

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19

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

**RESPONSE TO ACTING GENERAL COUNSEL'S EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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## **I. SUMMARY OF ARGUMENTS**

This case involves Wayron, Inc., a small metal fabricator in Longview, Washington. On June 23, 2011, the Regional Director for Region 19 issued a Complaint against Wayron, alleging various unfair labor practices arising from the 2010-2011 bargaining between Wayron and the three unions that cover the company's 17 employees, which ultimately resulted in an impasse and the implementation of the company's last and final offer that was rejected by the unions. Following a four day hearing on October 25 – 27, 2011, Administrative Law Judge Gerald A. Wacknov found, in large part, in Wayron's favor and dismissed the majority of the Complaint related to the allegations that Wayron bargained in bad faith, unlawfully refused to "open its books," and unlawfully implemented its last and final offer that was rejected before impasse.

The Acting General Counsel ("AGC") argues that the ALJ Wacknov's Decision was erroneous, and urges the Board to revisit the factual and credibility determinations made by the ALJ. The Board should decline such an invitation. Left with ALJ Wacknov's conclusions of fact and the applicable legal standards, the Board should affirm the ALJ's Decision, and dismiss the AGC's exceptions.

## **II. BACKGROUND**

### **A. The Parties and Bargaining Background.**

Wayron, located in Longview, Washington, fabricates and sells commercial metal products. (Administrative Law Judge's Decision ("ALJD") 2:10-12.) Started in 1974, the company has been unionized since near its beginning, and it recognizes three Unions: (1) Boilermakers, which represents the metal fabricator employees; (2) Machinists, which represents the mechanics; and (3) Painters, which represents Wayron's painters (collectively, "the Unions"). In 2002, two employees – Faye Dietz, a mechanical engineer working at Wayron

since 1990, and Jeff Spendlove, a painter employed since 1995— purchased Wayron. (ALJD 2:34-39.) They are working owners, as Dietz is still the company's engineer and Spendlove works in the paint shop. (ALJD 2:37-39.)

At the time of acquisition, the company had three separate collective bargaining agreements with each Union. (ALJD 2:41-42.) However, due to the small size of the business (typically between 5 to 25 employees), Dietz and Spendlove requested that the company and the Unions negotiate a single wall-to-wall Labor Agreement for convenience and to save time and money. The Unions agreed, and in 2002 a single contract was negotiated, and renegotiated and executed on May 7, 2007 and effective until September 30, 2010 ("the Labor Agreement"). (ALJD 2:41-50; G.C. Exs. 2-3.) At no time did the parties intend to merge the three Unions into a "single unit." (ALJD 2:44-47.)<sup>1</sup>

**B. Labor Agreement Expires on September 30, 2010 and Bargaining Begins.**

1. The 2006-2010 Labor Agreement expired on September 30, 2010.

The Labor Agreement was set to expire on September 30, 2010. (ALJD 2:49-50.) During the contract's term, in April 2009, Wayron began feeling the pressures of the slowing economy, and requested the Unions to open the contract for negotiation on the narrow issue of seeking a temporary concession of a reduction in labor compensation. (ALJD 7:3-8.) The Unions refused to open the contract during its term. (*Id.*)

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<sup>1</sup> The AGC's brief contains factual misrepresentations that the three unions represented "a unit of production and maintenance employees." (AGC's Brief 2.) The AGC alleged in the Complaint that the unions had merged into a single unit. (ALJD 4:4-9.) ALJ Wacknov rejected this argument, finding that there was no evidence from company or union witnesses that supported this contention. Consequently, ALJ Wacknov held that "[b]oth 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." (ALJD 2:44-47.) In fact, the evidence so clearly established that there was no merger, the AGC did not raise an exception to this finding.

In July 2010, each Union separately notified Wayron that it intended to open the contract for bargaining. (ALJD 3:36-37; Resp. Exs. 1, 4-6.) At the time contract negotiations began, there were 17 union members. The Boilermakers represented 13 employees, the Painters represented 2 employees, and the Machinists represented only 1. (ALJD 3:43; 9 at n. 14; Tr. 124:21-25.)

2. September 15, 2010 bargaining meeting.

On September 15, 2010, Wayron and the Unions entered into negotiations. (ALJD 4:10.) Dean Nordstrom, the company's labor consultant, and Ms. Dietz,<sup>2</sup> met with representatives from each Union, including Lance Hickey, Boilermakers Assistant Business Manager; Bill McCain, Boilermakers Shop Steward; Bud Bartunek, Painters Business Representative; Jeff Brooks, Painters Business Representative; and Greg Heidal, Machinists Business Representative. (ALJD 4:11-14.) Hickey, from the Boilermakers, was the lead negotiator and speaker for the Unions. (ALJD 4:11-13.) At the first bargaining meeting, Wayron expressed its need for a bare bones contact due to the bad economy and Wayron's difficulty to compete over the prior years. The company presented an initial offer to modify the expiring Labor Agreement that included numerous provision and cost-cutting changes (the document presented to the Unions has become to be known as the "red and blue contract"). (ALJD 4:17-18; G.C. Ex. 5.) Had all of the changes of the "red and blue contract" been accepted and implemented, it would have reduced labor costs by \$10.00/hour. (ALJD 4:17-18; Tr. 307:10-12.)

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<sup>2</sup> The Unions (and the AGC) argue that Ms. Dietz did not have authority to negotiate and make changes to the company's proposal and that the meetings were unproductive because Jeff Spendlove was not present at the first two. This characterization is false. Ms. Dietz, as a majority owner, has the authority to negotiate and bind the company in a labor agreement. (Tr. 245:4-12 (Dean Nordstrom, the company's bargaining consultant, testified that in his opinion, Dietz and Spendlove were partners and had equal authority to negotiate with the Unions.)) Moreover, Nordstrom and Dietz testified that the Unions never questioned Dietz's authority to negotiate or state that Spendlove was required to be present. (Tr. 260:13-261:11.) Spendlove stated that Dietz would represent the company in the 2010 negotiations because he had filled that role for the prior two contracts. (Tr. 300:21-301:2.)

According to the Unions' meeting notes taken by Heidal, the company stated that "we are not going to claim inability to pay," but rather Wayron wanted to focus on "employees [sic] choices" in terms of how the cost-cutting measures would take place. (Tr. 81:15-82:14; G.C. Ex. 17, p. 2.)<sup>3</sup>

The Unions provided their own proposed changes, which sought to increase compensation and benefits, including raising wages by 7%, increasing vacation, holiday and bereavement benefits, and raising the employer's pension and Health and Welfare contributions. (ALJD 4:18-19.) The parties reviewed – but did not accept – the other's initial proposal. (ALJD 4:16-23.) Both parties agreed to continue to meet at regular times and places until an agreement or an impasse had been reached.

In the meantime, Wayron and the Unions agreed to execute a day-by-day extension to the existing Labor Agreement, effective October 1, 2010, subject to termination by either party on the following conditions,

It is hereby agreed by and between the Parties to extend the current Agreement day to day, beginning October 1, 2010, until a new collective bargaining agreement has been ratified or until either party has served on the other party notice to terminate the Agreement. Said termination notice shall be served via fax to the following parties and shall be effective five business days after receipt. (ALJD 4:25-29; G.C. Ex. 6.)

