JD–33–12
Columbia City, IN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

COUPLED PRODUCTS, LLC

and

Cases 25–CA–31883
25–CA–62263

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

Belinda Brown, Esq.,
for the Acting General Counsel.
Anthony Stites and Hillary Knipstein, Esqs,
for the Respondent.
Jeffrey Macey, Esq,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Fort Wayne, Indiana, on April 2, 3, and 4, 2012. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (the Union) filed the charge in Case 25–CA–31883 on June 20, 2011[1] and filed the charge in Case 25–CA–62263 on August 4, 2011. The Acting General Counsel issued an order consolidating cases, consolidated complaint and notice of hearing (the complaint) on December 28, 2011.

The complaint alleges that since about May 24, 2011, Coupled Products, LLC (the Respondent) has refused provide the Union with financial records in violation of Section 8(a)(5) and (1) of the Act. The complaint also alleges that on or about June 20, 2011, the Respondent unilaterally altered terms and conditions of employment including the reduction of wages, the elimination of health insurance, the elimination of some paid holidays, and the reduction of paid vacation, without reaching a valid impasse, in violation of Section 8(a)(5) and (1) of the Act. Finally, the complaint alleges that the strike that began at the Respondent's facility in Columbia City, Indiana, on June 17, 2011, is an unfair labor practice strike.[2]

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[1] All dates are in 2011 unless otherwise indicated.

[2] On March 15, 2012, the Regional Director filed a petition for an injunction under Sec. 10(j) of the Act regarding the allegations in a complaint in the United States District Court for the Northern District of Indiana, Fort Wayne Division in Case 12CV0085. That matter is presently pending before the court.

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel in the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a limited liability company, with an office and place of business in Columbia City, Indiana, has been engaged in the manufacture of automobile and truck parts. Annually, the Respondent sells and ships from its Columbia City, Indiana facility goods valued in excess of $50,000 directly to points outside the State of Indiana. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Background

The Respondent purchased its Columbia City, Indiana facility from the Dana Corporation in 2007 and apparently assumed the existing collective bargaining agreement with the Union.[4] In 2009 the Respondent and the Union negotiated a collective bargaining agreement effective from June 17, 2009 through June 17, 2011 covering employees in the following unit:

> All production and hourly employees employed by the Respondent at its 2651 South 600 E., Columbia City, Indiana, 46725 facility, as certified by the National Labor Relations Board in Case No. 25–RC–6718 on November 14, 1977.

There are approximately 53 employees in the bargaining unit. The Respondent's corporate offices are in Rochester Hills, Michigan. The Respondent is owned by Brad Ginsberg and David Sinclair. Gustavo Ortiz is the Respondent's president. Tina Johnson is the director of U.S. operations and highest-ranking individual at the Columbia City facility.

In 2009 and 2010 and Respondent consolidated operations from two Ohio facilities it was operating at the time into the Columbia City facility. In October 2010 the only production facilities Respondents operated were the Columbia City facility and another one located in San Luis Petosi, Mexico.

On October 20, 2010, the Respondent notified the Union by letter that "based upon labor costs, as well as other factors" the work currently being performed at the Columbia City facility would be moved to its production facility in Mexico. In its letter, the Respondent offered to

[3] On June 4, 2012, pursuant to a motion filed by the Respondent, I reopened the record to receive a decision from the unemployment board of the State of Indiana (R. Exh.23) that issued on May 4, 2012, after the record had closed in this case.

[4] The Union has represented the unit employees at that facility since 1977.

bargain over the effects of its decision (GC Exh. 3). In a document posted at the Columbia City facility on October 28, 2010, the Respondent indicated that by moving the work from the Columbia City facility to its facility in Mexico it would save over $2 million annually in labor costs. This document further indicated that the Respondent would honor the current collective-bargaining agreement unless or until it is altered by a subsequent agreement" (GC Exh. 4).

In November 2010 the parties begin discussions regarding the closure of the Columbia City facility. According to Johnson's uncontroverted testimony, which I credit, the Union's bargaining committee was informed in late 2010 and early 2011 that while the Respondent as a whole was making a profit, the Columbia City facility was losing money (Tr. 474–475). In this connection, Johnson testified that in both 2010 and 2011 the Respondent was profitable.

At one of the meetings held in November 2010 Jeff Schrock and Ginny McMillin, representatives of the International UAW, met with Ginsberg and Johnson. At this meeting, the union representatives asked if there was any way that the Respondent would consider continuing to operate the Columbia City facility. Ginsberg indicated that he would be willing to continue to operate Columbia City if it could operate at the breakeven point or a small loss, as he would like to maintain a production facility in United States. The Respondent's representatives indicated that they would consider any Union proposals regarding the continued operation of the Columbia City facility. After the meeting, on November 16, 2010, the Respondent's counsel sent a letter again indicating that the Respondent would consider any proposal from the Union to keep the plant open. Pursuant to the Union's request, the Respondent also submitted an unaudited profit-and-loss statement for the Columbia City facility for the period from January to October 2010 (GC Exh. 5)

On January 11, 2011, the Union made a proposal to the Respondent regarding the continued operation of the Columbia City facility. In its proposal, the Union offered to give up the employees' 10-minute paid lunch and have the work day extend from 6:30 a.m.to 2:50 p.m. The Union estimated that this would save the Respondent approximately $36,000 annually. The Respondent did not accept the Union's proposal and on January 18, 2011, submitted a counterproposal. In its proposal the Respondent sought a 75-cent-an-hour reduction in pay for all bargaining unit employees, which would increase by 6 cents an hour per week until the Union accepted its proposal. The Respondent also proposed to eliminate its contribution to employee health care insurance premiums, eliminate sickness and accident pay, reduce employees' vacation time from a maximum 4 weeks to 2 weeks, eliminate several paid holidays and eliminate paid bereavement leave. The Respondent also proposed changes in employee classifications and a reduction of time in the notice period for layoffs. The Respondent advised the Union that it would have to accept the entire proposal for the Columbia City facility to stay open. (GC Exh. 7.)

