

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

WAYRON, LLC

and

Case 19-CA-32983

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

**ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**ACTING GENERAL COUNSEL'S BRIEF
TO THE ADMINISTRATIVE LAW JUDGE**

I. SUMMARY OF ARGUMENTS

Counsel for the Acting General Counsel (CAGC) respectfully excepts to portions of the Administrative Law Judge's Decision (ALJD). The Administrative Law Judge (ALJ) erred in finding that Respondent was not obligated to turn over its financial records to the Unions, that Respondent lawfully implemented new terms and conditions of employment in February 2011, and that Respondent did not engage in overall bad faith bargaining with the Unions.

The ALJ should have found that Respondent was obligated to provide financial information to the Unions to support its bargaining position. The record evidence, as well as the case law, supports a finding that Respondent was obligated to allow the Unions to review its records so that the Unions could substantiate Respondent's claimed inability to continue to pay employees at the contractual rate. The ALJ found that Respondent was merely claiming an inability to compete, not an inability to pay, and thus was not obligated to open its books to the Unions. This ruling failed to address ample record evidence to the contrary, including testimony from employees and representatives of the Unions, as well as bargaining notes from both Respondent and the Unions which support a finding that Respondent was obligated to open its books to the Unions.

In addition, the ALJ erred in finding that, "[e]ven if the Respondent had explicitly claimed an inability to pay....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." (ALJD at 16, fn. 26) This finding is not supported by the record. Two of the union representatives involved in bargaining testified that their unions had accepted concessions from employers in the past, but that they had required those employers to provide some financial documents to substantiate their claimed need for concessions prior to agreeing to accept them. Thus, the record evidence clearly supports a finding that the production of the financial records could have advanced bargaining.

The ALJ further erred in failing to find that Respondent engaged in overall bad faith bargaining. In his decision, the ALJ did not address the inherently destructive proposals in Respondent's initial contract proposal, which included eliminating just cause, pension, health

and welfare, and allowed Respondent to unilaterally set hours of work. As noted above, he erred in finding that Respondent acted lawfully when it refused to allow the Unions to audit its financial records. Finally, his finding that Respondent made significant movement in its economic proposals during the course of bargaining is not supported by the record.

Finally, the ALJ should have found that Respondent unlawfully implemented new terms and conditions of employment without bargaining to impasse with the Unions. As noted above, Respondent failed to allow the Unions to review its financial records, despite pleading poverty during bargaining. Respondent also engaged in overall bad faith bargaining. These actions precluded Respondent from declaring impasse and implementing its last best offer. In addition, the terms and conditions Respondent implemented were not consistent with its last best offer. Respondent's implemented terms and conditions of employment varied from its final offer to the Unions. The ALJ erred in finding that Respondent's failure to implement terms that were consistent with its last best offer was excusable because it had never received guidance from the Unions about where and how to make cuts to total employee compensation.

II. BACKGROUND

Wayron operates a steel fabrication shop in Longview, Washington. The Boilermakers, Machinists and Painters Unions (the Unions) represent a unit of production and maintenance employees at the shop. The parties' most recent collective bargaining agreement expired on September 30, 2010 (ALJD at 2, lines 49-50). The Unions and Respondent signed an extension agreement prior to the expiration of the agreement. Under the terms of the extension agreement, the 2006-2010 collective bargaining agreement continued in effect until one of the parties provided notice of intent to terminate. (ALJD at 4, lines 26-28)

A. Respondent and the Unions begin bargaining for a successor agreement

The parties began bargaining for a successor collective bargaining agreement on September 15, 2010. (ALJD at 4, line 10) The Unions were represented at the first negotiation session by Lance Hickey (“Hickey”), business representative for the Boilermakers, Bud Bartunek and Jeff Brooke, representatives for the Painters Union, and Greg Heidal, representative for the Machinists Union. Consultant Dean Nordstrom (“Nordstrom”) and Wayron co-owner Faye Dietz (“Dietz”) represented Respondent. Hickey was selected by the Unions to be their spokesperson, and Nordstrom was selected as Respondent’s spokesperson. (ALJD at 4, lines 11-14)

At the first session, the Unions gave Respondent their initial bargaining proposal. (ALJD at 4, lines 16-23; GC Ex. 4) Respondent then presented its own proposal to the Unions. (ALJD at 4, lines 16-23, GC Ex. 4; GC Ex. 5) The proposal was extremely regressive in nature, and sought a substantial number of economic and non-economic concessions from the Unions. Among other things, Respondent proposed eliminating all craft divisions, ending its obligation to hire employees referred by the Unions, barring the Unions from having access to unit employees during working time, and giving Respondent the right to terminate, transfer, lay-off or discipline employees for any reason, without just cause. (GC Ex. 5)

Respondent also sought the right to unilaterally set employee hours, giving it the potential to require employees to work “any number of hours...per day, or any combination of hours per day, or per week,” with no requirement of a minimum amount of advance notice, and sought to eliminate all rules governing overtime, save those required by law. Respondent

further proposed the elimination of shift premiums, sought to reduce the number of holidays and vacation days employees could receive, and sought to eliminate all pension and health and welfare benefits. (GC Ex. 5)