3. October 6, 2010 bargaining meeting.

The parties met on October 6, 2010 to continue bargaining. Present were Faye Dietz and Dean Nordstrom for Wayron, and Lance Hickey (Boilermakers), Jeff Brooke (Painters), Greg

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<sup>3</sup> As noted by ALJ Wacknov, the union witnesses contradicted each other regarding the company's need for cost-cutting measures. Consequently, ALJ Wacknov credited the testimony of Heidal based on his "relatively thorough recollection" that was "reinforced by the notes that he had taken." (ALJD 5:20-6:34, n. 6.) To the extent other union witnesses testified inconsistently with Heidal, ALJ Wacknov expressly did not credit the testimony. (ALJD 4 at n. 4.)

Heidal (Machinists) and Bill McCain (Boilermakers' Shop Steward) for the Unions. (ALJD 4:31-32.) The company again stressed the importance of a reduction in the total compensation package, and asked the Unions to decide how to distribute the "pot" of compensation. (Tr. 48:15-49:1; 86:11-17.) According to Heidal's testimony, the parties discussed how the money would be allocated based on the employees' "priorities" and "what's important to the people." The Unions responded that the employees' priority was "wages." (ALJD 17 at n. 28; Tr. 134:7-17; G.C. Ex. 17.) Neither party deviated from their initial economic proposal. (ALJD 4:33.)

4. November 4, 2010 bargaining meeting.

On November 4, 2010, the parties met for a third time. Present were Dietz, Spendlove and Nordstrom for Wayron, and Hickey, Brooke, Heidal and McCain for the Unions. (ALJD 4:37-39.) Wayron revised its initial economic proposal by offering cuts of an average of \$6.51 per hour (an increase from the "red and blue contract's" proposed \$10.00 per hour cuts). (ALJD 4:39-48.) According to Hickey's testimony, "Jeff [Spendlove] review[ed] the company's position, talking about how much they needed to make for – to be competitive." (ALJD 4:41-42.) Hickey continued, "then also at the meeting we were presented with the – a small like spreadsheet which showed the hourly rate, full package, and then where they needed to be at to stay competitive," and Spendlove explained that non-union competitors were bidding at an average of \$25/hour for labor compared to Wayron's \$30.51/hour for labor." (ALJD 4:41-42; Tr. 5:29-42; 84:17-85:4; 90:2-10; 154:20-155:1; 388:18-389:1; G.C. Ex. 7.) Spendlove testified that he is familiar with and has knowledge about what other competitors are bidding, including what Wayron is able to bid when using subcontractors to perform the work. (Tr. 314:14-8.) Heidal testified that Spendlove explained to the Unions "that they were looking for a competitive edge or an even playing field. . . with his competitors, and that he needed to reduce the costs of the

contract." (ALJD 5:36-42; Tr. 136:1-4.) Heidal admitted that Wayron told the Unions that "[t]hey can't compete with that contract. I don't believe they ever said they can't afford the contract. \* \* \* [t]hey said they were unable to compete and they wouldn't have any work." (ALJD 6:29-34.) Spendlove informed the Union that the average \$6.51 per hour cut would not even get them to their competitors' labor costs, but it would get the company closer. (ALJD 7:12-6.) Spendlove conveyed to the Unions that so long as Wayron could be competitive in the marketplace, the company could provide jobs to its employees; however, the opposite was true too, that without concessions to allow Wayron to be competitive, more layoffs lie ahead. (ALJD 7:24-28.)

Spendlove also explained to the Unions that the company needed to renew its line of credit with its bank in February 2011. (ALJD 7:28-31.) To do so, the bank was asking Wayron to demonstrate that changes were being made to lower costs and secure work. By way of example, Wayron shared with the Unions that it had received a concession from its landlord, and that it wanted a similar concession in labor costs so that it could win bids. (ALJD 6 at n. 8; Tr. 417:19-25.) Spendlove never said that without the line of credit, Wayron would close its doors or be in financial peril. (ALJD 7:20-28.)<sup>4</sup>

Wayron further invited the Unions and the employees to decide how the reduction would be applied – *e.g.*, wages, pension, Health and Welfare programs, or the elimination or

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<sup>4</sup> The AGC's Brief relies on testimony from Hickey and Brooke to support the contention that Spendlove claimed that the reason Wayron needed the concessions was because the company required a line of credit by February 2011 and that without the line of credit, Wayron would be out of business. The AGC's brief further relies on Hickey's testimony that Spendlove told the Unions that without the labor cost concessions, Wayron "would have to close its doors." (AGC Brief 6-8.) What the AGC fails to disclose to the Board is that the ALJ specifically discredited the testimony of Hickey and Brooke to the extent it conflicted with Heidal's testimony about Spendlove's statements about Wayron's financial position and the reasons for the concessions – to be competitive. (ALJD 4 at n. 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 inability to pay. Rather, I credit the version given by Business Representative Agent Heidal, *infra*.")) and n. 6 ("I do not credit the testimony of business agents Hickey and Brooke to the extent their testimony differs from Heidal's account of the meeting.))

modification of other fringe benefits. (ALJD 4:46-48; Tr. 52:4-15.) Spendlove expressed that Wayron was willing to conform to whatever scenario that the employees wanted, so long as the reduction equaled an average of \$6.51 per hour. (Tr. 52:4-8 (Hickey states, "the amount of the cut that they were looking at, total package, was \$6.51. . . we were basically given the opportunity. . . that we can take it from wherever you want."); 258:3-19 (Nordstrom testified that the company requested that the Unions provide what the employees' priorities were and what was the best allocation of the funds available, but that the Unions would not give a clear response or guidance); 413:24-414:12 (Dietz testified that the company "asked the Union, we have a certain number, amount of money that we can allocate for labor costs when we are bidding. . . So we asked the Union to go ask the members how they want the money to be allocated to get paid. . . and Unions never come [sic] back and tell us how."))

At the bargaining table, Wayron candidly expressed – and the Unions admitted they understood – the necessity of negotiating cost-cutting language into the contract and that Wayron needed to have a new contract by February 2011 in order to resign on loans. (ALJD 7:25-29.) Hickey said the Unions would review Wayron's proposal, as an average \$6.51 per hour cut was drastic, and the Unions would get back to Wayron. (ALJD 7:31-32.) Spendlove testified that, from his perspective, the Unions understood the situation and were receptive and he felt optimistic over the prospects of reaching an agreement. (ALJD 7:34-26.)

5. November 5, 2010 meeting with employees.

During the November 4, 2010 meeting, Spendlove and Dietz requested to have an informal meeting with the bargaining unit employees the following day and invited the Unions' representatives to be present. The Unions had no objections to the meeting. (ALJD 7:36-46.)

On November 5, 2010, Spendlove and Dietz met with the bargaining unit employees, and they explained to them exactly what was addressed during the negotiation meetings. (ALJD 7:44-8:4; Tr. 168:1-13 (McCain, the Boilermaker Shop Steward, testified that Spendlove "repeated what he had told the Union the day before at negotiations"); Tr. 181:18-182:2 (Stone provided a sworn statement to the NLRB that stated that "Jeff told us the he needed the cuts to be competitive with the non-Union shops in town."); 478:9-17 (Olson testified that "it was about where the company was on being competitive with being able to get jobs in the shop for everybody. . .they said they needed to be around that price to be competitive to be able to get jobs and have everybody still working.")<sup>5</sup> Spendlove told the employees that the company wanted the employees to decide what was the most important part of their compensation package and to determine what part of the compensation package to maintain, modify, increase, decrease or eliminate to achieve the needed labor cost reductions. (ALJD 7:47-8:3; Tr. 315:10-19.)