On January 24, 2011, the Union replied by indicating it could not accept the Respondent's proposal and submitted a counterproposal. The Union did not offer any wage concessions but offered to have employees pay more toward health insurance premiums and offered concessions with regard to other benefits. On January 25 and 27, 2011, the Respondent rejected the Union's proposal and made a final proposal. In relevant part, the Respondent continued to propose that it not pay any part of employees' insurance premiums and continued to seek the reduction of benefits that it had proposed earlier. The Respondent modified its proposal regarding

classification changes and withdrew its proposal regarding layoff notice. However, the Respondent's proposal sought a reduction of 87 cents an hour and indicated that after February 3, 2011, it would seek a 6 cent-an hour reduction every week until the proposal was accepted. The Respondent also indicated that unless an agreement was reached it would continue with its plans to move work from the Columbia City facility, but that it would honor its current obligations under the agreement. (GC Exhs. 9 and 10.)

On February 15, 2011, the Union notified the Respondent that it had rejected the Respondent's final proposal and requested to meet with it to bargain over the effects of the closure of the facility (GC Exh. 11). On February 17, 2011, Johnson replied to the Union with the following letter (GC Exh. 12):

> Please let this letter acknowledge I have received your letter of February 15, 2011. In light of the significant time that has elapsed since we first met to discuss the transfer of work, Coupled Products believes it would be best for us to wait until closer to the end of the current Collective Bargaining Agreement to negotiate.
>
> I note that we previously indicated additional lines [are] being moved to Mexico. Those moves will still take place as communicated.
>
> I propose that you provide me dates in mid May to late May for negotiations, as we should have a better understanding of the work situation at that point in time.

The Negotiations for a New Collective Bargaining Agreement

In early May 2011, the Union and the Respondent exchanged proposals for a new collective-bargaining agreement at the Columbia City facility. The Union's proposal sought a 3-year agreement which included a wage increase of 90 cents per hour the first year and 75 cents per hour during the second and third year. It also sought a $500 signing bonus and an increase in the Respondent's contribution to health insurance premiums (GC Exh. 14).[5] At the hearing, Beverly Kohne, one of the Union's bargaining committee members, testified that the amount of the proposed wage increase was randomly selected by the committee members' and was not based on any empirical data. (Tr. 147-148).

The Respondent's proposal (GC Exh. 13) included a $4.50 per hour wage reduction for nonskilled employees,[6] a reduction in paid vacations, and the elimination of sickness and accident pay and paid perfect attendance. The Respondent's proposal also sought the complete elimination of its contribution toward employee health insurance premiums.

[5] The Union proposed that employees contribute 20 percent of their health insurance premiums. In the 2009-2011 collective-bargaining agreement, bargaining unit employees contributed between 21 and 35 percent of the insurance premiums. (GC Exh. 2,p. 64).

[6] The nonskilled employees included the following classifications: machine setup; gauge and tool crib; final audit; SSR; plater; machine tech; hand bender; and assembly pack (GC Exh. 21).

Prior to preparing the Respondent's bargaining proposal, Johnson requested Rose Ann Rubrake, the human resources director at that Columbia City facility, to gather information on wages paid by manufacturing facilities in the area. Rubrake obtained wage information from several local manufacturing facilities for both skilled and nonskilled labor. She also contacted People Link, a temporary staffing agency; because several companies indicated that it was their source for nonskilled labor. Rubrake prepared a summary of the wage rates for nonskilled labor of the employers that she had contacted in the area. (R. Exh. 10.) Rubrake also used the website for the Bureau of Labor Statistics to find comparable wages for area employers.

Based on this information, Rubrake prepared a summary of the wages in a three-county area around the Respondent's Columbia City facility (R. Exh. 11). The summary reflected the following information: for assembly pack/benders the "market" rate ranged from $8.42 to $8.82, while the Respondent's wages ranged from $13.04 to $13.34; for floor setup, the "market" rate ranged from $9.28 to $11.26, while the Respondent's current rate was $14.84; for tool and die/maintenance the "market" rate ranged from $20.93 to $21.34, while the Respondent's current rate was $20.59; for machinists, the "market" rate ranged from $18.72 to $20.41, while the Respondent's current rate ranged from $16.86 to $18.68.

The parties met to negotiate a new collective-bargaining agreement on May 17, 18, 20, 24, and May 27, June 6, and 15, 2011.At the first bargaining session on May 17, 2011, Johnson was the Respondent's chief spokesperson and Rubrake, Stephanie Jones and David Jaggers also attended. International Union Representative McMillin was the Union's chief spokesperson. The remainder of the Union's committee was composed of Local Union President Kathy Smith; Recording Secretary Beverly Kohne; Joyce Lane; and Barbara West. The same individuals were present throughout the negotiations. During the negotiations on May 17 the parties did not discuss economic issues; rather they reviewed the noneconomic items and reached agreement on several of them. On May 18, the parties were able to reach agreement on a reduction of paid holidays.

On May 19, that Union sent the following letter (GC Exh. 15) to the Respondent:

> We the Bargaining Committee of UAW Local 2049, Unit 1 are formally requesting from Coupled Products LLC proof of the companies (sic) finances in all aspects. It is the Bargaining Committee's position that the company is asking for a concessionary Collective Bargaining Agreement in respect to Wages, Holidays, Vacations, S & A Pay, Bereavement Pay, Perfect Attendance and Insurance.
>
> We would also like to remind you that on January 13, 2011 Brad Ginsburg one of the owners of Coupled Products LLC made a statement in front of the entire Bargaining Unit members during a plant meeting that he had nothing to hide and was willing to open his books to anyone who wanted to see them. Therefore we are requesting to review Couple Products LLC Financial Books.

