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Stella D'oro Biscuit Company, Inc. *and* Local 50, Bakery, Confectionery, Tobacco Workers and Grain Millers International, AFL–CIO. Case 2–CA–38960

August 27, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER AND PEARCE

On June 30, 2009, Administrative Law Judge Steven Davis issued the attached decision. The General Counsel filed a brief in support of the judge's decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief. The General Counsel and the Respondent each filed answering briefs to the other's exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and supplemented below and to adopt the recommended Order as modified and set forth in full below.[2]

The principal issues in this case are two. First, did the judge correctly find that Respondent Stella D'oro Biscuit Company, Inc. (Stella), during the course of negotiations with the Union for a successor collective-bargaining agreement, claimed that it was unable to pay the costs of the expiring collective-bargaining agreement, and therefore obligated itself to furnish the Union with the requested documentation of that claim? Second, did the judge correctly find that Stella failed to comply with that obligation by refusing to turn over to the Union a copy of its 2007 audited financial statement, offering instead to allow the Union to examine this document at a locale where it would remain in Stella's possession? We agree with the judge's reasoning as to both findings, as supplemented below, and accordingly, we adopt his conclusion that Stella's refusal and failure to furnish the Union the 2007 audited financial statement violated Section 8(a)(5) and (1) of the Act.[3]

I. CLAIM OF INABILITY TO PAY

A. Facts

The judge comprehensively reviewed the evidence in this case, including that pertinent to the inability-to-pay-claim issue. We summarize that evidence briefly here.

At all times relevant to this case, Stella was owned by Brynwood Partners (Brynwood), a private equity investment firm. Brynwood purchases companies with the aim of improving their financial condition and then selling them at a profit in 5 to 10 years. Stella and the Union were parties to a collective-bargaining agreement due to expire June 29, 2008.[4] The parties began bargaining for a successor agreement on May 30 and met six times over the next 2 months. In those meetings, Stella's bargaining representatives made the following claims:

- Stella "can't survive under the current labor contract" and "could not go on with the business unless [it was] able to further reduce costs."
- "We [are] losing money. We [are] losing about a million or a million and a half. And, if we don't recover that kind of money, then we may have to close."
- Stella is a "bleeding, distressed asset—a losing proposition," and Brynwood's goal was to "turn this business around" so it could continue to operate and would be profitable when eventually sold.
- Stella required savings in its labor costs or it would "not be going forward with the business."

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

[2] We will amend the judge's remedy and modify his recommended Order to conform to the Board's standard remedial practices. We will substitute a new notice to conform to the Order as modified.

[3] We also adopt, for the reasons stated by the judge, his findings of additional violations based on this violation. Thus, the judge found that Stella's refusal and failure to furnish the requested financial statement was a factor in the subsequent decision by the employees to strike, and that therefore their strike was an unfair labor practice strike. The judge also found that the presence of this unremedied unfair labor practice prevented the creation of a valid impasse in the negotiations. Thus, the judge correctly concluded that Stella violated Sec. 8(a)(5) and (1) by implementing the terms of its final offer absent a valid impasse. And because those terms were unlawfully implemented, the judge also correctly concluded that the strikers' May 1, 2009 offer to return under the terms of the expired collective-bargaining agreement was not conditional, and Stella therefore violated Sec. 8(a)(3) and (1) by refusing to reinstate the striking employees upon their unconditional offer to return to work.

[4] All dates are in 2008, unless stated otherwise. The parties extended the expiring agreement to July 31.

- If the Union did not agree to its proposal, "we [are] not going to be able to survive. We might have to close the business."
- If Stella "didn't get the concessions" it sought, "they would have to" close the business.
- Brynwood does not "buy companies to take losses. We buy it to make a profit." If the company was not making a profit, Brynwood would take its "toy" and leave.
- The employees' choice in bargaining is to have jobs at lower pay or no jobs at all.

