwich."[5]

Regarding the November 4, 2010 session, Heidal, when asked by the General Counsel whether he remembered "generally" what Spendlove said at that session, answered, "Yeah, as a matter of fact. Not general, I remember pretty detailed what he said."[6] Heidal then went on to recount Spendlove's presentation:

> You know, he came in and pretty much laid of what he felt the condition of the company was, and that really backing up some of what Faye [Dietz] had said before, that they were having a hard time, having difficulties. There's not a lot of work out there, getting some bids. And the company was having good years and having bad years. And that they were looking for a competitive edge or an even playing field, if you will, with his competitors, and that he needed to reduce the costs of the contract.

[4] I do not credit Hickey's version of this alleged statement, upon which the General Counsel relies in support of the argument that the Respondent was pleading an inability to pay. Rather, I credit the version given by Business Representative Agent Heidal, infra.

[5] The rather obvious meaning of Dietz' remark, given the context, is that no matter what the contract wages and benefits, even if the contract provided that the employees should be paid a sandwich rather than $30.51 cents per hour, the employees would be receiving nothing, not even a sandwich, if there was no employment for them.

[6] Heidal appeared to have a relatively thorough recollection of Spendlove's remarks at the November 4, 2010 meeting, reinforced by the notes he had taken. I credit his testimony unless otherwise noted. I do not credit the testimony of business agents Hickey and Brooke to the extent their testimony differs from Heidal's account of meeting.

Spendlove then presented the Unions with a little spreadsheet or matrix, and said the Respondent was "looking at a reduction of something like six-something an hour."

Asked about whether Spendlove explained what he meant about a February deadline with the bank and the landlord, Heidal testified:

> Yeah, but not in as much detail as I would like. Essentially. . . they had to come to an agreement with the bank and the landlord,[7] and they were looking for us, giving us the impression that it was important for us to get on board for them to make some sort of agreement so that they could go to the bank and say, hey, this is where we're at.

Regarding this, Heidal testified, "I believe Jeff [Spendlove] said they were going to be in financial trouble"[8] if they were unable to make some agreement with the bank.[9]

Heidal testified the Unions asked to look at the Respondents books, infra, based on what the Respondent was telling them about its predicament. Asked why the Unions made this request, Heidal testified:

> . . . they weren't crying poverty. In fact, in our first meeting with the company we asked them about that. They were telling us, you know, things were tough. And so we asked them if they were crying poverty. And Dean Nordstrom, I believe, as he said, "you will never—you will never hear us say we don't have the ability to pay. Okay."
>
> Well, as we continued down this road they continue to beat the same drum that they were not making any money. So at some point you got to go, well, okay, prove it, you know. At this point they're not saying—they're not crying poverty, but they're telling us they can't afford the contract. They can't compete with that contract. I don't believe they ever said they can't afford the contract.
>
> So, all right, if that's the case, you're telling you can't compete, then we'll request the financial records. Where are you at? Are you going broke or not? . . . they said they were unable to compete and they wouldn't have any work.[10]

Spendlove testified that the Respondent had approached the Unions in 2009, the year before the expiration of the contract, with this very same problem. The Respondent had wanted to open up certain areas of the contract for concessions to get the costs down. The Unions were not interested, and refused to reopen the contract for this purpose. Without concessions the Respondent was unable to win bids and secure sufficient work for its employees, and layoffs necessarily followed.

Spendlove testified regarding his presentation at the November 4, 2010 meeting. He presented the issues that the company was facing with "securing jobs, future jobs, that is, work for employees." The Respondent had been struggling for some time with securing work, and was not being competitive. It was bidding but losing a significant number of bids, "significantly more than in the past." Spendlove told the Unions that what the Respondent was proposing would not get the company completely competitive but would get them closer, and he handed out the matrix of costs. The current average was $30.51 per hour. This, according to Spendlove, was an average of wages and benefits based on simple arithmetic; some wages, and apparently benefits, were higher for certain employees, and some were lower.

Spendlove testified he did not convey to the Unions that the Respondent was either unable to pay current contract benefits to the employees who were working or even unable to pay current employees more money. Rather, he testified the Respondent could pay the wages and benefits for the employees who were working. There was never a time when the company could not make payroll and benefits. Spendlove tried to convey to the Unions that "Wayron as a company wasn't in jeopardy . . . [but] that what we were not going to be able to provide was jobs." He said this several times. He said that so long as he could be competitive he could provide jobs. Spendlove stated the reduction was necessary so that the Respondent could compete with the nonunion competitors in the area, and conveyed to the Unions that the Respondent needed the cost reductions "in a short term fashion" due to the need to acquire a new line of credit. Further, Spendlove made it clear to Hickey that the Respondent was seeking a contract that could be signed no later than February 2011. Hickey said the Unions would have to talk about it, as $6.51 was a pretty drastic cut, and that the Unions would get back to the Respondent.

Spendlove testified that from the tenor of the discussions at that meeting it seemed to him the Unions understood the situation and were receptive; they said they could appreciate his position. He requested an opportunity to talk with the employees the following day, November 5, 2010, to explain to them what he had told the Unions, because it was a very significant reduction that they were being asked to accept and he wanted the employees to understand why such a significant reduction in wages and/or benefits was essential. He invited the union business representatives to attend. The Unions had no objections to the holding of such a meeting, and Hickey indicated he would be attending. Spendlove left the meeting "with a very

[7] I find that Spendlove said that in fact they had already made arrangements with the landlord to reduce the rent.