Respondent's bargaining representative, Nordstrom, did not appear to the Unions to be well versed in the terms of Respondent's proposal. (ALJD at 5, lines 24-26) In response to questions about Respondent's proposal, Nordstrom informed the Unions that Respondent's co-owner, Jeff Spendlove, had drafted it, and said he would have to refer their questions about it back to Spendlove. (Tr. 44-45) Nordstrom also said that Spendlove was the only person who could make changes to the proposal. (Tr. 211, 231) The Unions asked that Spendlove be present at future bargaining sessions, and Nordstrom agreed that he would be there. (Tr. 46, 132, 211, GC Ex. 17, p. 5) However, neither Nordstrom nor Dietz ever told Spendlove that the Unions had asked for him to be present at the table, or that they had agreed that he would be there. (Tr. 303) Dietz remained largely silent during the negotiation session, but spoke up during the first session to tell the Unions that if Respondent was "just paying a sandwich and there was no work, I could not even pay a sandwich." (ALJD at 5, lines 27-29) Respondent did not provide the Unions with a wage proposal at the September 15 bargaining session. (Tr. 44, 251, GC Ex. 5)

The parties met again on October 6. Spendlove did not attend. The parties had also scheduled negotiation sessions for October 12 and 21, but Respondent informed the Unions that Spendlove would not be in attendance at those sessions, either. (Tr. 47, 133, GC Ex. 18, p.1) Nordstrom recommended that the rest of the October sessions be cancelled due to Spendlove's inability to attend. (Tr. 47-48, 133, GC Ex. 18, p. 1) The Unions agreed, but continued to keep the dates open in the event Respondent became available. (Tr. 47-48, 133)

During the October 6 session, the parties discussed their respective proposals. The Unions asked a number of questions about Respondent's proposal, and then asked it to come up with a dollar amount that it was looking for in concessions from the Unions. (GC Ex. 18, p. 8, GC Ex. 27) Respondent did not provide the Unions with any dollar figures with regard to its proposal at the October 6 session. (Tr. 48, 133, 213) In fact, it was apparent to the Unions' negotiators that Nordstrom had not yet costed out Respondent's proposal. (Tr. 133, GC Ex. 18, p. 8) Nordstrom said he get the numbers to the Unions. (Tr. 134, GC Ex. 18. p. 8, GC Ex. 27)

The parties met again on November 4. Spendlove attended this session, along with Nordstrom and Dietz. (ALJD at 4, line 37) Spendlove presented the Unions with his position on the company's economic condition. (ALJD at 4, lines 36-42) Spendlove told the Unions that Respondent needed to make \$4.5 million per year, and was currently at only \$2.5 million, a \$2 million shortfall from where it needed to be. (ALJD at 5, lines 1-9; Tr. 51, 287-288, R. Ex. 9, p. 3) Spendlove explained that Respondent was operating on a line of credit and would have to go to the bank in February. He said that if the business was unable to get the loan that it needed in February, he did not think that Respondent could remain in business. (ALJD at 5, lines 1-18 and at 6, lines 1-14)

The Unions were told that Respondent had a February deadline with both its bank and its landlord. (ALJD at 6, lines 4-5) At the hearing, Dietz testified that Respondent went to its landlord and got a break on its rent, but needed to get a break from the Unions to bring labor costs down. She asserted that the concessions were necessary for the company to reach \$4.5 million and break even. (ALJD at 8, lines 6-10) Dietz also testified that the Unions were told that if Respondent continued to lose money, its line of credit would max out, it would not be

able to get a loan, and it would be in trouble. (Tr. 471) She testified that Respondent was attempting to take action to avoid going out of business, and that when Respondent was talking to the Unions it was “not broke” but trying to avoid getting there. (Tr. 471-472)

During the November session, Respondent provided the Unions with a spreadsheet that showed the employees’ current total hourly rate of compensation (wages and benefits), alongside a proposed hourly rate where Respondent claimed that it needed to be. (ALJD at 7, lines 15-18; GC Ex. 7) The spreadsheet showed a cut of \$6.51 per hour, per employee, down to an average hourly rate (with wages and benefits) of approximately \$24 per hour. (ALJD at 7, lines 30-34; GC Ex. 7) According to Hickey, Spendlove told the Unions that the \$24 figure represented all that he could afford to pay. (Tr. 214) He said that if Respondent did not get the concessions it was asking for, it would have to close its doors. (Tr. 214)

According to the ALJ, Spendlove conveyed to the Unions that “Wayron as a company wasn’t in jeopardy...[but] what we were not going to be able to provide was jobs.” (ALJD at 7, lines 24-27) When asked by Respondent’s attorney, “Was the issue more about laying employees off and there not being work?” Spendlove responded, “Yes. And I tried to convey across the table. Perhaps I didn’t convey it as well as I could have or should have, but what I tried to convey was that we—that Wayron as a company wasn’t in jeopardy. And I believe that I did a good job of conveying that what we were not going to be able to provide was jobs. I said that several times. What Wayron won’t be able to provide is jobs. We would like to continue to provide jobs to the employees....I only want to be competitive in the free market...And if that’s the case, I can provide jobs.” (Tr. 309) Spendlove did not state that his goal was to return employees from layoff status, but to provide jobs. When asked how many

employees were laid off at the time he made the statements, Spendlove testified that he did not know. (Tr. 309-310)