Stella's negotiators also told the Union that Brynwood had recently decided to invest $3.1 million in new automated packaging equipment, which was expected to result in a work force reduction of 26 employees. The Union was also told that Brynwood was willing to incur a $6 million liability in consequence of withdrawing from the Union's pension fund.[5] The expiring contract was a 3-year agreement. Presenting a proposed 5-year contract, Stella's chief negotiator, Mark Jacoby, said that Brynwood was prepared to fund losses in the short term, but it needed a longer contract so that it could see "light at the end of the tunnel."[6]

At the first bargaining session, Stella gave the Union a one-page financial summary for 2007, which showed a loss of $1.5 million. At that session, and repeatedly during bargaining, the Union's chief negotiator, Local 50 President Joyce Alston, asked for the complete financial statement. At the first bargaining session, Jacoby agreed to present the supporting documentation at the next session. At that next session, Jacoby placed Stella's 19-page 2007 audited financial statement in the middle of the table and told Alston that she could look at it, but it could not remain in her possession. Jacoby also told Alston that she, the Union's attorney, and/or the Union's accountant could view the statement in Jacoby's office and take notes, but they could not make copies. Jacoby made substantially identical offers at subsequent bargaining sessions. Alston initially agreed to this arrangement, but subsequently changed her mind and took the position that the Union was entitled to its own copy. Neither Jacoby nor any other Stella representative, in response to the Union's requests for financial information, denied that Stella was claiming inability to pay.[7]

B. Discussion

An employer that bases its bargaining position on an asserted inability to pay the union's bargaining demands is required, upon request by the union, to substantiate its claim by providing financial information. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). In *Nielsen Lithographing Co*., 305 NLRB 697 (1991),[8] the Board clarified that this duty applies only where an employer asserts "a present inability to pay, or a prospective inability to pay during the life of the contract being negotiated," not where the employer "is simply saying that it does not want to pay." Id. at 700. See *AMF Trucking & Warehousing*, 342 NLRB 1125, 1126 (2004) ("'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."). In determining whether there has been a claim of inability to pay, the Board evaluates an employer's claims "in the context of the particular circumstances in that case." *Lakeland Bus Lines*, 335 NLRB 322, 324 (2001), enf. denied 347 F.3d 955 (D.C. Cir. 2003). The Board does not require that the employer recite any "magic words," but only that its statements and actions be specific enough to convey an inability to pay. *Atlanta Hilton & Tower*, 271 NLRB 1600, 1602 (1984).

The judge found that statements made by Stella's representatives during negotiations effectively claimed a present inability to pay the wages and benefits the Union was requesting or an inability to pay during the life of the contract being negotiated. Based on credited testimony,

[5] The record does not establish that Stella ever withdrew from the Union's pension fund. According to the General Counsel's answering brief, it ultimately decided not to withdraw.

[6] The dissent mistakenly states that Jacoby said "the Respondent"—i.e., Stella—was prepared to fund losses in the short term. Jacoby said that *Brynwood* was so prepared, contingent on demanded labor-cost reductions. As explained below, the difference is material.

[7] The judge states that Union Attorney Louie Nikolaidis testified that he told Jacoby during a telephone conversation on June 18 that Stella was alleging an inability to pay and was therefore obligated to supply the requested financial documents. The judge further states that Jacoby gave "undenied testimony" that he (Jacoby) replied that Stella had not claimed an inability to pay. The General Counsel cross-excepts to the judge's finding that Jacoby denied claiming inability to pay.

We find merit in the General Counsel's cross-exception. As the General Counsel correctly contends, no record evidence supports a finding that Jacoby told Nikolaidis on June 18 that Stella was not claiming inability to pay. Rather, the first time Jacoby denied making an "inability to pay" claim was in an email dated November 24—more than 2 months after the Union's September 12 charge alerted Stella that the Union was alleging that Stella had so claimed. (Of course, if Nikolaidis is credited, Stella was aware of the Union's view as early as June 18. But we do not so find, as the judge neither credited nor discredited his testimony that he told Jacoby that Stella was claiming inability to pay.)

[8] Petition for review denied sub nom. *Graphic Communications Local 508 v. NLRB,* 977 F.2d 1168 (7th Cir. 1992).

the judge found that Stella's representatives told the Union that Stella

> could not continue to run the business at a loss, it could not survive under the current labor contract and had to reduce those costs to stay in business, that the concessions it sought were needed for the survival of the company and if it did not obtain them it would close, that it required savings in its labor costs or it would not be going forward, and it did not have the money to go forward with its business unless it implemented the labor cost reductions it proposed.