[8] This is different than what Hickey understood, namely that they needed a new loan to "continue in business."

[9] There is no evidence that during negotiations anyone questioned Spendlove about his statements regarding the line of credit or about the annual gross volume of business the Respondent needed to break even, or about the significance of these matters in relation to Spendlove's attempt to convince the Unions of the Respondent's inability to compete under the wages and benefits of the current contract. Indeed, at the hearing, neither the General Counsel nor the Respondent's counsel asked either Spendlove or Dietz to explain the significance or interrelationship of these concerns with the Respondent's repeated assertions of inability to compete.

[10] This final statement was in response to a leading question from the General Counsel, "And weren't they also saying they would go out of business if they didn't get the cuts that they sought?" To this question Heidal testified, "Yes, they said they were unable to compete and they wouldn't have any work." Accordingly, I find that Heidal did not testify that either Dietz or Spendlove said that the Respondent would go out of business if they did not get the cuts they were requesting. Rather, this was Heidal's assumption.

good feeling," and was optimistic over the prospects of reaching agreement.

The following day, November 5, 2010, Spendlove held the aforementioned meeting with the employees at the Respondent's shop. Hickey had notified Spendlove that he was unable to attend, and no union representatives were present for the meeting. At the meeting Spendlove told the employees what he had proposed to the Unions during negotiations: that he needed the employees to take a large cut in pay and/or benefits of over $6 per hour, that he had given the Unions and the employees the option of deciding where they would be willing to take the cuts, and that the cuts were needed in order to permit the Respondent to be competitive with the nonunion shops in town. He told them that Wayron had to pull "X" number of dollars per year to cover overhead. It was not that they couldn't pay, it was that the Respondent could not be competitive, and he was worried about providing jobs.[11]

During the hearing Spendlove and Dietz attempted to explain Spendlove's November 4 and 5, 2010 statements to the Unions and employees regarding the Respondent's need for $4.5 million per year to cover "overhead." Dietz testified that under the then-current contract (apparently assuming a full complement of approximately some 13 employees) the break-even point was $4.5 million. The "overhead" amount was based on all fixed costs, including labor costs, and the Respondent wanted to bring this down. With the reduced $24-per-hour wage and benefits package, the Respondent would no longer need to do $4.5 million per year with a full complement of employees to break even; rather, it could break even with much less gross revenue. Accordingly, regarding the bank line of credit, it appears that the Respondent would not have to ask the bank to continue the line of credit based on $4.5 million gross revenue (that is, the current contract rates), but on a much lesser amount, thus being able to request and obtain a substantially reduced line of credit.[12]

On November 9, 2010, Hickey wrote to the Respondent as follows:

Re: Information Request

> Boilermakers Local 104, on behalf of the Unions (sic) Bargaining Committee, is requesting the following information as a result of the position the Company has taken during contract negotiations. Specifically the Companies (sic) position that it is financially unable to pay wages and benefits equal to the wages and benefits in the expired Collective Bargaining Agreement and the Companies (sic) position during the Bargaining process that it needs wage and benefit concessions to remain in business.
>
> 1. Access to all financial records by an Auditor selected by the affected Unions and any other records deemed necessary by said Auditor to substantiate the Companies (sic) position of inability to pay.
>
> Please give your response to this request no later than November 30, 2010.

Spendlove replied immediately on the following day, November 10, 2010, as follows:

> 1. Wayron is not, nor has previously, claimed the inability to pay wages and benefits under any Collective Bargaining Agreement. During the course of our negotiations Mister Nordstrom has, for the record, stated several times that there is no inability to any [sic] contractual obligations.
>
> Wayron's position is that it is unable to remain competitive in the current global economic climate, and is seeking methods of reducing costs to continue to secure work.
>
> 2. For the reasons stated above, Wayron has no intention of allowing access for any audits concerning this matter.

Hickey did not directly disagree with this response from Spendlove. Thus, Hickey was asked by the General Counsel whether he agreed with Spendlove's characterization of the Respondent's position in the aforementioned letter that the Respondent was "merely not competitive" rather than unable to pay. Hickey responded as follows:

> . . . I mean I understand with the economic climate seeking a reduction, but the eliminating all, you know, basically all benefits was something that was out of the norm. We haven't seen it from any other Collective Bargaining Agreement we represent. Like I stated earlier, we've seen some small reductions. I mean, less than a dollar reductions, but something this significant amount, you know, was unheard of. So you know, in his statement claiming the inability to pay was still in question. . . .[13]

The next meeting was held on December 20, 2010. Only Nordstrom, Dietz, and Hickey were present at this meeting. At this time the Respondent employed only three employees, two boilermaker employees and one other employee, either a painter or machinist.[14] It was a very brief meeting, less than about 10 minutes. Hickey testified he "mentioned" that it would help if the parties extended the contract for 1 year.[15] The parties agreed that the next meeting would not be held until sometime in January 2011 due to the upcoming holidays.

[11] I do not credit the testimony of any employees who testified to the contrary.

[12] As noted, no one questioned Spendlove or Dietz about these matters during negotiations.

[13] It appears that Hickey was not stating that the Respondent had professed an inability to pay, but rather was articulating his belief that a request for such steep reductions in wages and benefits was, on its face, tantamount to an inability to pay, and that whether or not Spendlove was "claiming an inability to pay was still in question." Apparently the letter clarified this for Hickey, as no further requests for financial information were forthcoming from the Unions.