At the meeting held on May 20, Johnson gave the union committee a one-page document with financial information for the Columbia City facility for January through April 2011. This document was prepared by the Respondent and had not been audited by any outside entity. It

purported to show that during that period the Columbia City facility incurred a net loss of $1,603,214. (GC Exh. 16.) At this meeting, Johnson told the Union's committee that the Columbia City facility was losing customers and money and was not competitive.[7] The parties discussed issues of wages, insurance, vacation pay, sickness and accident pay, bereavement pay, and the perfect attendance bonus, but no agreement was reached on any of these issues. The parties were only able to agree on the elimination of the employees paid 10 minute lunch period. Near the end of the meeting, McMillin told Johnson that the membership would not accept what Johnson was asking of them. McMillin asked Johnson if she was trying to break the Union and Johnson replied that she thought "there were people who would accept this."[8]

At the May 24 meeting, the parties again discussed the substantial reduction in wages for nonskilled employees sought by the Respondent. According to Rubrake's credited testimony, she described to the union committee the contacts that she had with local manufacturing employers regarding their wage rates. Rubrake offered to McMillin the underlying documents Rubrake had prepared regarding her contacts with other employers, (including R. Exhs. 10 and 11), but McMillin responded that she did not want it. (Tr. 403-404, 443-444.)[9]

The parties also discussed the Respondent's proposal to cease making contributions toward the cost of employees' health insurance premiums and the elimination of sickness and accident pay, bereavement pay and the perfect attendance bonus. When Kathy Smith said that the Union was willing to consider a freeze in pay, Johnson responded that the Respondent needed a pay reduction. According to Kohne's notes, Johnson said that Ginsburg has indicated he did not want to pay anything toward employee insurance premiums. McMillin observed that the Respondent wanted the employees to pay higher insurance premiums and take a $4.50 an hour wage cut. Johnson indicated that in order to be competitive "we need a pay reduction." Later in the meeting the Union formally offered a freeze in wages but Johnson indicated she was not

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[7] I credit Johnson's testimony on this point (Tr. 66). Her testimony on this issue was corroborated by that of Kohne (Tr. 107); Kohne's notes (GC Exh. 31, p. 8) and Jones notes (R. Exh. 8, p.4).

[8] My findings regarding the substance of this meeting are based primarily on Kohne's notes (GC Exh. 31). Kohne's notes are very complete and I find them to be generally reliable. Consequently I have relied on them throughout this decision.

[9] Rubrake's testimony on this point is corroborated by Kohne (Tr. 150-151). McMillin admitted that Rubrake orally provided information about the wage rates of various local employers at the meeting (Tr. 319-321). McMillin's testimony on this point was consistent with her notes from that meeting which reflects the names of various employers and wage rates. (R. Exh 1, p. 39.) At the hearing McMillin testified that she did not recall saying that the Union did not need to look at the documents (Tr. 321). Somewhat puzzling to me is a reference in an internal union memo dated May 26, 2011 from McMillin to her superior, Mo Davison, who was then the director for UAW Region 3. This memo states "The Company has given me a recent sheet showing their finances (January-April, 2011) and paperwork regarding other companies' wages in the surrounding area and what Coupled Product wants their wages to be for the company to be competitive (copies attached). Of course, none of these other companies are union shops." (GC Exh. 39.) There are no copies attached to GC Exh. 39, so I do not know exactly what "paperwork" McMillin was referring to in her memo. I find this reference to "paperwork regarding other companies' wages in the surrounding areas" to be insufficient to discredit the detailed testimony of Rubrake and Kohne that at the meeting held on May 24 McMillin said she did not want the information proffered by Rubrake. However, from the memo that McMillin sent to Davidson, I draw the inference that McMillan obtained at least some of the information proffered to her by Rubrake after the meeting and submitted it to Davison.

going to move on any of the economic issues and they had "to stand." McMillin stated "[Y]ou are saying the company has an inability to pay wages." Johnson replied "[Y]es, we're not willing to pay." McMillin and Johnson then engaged in a heated exchange on this subject. McMillin asked "[A]re you saying you are unable to pay." Johnson responded by saying "[D]on't put words in my mouth." McMillin replied "I am not putting words in your mouth, you said it." (GC Exh. 31, pp. 23-24). McMillin then asked, are you willing to let us audit your books?" After asking this question, McMillin looked at the union committee and said "[T]hey don't legally have to." Johnson responded by indicating that she would notify Ginsburg of the Union's request. (R. Exh 8, p.16.)

According to Rubrake's bargaining notes, after the Union committee proposed a wage freeze, Johnson responded by saying that the Respondent was standing firm on the economic issues. McMillin then stated "So you're saying [the] Co. can't pay the wages you are now." Johnson replied "We have exhausted our thoughts and we stand firm on what we have to give. It's not that we can't pay. We are not willing to pay." (R. Exh. 9, CP 0487.)[10]

In the memo that McMillin sent to her superior Davison on May 26, (GC Exh. 39) MacMillan described her exchange with Johnson on May 24 as follows:

> I asked the Plant Manager, Tina Johnson yesterday in our meeting point-blank, are you telling me the Company is stating at this time their inability to pay the wages as they are today. She said, "Yes, am (sic) to be competitive, we can no longer pay these wages."
>
> I then requested that the Union be able to look at the books and she said no. Then she said don't put words into my mouth and I told her I wasn't doing that; I point-blank asked her a question. I repeated [the] answer she had given me back to her, with the time that she made it. She got upset and said she would give the request to Brad the owner, but he would more than likely refuse, because his business is privately owned.[11]

Near the end of the meeting Johnson said that she was fighting to keep jobs in the U.S. McMillin stated that the Union was not going to give up $4.50 an hour in wages and Johnson again reiterated that they were going to stand firm on the economic issues.

After considering all the evidence on this point, I find that at the meeting on May 24 Johnson said that the Respondent was not willing to pay the existing wages at the Columbia City facility but did not say that the Respondent was unable to pay the existing wages. In making this finding, I note that none of the notes introduced in evidence at the hearing indicate that Johnson made a definitive statement regarding the Respondent's inability to pay existing wages. Even McMillin's direct testimony does not indicate that Johnson claimed an inability to pay. (Tr. 267-

[10] Since Rubrake's notes are not consecutively numbered, I refer to the page by the Bates number assigned to it by the Respondent.