The judge said that he "agreed" that Stella "did not *expressly* plead an inability to pay," and that it told the Union that $3 million already had been invested in new equipment and that Brynwood was willing to fund continued losses "in the short term." That short term, however, was something less than the term of the 5-year contract Stella proposed, the judge found. And putting the statement about Brynwood's willingness to fund losses in context, the judge found that Brynwood's short-term willingness was contingent on the Union's acceptance of Stella's labor-cost concession demands. Stella had lost $1.5 million in the last year, and it needed labor-cost concessions to begin making money. Otherwise, Brynwood would withdraw its capital, close the facility, and sell. The judge found that these statements constituted a claim of an inability to pay because they linked Stella's need for labor-cost concessions with its unprofitability and, in turn, with its survival.

In coming to this conclusion, the judge relied on three of the Board's post-*Nielsen* decisions.

In *Shell Co*., 313 NLRB 133 (1993), the employer's negotiator told the union representing employees at one of its facilities that economic conditions had affected the facility "very badly, very seriously," that present circumstances were "bad" and a matter of "survival." Id. It reiterated these statements in a letter to its employees, saying that the situation was "critical" and a matter of "survival." Id. The Board found that the employer claimed a present inability to pay because of the "immediacy of [its] claims here concerning the [operation's] present survival and 'critical' condition." Id. at 134.

Similarly, in *Lakeland*, supra, 335 NLRB at 324–325, the Board found that the employer had claimed a present inability to pay based on its letter to employees stating that it was "trying to bring the bottom line back into the black," that accepting its final contract offer would enable it to "retain your jobs and get back in the black in the short term," and that "the future of Lakeland depends on it." Id. at 324–325. The Board found that these statements, in context, reasonably conveyed a present inability to pay by indicating that Lakeland was "presently unprofitable and as such was unable to pay more than that contained in its final offer." Id. at 325.

Finally, in *Stroehmann Bakeries*, 318 NLRB 1069 (1995), enf. denied 95 F.3d 218 (2d Cir. 1996), the Board found that the employer stated that it had suffered huge losses in the preceding year, that it projected continuing heavy losses in the coming year, and that it was proposing drastic reductions in wages and benefits to decrease its losses. The Board also found that, despite the employer's reference to the "deep pockets" of its parent company, that parent expected the employer to stand on its own and would not continue to fund the employer's losses without labor-cost concessions. Id. at 1079–1080.

Turning to this case, the judge found that Stella similarly linked its need for labor-cost concessions to its lack of profits, and its lack of profits to Brynwood deciding to take its money elsewhere and close and sell Stella D'oro. As in the three cases above, the need for concessions is linked to nonsurvival, and thus the judge found a claim of inability to pay.

Stella excepts, asserting that its representatives had only asserted an *unwillingness* to pay the Union's demands and not an *inability* to do so. *Nielsen*, 305 NLRB at 700. Stella argues that its bargaining strategy was founded upon its business objectives rather than an empty bank account—that its statements indicated Brynwood had the funds to operate Stella, but was not willing to deploy them without labor-cost concessions. In arguing that its statements reasonably could not be interpreted as conveying an inability to pay, Stella points to statements made by its negotiators that it had invested $3.1 million in the business and that it was willing to incur a $6 million pension withdrawal liability. Stella also contends that none of its contract proposals would have brought its finances to the break-even point, requiring Brynwood to continue to fund its losses. Thus, Stella argues that, as in the Second Circuit's decision in *Stroehmann* (denying enforcement of the Board's decision),[9] its reliance on Brynwood's "deep pockets" indicated to the Union that Stella's owners possessed ample funds but would choose not to pay absent labor-cost concessions—a bargaining strategy based on what the employer *would* pay, not what it *could* pay. Stella also faults the judge's decision for relying on Board decisions denied enforcement in the courts of appeals.

We find no merit in Stella's exceptions and instead agree with the judge's findings. Specifically, we find that Stella's bargaining representatives claimed a present inability to pay, but at minimum an inability to pay during the life of the contract under negotiation. As detailed

[9] *Stroehmann Bakeries v. NLRB*, 95 F.3d 218 (2d Cir. 1996).

above, Jacoby and others repeatedly and continually indicated that Stella's survival was linked to its obtaining concessions from the Union. 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 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 present unprofitability endangered Stella's survival.