[14] Although the record is unclear, it appears that at one point there were some 20 employees working for the Respondent among the three crafts, the great majority of whom were boilermaker employees. Because of a lack of work these employees had been laid off, some for very long periods of time, and by December 2010, the employee complement had declined to three employees.

[15] Hickey testified he believes he "proposed" this, but he did not necessarily want it to be characterized as a formal, written "proposal."

The next meeting was held on January 28, 2011. The Respondent scheduled this meeting with a FMCS mediator. Hickey and the various union business representatives were present, as was Bill McCain, the Boilermakers' chief steward. Nordstrom, Dietz, and Spendlove were present for the Respondent. The parties did not meet face to face. The mediator shuttled several times from one group to the other. Hickey understood from the mediator that the Respondent continued to propose the reduction to a $24-per-hour wage and benefits package, and the Unions advised the mediator that they refused to reduce the benefits package below the status quo. Hickey testified his "understanding" of what the mediator was telling him was that "without an agreement on the economics from the mediator none of the other parts of the proposal would be discussed."[16] No change in either position was made at this meeting. The mediator indicated that because the parties were so far apart there appeared to be no further need for her services, and no further sessions with the mediator were scheduled.

Immediately following the aforementioned meeting with the mediator the Respondent advised the Unions by email that it was terminating the collective-bargaining agreement on February 4, 2011. On February 2, 2011, Hickey sent a counterproposal to the Respondent providing for, inter alia, a 75-cent-per hour wage increase for each classification for each year of the agreement. This was a reduction from the Unions' initial proposal of a $1.25-per-hour wage increase for each classification for each year of the contract, but an increase from its recent December 20, 2010 and January 28, 2011 verbal proposal to retain the status quo.

Another negotiating session was scheduled for February 4, 2011. On the morning of the scheduled date Hickey emailed Spendlove as follows:

> I just got off the phone with Dean Nordstrom, he feels that the Company is not willing to move from your original proposal back in November he believes today meeting would be unproductive. Just to confirm with you is that indeed the position of the Company is that their last offer is the last best and final offer, if that is the case we agree nothing productive will result from meeting today, however if you are willing to continue to bargain and propose changes to the Company's position we are still willing to meet today. We have the Woodworkers hall reserved for 2:30pm today. (Syntax in original.)

Spendlove replied by email, "We will see you at 2:30"

The parties met again that afternoon. The same participants were present. The Union's February 2, 2011 proposal was reviewed. There is no contention that the Respondent refused to discuss anything the Unions wanted to discuss. Hickey believes the Unions retracted their February 2, 2011 proposal, requesting a 75-cent-per hour wage increase, by stating they were willing to forgo any wage increase and simply retain the status quo in a new contract as they had proposed at the earlier sessions. The Respondent declined, and again reiterated its need for the $24-figure because of the average benefits package of their competitors in the area[17] and, in addition, to show this reduction to its bank in order to get an extension of the line of credit. The Respondent said it would be implementing new terms and conditions of employment on Monday. Hickey's computer notes of the meeting state that as of today the company has not shown any movement from its November 4, 2010 proposal, and "the company would be looking at the terms and conditions for the employees this weekend and will be implementing those terms and conditions on Monday."[18]

Spendlove testified that throughout negotiations the Unions did not attempt to negotiate contract language with him. Further, Spendlove testified that on several occasions Hickey told him that while the Unions were sympathetic to his position, they just felt that giving Wayron concessions was going to lead to a domino effect down the line for all the Unions nationwide, and they could not do this.

On Friday afternoon, February 4, 2011, according to Mike Olson, a boilermaker working foreman, he and the other two employees who were working at the time went into the office to punch out. They were told by Dietz and Spendlove that "We want you to, on your way out, grab an application. Don't come in Monday, and go ahead and show up Tuesday with the application. We're going to rehire everybody. We're going to start new again." They said the negotiations were terminated because "there was nothing going on," and that the Unions were "not just being real." According to Olson, they did not specifically say the Respondent was going nonunion; however, because he was required to fill out a new employment application, he was uncertain whether the Respondent was still a union shop or not.

On Monday, February 7, 2011, without prior notification to the Unions, the Respondent sent the following termination of employment letter to all of its employees, including employees on layoff status:

> RE: Termination of Employment
>
> As the Collective Bargaining Agreement, as well as all extensions has (sic) been terminated, your employment with Wayron, LLC is hereby terminated effective 7:00 a.m. Monday February 7, 2011.
>
> All rights and privileges as an employee have ended as a result of this termination as of February 7, 2011.
>
> Your final pay and allowances (if any) will be mailed to you at the above address on the next regularly scheduled pay date, less standard deductions and any amount owed to Wayron, LLC.
>
> You are welcome to apply in person after February 8, 2011 if you wish to seek re-employment.

Spendlove testified the employees were told not to come to work on Monday because he and Dietz did not know at the time

[16] This hearsay testimony was objected to by Respondent's counsel and was received as hearsay not for the truth of the matter but only to permit Hickey to present his understanding of what he understood the mediator to be saying.

[17] Hickey testified he took Spendlove's word for this and did not question it or ask for verification because in some cases he knew it was true.