Spendlove also told the Unions that he needed concessions “in a short term fashion” so that the business could acquire a new line of credit. (ALJD at 7, lines 39-31) Jeff Spendlove’s notes from November 4 state, “break even 4.5, this year 2.5.” (R Ex. 8, p. 1) Dean Nordstrom’s notes from November 4 reflect that Spendlove told the Unions Respondent “will lose 2 million in 2010.” (R Ex. 9, p. 3) In addition, Spendlove’s notes from December 20 show that he asked Hickey whether “holidays and vacation were significant enough to put the company out of business. (R Ex. 8, p. 2) As late as February 4, Spendlove’s notes reflect that the bargaining position of Wayron was to “stay in business” as opposed to the Unions’ position to “retain pay/ benefits for guys & themselves.” (R Ex. 8, p. 4) As Machinist representative Greg Heidal testified, Respondent continued “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.” (ALJD at 6, lines 26-28)

The following day, Respondent called all of its employees to a meeting. (ALJD at 7, lines 45-46) At the meeting, Spendlove told employees that Respondent was looking to cut \$6.51 from their benefits and wages. (ALJD at 7, lines 49-50) Shop steward Bill McCain testified that Spendlove told employees that the company “may not continue working, or being open” if the Unions did not accept the concessions, although he could not recall the exact wording. McCain attending bargaining with the Unions the day before, and testified that Spendlove’s statements at the meeting with employees were consistent with what he had said during bargaining. (Tr. 168) Welder/ Fitter Robert Stone testified that Spendlove told employees it was up to them where to take the cuts, but if they did not decide to accept the

cuts, the business would close by February. (Tr. 179) Spendlove told the employees that Respondent was getting a break on its rent from its landlord, but that break would expire in February, and that he was hoping to keep the business open for two more years so his daughter could graduate. (Tr. 180) Spendlove testified that he told employees that if Respondent did not get the concessions it sought, it could not be competitive, and he was concerned about providing jobs. (ALJD at 8, lines 1-2)

B. The Unions request financial information supporting Respondent's claimed inability to pay

On November 10, 2010, the Unions sent Respondent a request seeking, in light of the "position the Company has taken during contract negotiations...that it is financially unable to pay wages and benefits equal to the wages and benefits in the expired Collective Bargaining Agreement and...that it needs wage and benefit concessions to remain in business," access by an auditor to "all financial records...and any other records deemed necessary...to substantiate the...position of inability to pay." (ALJD at 8, lines 23-35; GC Ex. 8) The Unions made the request to substantiate Respondent's claims at the bargaining table that it needed substantial concessions from the Unions to remain in business. (Tr. 141, 215, GC Ex. 8) By letter dated November 10, Respondent denied the Unions' request. (ALJD at 8, lines 37-50; GC Ex. 9)

Lance Hickey and Jeff Brooke testified that their unions had accepted concessions from employers in the past, but not without those employers providing some financial documents to substantiate their claimed need for concessions. (Tr. 120, 215) Respondent claimed that all of its competitors were bidding at \$25 per hour, but that figure did not comport with the Unions' knowledge of what other unionized employers were paying in the area. (Tr. 112) Hickey stated that Respondent's attempt to eliminate "all benefits was

something that was out of the norm” and brought Respondent’s assertion that it was not claiming an inability to pay into question. (ALJD at 9, lines 8-14) The ALJ found that Respondent did not claim poverty in negotiations, but instead made remarks that “were intended...to demonstrate and convince the Unions and employees of the necessity of concessions so that Respondent could successfully return...laid-off employees to work.” (ALJD at 16, lines 14-16)

C. Respondent notifies the Unions of its intent to terminate the collective bargaining agreement

The parties next met on December 20, 2010. Hickey was the only representative from the Unions at the December meeting. (ALJD at 9, lines 15-16) He raised the possibility of extending the current agreement longer to allow the parties to continue bargaining, but Respondent was unwilling to agree. (ALJD at 9, lines 19-21) The next bargaining session was held on January 28, 2011. A federal mediator was present at Respondent’s request. (ALJD at 9, lines 23-25)

During the January 28 session, the mediator separated the parties into different rooms and conducted shuttle mediation. (ALJD at 9, lines 26-27) The mediator communicated Respondent’s position to the Unions. Hickey’s understanding of that position was that if the Unions would not reach an agreement with Respondent on economics, Respondent was not willing to discuss the remainder of the contract terms. (ALJD at 9, lines 30-34) No progress was made at the mediated session. The mediator told the Unions and Respondent that there was no longer a need for her services, as they were so far apart in bargaining. (ALJD at 9, lines 34-35)

Almost immediately after the session ended, Respondent notified the Unions that it was terminating the collective bargaining agreement effective February 4, 2011. (ALJD at 9, lines 36-39) After receiving the notice of termination from Respondent, the Unions submitted a new bargaining proposal, with decreases in shift premium amounts, health and welfare contributions, and hourly pay increases. (ALJD at 9, line 39 and at 10, lines 1-6)