6. Unions cancel next meetings and request company to open its books.

The parties agreed to meet on November 9, 2010; however, at 7:03 AM of November 9, Hickey, on behalf of the Unions, cancelled the meeting. (Tr. 92:21-93:9; Resp. Ex. 3.) Instead, Hickey presented Wayron with a request to "open their books" and grant "[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." (ALJD 8:18-35; G.C. Ex. 8.) The company had never asserted any such "inability to pay" position – and no

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<sup>5</sup> The AGC's Brief again relies on discredited testimony of two employees, McCain and Stone, to support the contention that Spendlove told the employees that the company may close in February 2011 if the labor concessions were not given. (AGC Brief 8-9.) The AGC fails to inform the Board that ALJ Wacknov expressly found McCain's and Stone's testimony incredible. (ALJD 8 at n. 11 ("I do not credit the testimony of any employees who testified to the contrary.")) Instead, ALJ Wacknov found that the record established that Spendlove told the employees that pay cuts of over \$6 per hour were needed in order to permit the company to be competitive with the non-union shops in town. (ALJD 7:46-8:4.)

witness testified to the contrary. (ALJD 15:43-16:3; Tr. 141:4-6 (Heidal testifies he understood Wayron was claiming that "[t]hey can't compete with that contract. I don't believe they ever said they can't afford the contract.")) Accordingly, on November 10, 2010, Wayron objected to the Unions' thinly veiled scheme to obtain the company's financial records without basis and, thusly, Wayron refused to produce the requested documents. (ALJD 8:37-50; G.C. Ex. 9.) The Unions apparently conceded that their request was without merit, as they asserted no challenge whatsoever to Wayron's objections. (ALJD 9:1; 15:43-16:3.)

Spendlove and Dietz testified that the company was never in the position of not being able to pay payroll and benefits; rather, it was an issue of whether Wayron had enough work to keep its workers employed. (ALJD 7:20-28.) During the hearing, ALJ Wacknov inquired of the Unions why they did not request information about Wayron's competitors and bidding information – to which they may have arguably been entitled based on Wayron's reason for seeking the concessions. (ALJD 16:3-7.) The Unions admitted they had not sought information about competition/bids – nor have they done so to date. (*Id.*)

The AGC's Brief fails to inform the Board that the Unions cancelled the next meeting that was scheduled for November 24, 2010. (Tr. 53:16-18; Resp. Ex. 10, pp. 2-3.) Hickey promised that he would quickly provide the company with new dates to reconvene the negotiations. (Resp. Ex. 10, p. 2.) It became obvious to Wayron that the Unions were stalling, as they were satisfied with the status quo. As of December 7, 2010, Wayron had not heard back from the Unions, so Spendlove contacted Hickey to request new dates. (Resp. 10, p. 1.) Three days later, the Unions responded and the parties agreed to meet on December 20, 2010. (*Id.*)

7. December 20, 2010 bargaining meeting.

On December 20, 2010, Dietz, Spendlove and Nordstrom for the Wayron, met with the Unions, represented only by Hickey. (ALJD 9:16.) The Unions unilaterally rejected the company's latest proposal without submittal to the membership, and the Unions clearly expressed that they had no intention of presenting the offer to the membership for consideration or vote. (Tr. 331:10-24; Resp. Ex. 8, p. 3 (Spendlove's handwritten meeting notes from 12/20/2010, stating "Union stated that they were 'unwilling to take reductions to the employees" and "unwilling to reduce package in any form.") According to Spendlove, Hickey's response to Wayron was that the Unions would not give Wayron a concession because it would "lead to a domino effect in the next bargaining." (ALJD 10:36-40.) It was abundantly clear to Wayron that the Unions' representatives were looking out for the Internationals, not the specific employees of Wayron. (Tr. 504:10-20.)<sup>6</sup>

Hickey then offered a counter-proposal of extending the expired contract for one year – in effect, maintaining the extension agreement for one year. (ALJD 9:19-20; Resp. Ex. 7 (Hickey's email to Heidal, stating "Greg, no we did not get anywhere, I did propose to extend the current CBA for one year.")) Curiously, Hickey attempted to minimize the length of and the

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<sup>6</sup> The members requested their Unions to come meet with the employees, but the Unions failed to do so. Gary Bishop, a Boilermaker employee, testified that he called Lance Hickey to ask how the negotiations were going, and Hickey said that "they're being stalled." Bishop continued that during the fall of 2010, he called Hickey, "[a]nd I said, well, you've got to come down here to Wayron. You've got to take a census of what each individual employee would like to have. I said we're willing to give up some of our benefits to help Wayron in order to – help Wayron be more competitive. \* \* \* Lance Hickey told me, he goes, well, I understand that, Gary, but, you know, I'm not going to go that route. I'm not going to do that. I'm not going to – if I went there and I gave into Wayron, a little bit like that, it would be a domino effect. I'd have to do it for other companies. So sorry to see that some of the employees might not come back if they're laid off, but I'm not going to do that. That's – to me that was he didn't care. It was like he didn't even care if Wayron went out of business." (Tr. 503:19-505:1.)

content covered at the December 20 meeting, testifying that "It was very brief. We met and no discussions really other than we were going to move to set dates in January because of the holidays being there. I don't even think we sat down. It was ten minutes maybe about." (Tr. 55:1-6.) Presumably, Hickey was attempting to ignore the fact that the Unions made a counter-proposal of "status quo" on December 20 because in every meeting thereafter, the Unions engaged in regressive bargaining, seeking an increase in benefits from the expired contract, as will be discussed in greater detail below. In all events, Spendlove, Dietz, and Nordstrom all consistently testified that the meeting on December 20 lasted for an hour and a half, and the parties continued to discuss Wayron's request for compensation reductions and the Unions' counter-proposal and refusal go below the status quo. (Tr. 272:9-23; 289:5-13; 330:14-19.) On cross examination, Hickey reluctantly admitted that he made the status quo counter proposal. (ALJD 9:19-20; n. 15.)

8. January 28, 2011 bargaining meeting with FMCS mediator.

Understanding that the parties' positions were calcifying, Wayron requested an FMCS mediator to attend the next negotiation scheduled on January 28, 2011. (ALJD 9:23-25.) Through the FMCS mediator, Spendlove expressed that the company could not accept any offer that did not include the previously proposed cost reduction plan. The Unions rejected that offer and refused to reduce the benefits package below the status quo. (ALJD 9:29-30.) The mediator proposed a two-week "think about it" period. (Tr. 276:22-25; 336:1-13.) Wayron rejected this proposal and candidly expressed its concern to the mediator that the Unions were engaging in stalling tactics to maintain the status quo (which was the equivalent of their offer) and in an effort to gain the greatest amount of benefit from the expired Labor Agreement. (Tr. 276:22-25; 290:1-8 (Nordstrom testified that "we could end up in a foot-dragging situation here whereby the

one year [roll over of the contract] would be accomplished simply by [the Unions] not doing much"); 427:16-24; 333:8-11; *see also* Tr. 105:11-20; 160:1-11 (Hickey and Heidal admit that the members were enjoying the benefits of the expired agreement.))

During the meeting, neither party changed their position. (ALJD 9:32.) Thus, the mediator informed Wayron and the Unions that the parties were "too far apart," and she did not believe that there was anything additional she could do to facilitate an agreement. (ALJD 9:32-34; 103:9-13; Tr. 274:11-20; 426:16-24.) She declared that the parties were at impasse. (Tr. 426:23-24 (Dietz testified that the mediator stated "there's nothing I can do. You guys are at impasse.")) Wayron informed the mediator that it intended to terminate the extension agreement, which had the effect of allowing the Labor Agreement to expire as well. (Tr. 335:5-12; 427:2-10.) The mediator shared this with the Unions. (Tr. 335:13-25; 427:11-13.) In response, the Union threatened to file a ULP against the company if Wayron terminated the extension agreement and implemented its last and final offer. (Tr. 103:14-22.)