[18] After the February 4, 2011 meeting, Nordstrom had no further involvement in this matter.

whether they could formulate the details of the economic package by then. Thus, in the absence of any guidance from the Unions, they had to decide on the wage/benefit package generally for all employees, and specifically for each employee, depending upon the employee's job classification, seniority and benefits. Spendlove testified that when he and Dietz purchased the company from its predecessor, they terminated and rehired all of the employees; similarly, they thought this would be a good precedent to follow in order to make a clean break for accounting purposes[19] and start over. He testified, "It seemed to us that the cleanest, best way to…enact the last offer before reaching impasse, the cleanest, easiest way to do that and keep everything clear would be to just start everybody over on a completely new set of . . . bookkeeping books." They had the employees reapply because they were not sure that employees would want to come back under the new conditions. As noted, there were only three employees working and many more on layoff status. Spendlove testified it just seemed like the most direct way to let the employees know that they would be returning to work under new terms and conditions of employment, and for the employees to let the Respondent know that they were willing to do so.

Over the weekend the Respondent had decided upon a new wage and benefits package that would conform to its last and final wage and benefits proposal it had offered to the Unions, namely, an average $24-per-hour figure per employee. On Tuesday, February 8, 2011 the employees who were working on the previous Friday were rehired after filling out new employment applications, and began receiving wages and benefits in accordance with the Respondent's newly instituted wage and benefits package.

Robert Stone, a Boilermaker employee, who apparently was on layoff status, testified that he phoned Boilermaker Foreman Gary Bishop about the letter. Bishop told him to come in and reapply. He did not reapply because "Well, they fired me once, so I figured they didn't want me."

Bill McCain, a 20-year Boilermaker employee with the Respondent and its predecessor, had been shop steward for the Boilermakers and had attended negotiating sessions. He had been on layoff status since December 15, 2010. Sometime after February 7, 2011 he received the aforementioned letter from the Respondent. McCain testified that on Friday, February 4,2011 he had a phone conversation with Mike Olson, a Boilermakers foreman, whom McCain identified as a lead man, and asked him about the situation. Olson told him to come in and fill out an application, adding that he too had been given an application on Friday. Olson told him that they were "closing on Monday and reopening on Tuesday, the following day, nonunion, that I had to re-apply for my job." Olson did not say where he had obtained this information. McCain testified that upon reading the letter he assumed the Respondent was going to be a nonunion shop as the letter said nothing to the contrary. He never spoke to Dietz or Spendlove about the matter, and did not reapply because he did not want to work for a non-union shop; nor would he have reapplied even if he knew the shop would continue to be a union shop but not under a collective-bargaining agreement.[20]

Corey Wasson, a boilermaker employee, is currently employed by the Respondent. Wasson reapplied for his job after receiving the letter and spoke with Dietz and Spendlove. Wasson testified that when he met with Dietz and Spendlove, he believes they told him the shop would be working "not under a Union contract anymore, and they decided to pay him more money in wages but there would not be more benefits till later on when the company was doing better." However his Board affidavit states that when he went in to meet with Dietz and Spendlove, "The first thing they told me was the shop was non-Union and . . . there would be no benefits." Wasson attempted to explain this discrepancy by testifying, in effect, that his affidavit was imprecise as it reflected his belief or understanding of the situation rather than the explicit words of Dietz and Spendlove.

Wasson attended a Boilermakers union meeting held for the purpose of updating employees about the status of negotiations. Wasson testified that one of the business representatives stated there should be some work coming up at the shipyards and that the employees would not be able to return to Wayron without a contract and work in the same trade because it was against the Boilermakers constitution; thus, the employees could not be in the Union if they continued working for Wayron.

Brett Lafever, a boilermaker employee, had worked for the Respondent since 2007. He reapplied on February 8, 2010 and was rehired. His Board affidavit states: "The interview started with Jeff and Faye thanking me for coming in and telling me that as I may know Wayron was starting up as a non-Union shop." However during the course of his testimony he too attempted to retract this statement by maintaining that this was more of an assumption on his part rather than the actual statements of Dietz and Spendlove. He further testified that neither Dietz nor Spendlove said anything at all about the contract or the Unions, and did not say the company was no longer under a union contract. During the interview they told him about a new package deal for each employee; he was offered more wages, but no pension and no medical, and told that maybe these benefits could be available in the future.

On February 18, 2011, and again on February 22, 2011, Hickey wrote to the Respondent to schedule further negotiations. On March 2, 2011, the Boilermakers filed its initial

[19] Employees whether or not they were on layoff were entitled to accrued vacation pay, and they were each sent a check for this, as the Respondent did not know whether they would be returning to work or would be remaining on layoff status. If they wanted to be rehired by the Respondent their vacation leave would again begin accruing at the time they were rehired. However, they lost no vacation benefits.

[20] The Respondent, in its answer to the complaint, admits the supervisory status of Mike Olson. At the hearing however, Respondent's counsel stated this was an error on her part and was granted permission to amend the answer to deny supervisory status. Thereupon the General Counsel was given time to investigate and provide further evidence on this matter. While it appears from the record evidence that Olson was not a supervisor within the meaning of the Act, it is unnecessary to make such a determination. Thus, the statement regarding the nonunion status of the Respondent attributed to Olson by McCain is identical to the statements I find were made by Dietz and Spendlove, infra, and would simply be cumulative.

charge in this matter, and filed amended charges on March 9 and 18 alleging, inter alia, that the Respondent had withdrawn recognition from the Boilermakers.[21]

Spendlove did not reply to the requests for further negotiations until March 14, 2011, when he sent the following email to the Unions:

> Wayron is, and has always been, willing to meet with you for contract negotiations. However, what appears to be more pressing is the Boilermakers' NLRB charges against the company, which Wayron denies. We anticipate that the subject matters of the charges may overlap with any topics of negotiation and further anticipate that the parties will not be able to bargain beyond impasse without the resolution of such charges.
>
> Wayron hopes that negotiations will be productive in resolving the charges and moving forward with a new contract.
>
> We have negotiated in good faith with the union and will continue to do so.