The parties met for another bargaining session on February 4. Prior to the bargaining session, Hickey emailed Spendlove. He told him that he had just finished speaking with Nordstrom, who told him that Respondent was unwilling to move from its November 4 offer. Hickey stated that if Respondent was unwilling to make any movement, then a meeting would be unproductive, but that the Unions would meet if Respondent was “willing to continue to bargain and propose changes to the Company’s position.” (ALJD at 10, lines 11-18) Spendlove replied that Respondent would be at the bargaining session. (ALJD at 10, line 20) The parties met, but were unable to reach any agreement on February 4. (ALJD at 10, lines 22-34) Respondent reiterated its need for a reduction to \$24 per hour because of its competitors and to secure an extension of its line of credit with its bank. (ALJD at 10, lines 29-31) Respondent told the Unions that it planned to implement its own terms and conditions of employment on the following Monday, February 7. (ALJD at 10, lines 32-24)

Respondent decided not to open on Monday, February 7 because Spendlove and Dietz were not sure how to formulate the details of the wage and benefit package, and had to spend the weekend deciding on the wage and benefit package “generally for all the employees, and specifically for each employee, spending upon the employee’s job classification, seniority and benefits.” (ALJD at 11, lines 26-30) In the spreadsheet provided to the Unions on November 4, Respondent proposed an average of \$24 per hour in compensation. (GC Ex. 7) This

document did not state which fringe benefits would be eliminated or reduced, or by how much they would be reduced. (GC Ex. 7)

At the hearing, Spendlove testified that Respondent's November 4, 2010 offer was for a total of \$23.90 per hour in total wages and compensation. He provided a spreadsheet representing Respondent's November 4 offer, broken down into wages and benefits. The spreadsheet showed wages in the amount of \$18.82 per hour, pension in the amount of \$1.69 per hour, and the rest of the money allocated to the other benefits. (R Ex. 13, p. 2) Spendlove admitted, however, that this spreadsheet was never provided to the Unions, and that the only document the Unions were given during bargaining was the spreadsheet offering an average of \$24 per hour with no breakdown of how that money would be allocated. (Tr. 377, GC Ex. 7)

At the hearing Respondent also provided a spreadsheet showing how it ultimately implemented its offer. (R Ex. 13, p. 3) This spreadsheet shows a total average of \$23.78 in hourly compensation, with \$21.65 of that allocated to wages and nothing allocated to pension. (R. Ex. 13, p. 3, Tr. 354) No explanation was given for how Respondent reached the implemented offer from the November 4 offer, other than testimony that Spendlove and Dietz worked over the weekend to come up with a way to implement their offer. The spreadsheet outlining the implemented offer in Respondent's Exhibit 13 was never provided to the Unions. (Tr. 377)

D. Respondent terminates all unit employees

On Monday, February 7, 2011, Respondent sent a letter to unit employees that stated as follows:

As the Collective Bargaining Agreement, as well as all extensions has 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 owned to Wayron, LLC.

You are welcome to apply in person after February 8, 2011 if you wish to seek re-employment.

Regards, Wayron LLC

(ALJD at 11, lines 1-22; GC Ex. 12) The Unions were provided with a copy of the letter at the same time it went to their members, but were not given notice by Respondent before the letters went out. (ALJD at 11, line 1)

On February 4, Boilermakers steward Bill McCain spoke to foreman Mike Olson. Olson told him that Respondent was closing on Monday and re-opening on Tuesday as a non-union shop. (ALJD at 12, lines 15-16) Employee Corey Wasson reapplied for his job after receiving the letter from Respondent terminating his employment. After he submitted his application, he was called for an interview with Spendlove and Dietz. They told him that the shop was now non-union, and that employees would no longer be receiving any benefits. ALJD at 12, lines 25-32) Brett La Fever, a boiler maker employee, was also called in for an interview, and told by Dietz and Spendlove that Respondent was now operating a non-union shop. (ALJD at 12, lines 40-44)

Under Section 8 of the expired collective bargaining agreement, Respondent is required to give advance notice to the Unions when new or additional employees are required. (GC Ex. 2, p. 2) Respondent did not contact the Unions when it needed employees, but

instead advertised for employees in the newspaper. (Tr. 218-219, GC Ex. 24) Despite language in the expired contract requiring Respondent to notify the Unions when new employees were hired, no such notice was provided. (Tr. 141-142, 218, GC Ex. 2, p. 2) It was not until it learned that the NLRB was planning to file for injunctive relief under Section 10(j) of the Act in this matter that Respondent provided the Boilermakers Union with a list of its members that had been rehired. (ALJD at 14, lines 35-39) Respondent has not paid anything into the Unions' health and welfare funds since the contract terminated.