[11] I give less weight to McMillin's memo than the contemporaneous notes that were made during the bargaining meeting. I note, however, that even McMillin's memo reflects that Johnson stated that in order to be "competitive" the Respondent could no longer pay the existing wages

268.) On direct examination by counsel for the Acting General Counsel, McMillin testified as follows:

> Q. Did you make a request to audit the company's books?
>
> A. Yes, I did.
>
> Q. Why did you make that request?
>
> A. Well, I felt like because the company was asking for concessions and that if they would show us their books - if they were saying that they needed to be more competitive, they were losing money, if they would just show us our [sic] books – not me per se but I'd have somebody in research in Detroit look at them - that it be more to our advantage trying to explain to our membership for all the concessions they were asking for.

On Wednesday, May 25, McMillin sent the following e-mail (GC Exh. 17) to Johnson:

> I am requesting in writing our rights to audit Coupled Products LLC books and all finances. Per NLRB rulings, when a company is demanding wage reductions on poverty or their INABILITY (emphasis in original) to pay the wages on where they are at today. We as a Union have the right to go over all books pertaining to finances and that is what I am requesting to do. Please get back with me as soon as possible on your answer to my request.

On May 25, the Union also submitted a new proposal to the Respondent (GC Exh. 18). The counterproposal offered the Respondent additional concessions from the terms and conditions contained in the then existing collective-bargaining agreement. Specifically the counterproposal contained a wage freeze for the term of the contract and proposed limiting the Respondent's contributions for employee health care premiums to 25 percent. It lowered the amount of sickness and accident pay to $205 per week and reduced employee eligibility to 20 weeks. The Union also agreed that employees would be paid for vacation at the time it was taken and would lose any unused vacation time at the end of the year. Finally, the Union agreed to limit bereavement pay to immediate family members

On May 26 Johnson responded to McMillin's May 25 email requesting an audit of the Respondent's financial records by a letter indicating in relevant part "We are not providing an audit because we are private company and our books are proprietary in nature. We provided you with our financials as a total accommodation to show you we are not competitive in the marketplace." (GC Exh. 19)

At a meeting held on May 27, the parties reviewed the noneconomic issues and reached agreement on those that were outstanding. Specifically, the parties reached agreement on the notification to employees for scheduling overtime and the Respondent withdrew its proposal that skills would supersede seniority for purposes of scheduling overtime. (GC Exh. 31, p. 28; R. Exh. 9, CP 0496.) The parties then discussed the economic issues and Johnson rejected the Union's proposal of May 25 (Tr. 68-69). Johnson indicated that the Respondent was going to

stand firm on the economic issues. McMillin commented that it appeared that the Respondent "did not even want to talk about this." McMillin pointed out that the Union was willing to reduce the number of sickness and accident weeks from 26 to 20. Johnson replied that she was rejecting the Union's proposal. McMillin indicated that employees could not give up $4.50 an hour. Johnson replied by asking "[W]here do we go from here." McMillin again asked if the Union could audit the Respondent's books and Johnson refused. Johnson reiterated that the Respondent needed to stand firm in order to be competitive. McMillin asked if this was the Respondent's best and final offer. Johnson said that she could "type up a letter" and give it to the Union that day. McMillin said that she was going to file an NLRB charge because the Respondent would not permit the Union to audit its books. Johnson replied "[D]o what you have to do." McMillin stated the Respondent's offer would be taken to the membership, but that the committee would not support it (GC Exh. 31, pp. 29-30; R. Exh. 9, CP 0498; R. Exh. 8, pp. 19-20).

On May 27, the Respondent submitted its "last and best proposal" to the Union (GC Exh. 20). This proposal was for a 1-year contract and contained the following terms: (1) employees would have to pay their own health insurance premiums, consistent with the Respondent's unrepresented U.S. employees; (2) a reduction in paid vacation time (3) the elimination of Good Friday as a paid holiday; (4) the elimination of sickness and accident pay; (5) bereavement days were to be included in paid vacation days; (6) elimination of the paid perfect attendance bonus; (7) elimination of the 10-minute paid lunch, with new plant hours from 6:30 a.m. to 2:50 p.m. and; (8) a $4.25 per hour wage reduction for nonskilled employees and (9) modifying call-in time from 4 to 2 hours. The Company's proposal also contained other terms involving classifications, layoffs, overtime and other miscellaneous provisions (GC Exh. 20). In this proposal, the Respondent changed its reduction in wages for nonskilled employees from $4.50 to $4.25 per hour.

When the parties met again on June 6, McMillin said that the 1-year duration of the contract had not been discussed. Johnson indicated that the Respondent thought that the Union would want a 1-year agreement considering the terms contained in the Respondent's proposal. The Union indicated it wanted a 2-year agreement and also asked to if the Respondent would make some clarifications to its final proposal, so that it was clear to employees what the proposal took away from them. Johnson agreed to both proposals made by the Union. After a discussion of unresolved grievances the meeting adjourned.

On June 8 the Respondent sent the Union its last, best proposal for a 2-year agreement with clarifications to some provisions. In addition, it attached a document as exhibit A. which illustrated the effect the $4.25-an hour reduction would have on the wage rates of nonskilled employees. (GC Exh. 21.)

On June 9, Union presented a document to the membership entitled "Tentative Agreement Highlights Sheet" which went through all the contract provisions and indicated any changes sought by the Respondent's final proposal. This document also shows the effect of the full payment of insurance premiums on the wages of nonskilled employees. On the same date the union committee met with the membership and explained the proposal but did not recommend its acceptance. The membership voted to reject the Respondent's proposal by a margin of 46-4.

After discussions with employees about what they were willing to accept in a new agreement, the Union submitted a new proposal (GC Exh. 36) to the Respondent dated June 10. This proposal contained the following terms:

> Extend current agreement for (one) year;
> Freeze wages for duration of new agreement;
> Vacation time up front with no pay when taken (No lump-sum payments);
> S &A. Pay, stays as it is with maximum 20 weeks benefits;
> Insurance, 25% across-the-board employee's portion. Union will assist the Company in finding a more affordable Insurance for both parties so that there will not be need for the cost of a broker;
> Bereavement, 3 days off with pay for Immediate Family members (open for discussion).

The Union's proposal also indicated "We would also like to inform you that the membership will never ratify any agreement that allows the company to treat the Union employees as they do their non-union U.S employees when it comes to changing any benefit once an agreement has been ratified."