9. Parties reach impasse and Wayron terminates extension to Labor Agreement.

On the afternoon of January 28, 2011, Wayron provided the Unions with a 5-day notice of termination of the extension agreement, effective February 4, 2011. (ALJD 9:36-38.) Wayron's notice complied with the terms of the extension agreement. (G.C. Exs. 6, 10.)

On February 2, 2011, the Unions requested another meeting, and Wayron agreed. (ALJD 10:8-9.) Hickey contacted Nordstrom to determine if meeting again before the Labor Agreement expired would be fruitful, and Nordstrom informed Hickey that the company was and continued to be open to negotiation, but that the company did not intend to change its position with regard to terminating the contract. (Tr. 277:6-15; Resp. Ex. 12.) On February 2, Hickey contacted

Spendlove by phone and specifically asked what Wayron's best and final offer was, and Spendlove clearly answered that it was the "red and blue contract" with the \$6.51 compensation reductions proposed in November. (ALJD 10:8-20; Tr. 337:15-19.)

Later that day, the Unions inexplicably sent Wayron a counter-proposal that *increased* the benefits from the status quo – yet another attempt at bad faith regressive bargaining. (ALJD 9:38-10:7; Tr. 110:22-111:2 (Hickey admits that the new proposal was above status quo, and attempted to minimize the December 20 status quo counter proposal as merely "verbal" and not a "formal proposal"); 339:4-13; 429:1-12; G.C. Ex. 11.) The next day, on February 3, Wayron rejected the proposal via email. (Resp. Ex. 11.) On February 4, Hickey said in an email to Spendlove, Dietz and Nordstrom, "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." (ALJD 10:8-20; Resp. Ex. 12, p. 1.) Wayron agreed to meet with the Unions and negotiate in good faith. (ALJD 10:20; Tr. 341:15-342:4.)

On February 4, the parties met to continue negotiation, but neither party moved from its position. (Tr. 61:10-11.) In addition, the Unions threatened that they would file an ULP charge against Wayron if it continued to exercise its right to terminate the extension agreement. (Tr. 62:7-9; 282:15-283:17; 343:23-244:3; 430:7-8.) The company was not persuaded (or impressed) by the Unions' threats, stalling tactics, refusal to submit the company's proposal to the employees, and bad-faith regressive bargaining. Wayron informed the Unions that the parties were at impasse and that the extension agreement would expired as of that afternoon and the

company intended to meet with the employees the following Monday to implement the terms and conditions rejected by the Unions. (ALJD 10:30-31; Tr. 61:12-19; 283:18-284:1; 342:16-25.)

**C. Wayron Implements the Last and Final Offer Rejected By the Unions.**

As of February 7, 2011, only three employees were actually working, the remaining employees had been laid off. (ALJD 9:17-18; Tr. 343:15-22; 372:11-15; 443:22-23 (Dietz testified that only two Boilermakers and one Painter were employed as of February 7.)) On February 5, 2011, Spendlove and Dietz informed the employees that the contract was expiring that night, and the employees would be terminated and they were all invited to apply for employment the following week. (ALJD 10:42-46.) On February 7, 2011, Wayron terminated all of the employees both on active and laid off status and provided each with their final paychecks that included all earned wages and accrued vacation. (ALJD 11:4-22.) The reason Spendlove and Dietz decided to terminate the employees – rather than merely change the terms and conditions of employment – was based on their assumption that a termination was required for accounting purposes and to make the new terms and conditions "clear" to employees, as that is what they had done when they purchased the company in 2002. (ALJD 11:28-39.) Spendlove explained that the reason he had the employees reapply is because he was not sure that employees would want to come back under the new conditions. He further testified that it appeared to him that having the employees reapply was the most direct way to inform the employees of the new terms and conditions of employment, and for the employees to let the owners know if they were willing to continue working accordingly. (*Id.*)

After a one-day shutdown, on February 8, 2011, Wayron began accepting applications and hiring employees back to work. (Tr. 347:24-348:1; 443:18-20.) Twelve of the 17

bargaining unit employees submitted applications<sup>7</sup> and were either hired or will be hired when there is work that they are qualified to perform – six employees had been brought back as of the date of the hearing. (Tr. 348:2-11; 433:9-24.)<sup>8,9</sup>

Consistent with its last offer, Wayron established new terms and conditions of employment. As Wayron presented in its final offer to the Unions before impasse, Wayron reduced the average compensation package by approximately \$6.50 – it would have preferred if the Unions had provided guidance on how the employees wanted the compensation to be distributed, but the Unions refuse to provide that information. (ALJD 11:24-28; Tr. 385:6-14 (Spendlove testified that "because the Union failed to tell us how they wanted to divide up that money pie that everybody kept mentioning. Then Faye and I had to do that. And I'll admit, we did the best we could. It may not be perfect. I did the best I could do. I asked for guidance. I didn't get it.)) To achieve this, Wayron increased wages, decreased vacation, holiday and bereavement benefits, and eliminated the employer's contributions to the Health and Welfare benefit plans and pension trusts, which resulted in an average wage of \$24.00/hour. (ALJD 11:41-47.) Spendlove and Dietz devised the new compensation package and met with employees interested in working for Wayron and informed them of the new terms and

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<sup>7</sup> Wayron also received applications from other individuals who had not been previously employed with the company. (Tr. 349:14-23.) As of the date of the hearing in this matter, Wayron has hired six new employees in the paint shop. None of the "new" employees have replaced any of the "pre February 7, 2011" workers. (Tr. 350:4-19; 434:11 (Dietz testified that Wayron has "not hired any new Boilermakers or Machinists"); 445:9-11; 446:20-447:15.)

<sup>8</sup> ALJ Wacknov found that Wayron violated Section 8(a)(1) and (3) by terminating the employees and having them reapply. (ALJD 18:10-35.) While Wayron disagrees with the ALJ's finding given that Wayron has offered reinstatement to all of the employees (either by hiring the employees or reinstating them to laid off status), it is willing to accept the Decision as issued.

<sup>9</sup> As part of the settlement agreement with the NLRB regarding the threat of a 10(j) injunction, Wayron offered reinstatement to all the individuals who had not reapplied – unfortunately, there is no work so the reinstatement was to layoff status with the promise that they will be called back when work is available for which they are qualified. (Resp. Ex. 20.)

conditions. (ALJD 11:41-46.) This change in the compensation structure is the same that Wayron offered to the Unions on November 4, 2010, December 20, 2010, January 28, 2011, and February 4, 2010.

**D. Questions About Whether Wayron Was Union or Non-Union as of February 8, 2011.**

The Unions never contacted their members during January or February 2011 to inform them of the contract negotiations status, that Wayron had terminated the extension agreement, that the Labor Agreement had lapsed, and that Wayron intended to implement its last and final offer and reduce the compensation package. (Tr. 114:8-16 (Hickey admits that the Boilermakers did not meet with the members); 480:14-21 (Olson testified that no one from the Boilermakers contacted him about the status of negotiations or contract termination); 505:6-22.) In fact, as of today, the Unions still have not contacted or met with the members – except to notify the members that they needed to pay their dues.<sup>10</sup> (Tr. 115:7-12; 480:19-21; 484:7-9 (Olson testified that the Boilermakers have not contacted him even to inform that the parties are back at the negotiation table.))