Employees who returned to work were given varying wage rates. Foreman Gary Bishop's wages were increased from \$21.29 per hour to \$25.00 per hour, an increase of 17%. (Tr. 379, GC Ex. 26) Paint shop employee Steven Hoyt's salary was increased by 21%. (Tr. 380, GC Ex. 26) However, fab shop employee Scott McSkimming's wage rate only increased from \$13.17 to \$14 per hour, an increase of only .06 %. (Tr. 381, GC Ex. 26) Spendlove admitted that he did not negotiate the amounts of the pay increases with the Unions prior to implementing them. (Tr. 381) Further, the average of the returning and/or new employees' compensation did not reach the \$24 per hour figure that Respondent told the Unions was its last and final offer. (Tr. 381, GC Ex. 26) Spendlove acknowledged that Respondent would be bringing people in at an entry level rate, and would be not be at the \$24 per hour average. (Tr. 383)

III. ARGUMENT

The ALJ correctly found that Respondent unlawfully terminated all of its unit employees and withdrew recognition from the Unions. However, he erred in finding that Respondent bargained in good faith prior to firing its employees and withdrawing recognition

from the Unions. The record evidence demonstrates that from the first day of negotiations in September, Respondent engaged in an overall pattern of bad faith bargaining. It introduced extremely regressive proposals and refused to make any movement from those proposals during bargaining. It claimed that if it did not receive the concessions it sought, it may have to close its doors, but refused to substantiate its claims by allowing the Unions to examine its financial records. Finally, it repudiated the collective bargaining agreement and implemented its own terms and conditions of employment.

A. Respondent was obligated to allow the Unions to audit its financial records

The ALJ erred in finding that Respondent was not obligated to allow the Unions to review its financial records on the basis that it did not claim poverty in negotiations, but instead made remarks that “were intended...to demonstrate and convince the Unions and employees of the necessity of concessions so that Respondent could successfully return...laid-off employees to work.” (ALJD at 16, lines 14-16) The record evidence does not support this finding, and demonstrates that Respondent made statements starting with the first bargaining session that linked the concessions it was seeking in bargaining to its continued viability as a company and the ability of its employees to keep their jobs.

The fact that Respondent was careful not to make an outright claim of inability to pay does not change the fact that the totality of the statements made at the table and to employees show that Respondent was in fact claiming that the Unions’ failure to accept the drastic concessions it proposed could result in Respondent closing its doors. The Board has held that there are no “magic words” that trigger a finding that an employer is obligated to open its books to a union, and requires only that an employer’s “statements and actions be specific

enough to convey an inability to pay.” *Stella D’oro Biscuit Co.*, 355 NLRB No. 158 (2010), citing *Atlanta Hilton & Tower*, 271 NLRB 1600, 1602 (1984).

In *Stella D’oro*, the Board held that the employer’s statements that it “could not continue to run the business at a loss, it could not survive under the current labor contract and had to reduce those costs to stay in business, that the concessions it sought were needed for the survival of the company and if it did not obtain them it would close, that it required savings in its labor costs or it would not be going forward, and it did not have the money to go forward with its business unless it implemented the labor cost reductions it proposed” all constituted a claim of inability to pay, even though the employer never expressly pleaded an inability to pay. *Id.* at *3. Respondent’s statements in the instant matter are similar to those made by the employer in *Stella D’oro*.

1. Respondent painted a bleak picture of its economic outlook

Respondent made claims from the first day of bargaining that it was unable to continue paying employees at the rates outlined in the expired contract, and would need drastic concessions in order to stay afloat. In essence, while being careful not to explicitly plead poverty, Respondent communicated to the Unions and employees that the drastic concessions it sought were necessary for it to stay in business. As Machinist representative Greg Heidal testified, Respondent continued “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 the first bargaining session, Respondent’s co-owner, Faye Dietz, told the Unions that if Respondent was “just paying a sandwich and there was no work, I could not even pay a sandwich.” In his decision, the ALJ asserts that the “rather obvious meaning on Dietz’s

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 per hour, the employees would be receiving nothing, not even a sandwich, if there was no employment for them.” The ALJ does not explain what the difference is between telling employees that Respondent would have no work for them, and telling them that Respondent would be unable to stay in business. Either way, the record clearly demonstrates that Respondent was trying to impress upon the Unions that if it did not receive the concessions it sought, the employees would not be working.

Jeff Spendlove’s testimony at the hearing, which was credited by the ALJ, further demonstrates the message that Respondent was conveying to the Unions, that the continued viability of the company was in jeopardy. When asked by Respondent’s attorney, “Was the issue more about laying employees off and there not being work?” He responded, “Yes. And I tried to convey across the table. Perhaps I didn’t convey it as well as I could have or should have, but what I tried to convey was that we—that Wayron as a company wasn’t in jeopardy. And I believe that I did a good job of conveying that what we were not going to be able to provide was jobs. I said that several times. What Wayron won’t be able to provide is jobs. We would like to continue to provide jobs to the employees....I only want to be competitive in the free market...And if that’s the case, I can provide jobs.” It is worth noting that Spendlove did not state that his goal was to return employees from layoff status, but to provide jobs. To further underscore the fact that the laid off employees were not the focus of Respondent’s discussions during negotiations, when asked how many employees were laid off at the time he made the statements, Spendlove testified that he did not know.

During the parties' November 4 bargaining session, Spendlove painted a bleak picture of a company that was two million dollars short of breaking even and had to secure concessions from the Unions by January 2011 in order to secure a loan and continue operating. Boilermakers representative Lance Hickey testified that Wayron co-owner Jeff Spendlove told the Unions that the company was operating on a line of credit, and if it could not get the cuts it needed by the time its loan came up in February, it could not secure a new loan to continue business. Painters' representative Jeff Brooke testified that Spendlove told the Unions that it only had a certain amount of money it could afford to pay the employees, and that if it did not achieve a \$6 per hour roll back in wages, it would have to close its doors.