The parties met again on June 15. Johnson told the union committee that the Respondent had reviewed the Union's latest proposal but that the proposal would not make the Respondent "competitive." Johnson said the Respondent was standing by its final and best offer as it had to be competitive. Kathy Smith told Johnson what the employees had to offer by virtue of their experience and that they could not live off $8.79 an hour, Johnson said that they could all live off that amount. Johnson rejected the Union's request for an extension of the agreement that was expiring on June 17. The Union advised Johnson at this meeting that it was going to go on strike. (GC Exh. 31, pp. 36-37.)

On June 15, the Respondent posted a notice to employees indicating: "We have been informed that Local 2049 will be going on strike as of June 17, 2011 and we regret that decision. We will allow those who are willing and choose to work to do so." On June 16, the Respondent posted notice in its facility stating that its last, best offer would go into effect on Monday, June 20.

On the morning of June 17, the union committee gave Johnson the following letter (GC Exh. 40):

> We, the Bargaining Committee of UAW Local 2049, Unit 1 in a last ditch effort to avoid a labor dispute are requesting that the company open their books to the International Union UAW Auditing Department for review.
>
> You stated that Brad (Coupled Products LLC) can no longer afford, and has the inability to pay the wages where they are at today.
>
> You tell us the company is continuously losing money, if this is true and you can show us this through your financial books we may be more apt to convince the membership that with these current wages the company would go bankrupt.

> We need your response today no later than 12 noon, in writing.

When Johnson received the Union's letter, she handwrote the following response on the Union's letter and delivered it to the union committee (R. Exh. 6)

> Received June 17-I disagree with the contents/accusations in this letter. I have never stated Brad or CP could not afford or has the inability to pay wages where they are today. Furthermore, Kathy kept using those words "can't afford" and I told her not to put words into my mouth for this position as well as other positions during negotiations. We stand firm in saying we need to be competitive which is what was actually said during negotiations.

On the same date Johnson also sent a typewritten letter reiterating her handwritten response. She also indicated that the Respondent would not provide an audit because it is a private company and its “books" are proprietary in nature. Johnson further indicated that "we provided you with our financials to show you were not competitive in the marketplace, which is in fact what our position has always been throughout negotiations." (R. Exh 5.)

At midnight on the evening of June 17, the Union initiated a strike against the Respondent. On Monday, June 20, Johnson instructed Rubrake to implement the final offer as of that date, including the $4.25 per hour wage decrease for all nonskilled labor. On June 20 the Respondent also notified the Union that it would begin hiring permanent replacement employees. Respondent began to hire replacement employees on June 23 and, at the time of the hearing, there were approximately 32 to 34 replacement employees working in the facility.

The Union's Strike

The strike that began on June 17, 2011, was continuing at the time that the hearing was held in this case in early April 2012. On May 2, 2011, prior to the first bargaining session, the employees at the Columbia City facility authorized the Local Union to engage in a strike if they were unable to come to an agreement with the Respondent. Under the internal rules of the UAW a local union cannot engage in a sanctioned strike without the authorization of the International Union. In a letter dated May 20 from the bargaining committee the Local Union requested strike authorization from the International Union. In this letter (GC Exh. 41, p.2)., the bargaining committee indicated:

> "The issues in dispute are as follows: Vacation, Wages, Insurance, Perfect Attendance, Bereavement, S &A Pay and any related issues of our CBA.
>
> We requested copies of copy Insurance Plans and any of the things that might affect the employees.

On the same date McMillin submitted a memo to Davison requesting strike authorization. On June 9 the union committee presented the Respondent's final offer to the membership for a vote. At this meeting, McMillin told the members that she thought the Respondent’s offer on wages was "ridiculous" and that the committee was not recommending acceptance of the Respondent’s proposed agreement (Tr. 337-339). At the hearing, McMillin testified that she did

not recall using the term "unfair labor practice" during the meeting. The membership voted against ratifying the Respondent's final offer.

Michael Ailes, the former assistant director for UAW Region 3, testified that after receiving the request for strike authorization from the Local Union, he made a recommendation to approve the request to then Region 3 Director Davison. In making his recommendation he referred to the fact that the Local Union had not received information pursuant to requests it had made and that he did not see how the dispute could be resolved without the information (Tr. 285). On June 15, the International Union issued a strike authorization approval.

Analysis and Conclusions

The Acting General Counsel contends that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide the Union with its financial records. In support of his position, the Acting General Counsel asserts that the thrust of the Respondent statements made during bargaining was its inability to pay current wages rather than a desire to increase its profits through greater economic competitiveness. The Acting General Counsel further asserts that the Respondent's statements made during bargaining, "when coupled with the drastic concessions is sought, conveyed that the employer would not continue to operate the facility at a loss and would shutter that facility and move elsewhere if the Union did not agree to its concessionary proposals." Therefore, according to the Acting General Counsel the Respondent in effect claimed an inability to pay and had a duty under the Act to provide the financial information requested by the Union. (AGC brief, p. 16.) In support of his position, the Acting General Counsel principally relies on *Stroehmann Bakeries*, 318 NLRB 1069 (1995), enf. denied 95 F.3d 218 (2d Cir. 1996). The Acting General Counsel also relies on *Stella D'oro Biscuit Co*., 355 NLRB 769 (2010); *Lakeland Bus Lines,* 335 NLRB 322 (2001), enf. denied 347 F. 3d 955 (D.C. Cir. 2003); and *ConAgra, Inc*., 321 NLRB 944 (1996), enf. denied 117 F.3d 1435 (D.C. Cir. 1997).

The Acting General Counsel further contends that even if the Respondent did not claim an inability to pay, it was obligated to provide the Union with information to substantiate the specific economic claims it made to justify its concessionary proposals. The Acting General Counsel asserts that although the Union's request for the Respondent to "open its books" was arguably broader than what is needed to substantiate the Respondent's specific claims, the Respondent's refusal to provide any further information beyond the one-page profit and loss statement is not excused because the Union's request was overbroad. The Acting General Counsel contends that the Respondent was obligated to comply with the request to the extent that it encompassed relevant information necessary to verify its assertions and that its failure to do so violated Section 8(a)(5) and (1) of the Act.