There were further emails back and forth as to which side had the primary responsibility to furnish tentative negotiating dates. By email dated March 24, 2011, Spendlove proposed negotiating dates to Hickey and also stated:

> I recommend that one of the first orders of discussion is dismantling the wall-to-wall contracts with the three unions. While this may have been effective and efficient several years ago, the nature of our business has changed, and based on unforeseen economic factors, the Company intends to negotiate that it separately bargains with each union.

The parties agreed to meet on April 22 and 29, 2011. However, on April 19, 2011, the Boilermaker employees filed a decertification petition in a unit described as excluding "Painters, Machinists, Office Personnel." Spendlove testified that upon being advised of this decertification petition he believed the Boilermakers Union no longer had the majority support of the boilermaker employees. He based this belief on the fact that he was told this by the two boilermaker employees who filed the petition, namely, Brett Lafever and Rick Crenshaw, "that eight people, I believe it was eight people, had signed the petition." At that time, according to Spendlove, the Respondent had eight boilermaker employees "on its books," four who were working and four who were apparently on layoff status.[22]

By email dated April 20, 2011, Spendlove stated to Hickey:

> In light of the petition Wayron received on April 19, 2011 regarding Boilermaker decertification, Wayron is canceling the negotiation meeting scheduled for the 22nd of April.
>
> At this time, we plan to continue to negotiate with the Machinist and Painter unions as scheduled on the 29th, but will confirm this prior to meeting next week.

The scheduled April 29, 2011 meeting with the Painters and Machinists was not held because these Unions refused to meet without the Boilermakers also being present; the Respondent was not agreeable to this condition.

On May 6, 2011, the machinist employees filed a decertification petition in a unit described as excluding "Painters, Boilermakers." As of that date the Respondent had only one machinist employee on its books. Spendlove advised the Machinists Union that the Respondent was "withdrawing recognition" from that Union. Spendlove testified the Respondent felt it would be improper and unlawful "if we bargained with two decertified Unions."

By May 23, 2011, all eight boilermaker employees were working.

By emails dated June 14 and July 8, 2011, the Boilermakers requested "hire or re-hire dates" for eight named employees who had returned to work; they had all been working since May 23, 2011. Spendlove initially did not provide the requested information because of the pending boilermakers employees' decertification petition.

On June 23, 2011 the complaint in this matter was issued. Further, sometime before July 27, 2011, the Regional Office dismissed both decertification petitions.[23]

As a result of this development, Spendlove replied to the Boilermakers by email dated July 27, 2011, giving the hire or rehire dates of the eight employees "out of an abundance of caution," but further stated that the Boilermakers no longer had majority support from the individuals in that unit, that the employees "ha[d] made it known to the NLRB and the company that they do not want to be represented by the Boilermakers," and that, "Out of respect for the employees' expressed intent, the company does not recognize the Boilermakers and is under no obligation to provide the requested information." Thus, the Respondent had delayed providing the information from June 14, 2011, to July 27, 2011.

Thereafter the Respondent was advised by the Regional Office that the Board had authorized the filing of an injunction under Section 10(j) of the Act with the Federal district court to require the Respondent to continue bargaining with the Unions as the "joint" bargaining representatives of the unit employees, and to offer four previously laid-off employees, who had been terminated pursuant to Respondent's aforementioned February 7 termination letter, reinstatement to their layoff status.[24]

On August 25, the Respondent emailed all three Unions stating that that it would agree to bargain with the Unions.

On August, 26, 2011, the Respondent and Regional Office entered into an Agreement to Entry of a Consent Judgment whereby the Respondent agreed, inter alia, to bargain with the Unions, reinstate the named employees to layoff status, and

[21] On April 4, 2011, the Boilermakers filed its third amended charge in this matter, for the first time specifying that it was filing on behalf of itself and the two other Unions "as joint representatives of the bargaining unit."

[22] Two boilermaker employees were hired on February 8, 2011, two were hired on February 9, 2011, two were hired on April 25, 2011, one was hired on April 27, 2011, and one was hired on May 23, 2011. The two employees who filed the petition were Brett Lafever, who had been hired on February 9, 2011, and Rick Crenshaw, who was not hired until May 23, 2011.

[23] The record does not indicate the rationale of the Regional Office for dismissing the petitions.

[24] The employees are Karl Graichen, William McCain, Chester Scott, and Robert Stone.

post copies of the Agreement to Entry of a Consent Judgment at its facility.

Thereafter, the parties have negotiated pursuant to the Consent Judgment agreement.

C. Analysis and Conclusions

It is clear that there was no meeting of the minds between the Respondent and the three Unions to engage in collective bargaining for a single/joint wall-to-wall unit covering all employees. Neither the contract itself nor the apparent understanding and conduct of the parties during prior negotiations and the current set of negotiations reflect such a meeting of the minds. Rather, the Respondent and the three Unions were bargaining at the same time not because they had decided to consolidate three distinct craft units into one, but simply for purposes of convenience and cost savings. Indeed, if for some unexplained reason they had decided to establish a single unit,[25] it is reasonable to presume they would have simply said so in no uncertain terms so that there could be no ambiguity; such as, for example, "This contract is intended to cover all employees represented by the individual unions as a single unit and not as three separate units." Here, Spendlove was insistent that there was no such agreement, and not one union witness testified to the contrary. "The Board does not find a merger in the absence of unmistakable evidence that the parties *mutually* agreed to extinguish the separateness of the previously recognized or certified units." *Duval Corp.,* 234 NLRB 160 (1978) (emphasis *in original) (*quoting *Utility Workers Union of America,* 203 NLRB 230, 239 (1973), enfd. 490 F.2d 1383 (6th Cir. 1974). I shall dismiss this allegation of the complaint.