The ALJ stated that he did not credit the testimony of Hickey or Brooke to the extent that it differed from that of Heidal. Heidal testified that Respondent to the Unions it had to come to an agreement with the bank or landlord. He further testified that Spendlove told the Unions that Respondent would be in "financial trouble" if it did not get the concessions it asked for. The ALJ found this account to be different from Hickey's account that Respondent claimed that it needed a loan in order to stay in business. (ALJD at 6, lines 13-14, fn. 8) In fact, Heidal and Hickey's accounts are similar. Both recalled that Spendlove was concerned about his dealings with the bank and/or its landlord, and that the concessions were crucial to those communications, which demonstrates that Respondent was stressing to the Unions that its financial condition was in jeopardy, absent concessions.

Further, Respondent's own bargaining notes demonstrate that Respondent was informing the Unions that it needed concessions in order to break even for the year. Jeff Spendlove's notes from November 4 state, "break even 4.5, this year 2.5." Dean Nordstrom's notes from November 4 reflect that Spendlove told the Unions Respondent "will lose 2

million in 2010.” In addition, Spendlove’s notes from December 20 show that he asked Hickey whether “holidays and vacation were significant enough to put the company out of business. As late as February 4, Spendlove’s notes reflect that the bargaining position of Wayron was to “stay in business” as opposed to the Unions’ position to “retain pay/ benefits for buys & themselves.” Nowhere in the notes does it state that Respondent was seeking concessions in order to bring employees back from layoff, which further supports a finding that Respondent was asserting that it could go out of business absent concessions.

In his decision, the ALJ explains away Respondent’s remarks about its financial condition by finding that they “were intended...to demonstrate and convince the Unions and employees of the necessity of concessions so that 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.” (ALJD at 16, lines 14-16) However, the record shows that the message that Respondent was actually conveying to the Unions was that its business was in jeopardy if it did not get the concessions it was seeking.

The ALJ completely dismissed testimony from employees that Respondent informed them that it would close its doors if it did not get concessions from employees. (ALJD at 8, fn. 11) The ALJ did not provide a basis for his refusal to credit the employees who testified. He did credit Spendlove, who testified that he told employees that it was not that Respondent couldn’t pay, but that it could not be competitive, and he was worried about “providing jobs.” It is hard to see how this is inconsistent with employee testimony that Respondent told them it needed concessions in order to stay in business. Spendlove did not testify that he told

employees he was worried about returning laid off employees to work; he testified that he was worried about providing jobs.

2. The record and the case law support reversal of the ALJ's finding that Respondent was not obligated to provide financial information

Under *Standard Dry Wall Products*, 91 NLRB 544 (1950), the Board will not overrule an ALJ's resolutions as to credibility, except where the weight of all the relevant evidence establishes that the ALJ's resolution was incorrect. However, the ALJ's finding regarding whether Respondent was obligated to open its books or not is not a question of credibility under *Standard Dry Wall*, but a finding of ultimate fact. This finding should rest not only on the testimony of Respondent, but on the record as a whole. See *Diversified Chemicals Corp.*, 231 NLRB 982, fn. 7 (1977). Even accepting the credibility determinations of the ALJ in this matter, the record as a whole, as well as the case law in this area, unequivocally supports a finding that Respondent acted unlawfully when it refused to allow the Unions to examine its books to substantiate its bargaining claims.

As part of its duty to bargain in good faith, an employer must provide a union with requested information that is necessary and relevant to the union's role as the collective-bargaining representative. *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967); *Hardesty Co. v. NLRB*, 308 F.3d 859, 863 (8th Cir. 2002). When an employer makes a claim of inability to pay in support of its bargaining position, it is required to provide the union with financial information to substantiate its claim. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). By telling the Unions and employees that it needed concessions in order to continue providing work for employees, Respondent triggered its obligation to open its books to the Unions. See *NLRB v. Western Wirebound Box Co.*, 356 F.2d 88, 91 (9th Cir. 1966)

(company must substantiate claim of competitive disadvantage); *Stella D'oro Biscuit Co., Inc.*, 355 NLRB No. 158 (2010) (inability to pay claim established when company stated would close and sell facility absent demanded concessions); *Republic Die and Tool Co.*, 343 NLRB 683 (2004) (statements that due to “global competition and the company’s financial problems,” company was losing money and would be cutting employee benefits triggered duty to allow union to do a financial audit); *Shell Co.*, 313 NLRB 133 (1993) (claims that present circumstances were “bad” and a matter of “survival” and, that “we are telling you all of this because we need your help, your assistance, because of this condition” held equivalent to inability to pay).

B. The financial information would have advanced bargaining

The ALJ erred in finding that, “[e]ven if Respondent had explicitly claimed an inability to pay,...under the circumstances herein the Unions would not be entitled to the requested financial information.” The ALJ cites *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956), in which 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.” The ALJ asserts in his decision that the Unions “made it clear that for reasons unrelated to Respondent’s financial circumstances it could not agree to concessions, particularly to the significant concessions requested by Respondent, because to do so would jeopardize the Unions’ bargaining positions nationwide. Both sides knew, under the circumstances, that an audit of Respondent’s financial documents simply would have been an unproductive, time-consuming, exercise in futility, and would not have advanced the prospects for agreement.”