The Acting General Counsel contends that because the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the requested information, the Respondent implemented its final offer without reaching a valid impasse and accordingly the implementation of its final offer also violated Section 8(a)(5) and (1) of the Act. Finally, the Acting General Counsel contends that the strike is an unfair labor practice strike because the Respondent unilaterally implemented its final offer without providing the Union with necessary and relevant information. The Acting General Counsel claims the alleged unfair labor practices are, in part, the cause of the strike.

In its defense, the Respondent argues that the Union is not entitled to review and audit its general financial records because it has not pled an inability to pay the wages sought by the Union. *Nielsen Lithographing Co*., 305 NLRB 697 (1991), review denied 977 F.2d 1168 (7th Cir. 1992). The Respondent further argues that the Union never made a specific request for information regarding its claim that the wages paid at its Columbia City facility made it less competitive and that it had, in fact, provided the Union with information regarding the cost of operating the Columbia City facility. The Respondent further contends that because it did not violate the Act in refusing to provide the information requested by the Union a valid impasse was reached and therefore the implementation of its final offer was lawful. Finally, the Respondent contends that since it committed no unfair labor practices, the strike is an economic strike rather than an unfair labor practice strike.

In *NLRB v Truitt Mfg. Co*., 351 U.S. 149 (1956), the Supreme Court held that "a refusal to attempt to substantiate a claim of inability to pay increased wages may support a finding of a failure to bargain in good faith." 351 U.S. at 153. Since the employer in *Truitt* had specifically claimed that it could not afford to pay increased wages, the Court enforced the Board's finding of a violation of Section 8(a)(5) and (1) of the Act. In so finding, the Court noted:

> We do not hold, however, that in every case in which economic inability is raised as an argument against increase wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn upon its particular facts. [Id at 153.]

In the instant case, the Union requested to review the Respondent's general financial records at the outset of negotiations in its letter of May 19. At the meeting held on May 20, Johnson gave the Union a one-page document purporting to show that the Columbia City facility lost more than $1,500,000 from January through April 2011. At the meeting, Johnson told the Union that the Columbia City facility was losing customers and money and was not competitive. Johnson did not state that the Respondent as a whole was losing money. In fact, in the negotiations in late 2010 and 2011 regarding the possible closure of the Columbia City facility, Johnson had indicated to the union committee that while the Columbia City facility was losing money the Respondent as a whole was profitable.

At the May 24 meeting when the parties discussed the substantial reduction in wages for nonskilled employees sought by the Respondent, Rubrake described to the Union her contacts with other manufacturing facilities in the area which indicated that the Respondent's wage rate for unskilled labor was substantially higher. As I have found above, at the meeting held on that date, Johnson did not state that the Respondent was unable to pay the existing wages. Rather, she stated that the Respondent was not willing to continue to pay existing wages and that in order to be "competitive" the Respondent needed a pay reduction.

When the Union again requested to audit the Respondent’s financial records in its May 25 email, Johnson replied that the Respondent had furnished financial information to show that it was "not competitive in the marketplace." At the meeting held on May 27, Johnson again stated that that the Respondent had to stand firm on economic issues in order to remain competitive.

In response to the Union's claim in its letter of June 17 that Johnson had stated that the Respondent was unable to pay the current wages, Johnson immediately replied, indicating that she had never said that the Respondent was unable to pay the current wages. She reiterated that the Respondent was standing firm on its economic proposal in order to be competitive.

I find that the Respondent's statements that it needed wage and benefit reductions at the Columbia City facility in order to remain competitive does not obligate the Respondent to accede to the Union's request that it be permitted to audit its general financial records. *Neilsen Lithographing Co.,* 305 NLRB 697 (1991), review denied 977 F.2d 1168 (7th Cir. 1992); *Burruss Transfer, Inc*. 307 NLRB 226 (1992). The Board stated in *Nielsen*, supra, at 700 "[A]n 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." (fn. omitted) In *AMF Trucking & Warehousing, Inc*., 342 NLRB 1125, 1126 (2004) the Board held:

> [T]he phrase "inability to pay" means, by definition that the employer is incapable of meeting the union's demands. That is, the phrase means more than the assertion that it would be difficult to pay, or that it would cause economic problems or distress to pay. "Inability to pay" means that the company presently has insufficient assets to pay or that it would have insufficient assets to pay during the life of the contract that is being negotiated. Thus, inability to pay is inextricably linked to nonsurvival in business.

When viewed under that standard, it is clear that the Respondent never claimed an inability to pay the Union's demands. During the negotiations the Respondent did not even state that it was losing money as a whole. Rather, at the May 20 meeting Johnson indicated only that Columbia City was losing money and customers. Despite the Union's repeated assertions throughout the bargaining that Johnson had claimed an inability to pay the existing wages, Johnson consistently emphasized that the Respondent needed wage concessions regarding its nonskilled employees and a reduction in the cost of benefits in order to be competitive. Supporting this position, the Respondent offered the research done by Rubrake reflecting that it paid substantially more in wages for unskilled employees than that of several other manufacturers in the area. The Board has found that statements made by an employer regarding the need to be competitive or being at a competitive disadvantage are not a sufficient basis for an obligation to provide to a union, upon request, records regarding its general financial condition. *Burruss Transfer*, supra, at 228. In *Concrete Pipe & Products Corp*., 305 NLRB 152 (1991),the employer's president indicated at the outset of negotiations that the employer was in a declining market due to many new competitive products. He also indicated that the employer had competition from nonunion concrete pipe producers which had very low labor costs. He stated "To survive in today's market we have got to be able to be competitive, and to be competitive wage rates and benefits must be lowered." Id. at152. The Board found that the employer's statement did not trigger a duty to furnish economic information because it did not raise a claim of a present inability to pay under *Truitt*. The Board found that the statement regarding the need "to survive" was nothing more than a restatement of the desire to compete. The Board noted that the employer did not assert it was losing money or that its business was at some imminent risk of closing. Accordingly, the Board found that the employer did not violate Section 8(a)(5) and (1) of the Act by failing to comply with the union's information request

I note that even in cases where an employer has made a claim suggesting that it is unable to pay current wages and benefits, the Board has held that a clarification unequivocally indicating that the employer is not claiming an inability to pay establishes that the employer is not obligated to provide general financial information requested by the union. *Richmond Times-Dispatch,* 345 NLRB 195 (2005); *American Polystyrene Corp*., 341 NLRB 508 (2004). In the instant case when the Union, in its June 17 letter, again asserted that Johnson had claimed that the Respondent was unable to pay the existing wages, Johnson denied that assertion in both a handwritten and typed letter and reiterated that the Respondent's economic proposal was based on its need to be competitive.