Neither Spendlove nor Dietz ever told any employees or applicants that Wayron was a non-union shop – rather when there was confusion expressed by the employees, Spendlove

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<sup>10</sup> During the fall 2010, the Boilermakers held a meeting with its members and they told the employees that if Wayron decided to work without a contract, the employees could not go back to Wayron and still be in the Union – that “[w]e would be blackballed from the Union or something. And we couldn't get a withdrawal card” to preserve their standing with the union. (Tr. 190:4-15; 192:1-19.) Mike Olson attended the meeting with the Boilermakers and he testified that that the employees were willing to make the concessions, but Hickey and Dean Calhoun, the Boilermakers representatives, said “they weren't going to accept that with Wayron because it would become a domino effect if they accepted that. They said they weren't going to do it. They weren't going to accept it.” (Tr. 478:22-479:10.) Olson and Gary Bishop testified that the questions were raised about what would happen if Wayron went non-union, and the Boilermakers' business representatives told the members that they could not work at Wayron or otherwise they would lose their union membership if they worked in the same trade. (ALJD 12:34-39; Tr. 479:11-21; 502:18-503:19.) Based on this discussion, Olson understood that if Wayron and the Unions were unable to agree on a contract, then Wayron would become non-union. (Tr. 480:2-13.) To be clear, this was based on the discussion with the Boilermakers' business representatives – not Wayron.

explained to them that "working without a contract is not the same as having no Union." (Tr. 352:7-15; 444:13-21; 447:22-24; 481:5-5-15 (Olson testified that neither Dietz nor Spendlove discussed whether Wayron was union or non-union); 506:16-18.)

Due to the Unions' complete abandonment of their members, some members erroneously concluded that Wayron was non-union. Several employees testified that since Spendlove and Dietz told them that Wayron would be paying them according to new terms and conditions (increased wages, but no Health and Welfare or pension contributions), they assumed that Wayron was non-union. (Tr. 184:18-23; 185:2-186:8; 188:5-189:1 (Wasson testified that he assumed that Wayron was non-union, and a week after he was rehired, he asked Spendlove about it and Spendlove explained that "we were still Union and that we were working without a contract."); Tr. 196:8-13; 197:10-19; 201:21-202:2; 506:16-5 (Bishop testified that he was confused about whether Wayron was union or not.))<sup>11</sup>

**E. Wayron's Recognition of the Unions.**

1. Wayron continued to recognize the Unions after the Labor Agreement expires.

The expired Labor Agreement notwithstanding, Wayron continued to recognize the Unions. (Tr. 447:16-21.) As demonstrated in various bid to potential customers, it identified itself as a union shop. (Tr. 357:13-358:1; 388:5-17; 447:25-448:11; Resp. Ex. 15.) Moreover, Wayron responded to the Unions' request to continue negotiations. (Tr. 234:10-14.) On

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<sup>11</sup> ALJ Wacknov found that during the course of rehiring the workers, Dietz and Spendlove made representation to employees about Wayron being a "non-union shop," in violation of Section 8(a)(1). (ALJD 12 at n. 12; 18:43-45; 19:3-4.) While Wayron disagrees with this finding based on the record, it is willing to accept the ALJ's Decision as issued, including the order to "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." Wayron has not engaged in such conduct nor will it do so.

February 18 and 22, 2011, Hickey requested to schedule further negotiations. (ALJD 13:9-10.)

On March 14, 2011, Spendlove responded to the Unions' request to continue bargaining,

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,<sup>12</sup> 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 resolution of the charges. Wayron hopes that negotiations will be productive in resolving the charges and moving forward with a new contract. (ALJD 13:14-25; G.C. Ex. 14, p. 1.)

The Unions did not respond to Spendlove's email, so Spendlove followed up with the Unions again on March 21. (G.C. Ex. 15, p. 2.) The parties agreed to meet on April 22 and 29, 2011. (ALJD 13: 37; G.C. Ex. 15, p. 1.)<sup>13</sup>

2. Boilermaker members petition to decertify.

On April 19, 2011, Wayron received notice from the NLRB that the Boilermaker employees had filed a Decertification Petition with the NLRB. (ALJD 13:37-39.) Spendlove believed that the Boilermakers no longer had the majority support of the members based on the information he received from two of the members, informing him that 8 members (that is, all Boilermaker workers, including those on layoff) signed the decertification petition. (ALJD 13:39-45; Tr. 360:14-17; 366:11-23; 483:8-14 (Olson testified that a majority of the Boilermakers had signed the petition.)) In light of this information, Spendlove sent an email to the Unions, informing the Boilermakers that it intended to cancel the bargaining meeting because

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<sup>12</sup> The Boilermakers filed ULP charges against Wayron on March 2, 2011. (ALJD 13:10-12.)

<sup>13</sup> ALJ Wacknov found that by not promptly responding to the Unions' request to continue bargaining, Wayron "implicitly withdrew recognition from the Unions from February 7, 2011 until March 14, 2011," and that five week delay constituted a violation of Section 8(a)(5). Generally, a "cooling off" period after impasse is sanctioned under Board and court precedent; however, Wayron is willing to accept the ALJ's Decision on this issue, especially given that the parties have been back at the bargaining table for over eight months.

the Boilermakers had lost majority support of its members. Spendlove specifically stated that "we plan to continue to negotiate with the Machinist and Painter Unions as scheduled on the 29th." (ALJD 14:1-10.)

While Wayron withdrew its recognition of the Boilermakers, it continued to recognize and attempted to negotiate with the Machinists and Painters. However, the Machinists took the position that the Boilermakers would be in attendance at the negotiations and that Lance Hickey would continue to be the spokesperson for all three Unions – despite the objective evidence that the Boilermakers had lost majority support. (ALJD 14:12-14; C.G. Ex. 21.) Based on the Machinists' untenable position and condition of the meeting, Wayron cancelled the meeting scheduled for April 29. (ALJD 14:14; C.G. Ex. 22.)

3. Machinist member petitions to decertify.

On May 6, 2011, Wayron received notice that the sole Machinist member filed a petition to decertify the Union with the NLRB. (ALJD 14:16-17.) Said another way, 100% of the members (one of one) supported decertify. (ALJD 14:17-18.) Thus, Wayron withdrew recognition of the second union, yet it continued to recognize the Painters. (ALJD 14:18-20.)

4. Wayron agrees to recognize and bargain with all Unions pursuant to a pre-10(j) settlement.

At some point, the employees notified Wayron that they had been informed that the NLRB was not going to process their decertification petitions – and that the NLRB has stopped taking the employees' phone calls.<sup>14</sup> (Tr. 366:1-9.) On August 25, 2011, Wayron and the NLRB entered into a settlement agreement, whereby Wayron agreed to re-enter negotiations with all

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<sup>14</sup> ALJ Wacknov found that Wayron was not privileged to withdraw recognition from the two unions, consistent with the position taken by the NLRB, Region 19 office. Again, Wayron is willing to accept the ALJ's Decision as issued, especially given that Wayron has reengaged in bargaining with the Unions and also because the Boilermakers have since voluntarily withdrawn as the representative for those employees.

three Unions and the NLRB agreed to not file a motion for 10(j) injunctions seeking the same outcome. (ALJD 14:41-15:8.) As of the date of this filing, the parties have resumed negotiations and are making progress. Importantly, on February 6, 2012, the Boilermakers voluntarily disclaimed their interest in representing the employees covered by that unit. Thus, Wayron is negotiated currently with the Painters and Machinists unions.