This finding critically misstates the position of the Unions during bargaining. Both Lance Hickey and Jeff Brooke testified that their unions had accepted concessions from employers in the past, but not without those employers providing some financial documents to substantiate their claimed need for concessions. The Unions further testified that Respondent claimed that all of its competitors were bidding at \$25 per hour, but that figure did not comport with the Unions' knowledge of what other unionized employers were paying in the area. These statements make it clear that the Unions would have been willing to consider concessions, were Respondent willing to turn over its books, and demonstrate that the ALJ's finding that the financial information would not have furthered bargaining in any meaningful way is without basis and should be reversed.

C. Respondent bargained in bad faith with the Unions

The ALJ should have found that Respondent engaged in overall bad faith bargaining with the Unions. The ALJ does not state the basis for his finding, other than to state that “[b]oth sides began with proposals that they eventually modified. 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 to a \$6.51 per hour cut in pay and/or benefits.” (ALJD at 16, lines 24-26) The record evidence is contrary to this finding.

The evidence on the record is clear that no wage proposal was presented to the Unions at the parties' bargaining sessions in September and October. In fact, the Unions asked Respondent to cost out its proposals at those sessions, and Respondent was unable to do so. The first time any dollar figures were presented to the Unions was in November, when Respondent gave the employees a spread sheet showing that it was seeking to cut wages by

about \$6.00 per hour. Respondent asserted that its original proposal would have cut wages and benefits by approximately \$10 per hour, but these figures were not presented to the Unions. Respondent introduced a set of spreadsheets at the hearing that included spreadsheets of its initial offer, its November offer, and its implemented terms (R Ex. 13), but Spendlove admitted that these spreadsheets were never shown to the Unions. Thus, the approximately \$4.00 per hour “movement” that the ALJ found to have occurred was based on a cost analysis that was never presented to the Unions.

The Board has defined the requirement to bargain in good faith to mean more than merely engaging in ‘sterile discussion’ of union and employer differences at the bargaining table. Rather, parties must demonstrate a “sincere effort... to reach a common ground” by actively deliberating. *NLRB v. American National Insurance Co.*, 343 U.S. 395, 402 (1952); *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir. 1943). Collective bargaining, then, is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of “take it or leave it”; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining agreement. *NLRB v. Insurance Agents’ International Union*, 361 U.S. 477, 478 (1960). Under all of the circumstances presented here, it is clear that Respondent engaged in overall bad faith bargaining.

When an employer enters bargaining with a fixed set of demands and refuses to make any movement, as Respondent did here, the Board has consistently found evidence of a failure to bargain in good faith. *Regency Service Carts, Inc.*, 345 NLRB 671 (2005) (employer’s adamant adherence to proposals granting management exclusive right to make changes in a number of mandatory subjects indicative of bad faith bargaining); *Public Service Co. of*

Oklahoma, 334 NLRB 487 (2001) (same); *Anderson Enterprises*, 329 NLRB 760 (1999) (“entering negotiations with a predetermined resolve not to budge from an initial position betrays an attitude inconsistent with good faith bargaining”); *88 Transit Lines, Inc.*, 300 NLRB 177 (1990) (adamant insistence on initial proposal indicative of bad faith bargaining); *Overnite Transportation Co.*, 296 NLRB 669 (1984); *A-1 King Size Sandwiches, Inc.*, 265 NLRB 850 (1982), *enfd.*, 732 F.2d 872 (11th Cir. 1984), *cert. denied*, 469 U.S. 1035 (Board affirmed an ALJ finding of bad faith in a first contract setting when Respondent refused to make any substantive movement on key issues such as wages and management rights).

Respondent’s initial proposal essentially gutted the previous collective bargaining agreement, eliminating just cause, pension, health and welfare, and all semblance of employee control over their own hours of work. All of these are mandatory subjects of bargaining that go to the heart of the parties’ relationship. Respondent then refused to move on a single issue throughout the course of negotiations and, when the Unions requested information necessary to evaluate the rationale for such drastic concessions, Respondent steadfastly refused to provide it. Even after the Unions, in an attempt to prevent negotiations from being derailed, effectively bargained against themselves by withdrawing certain proposals and modifying others, Respondent still refused to budge.

After it became apparent to Respondent that its employees’ representatives were not going to accede to the concessions it sought, Respondent terminated the extension agreement, fired all of its unit employees, required them to reapply for their own jobs, repudiated the bargained terms and conditions of employment, told employees it was a non-union shop, rehired employees without regard to its past practice of recalling based on seniority, and initially refused to respond to the Unions’ requests for further bargaining. Finally,

Respondent unlawfully withdrew recognition from the Unions. All of this conduct, taken together, supports a finding that Respondent engaged in an overall pattern of bad faith bargaining with the Unions.