I find that under the circumstances of this case, since there is no credible evidence that the Respondent maintained the position that it was unable to pay existing wages and benefits, the Respondent did not violate Section 8(a)(5) and (1) of the Act by refusing the Union's request to review and audit its general financial records. In making this finding, however, I do not rely on the fact that the Respondent gave to the Union the one-page profit-and-loss statement regarding the Columbia City facility for the period from January to April 2011. (GC Exh. 16.) Johnson testified that documents of this type were used by the Respondent to determine the financial position of the Respondent's Columbia city facility. At the hearing, however, she was unable to explain how the two largest expense items in the document; $759,856 for "Allocable Selling, General and Administrative Expenses" and $800,000 for "Management fees," were calculated. Without further explanation, this document would not appear to be of much use to the Union in determining the effect the cost of labor and benefits had on the purported loss at the Columbia City facility. I also note, however, that the Union never sought a more detailed explanation as to how the document was prepared or how the various line items were calculated.

I find the cases relied on by the Acting General Counsel in support of the argument that the Respondent's refusal to allow the Union to review and audit its financial information violated Section 8(a)(5) and (1) are distinguishable. In *Stroehmann Bakeries, Inc*., 318 NLRB 1069 (1995), the respondent-employer, a manufacturer and distributor of bakery products, was a wholly owned subsidiary of Weston Foods, which in turn was a subsidiary of George Weston Ltd., a Canadian conglomerate. On November 16, 1993, representatives of the employer met with the Union at their only bargaining session held for the Syracuse, New York facility. At this meeting the employer's director of industrial relations, Spehalski stated that the employer had lost $12 million in 1992 and was expected to lose $16 to $20 million in 1993. He noted that Weston wished to maintain a foothold in the American baking industry but that the employer could not continue and would go out of business without a parent company willing to fund its losses. He denied claiming an inability to pay because the parent company's "deep pockets" were sufficient to pay for the employer's Syracuse operation. At this meeting the employer proposed a substantial reduction in wages and benefits and a reduction in the number of unit employees. The union was told that the employer needed concessions of approximately $150,000 to offset the alleged losses sustained at the Syracuse facility.

On December 10, 1992, the employer's president sent a letter to all unit employees indicating that as a result of the losses sustained in 1992 and 1993 the employer "cannot continue to operate as we have in the past. We simply cannot afford it." Id. at 1073. On the same date, the Union submitted an extensive request for information, including financial information. The employer refused to provide the requested information to the union. The Board found that under

the circumstances present in that case, the Respondent's refusal to provide the financial information violated Section 8(a)(5) and (1) of the Act. The Board found that, in effect, the employer stated that, absent the concessions that it sought, Weston would not continue to subsidize the employer, and the employer could not afford to continue the present unit complement and wage scale. The Board therefore found that the employer was basing its contract proposals on asserted financial hardship and the inability to pay. Id. at 1079.

In the instant case, the Respondent never claimed it was losing money as a whole or that its survival was an issue. Rather, it claimed that only the Columbia City facility was losing money and therefore it sought labor cost reductions at that facility. The Respondent always focused on the alleged financial condition of its Columbia City plant and never linked its continuation as a company to the proposals it made regarding that facility. In this connection, in the negotiations in late 2010 regarding a possible closure of the Columbia City facility, the Respondent noted that, in its view, the cost structure at Columbia City was too expensive to maintain and it could save over $2 million a year in labor costs by moving work performed at Columbia City to its plant in Mexico.Accordingly, I find that unlike the employer in *Stroehmann,* the Respondent did not base its proposal on financial hardship or the inability to pay the current wages and benefits.

In *Stella D'Oro Biscuit Co*. 355 NLRB 769 (2010), the employer's representatives repeatedly indicated that the employer's survival was linked to its obtaining concessions from the union. In this regard, the Board noted that the following:

> Thus, it was stated, for example, that Stella 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 that it did not have the money to go for forward unless it implemented the proposed reductions in labor costs. Stella clearly grounded its need for concessions in its current financial situation: absent concessions its unprofitability endangered Stella's survival. [Id at 771,772.].

Given those statements, the Board found that the employer claimed it was unable to pay the current wages and was obligated to provide the union with the requested audited financial records. As I have noted earlier, the facts in the instant case do not establish a nexus between statements made by the Respondent during negotiations regarding its desire for concessions at the Columbia City plant and its survivability during the term of the contract.

In *Lakeland Bus Lines*, 335 NLRB 322, 324 (2001), the employer sent a letter to employees stating that it was "trying to bring the bottom-line back into the black." The letter also indicated that if employees accepted the employer's final contract offer, it would enable it to "retain your jobs and get back in the black into short-term." Finally the letter noted "the future of Lakeland depends on it." Id. at 324-325. The Board found that the statements conveyed a present inability to pay by indicating that the employer was unprofitable and was unable to pay more than what was set forth in its final offer. Accordingly, the Board found that the employer's refusal to furnish the Union with an audited financial statement violated Section 8(a)(5) and (1) of the Act

In *ConAgra, Inc*., 321 NLRB 944 (1996), the Board found that the employer violated Section 8(a)(5) and (1) by failing to provide the union with requested financial information regarding its plant in Molinos, Puerto Rico. The Board noted that the employer, although it made representations that were carefully couched in terms of competitive disadvantage, also made statements that amounted to claims that it could not presently pay the union's wage demands and stay in business during the term of the proposed agreement. In particular, the Board relied on the following:

> [T]he statements of Respondent Molinos' representative, Espinosa, at a negotiating session that he had seen the Company decline over the last 4 years, "the situation is serious and fragile," "if we are not competitive we cannot survive," and "we must do something to be able to survive;" and its general manager's statement at the same session that if immediate measures were not taken the probabilities were that Molinos would not be here in the future. We also note Espinoza's statement at another session, while discussing the Respondents' proposal to cease supplying soap to employees, that "things like this are what makes us not be competitive and can make as have to close shop because we cannot compete.