### **III. ARGUMENT**

ALJ Wacknov correctly held that Wayron bargained in good faith with the Unions until the parties were at impasse. The ALJ also correctly held that Wayron properly implemented the last and final offer that the Unions rejected. Finally, ALJ Wacknov correctly held that the company acted lawfully when it refused the Unions' demand to "open its books," as the company had not claimed poverty or that it would not be able to pay the employees' wages and benefits and, thus, the ALJ correctly held that the Unions were not entitled to review Wayron's financial information.

#### **A. The ALJ Correctly Found that the Unions Were Not Entitled to the Company's Financial Records.**

The AGC's argues that ALJ Wacknov erred in finding that the company was not obligated to turn over its financial information pursuant to the Unions' request based on his finding that Wayron never claimed poverty or inability to pay. However, to support this argument, the AGC relies on portions of the record that ALJ Wacknov specifically and expressly did not credit as trustworthy.<sup>15</sup>

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<sup>15</sup> The AGC's brief also asserts facts for which there is no evidentiary support. For example, without citation, the AGC's brief argues that "Respondent made claims from the first day of bargaining that it was *unable to continue paying employees at the rates outlines in the expired contract*, and would need drastic *concessions in order to stay afloat*." (Emphasis added.) The AGC's statements are pure argument and not fact.

ALJ Wacknov found that "[i]t is clear that throughout negotiations the [company] never explicitly said that it could not or would not agree to the Unions' proposals because of an inability to pay." (ALJD 15:43-44; *see also* Tr. 141:4-6 (Heidal testifies he understood Wayron was claiming that "[t]hey can't compete with that contract. I don't believe they ever said that can't afford the contract.")) The ALJ correctly found that when the Unions inquired about why the company was seeking cost-cutting measures, the company "replied in explicit terms" that it was not pleading poverty or inability to pay, but rather the company was at a competitive disadvantage in winning bids with such high labor costs. (ALJD 15:44-16:4.) Based on the overwhelming evidence, ALJ Wacknov found it "significant" that the Unions never disputed the company's reason for the concessions and, in fact, when the company refused to provide the Unions with its financial records because it had not claimed inability to pay, the Unions did not dispute – and thus conceded – that their request was without basis. (ALJD 16:3-7.)

In the AGC's view of the world, if an employer attempts to reduce the economics in a labor agreement during bargaining, there should be an inference of "inability to pay" and requirement that financial records be produced upon request. This, however, is not the law. There are many reasons for an employer to seek cost-cutting measures in bargaining that does not involve the risk of going out of business – such as, like here, to create a competitive advantage. As the ALJ found, Wayron never expressed that it could not pay the employees or that if it did not received concessions that it would close its doors.<sup>16</sup> Rather, it needed to cut labor costs in order to successfully bid against its competitors.

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<sup>16</sup> It is telling that the only witnesses that testified that Wayron made such statements about "closing its doors" or "going out of business" were made by union witnesses that ALJ Wacknov expressly did not credit. Instead, ALJ Wacknov found credible the union witnesses who confirmed the testimony of the company witnesses, that the company never claimed poverty or inability to pay, but instead the company sought concessions to become competitive. Therefore, the case relied on by the AGC, *Stella D'Oro Biscuit Co.*, 355 NLRB No. 158 (2010) is

As the records demonstrates and the ALJ concluded, during most of the negotiations, the majority of Wayron's employees were laid off due to lack of work – i.e., due to Wayron being outbid by its competitors with lower labor costs. In fact, as of December 2010, only two employees were working, while 18 were laid off. As a matter of simple logic, it is easy to make the case that lower labor costs *equaled* more competitive bidding *equaled* more work for the company *equaled* more jobs for Wayron's employees. The AGC attempts to distort this fairly straightforward logical argument by contending that what the company really meant was that without bids, it was going out of business. There is no evidence that supports this strained argument or tortured interpretation of the events.

With regard to Wayron's renewal of its bank loan, the evidence demonstrated that Spendlove and Dietz shared with the Unions and the employees that the company needed to renew its bank loan in February 2011 and, as a condition of renewal, the bank was requiring Wayron to demonstrate that it was taking measures to reduce costs and increase revenue – such as receiving a concession from its landlord and lowering labor costs in order to win more bids. As the ALJ correctly found, no one from Wayron told the Unions or employees that without the loan, the business would go under. (The ALJ expressly discredited the union witnesses who testified to the contrary.) (ALJD 16:15-20.)

When an employer, either in response to bargaining demands from the union or in support of its own proposal, makes a claim of inability to pay, the union is entitled to request and review the employer's financial records to asses and substantiate the employer's representations about its financial condition. *NLRB v. Truitt Mfg. Co.*, 351 US 149 (1956). "The relevant

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inapposite, where the company confessed that without concessions it could not stay in business and would not survive.

distinction is between a mere 'unwillingness' to pay, which does not trigger an employer's obligation to provide financial information, and an 'inability' to pay, which does trigger such an obligation to provide such information." *Dover Hospitality Services, Inc., a/k/a Dover Caterers, Inc., a/k/a Dover Coll. Services, Inc. & Local 1102 of the Retail, Wholesale & Dep't Store Union, United Food & Commercial Workers Union*, 29-CA-30591, 2011 WL 4499436 (N.L.R.B. Div. of Judges Sept. 28, 2011) (citing *North Star Steel Co.*, 347 NLRB 1364, 1370; *Richmond Times-Dispatch*, 345 NLRB 195, 197 (2005)). "Put another way, the crucial distinction is between claims of 'can't pay' and 'doesn't want to pay' or 'cannot' and 'will not.'" *Id.* (citing *Nielsen Lithographing Co.*, 305 NLRB 697, 700 (1991), *affd. sub nom Graphic Communications International Union Local 508 v. NLRB*, 977 F.2d 1168 (7th Cir. 1992); *North Star Steel, supra*; *Lakeland Bus Lines, Inc.*, 335 NLRB 322, 324 (2001)).

In *Nielsen Lithographing Co.*, the Board held that the *Truitt* requirement that an employer provide general financial information to verify a claim of an inability to pay does not apply to an employer's claim that maintaining existing employee benefits is necessary to avoid placing the employer at a competitive disadvantage in the future. 305 NLRB 697 (1991), *affd. sub nom. Graphic Communications Local 50B v. NLRB*, 977 F.2d 1169 (7th Cir. 1992). Thus, in *Nielsen*, the employer acknowledged that it was still making a profit and was not pleading poverty or an inability to pay during the term of the contract being negotiated. Rather, it maintained that concessions were necessary in order to be competitive in the future. The Union requested certain information it deemed necessary to evaluate the claim that the employer was losing its ability to compete, including the employer's balance sheets, bank loan documents, and analyses of working capital. Although the Board initially found that the employer was required to provide the requested information, after the Seventh Circuit refused enforcement of that decision, the Board

held that “an employer's obligation to open its books does not arise unless the employer has predicated its bargaining stance on assertions about its inability to pay during the term of the bargaining agreement under negotiation.” *Id.* at 700. The Board emphasized that the obligation to provide general financial information does not arise where the employer “is simply saying that it does not want to pay.” (*Id.*)

In *Burruss Transfer*, the Board found that the employer did not claim inability to pay where it said it would “not be able to survive” if it increased wages or benefits. 307 NLRB 226, 228 (1992). In *AMF Trucking & Warehousing*, the Board found no inability-to-pay claim where the employer said it was “fighting to keep the business alive.” 342 NLRB 1125, 1126 (2004). Similarly, in *Stroehmann Bakeries v. NLRB*, the Second Circuit denied enforcement and found no inability-to-pay claim where the employer conveyed to the union that it would go out of business but for its parent company willing to bail it out financially. 95 F.3d 218, 220 (2d Cir. 1996). In *Lakeland Bus Lines v. NLRB*, the D.C. Circuit denied enforcement based on evidence that the employer explicitly stated that it was not asserting an inability to pay, but was only asserting the existence of short-term business losses. 347 F.3d 955, 963 (D.C. Cir. 2003). These cases establish that Wayron was justified in refusing to open its books.