D. Respondent unilaterally changed terms and conditions of employment in violation of Sections 8(a)(5) and (d) of the Act

The ALJ erred in finding that Respondent acted lawfully in setting its own terms and conditions of employment after February 7, 2011. Respondent changed the terms and conditions of employment for employees who returned to work or were hired after February 7. These changes included employees' wage rates, ceasing to notify the Unions when it intended to hire employees, ceasing to notify the Unions about new hires, and ceasing to contribute to employees' pension or health and welfare trusts. Respondent took these actions without first notifying or bargaining about the changes, in violation of Section 8(a)(5) of the Act. *Caterpillar, Inc.*, 355 NLRB No. 91 (2010). Respondent was obligated to refrain from making unilateral changes unless and until the parties either reached agreement, or reached a lawful impasse in bargaining. See *Duffy Tool & Stamping, L.L.C. v. NLRB*, 233 F.3d 995, 999 (7th Cir. 2000); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), *enfd.*, 15 F.3d 1087 (9th Cir. 1994).

There is no dispute that the parties had not reached agreement as of February 7. It is also clear that the parties were not at lawful impasse when the new terms and conditions of employment were imposed. As discussed more fully above, Respondent unlawfully failed to provide financial information requested by the Unions to evaluate its bargaining claims. This alone precludes a lawful impasse. *Stella D'oro Biscuit Co., Inc.*, 355 NLRB No. 158 (2010). Further, Respondent engaged in an overall course of conduct designed to frustrate

negotiations, including never moving off of its initial proposed agreement which would give it virtually unassailable control over several mandatory subjects of bargaining that go to the heart of the parties' relationship, such as just cause, hours of work, and classification of jobs, and refusing to bargain jointly with the Unions. Respondent's bad faith bargaining prohibited it from lawfully declaring impasse and implementing its final offer. See *Liquor Industry Bargaining Group*, 333 NLRB 1219 (2001) (employer entering into negotiations with no intent to reach agreement precludes impasse), *Great Southern Fire Protection*, 325 NLRB 9 (1997) (same).

Further, even if the parties had reached impasse, Respondent would only have been privileged to impose its last best offer. The only wage offer provided to the Unions was the spreadsheet Respondent presented at the bargaining table on November 4. Respondent offered to pay an average of \$24 per hour in wages and benefits, but did not specify how that amount would be allocated. At the hearing, Respondent claimed that the final implemented offer was for an average of \$21.65 in wages, along with vacation, funeral, jury duty and holiday benefits (but no pension or health and welfare), for a total of \$23.78 per hour. Respondent therefore admitted that its implemented offer was lower than its final offer to the Unions on November 4.

Ultimately, Respondent's payroll records show that Respondent did not even implement an average compensation package of \$23.78 per hour or \$24 per hour, however. After February 7, Respondent was paying employees an average of only \$20.80 per hour, even less than the wage it claimed that it implemented. Even assuming that Respondent paid the employee benefits outlined in its purported implemented offer, it was only paying employees an average of \$21.80 per hour. This average included the wages of both foremen

at \$25.00 per hour. Some employees received increases of as much as 21% under the implemented terms, while others received as little as .06%.

Even if the parties had reached lawful impasse, Respondent would only have been privileged to implement changes that were reasonably comprehended by its pre-impasse proposals. Respondent asserted, and the ALJ agreed, that it increased employee wages and decreased benefits because the Unions indicated that employees were more concerned about their wages. However, it implemented the wage increases in an arbitrary manner, granting some employees large increases while others got almost nothing. Respondent was not privileged to implement changes that were significantly different from those that were in its last offer to the Unions on November 4. The Unions were not notified in advance of what Respondent planned to implement, nor were they given an opportunity to respond. *See Plainville Ready Mix Concrete Co.* 309 NLRB 581 (1992) (unlawful for employer to offer wage increase in lieu of gain sharing and incentive pay, but implement at the existing hourly rate); *see also Winn-Dixie Stores v. NLRB*, 567 F.2d 1343 (5th Cir. 1978) (employer acted unlawfully by implementing wage increases that were significantly different than those proposed to and rejected by the union. The employer went to impasse with the union over a proposed wage increase of 5.5%, but implemented increases of 4.11% to 6.23%). In this case, the ALJ clearly erred by finding that the terms and conditions of employment Respondent implemented were consistent with those in its last best offer to the Unions.

IV. CONCLUSION

For the reasons advanced above, Counsel for the Acting General Counsel respectfully asks for reversal of the Administrative Law Judge's findings that Respondent Wayron LLC

did not unlawfully fail to provide the Unions with information necessary to the Unions' performance of their duties as the exclusive joint collective bargaining representative of the Unit, did not engage in overall bad faith bargaining with the Unions; and did not repudiate the collectively bargained terms and conditions of employment for Unit employees by, among other things, refusing to make payments into the Unions' health and welfare and pension trusts, by refusing to abide by hiring hall and recall requirements, and by changing employee wage rates.

Counsel for the Acting General Counsel respectfully asks the Board to uphold the complaint allegations with regard to the above issues and to grant the traditional and remedial orders, including making the affected employees whole for all losses suffered.

Dated at Detroit, Michigan this 3rd day of May, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Counsel for the Acting General Counsel's Brief in Support of Exceptions to the Decision Administrative Law Judge was served on the 3rd day of May, 2012 on the following parties by electronic mail:

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