But even assuming that the statements to which Stella points—i.e., that Brynwood had invested $3 million in new equipment, that it was willing to incur a $6 million pension fund withdrawal liability, and that it would continue to fund Stella's operating losses "in the short term"—showed that Stella currently had access to Brynwood's "deep pockets" and thus negated any claim of present inability to pay, the unmistakable messages conveyed to the Union were, first, that Stella would become unable to pay just as soon as Brynwood took its "toy" and left, and second, that, absent concessions, Brynwood would do just that. Brynwood's emphatically "short-term" willingness to fund losses was plainly contingent on the concessions Stella demanded. As for Jacoby's statements concerning the $9 million in actual and proposed expenditures, those cut both ways, as much suggesting preparations for selling the business as for continuing it on a profitable basis. After all, a business boasting new automated equipment (requiring fewer employees to operate) and shorn of pension fund costs would be more attractive to potential purchasers and command a higher price. Thus, even if Stella did not claim a present inability to pay, it signified that it would become unable to pay if Brynwood pulled the plug, and that unless the Union accepted the demanded concessions, the plug would be pulled. As Jacoby succinctly put it, the employees' choice was jobs at lower pay or no jobs at all.[10]

That Brynwood itself has "deep pockets" does not change the result. Stella maintains that it never asserted an inability to pay because it clearly indicated during negotiations that Brynwood possessed ample funds. Stella argues that its bargaining posture signaled that it was *unwilling* to pay the Union's demands because Brynwood possessed the funds, but chose not to deploy them without labor-cost concessions. But it is Stella's ability to pay, not Brynwood's, that is at issue here. See *United Stockyards Corp*., 293 NLRB 1, 2 (1989) ("It is the [r]espondent's financial condition, and not [its parent company's,] that . . . was placed in issue by the remarks made . . . during contract negotiations."), enfd. sub nom. *NLRB v. Sioux City Stockyards*, 901 F.2d 669 (8th Cir. 1990) (per curiam). And Stella's message was plain: it would be unable to pay if Brynwood became unwilling to pay, and Brynwood's willingness to pay depended entirely on the Union accepting the wage and benefit cuts Stella demanded.[11]

The decision of the Second Circuit in *Stroehmann Bakeries* is not to the contrary. There, as here, the employer conveyed to the union that it would go out of business without a parent company willing to fund its losses. But in *Stroehmann*, the employer expressly denied that it was claiming inability to pay because its parent, a Canadian company, "intended to maintain a foothold in the American baking industry and was therefore willing to bail Stroehmann out financially." 95 F.3d at 220. Here, by contrast, Stella never denied (until long after the relevant events) that it was claiming inability to pay, and it made abundantly clear that Brynwood would "close and sell" Stella D'oro if the Union did not grant the demanded concessions.[12]

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[10] Thus, this case is unlike those in which the Board found no claim of inability to pay where the employer's statements, taken in context, did not link its proposals to its survival. For example, in *AMF Trucking & Warehousing*, supra, 342 NLRB at 1125, the Board found no claim of inability to pay because although the employer stated that it was in "distress" and "fighting to [stay] alive," it "never said that the survival of the Company was at stake" if it paid the union's demands. Id. at 1126. Similarly, in *Richmond Times-Dispatch*, 345 NLRB 195, 197 (2005), the Board found that the employer did not claim inability to pay a discontinued holiday bonus because it indicated only that it was losing money, not that it possessed insufficient assets to pay the bonus.

Chairman Liebman agrees that, under *Nielsen* and its progeny, Stella's statements claimed an inability to pay. As discussed in her dissent in *Richmond Times-Dispatch*, 345 NLRB at 202 fn. 5, however, she would revisit the Board's decision in *Nielsen* in order to devise a "better and more practical rule."

[11] The dissent finds "unsupported by the record" the judge's finding, upon which it says we rely, that Brynwood was willing to fund continued losses only for a period of time shorter than the 5-year contract term Stella proposed. Accordingly, the dissent concludes that Stella did not claim inability to pay under the test stated in *AMF Trucking & Warehousing*, supra, 342 NLRB at 1126 ("'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."). But even assuming Brynwood was willing to fund losses for more than 5 years, Jacoby's message to the Union was that Brynwood's willingness was contingent on the demanded labor-cost concessions, without which Brynwood would pull the plug and immediately render *the Respondent* unable to pay. In light of *United Stockyards*, supra, that message constituted a claim of inability to pay under the *AMF Trucking* test.