Throughout the course of bargaining both sides essentially adhered to their respective initial positions. The Respondent required significant reductions in labor costs to remain competitive. While not entirely clear from the record, it appears the Respondent's total employee complement had declined from at one point approximately 20 employees, to a relatively steady employee complement of some 13 employees, to 3 employees in late 2010 and early 2011 when the current negotiations were ongoing. Dietz and Spendlove attributed the decline to the fact that the Respondent was unable to successfully bid jobs due to excessive labor costs. Although the Unions acknowledged this as the catalyst for the Respondent's request for concessions, they were nevertheless adamant that there would be no reductions whatsoever; thus, Hickey told the Respondent's negotiators as well as boilermaker employees that to give the Respondent concessions would cause a domino effect with other employers that would adversely impact the Unions, and that there would be no concessions.

It is clear that throughout negotiations the Respondent never explicitly said that it could not or would not agree to the Unions' proposals because of an inability to pay. In fact the opposite is true. Thus, at the very first negotiating session, when the Unions asked whether the Respondent was making such an assertion, the Respondent's negotiator, Nordstrom, immediately replied in explicit terms that it was making no such claim. And in November 2010, when the Unions asked to examine the Respondent's financial records, the Respondent, through Spendlove, again immediately reiterated that it had made and was making no such claim of an inability to pay. It is significant that Hickey did not dispute that the Respondent was at a competitive disadvantage; indeed, the Unions neither disputed this assertion nor requested information supporting this specific contention of the Respondent, such as, for example, documents showing bids by the Respondent that it had not been awarded. Clearly, the Unions knew why the Respondent's employee complement had drastically declined.

The General Counsel argues that although there was no explicit statement from the Respondent of an inability to pay, such an inability may be gleaned from some of the remarks made during negotiations, namely Dietz' remark that the Respondent could not even pay the employees a sandwich, and Spendlove's remarks about a $4.5 million break even point and the necessity of securing a bank line of credit. I do not agree. I find that these remarks and examples were intended by Dietz and Spendlove to demonstrate and convince the Unions and employees of the necessity of concessions so that the Respondent could successfully return the laid-off employees to work (and earn more than the price of a sandwich, that is, more than nothing) and provide employment for the complement of employees it had employed in the past. To do so would require a new break even point and a continuing line of credit sufficient to conduct its business operations based on a full complement of employees. I shall dismiss this allegation of the complaint. *American Polystyrene Corp.*, 341 NLRB 508 (2004); *AMF Trucking & Warehousing, Inc.*, 342 NLRB 1125 (2004); *North Star Steel Co.,* 347 NLRB 1364, 1369–1370 (2006); *Nielsen Lithographing Co.,* 305 NLRB 697, 700 (1991), affd. sub nom. *Graphic Communications Local 508 v. NLRB*, 977 F.2d 1168 (7th Cir. 1992).[26]

Both sides began with proposals that they eventually modified. The Respondent lowered its initial demand from an approximately $10-per-hour cut in pay and/or benefits to a $6.51-per-hour cut in pay and/or benefits.[27] The Unions reduced their

[25] As noted, the record is devoid of evidence that the parties decided to establish a single unit, and there is no record evidence of any benefit whatsoever, either to the Respondent or to the Unions, for consolidating the three units into one for bargaining purposes.

[26] Even if the Respondent had explicitly claimed an inability to pay, I find that under the circumstances herein the Unions would not be entitled to the requested financial information. Thus, in *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956) the Supreme Court states, "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." Here, regardless of the Respondent's financial circumstances, the Unions made it clear that for reasons unrelated to the Respondent's financial circumstances it could not agree to concessions, particularly to the significant concessions requested by the Respondent, because to do so would jeopardize the Unions' bargaining positions nationwide. Both sides knew, under the circumstances, that an audit of the Respondent's financial documents simply would have been an unproductive, time-consuming, exercise in futility, and would not have advanced the prospects for agreement.

[27] The Respondent advised the Unions that it made no difference what contract cost items were reduced to get from the contract rates, which the Respondent calculated as amounting to a $30-per-hour average cost package, to approximately a $24-per-hour average cost pack-

initial demand from a pay increase to simply an extension of the current contract pay and benefits, the status quo, over a 1-year period. Neither the Respondent nor the Unions were willing to move from their respective positions. Discussions regarding contract language were either nonexistent or highly abbreviated as economics dominated the negotiations; there is no showing that the Respondent was unwilling to discuss whatever the Unions wanted to discuss regarding any of the Respondent's contract proposals, including specific proposed changes in contract language. The fact that many noneconomic proposals had not yet been negotiated was not due to the Respondent's refusal to do so. Rather, it is clear the parties implicitly postponed bargaining over non-economic matters until agreement had been reached on the overriding economic issues.