The cases relied on by the AGC are easily distinguished and, in fact, support Wayron's actions. For example, in *NLRB v. Western Wirebound Box Co.*, the company attempted to bargain for wage cuts because “price competition was vigorous.” 356 F.2d 88, 89-90 (9th Cir. 1966). In response, the union requested to review the company's figures for the past two years related to productivity, labor and material costs, and price changes. *Id.* The company refused. In upholding the ALJ's finding that the employer, who claimed that it was at a competitive disadvantage, was required to provide the union with the requested information, the court noted

that "at no time did the union ask for more than figures relating to productivity and unit cost," which would assist the union in determining if the company's competitive disadvantage assertion was valid. *Id.* Here, in stark contrast, the Unions presented Wayron with a demand to "open their books" and grant "[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." (G.C. Ex. 8 (emphasis added).) Such a broad demand for "all financial records" was not warranted under the circumstances in this matter. Accordingly, ALJ Wacknov noted that the Unions "did not dispute that the [company] was at a competitive disadvantage; indeed, the Unions neither disputed this assertion nor requested information supporting this specific contention of the [company], such as, for example, documents showing bids by the [company] that it had not been awarded." (ALJD 16:3-6.) While the Unions could have tailored their request to the pertinent information to which they were arguably entitled, they did not.

Here, the ALJ correctly found that the company was never in the position of not being able to pay payroll and benefits; rather, it was a question of whether Wayron had enough work to keep the workers employed. (ALJD 15:43-16:24.) Moreover, the ALJ aptly noted that even if – for argument sake – review of the financial records was required, it would have been an "exercise in futility," as the Unions had unequivocally informed the company and their members that they would not agree to any decrease from the status quo, "because to do so would jeopardize the Union's bargaining positions nationwide." (ALJD 16 at n. 26.)<sup>17</sup> Based on the

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<sup>17</sup> Boilermaker employee Gary Bishop testified about his conversation with Lance Hickey, specifically when Hickey said, "I'm not going to – if I went there and I gave into Wayron, a little bit like that, it would be a domino effect. I'd have to do it for other companies. So sorry to see that some of the employees might not come back if they're laid off, but I'm not going to do that. That's – to me that was he didn't care. It was like he didn't even care if Wayron went out of business." (Tr. 503:19-505:1.)

cases cited above and the ALJ's finding of fact, Wayron did not claim an inability to pay and, thus, was not obligated to turn over "all financial records." Rather, Wayron stated that it "would not" pay because to do so would cause it to be at a competitive disadvantage and preclude Wayron from winning bids against its competitors. Thus, ALJ Wacknov correctly dismissed the claim.

**B. The ALJ Correctly Found that Wayron Bargained in Good Faith.**

ALJ Wacknov correctly found that there was no evidence of bad faith bargaining. Specifically, he found that the parties bargained from September 15, 2010 to February 4, 2011, a period of nearly five months, and during that period, the company agreed to extend the expired labor agreement to facilitate the reaching of an agreement. (ALJD 17:8-11.) In addition, the ALJ found that Wayron discussed the Unions' contract proposals, and there was no evidence that Wayron was ever unwilling to bargain over any issue raised by the Unions. (ALJD 16:31-33; 17:3-6.) Importantly, ALJ Wacknov correctly found that both parties began with proposals that they eventually modified. (ALJD 16:26.) As the ALJ succinctly summarizes the evidence, Wayron lowered its initial demand from approximately \$10 per hour cut as stated in the "red and blue contract," to a \$6.51 per hour cut in pay in benefits; the Union reduced their initial demand of a pay and benefits increase to simply an extension of the expired labor agreement for a one-year period. However, the parties were unwilling to move from these respective positions. (ALJD 16:26-31.)

The AGC attempts to argue that Wayron bargained in bad faith by proposing the "red and blue contract," which was an attempt to create a bare bones contract that it believed was reasonable for a company of its size with less than 20 employees, and that Wayron "refused to

budge" on any issue. However, this is belied by the record and factual findings of the ALJ discussed above.

Ironically, the Unions' flat "refusal to budge" on anything below status quo is the exact same misconduct in which the AGC accuses Wayron of engaging. The Unions engaged in other instances of bad faith bargaining. For example, the Unions conspicuously attempted to stall and prolong the negotiation process with the goal of achieving the greatest amount of benefit from the expired Labor Agreement. So long as the Unions continued the stalling tactics, the Labor Agreement remained intact and in force. In addition, the Unions engaged in regressive bargaining. Specifically, on December 20, 2010, the Unions offered to roll over the expired contract for a year, yet the Unions' subsequent proposals were actually higher than their status quo proposal.

Distilled to its essence, Wayron refused to maintain status quo; the Union refused to deviate downward from status quo. At Wayron's request, the parties hired a mediator to assist them in progress; however, as the mediator said, the parties were "too far apart." Accordingly, ALJ Wacknov found that the parties, "after bargaining, had reached the point at which neither side was willing to move from its position." (ALJD 17:13-15.) The ALJ found Hickey's email dated February 4, 2011, to Wayron, admitted as much. (ALJD 17:15; Resp. Ex. 12, p. 1.) Thus, the ALJ concluded that, based on the overwhelming evidence, an impasse had been reached after good faith effort to reach an agreement.

**C. The ALJ Correctly Found that Wayron Properly and Lawfully Implemented the New Terms and Conditions.**

The AGC argues that the parties did not reach impasse, so Wayron was not permitted to unilaterally implement its last and final offer rejected by the Unions. In addition, the AGC

argues in the alternative that even if impasse was reached, Wayron did not properly implement the new terms and conditions according to its last and final offer. These arguments fail both as a matter of fact and law.

1. The parties reached impasse.

The ALJ correctly found that after five months of bargaining, the parties had come to a stalemate and neither side was willing to move from its position; therefore, the ALJ, guided by case law, held that an impasse had been reached. (ALJD 17:13-16.) The AGC takes issue with this finding based on the argument that Wayron did not "open its books"; however, this argument fails because Wayron was not obligated to "open its books" as discussed above. Next, the AGC argues that there was no impasse because Wayron engaged in bad faith bargaining; however, this argument also fails based on the record, the ALJ's finding of fact, and the discussion above, that Wayron did not engage in bad faith bargaining.

A genuine impasse in negotiations is synonymous with deadlock. Where there is a genuine impasse, the parties have discussed a subject or subjects in good faith, and despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position. *In Re Connecticut State Conference Bd.*, 339 NLRB 760 (2003). By definition, an impasse occurs whenever negotiations reach that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless. *Atlas Refinery, Inc.*, 354 NLRB No. 120 (2010). A party's firmness on an issue, pursuant to good faith, "militates toward rather than against a finding of impasse," especially when the union indicates that it will not accept the company's proposal. *E. I. Du Pont & Co.*, 268 NLRB 1075 (1984); *see also Seattle-First National Bank*, 267 NLRB 897, 898 (1983), *enfd.* 738 F.2d 1038 (9th Cir. 1984) (employer's adamant refusal to agree to dues-checkoff evidence of impasse);

*Times Herald Printing Co.*, 221 NLRB 225, 229 (1975) (employer's adamant demand for manning proposals, and union's adamant rejection of them, evidence of impasse).