[12] We also observe that, although it is unclear from the record whether Stella told the Union as much in bargaining, Brynwood's business model appears to be incompatible with its maintaining a foothold in *any* industry. As the judge found, Brynwood buys companies with the object of turning them around financially and selling them at a profit in 5 to 10 years.

Also distinguishable are the decisions of the D.C. Circuit denying enforcement of the Board's orders in previous "inability to pay" cases. Thus, in *Lakeland Bus Lines, Inc. v. NLRB*, 347 F.3d 955 (D.C. Cir. 2003), the court relied 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. Id. at 963. Moreover, the court stated that the Board should not have relied on the *absence* of employer statements regarding its profitability as indicating a claim of inability to pay. Id. In contrast, Stella did not state that it was not claiming inability to pay, and it affirmatively asserted that the Company was unprofitable and that its survival depended on labor-cost concessions. In *ConAgra, Inc. v. NLRB*, 117 F.3d 1435 (D.C. Cir. 1997), the court denied enforcement because the employer's representatives repeatedly stated that the company remained profitable, but that it needed concessions to improve its ability to compete. Therefore, the Board could not find, consistently with its decision in *Nielsen*, supra, that the employer was claiming it could not afford to pay the union's demand. 117 F.3d at 1442–1443. This case is far otherwise.

Accordingly, we find that Stella claimed an inability to pay and was obligated to provide the Union with the requested financial information, the 2007 audited financial statement.[13]

II. FAILURE AND REFUSAL TO PROVIDE THE 2007 FINANCIAL STATEMENT

The judge found that Stella's offer to allow the Union to view—but not retain in its possession—the 2007 financial statement failed to satisfy its duty to furnish requested information. In determining whether Stella's offer was adequate, the judge applied the following factors: the volume and nature of the information; whether furnishing a photocopy would give greater assurance of accuracy and completeness; and the comparative cost and convenience to both parties of providing the photocopy. *American Telephone & Telegraph Co*., 250 NLRB 47, 54 (1980), enfd. sub nom. *Communication Workers Local 1051 v. NLRB*, 644 F.2d 923 (1st Cir. 1981). Applying these factors, the judge found that all three favored the Union's stance: the document was a complex financial statement that did not lend itself to "quick and easy comprehension"; possession of the document would benefit the Union, as its professionals could "examine it in detail" for purposes of advising the Union on its bargaining posture; and the cost of photocopying the document was negligible. The judge distinguished two cases Stella relied on: *Roadway Express*, 275 NLRB 1107, 1107 fn. 4 (1985) (employer could allow on-premise review of one-page customer letter), and *Abercrombie & Fitch Co*., 206 NLRB 464 (1973) (employer need not provide photocopy of three-and-a-half page uncomplicated record).

The judge rejected Stella's assertion that it needed to keep the information in the financial statement confidential to prevent its competitors, vendors and suppliers from either refusing to deal with it or taking advantage of its financial weakness. The judge found that although these were legitimate concerns, the Union met them by offering to sign a confidentiality agreement, and there was no evidence that the Union could not be expected to honor such an agreement. *Island Creek Coal Co*., 289 NLRB 851, 851 fn. 1 (1988) ("Absent proof that the [u]nion was unreliable in respecting confidentiality agreements, the [r]espondent's failure to test its willingness to treat the information confidentially weighs heavily against its defense."), petition for review denied sub nom. *Mine Workers District 31 v. NLRB*, 879 F.2d 939 (D.C. Cir. 1989); *Facet Enterprises,* 290 NLRB 152, 165 (1988), enfd. in relevant part 907 F.2d 963 (10th Cir. 1990). The judge also observed that Stella had already disseminated a summary of the document both to the Union and directly to its work force, and that this summary showed the exact amount of Stella's loss, "the main item [Stella] sought to conceal from its vendors, customers, and competitors." Finally, the judge rejected Stella's assertion that the Union had abandoned its request for the information by going ahead and bargaining without it. The Union continued to request the information, and the reality of bargaining, the judge found, compelled the Union to continue to negotiate without it.