The parties bargained from September 15, 2010, through February 4, 2011, a period of nearly 5-months, and the Respondent was willing to extend the terms and conditions of the expired collective bargaining from September 30, 2010, to February 4, 2011, a period of over 4 months, to facilitate the reaching of an agreement. Finally, as no progress was being made and as time was of the essence, the Respondent, in a final attempt to reach agreement, initiated a meeting with a Federal mediator to assist the parties' efforts. Clearly, the parties, after bargaining, had reached the point at which neither side was willing to move from its firm position. Hickey admitted as much in his February 4, 2011 email, supra. Accordingly, an impasse had been reached. I so find. I shall dismiss this allegation of the complaint. See *California Pacific Medical Center,* 356 NLRB 1283, 1288–1289 (May 25, 2011).

The General Counsel maintains that the terms and conditions of employment established and implemented by the Respondent on or after February 7 were unilaterally implemented in violation of Section 8(a)(5) of the Act because they had not been specifically proposed to the Unions during negotiations.

In support of this argument the General Counsel points out that in fact after February 8, 2011, the Respondent's payroll reflects an average hourly pay/benefits package of its then-current employees of less than $24 per hour, and that this establishes that the implemented economic package was less than, and not reasonably encompassed by, what was offered the Unions during negotiations. I find no merit to this contention. Between February 4 and 8, 2011, the Respondent was attempting to establish an average hourly rate of approximately $24 per hour based on its current and laid-off employee complement at the time; the fact that its employee complement changed after it instituted this pay/benefit package was simply a contingency that it could not have accurately input into its calculations over the weekend of February 4, 2011, as it did not know which employees would be returning to work. Moreover, the fact that the Respondent raised the hourly wage of some of its employees while reducing or eliminating other benefits seems to be consistent with the Respondent's proposal during negotiations.[28] Thus the Respondent's proposal gave the Unions a lump sum, namely $24 per hour, to disburse among various wage and benefit items, in the amounts selected by the Unions; the options presented the Unions did not preclude increasing any benefits the Unions and employees may have chosen to increase, nor did it preclude the elimination of any benefits the Unions and employees may have chosen to eliminate. Accordingly, following the impasse, the Respondent was privileged to unilaterally increase, reduce and/or eliminate any of the various economic items in order to arrive at, or as close to, the $24-per-hour average as possible. I find that the Respondent diligently endeavored to do so.

In summary, the record evidence shows that the Respondent attempted to reduce its wages and benefits by some $6.51 to an average of some $24-per-hour, and that it did so within reasonable bounds considering the difficulty of having so many variables to reconcile in order to reach that figure. Further, I find that the terms and conditions implemented by the Respondent were reasonably encompassed by the proposals it made to the Unions during the course of bargaining. I shall dismiss this allegation of the complaint.[29]

As I have found above, after an impasse had been reached the Respondent advised the Unions that it would be implementing new terms of employment on the following Monday, February 7, 2011.

By letter dated February 7, 2011, all of the employees, whether they were currently employed or on layoff status, were discharged as follows:

> As the Collective Bargaining Agreement, as well as all extensions has (sic) been terminated, your employment with Wayron, LLC is hereby terminated effective 7:00 a.m. Monday February 7, 2011.

They were further advised that all their prior rights and privileges as employees had ended; told that they would be mailed their final paychecks; and informed that they could "apply in person" if they wished to seek reemployment. Thus the employees were explicitly told that their discharge and the requirement that they must seek reemployment by submitting new employment applications was precipitated by the Respondent's termination of the collective-bargaining agreement; and they reasonably believed, I find, that the Respondent terminated the agreement, as well as the employees, as a result of the Unions' unwillingness to accede to the Respondent's demands during negotiations. While the Respondent maintains that it did not intend to retaliate against the employees, and that its deci-

age, a reduction of $6.51 per hour. It furnished the Unions with a chart identifying each of the current economic items-wages, vacation benefits, holiday benefits, health and welfare benefits, pension benefits, funeral benefits and jury duty benefits--and the average hourly amount of each item, and suggested that the Unions survey the employees to determine which of the economic items they would be willing to reduce and the extent of the reductions.

[28] At some point during negotiations the Unions advised the Respondent that the employees had been polled as to what financial items they deemed most significant, and that wages was of primary importance.

[29] The record evidence supports the Respondent's contention that it had always recalled employees from layoff based on both seniority and the employees' specific abilities to perform the work in question, and it had always hired new employees from responses to newspaper ads or as walk-ins seeking employment. The record does not support the General Counsel's contention herein that the Respondent deviated from this modus operandi after February 7, 2011.

sion to terminate them and have them reapply was premised on legitimate business considerations, it did not so advise the employees in the letter.

I agree with the General Counsel's assertion that such a message to employees announcing adverse consequences, including termination, resulting from the refusal by their collective bargaining representatives to accept the Respondent's demands, is inherently destructive of employees' Section 7 rights, and on its face constitutes unlawful retaliation against them for their union activity in violation of Section 8(a)(3) and (1) of the Act. I so find. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33 (1967); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 227–228 (1963).

Whatever the Respondent's motivation for sending such a letter, it is clear that the employees understood from the letter that the Respondent was terminating its contractual relationship with the Unions as well as its relationship with the employees, that the two were interrelated, and that by reapplying in person the employees would be acknowledging that they agreed to a new relationship with the Respondent; and, as Respondent had severed its relationship with the employees, it was reasonable for the employees to believe it had similarly severed its relationship with the Unions. This conclusion is enforced by the statements of Dietz and Spendlove who, I find, told employees Wasson and Lafever during their reemployment interviews that Wayron was nonunion.[30] By such conduct I find the Respondent has violated Section 8(a)(1) of the Act. See *Eldorado, Inc*., 335 NLRB 952 (2001); *Williams Enterprises*, 301 NLRB 167 (1991).