The case of *LAWI/CSA Consolidators, Inc. v. Wholesale & Retail Food Distribution, Teamsters Local 63*, is dispositive here. 849 F.2d 1236, 1240 (9th Cir. 1988). In that case, in finding that the parties had reached an impasse, the court relied mainly on the fact that in both of the two bargaining sessions in December, the company suggested substantial economic concessions to which the union flatly refused to agree. *Id.* The court concluded that employer's letter to the union in which it stated that an impasse had been reached reflected its genuine belief that further negotiations would be futile. *Id.* The court also found that the fact that the parties did not change their positions in the January negotiations further showed that an impasse had been reached in December. *Id.*

Likewise, in *Taft Broad. Co., Wdaf Am-Fm TV*, the parties reached an impasse where both parties took strong positions and both parties bargained in good faith with a sincere desire to reach an agreement. 163 NLRB 475 (1967). However, after more than 23 bargaining sessions, progress was imperceptible on the critical issues and each believed that, as to some of those issues, they were further apart than when they had begun negotiations. *Id.* The court stated, "We are unable to conclude that a continuation of bargaining sessions would have culminated in a bargaining agreement." *Id.*

Here, the parties reached impasse because the parties were deadlocked. On January 28, 2011, Wayron told the Unions, via the FMCS mediator, that it intended to terminate the contact and implement the last and final offer. On February 2, the Unions' Chief Negotiator, Hickey, called Spendlove and asked what the last and final offer was, to which Jeff Spendlove promptly answered, "It's the Red and Blue Contract with the \$6.00/hour reduction in labor cost." Hickey

also sent an email to Spendlove and Dietz, acknowledging that he understood Wayron's offer to be the last and final – and also acknowledging that further negotiations would be fruitless. (Resp. Ex. 12.) The Unions rejected that offer, and in fact, in an eleventh hour bargaining meeting, the Unions engaged in regressive bargaining, providing a written proposal that was an increase from their previous "status quo" proposal offered in December 2010. The fact that both parties took strong, divergent positions with respect to compensation and flatly refused the other party's proposals is irrefutable evidence of impasse. Based on the extensive record on this issue, the ALJ correctly found the parties had reached impasse. (ALJD 17:13-17.)

2. Wayron properly and lawfully implemented its final offer.

The AGC raises the same arguments it raised to the ALJ regarding whether Wayron implemented the terms of its last and final offer that was rejected by the Unions. The ALJ considered and rejected the AGC's arguments. The Board should too. Specifically, ALJ Wacknov considered the AGC's argument that the company's payroll records of its then-current employees reflected an average hourly pay/benefits package of less than \$24 per hour, which she contends demonstrates that Wayron implemented a greater pay cut than its last offer.

ALJ Wacknov correctly identified the flaws in the AGC's argument and found it to be without merit. (ALJD 17:24-28.) First, the ALJ found that the last and final offer to the Unions was a reduction of wages and benefits to achieve an average hourly rate of \$24 per hour. Without any guidance from the Unions on how to apportion the total compensation package, Spendlove and Dietz determined to increase the wages and eliminate or reduce some of the benefits based the Unions' earlier representations that "wages" were the priority. (ALJ Wacknov found that nothing during the bargaining precluded Wayron from increasing wages or

eliminating/reducing benefits. (ALJD 17:33-40).<sup>18</sup> Then , Spendlove and Dietz "diligently endeavored" to derive a compensation scheme that averaged \$24 per hour. (ALJD 17:40-43.) When the company began hiring on February 8, 2011, Wayron brought back several employees based on the compensation scheme that equaled an average of \$24 per hour. The specific average hourly rate of the employees who were rehired was less than \$24 per hour; however, as Spendlove explained, if/when Wayron rehires additional employees (for example, Senior Level Boilermakers), the average could be over \$24 per hour based on the compensation scheme. That is, the average depends on which employees are currently working. Based on the record, ALJ Wacknov correctly found that "the [company] 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 [company] diligently endeavored to do so." (ALJD 17:40-43.)

In addition, the AGC asserts that Wayron implemented the wage increases without notifying the Unions in advance or giving the Unions the opportunity to respond. However, it is impossible that the Unions were not given notice that Wayron would be implementing a compensation plan that reduced the average labor cost to \$24 per hour. Wayron repeatedly asked the Unions for guidance on how to distribute the cuts, and the only guidance Wayron ever received was that the employees' priority was "wages." Accordingly, Wayron made changes to compensation structure that prioritized wages. To the extent the AGC is arguing that Wayron

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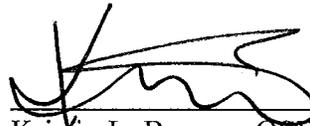
<sup>18</sup> Where an impasse is reached, "the employer may unilaterally impose changes in the terms of employment if the changes were *reasonably comprehended* in the terms of its contract offers to the union." *Sw. Forest Indus., Inc. v. N.L.R.B.*, 841 F.2d 270, 273 (9th Cir. 1988) (emphasis added) (citing *Cuyamaca Meats, Inc. v. San Diego & Imperial Counties Butchers' & Food Employers' Pension Trust Fund*, 827 F.2d 491, 496 (9th Cir. 1987)); *Taft Broad. Co., Wdaf Am-Fm TV*, 163 NLRB 475 (1967). so long as the changes the employer implemented are "recognizable pieces in the impasse offers," the employer has not committed an unfair labor practice. *Plainville Ready Mix Concrete Co. & Truckdrivers, Chauffeurs & Helpers Local Union No. 100, Affiliated with the Int'l Bhd. of Teamsters, AFL-CIO*, ES 9-CA-26777, 1992 WL 1465902 (N.L.R.B. Div. of Judges June 30, 1992).

was required to inform the Union that it intended to cut Health and Welfare benefits and company pension contributions, it did so in the "red and blue contract" that was provided to the Unions at the first negotiation meeting. In sum, ALJ Wacknov correctly concluded that Wayron faithfully and diligently endeavored to implement the last and final offer that was proposed to the Unions, understood by the Unions, and rejected by the Unions. (ALJD 17:45-18:4.)

#### **IV. CONCLUSION**

For the foregoing reasons, Respondent Wayron respectfully requests that ALJ Wacknov's Decision be adopted and the NLRB's Complaint – and Unions' ULP charges discussed herein – be dismissed.

RESPECTFULLY submitted this 24th day of May, 2012.



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**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing **RESPONSE TO ACTING GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW** on:

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by faxing a copy thereof to each person at their last-known facsimile number on the date set forth below;

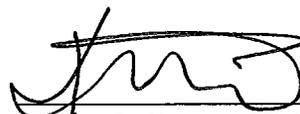
by mailing a copy thereof in a sealed, first-class postage prepaid envelope, addressed to each person's last-known address and depositing in the U.S. mail at Portland, Oregon on the date set forth below;

by causing a copy thereof to be e-mailed to each person at said person's last-known email address on the date set forth below;

by causing a copy thereof to be hand-delivered to said persons at each person's last-known office address on the date set forth below;

by sending a copy thereof via overnight courier in a sealed, prepaid envelope, addressed to each person's last-known address on the date set forth below.

DATED: May 24, 2012.



Kristin L. Bremer, OSB No. 032744

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