In the instant case, while the Respondent consistently claimed that the existing wages and benefits at the Columbia City facility were not "competitive" it never made statements linking its economic proposal to its survivability as a company.

As I noted above, the Acting General Counsel argues that if I conclude that the Respondent did not claim an inability to pay, it was still obligated to provide the Union with information necessary to justify its concessionary proposal. In this connection, the Acting General Counsel contends that even if the request to review and audit all of the Respondent's financial records was overbroad, the Respondent had a duty to comply with the request to the extent it encompassed relevant information necessary to verify its assertions.

I find the cases relied on by the Acting General Counsel to be distinguishable. In *Caldwell Mfg. Co*., 346 NLRB 1159 (2006), the employer maintained that concessions were necessary at its Rochester New York plant in order for that plant to become a viable option for the location of new product lines and to be competitive in the industry. In response to this claim, the union requested specific information such as the cost data for each of the employer's plants, competitor data and data on possible new production. In its decision, the Board emphasized that there was no evidence that the employer claimed an inability to pay and that the union did not seek general access to the employer's financial records. Relying on *Nielsen Lithographing* and *Burruss Transfer*, supra, the Board specifically noted that "generally an employer is not obligated to open its financial records to union unless the employer has claimed an inability to pay and that broad statements of 'competitive disadvantage' did not amount to a claim of an inability to pay." Id. at 1160. In *Caldwell*, the Board found that the union's request was narrowly tailored in response to the employer's specific claims and was necessary to evaluate those claims. Thus, the Board found that the requested information was relevant and found that the employer violated Section 8(a)(5) and (1) by failing to provide it.

In the instant case, the Union did not make specific request for information to evaluate the specifics of the Respondent's claim that it needed concessions in order to make the Columbia City plant more competitive. Rather, the Union requested an audit of the Respondent's general financial records and *Caldwell* itself establishes that the Union is not entitled to such information based on the claim that concessions are necessary in order to be competitive.

In *A-1 Door & Building Solutions*, 356 NLRB No. 76 (2011), the employer justified its bargaining proposals seeking concessions by asserting that its wages and benefits were not competitive with its competitors. The employer discussed competition in terms of being able to get bids. The union then requested specific information regarding the employer's job bidding history. Relying on *Caldwell,* the Board found that the information was tailored to the employer's specific claim and did not encompass general financial data. Under the circumstances, the Board found that the employer violated Section 8(a)(5) and (1) by failing to provide the specific information requested by the union.

In *Taylor Hospital*, 317 NLRB 991 (1995), the employer advised the union that insurance reimbursements had dropped and the number of patients and their length of stay had decreased. The employer indicated that because of the decreasing revenues, the number of available beds would be decreased and a number of RNs would be laid off and their places taken by less skilled personnel. The union then asked for information regarding the budget and copies of census and reimbursement records. The employer refused to provide the information. In finding that the information was relevant, the Board emphasized that the union sought only information related to the economic layoff and the purported reasons for it. The Board noted that the union never requested that the employer "open its books" nor had it exhibited any interest in the employer's general financial position. Id. at 994.

These cases are distinguishable from the instant case since the request for information in both cases was specifically tailored to the employer's assertions in bargaining and did not seek a review and audit of the employer's general financial records.

Keauhou Beach Hotel Co., 298 NLRB 702 (1990), is easily distinguished from the instant case. There, the union requested presumptively relevant information regarding unit employees. The Respondent claimed that the union's request was ambiguous in that it failed to specify whether it was seeking information regarding all employees or only unit employees. It is in that context that the Board observed that an employer may not refuse to comply with an ambiguous information request but must request clarification and/or comply with a request to the extent encompasses necessary and relevant information.

The General Counsel has not cited any case, and I am unaware of none, where a union made a request to obtain the employer's financial records, and the Board, while not granting that request, ordered an employer to provide more specific information. Rather, if the Board finds that an employer is not obligated to provide the financial information sought by the union, it dismisses the complaint allegation claiming such information must be provided. *Neilsen Lithographing* and *Burruss Transfer*, supra. It is up to the union to determine what necessary and relevant information it needs in order to properly assess claims made by an employer during bargaining and then request that information. An employer is not obligated to guess at what

information contained within its financial records could prove helpful to a union in evaluating its assertions made at the bargaining table and to provide such information.

On the basis of the foregoing, I find that the Respondent has not violated Section 8(a)(5) and (1) of the Act by refusing to permit the union to review and audit its financial records and accordingly I dismiss that allegation in the complaint.

The Acting General Counsel does not dispute that the parties were, in fact, at an impasse when the Respondent unilaterally implemented changes in working conditions, including a reduction in wages and benefits on June 20, 2011. Rather, the Acting General Counsel relies on *Caldwell*, supra, and *Decker Coal Co*., 301 NLRB 729 (1991), for the proposition that a valid impasse cannot be reached when an employer has failed to provide necessary and relevant information in violation of Section 8(a)(5) and (1) of the Act. I agree with the Acting General Counsel on the standard to be applied in this case in determining whether the parties were at a valid impasse when the Respondent implemented its final offer on June20, 2011. However, since I have found that the Respondent did not violate the Act in refusing to provide the Union with an opportunity to review and audit its financial records, I consequently find that the parties were at a valid impasse when the Respondent implemented its final offer. Accordingly, I dismiss the complaint allegation alleging that the Respondent violated Section 8(a)(5) and (1) of the Act when it implemented its final offer.

Since I have found that the Respondent did not commit any unfair labor practices, I conclude that the strike the Union initiated on June 17, 2011, is not an unfair labor practice strike, but rather an economic strike.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The complaint is dismissed.

Dated, Washington, D.C., June 20, 2012.

Mark Carissimi
Administrative Law Judge

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