In addition to failing to notify the Unions regarding the termination of all employees, as announced in its February 7, 2011 letter, the Respondent delayed its response to the Unions' request for bargaining for nearly a month; and not until March 14, 2011, after the charge and amended charges herein had been filed, did it finally reply to the Unions' bargaining requests. By such conduct, I find, the Respondent implicitly withdrew recognition from the Unions from February 7, 2011 until March 14, 2011. By such conduct the Respondent has violated Section 8(a)(5) of the Act as alleged. See *Lou's Produce, Inc*., 308 NLRB 1194, 1196 (1992).

Upon receiving the boilermaker employees' decertification petition the Respondent immediately withdrew recognition from the Boilermaker's Union. Later, upon receiving the machinist employee's decertification petition, the Respondent immediately withdrew recognition from the Machinists Union. I find the Respondent was not privileged to withdraw recognition from these two unions, as the probable effects of its prior unlawful conduct had not been dissipated. Thus, as set forth above, it had terminated its employees, required them to reapply, caused them to reasonably believe they would have to give up union representation to be assured of further employment, and did not timely reply to the Unions' bargaining requests. Such unlawful conduct reasonably would cause employee disaffection from the Unions. Accordingly, by refusing to continue bargaining with the Boilermakers Union and the Machinists Union after the decertification petitions had been filed, I find that the Respondent has violated Section 8(a)(5) and (1) of the Act. *Lee Lumber & Building Material Corp.,* 322 NLRB 175, 177 (1996), enfd. 117 F.3d 1454 (D.C. Cir. 1997); *Ely-Brown Co.,* 328 NLRB 496, 497 (1999); *Pirelli Cable Corp*., 323 NLRB 1009, 1010 (1997).

Because of the pending boilermaker employees' decertification petition the Respondent initially refused to furnish the information requested by the Boilermakers, namely the hire or rehire dates of the eight named employees. Clearly, as the collective-bargaining representative of the boilermaker employees, the Boilermakers Union is entitled to this relevant information. However, the Respondent did not furnish the information until some 6 weeks later when the decertification was dismissed by the Regional Office. By delaying the furnishing of this information, I find the Respondent has violated Section 8(a)(5) of the Act.

CONCLUSIONS OF LAW AND RECOMMENDATIONS

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.
3. The Respondent has violated Section 8(a) (1) and (5) of the Act as found herein.

THE REMEDY

Having found the Respondent Wayron, LLC has violated and is violating Section 8(a)(1) and (5) of the Act, I recommend that it be required to cease and desist therefrom and from in any other like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. I shall also recommend the posting of an appropriate notice, attached hereto as "Appendix."

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[31]

ORDER

The Respondent, Wayron, LLC, Longview, Washintgon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating employees and requiring them to reapply because of the termination of the contract and impasse in collective bargaining negotiations.

(b) Advising or causing employees to believe that because of the termination of the contract and impasse in negotiations they are no longer represented by the Unions.

(c) Failing to notify the Unions of its intent to discharge employees, implicitly withdrawing recognition from the Unions,

[30] In this regard I credit the corroborative statements of Wasson and Lafever, attested to in their Board affidavits, and discount their self-serving testimony that their affidavits were inaccurate because they were substituting their subjective opinions and beliefs for what in fact was actually stated to them by Dietz and Spendlove. Further, I discredit the testimony of Dietz and Spendlove to the extent it is inconsistent with the affidavits of Wasson and Lafever.

[31] 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.

delaying further bargaining with the Unions, and delaying the furnishing of relevant information to the Boilermaker Union.

(d) Withdrawing recognition from the Boilermakers Union and Machinists Union pursuant to decertification petitions prior to the remedying of unfair labor practices, which reasonably influenced the filing of such petitions.

(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, which is necessary to effectuate the purposes of the Act.

(a) Advise, by letter, all employees employed or on layoff status on February 7, 2011 that their terminations have been rescinded, that they need not reapply for future employment, and that their rights and privileges as an employee with regard to seniority and recall from layoff have been restored.

(b) Within 14 days after service by the Region, post at its Longview, Washington facility copies of the attached notice marked "Appendix", and mail copies of the notice to employees who were on layoff status on February, 2011."[32] Copies of the notice, on forms provided by the Regional Director for Region 19, after being duly signed by Respondent's representative, shall be posted immediately upon receipt thereof, and shall remain posted for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Within 21 days after service by the Regional Office, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated: March 29, 2012

[32] If this Order is enforced by a judgment of the United States Court of Appeals, the wording 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."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT terminate employees and require them to reapply because of the termination of the contract and impasse in collective bargaining negotiations.

WE WILL NOT advise or cause employees to believe that because of the termination of the contract and impasse in negotiations the Unions no longer represent them.

WE WILL NOT fail to notify the Unions of our intent to discharge employees, implicitly withdraw recognition from the Unions, delay further bargaining with the Unions, or delay the providing of relevant information requested by the Boilermakers Union as the collective bargaining representative of boilermaker employees.

WE WILL NOT withdraw recognition from the Boilermakers Union and Machinists Union pursuant to decertification petitions before we have remedied the unfair labor practices which reasonably influenced the filing of such petitions.

WE WILL rescind the February 7, 2011 terminations of all employees. You are hereby advised that your terminations have been rescinded, that you need not reapply for future employment, and that your rights and privileges as an employee with regard to seniority and recall from layoff have been restored.

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

WAYRON, LLC