Stella excepts, emphasizing the judge's finding that its confidentiality concerns were "legitimate," and arguing that its offer to allow the Union to view the 2007 financial statement constituted a "mutually acceptable accommodation" based on Stella's need to keep the information confidential to prevent disruption to its fragile business. Stella also contends that the requested statement comes within the scope of *Roadway Express*, supra, and *Abercrombie & Fitch*, supra, and not *American Telephone & Telegraph*, supra, in which the requested documents consisted of more than 90 pages. Thus, Stella met its duty to furnish the requested information in a "manner not so burdensome or time-consuming as to impede the process of bargaining." *Cincinnati Steel Castings Co.*, 86 NLRB 592, 593 (1949) (emphasis omitted).

[13] We find no merit in the General Counsel's cross-exception that the Union made a broad request for financial documentation and is therefore entitled to all data and information verifying Stella's financial condition. We find that the Union requested only the 2007 audited financial statement and that the judge properly limited the remedy to this document.

We find no merit in this exception and find that Stella failed to meet its obligations under Section 8(a)(5) by limiting the Union's access to this document. Contrary to Stella's claim, its offer to permit an *in camera* inspection at its offices was not "mutually acceptable."[14] The Union initially agreed to that arrangement, but it changed its mind. And although there is no bright line somewhere between 3-1/2 pages (*Abercrombie & Fitch*, supra) and 90 (*American Telephone & Telegraph*, supra), the judge reasonably placed the document at issue here within the scope of *American Telephone & Telegraph* based on not only its length, but also its complexity.

Moreover, the judge's finding that Stella was required to provide the Union a copy of the financial statement is consistent with *Union Switch & Signal, Inc*., 316 NLRB 1025 (1995). In that case, even though the employer permitted the union to view and take notes on an air quality study relevant to a grievance, the Board affirmed the judge's finding that the employer violated Section 8(a)(5) by refusing to provide the union a copy of the study. The study included 12 pages of tabulations, which the judge found would be laborious to copy by hand and difficult to copy accurately. Stella's 19-page financial statement at issue here similarly includes information in numerical format and is longer than the 12 pages of tabulations in *Union Switch & Signal,* supra*.*

Even assuming, as Stella claims, that much of the document consisted of data bearing no relevance to bargaining, the *document itself* was relevant. Stella made it so by claiming inability to pay. That settled, the only issue is whether the Union was entitled to possession of its own copy. For the reasons stated by the judge, we agree that it was.

The only reason Stella gave for refusing to give the Union its own copy was a need for confidentiality. And although Stella emphasizes the judge's finding that its concerns on that score were "legitimate," they are weak. First, as stated above, the judge also found that Stella had distributed a one-page summary of the financial statement to the Union and to its employees, and that this summary showed the exact amount of Stella's loss, "the main item [Stella] sought to conceal from its vendors, customers, and competitors." Second, the Union offered to sign a confidentiality agreement, and Stella has never claimed grounds for believing that the Union would not honor such an agreement. Indeed, Jacoby conceded in his testimony that he had no reason not to trust the Union in this regard. Accordingly, we adopt the judge's conclusion that Stella did not satisfy its duty to furnish the 2007 audited financial statement and therefore violated Section 8(a)(5) and (1) of the Act.

AMENDED REMEDY

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

We shall order the Respondent to provide the Union with a copy of its 2007 audited financial report.

We shall also order that the Respondent immediately and unconditionally reinstate all employees who participated in the unfair labor practice strike that began on August 13, 2008,[15] and make them whole for any loss of earnings and other benefits from and after May 6, 2009, the date the strikers made their unconditional offer to return to work, with backpay computed on a quarterly basis as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that the Respondent's unlawful refusal to provide the Union with requested relevant information precluded a lawful bargaining impasse, and accordingly that the Respondent was not free to implement the terms and conditions of its final offer on August 27, 2008, we shall also order that the Respondent restore all the terms and conditions in the contract that expired, after extension, on July 31, 2008, and maintain them unless and until the parties bargain in good faith to an agreement or lawful impasse. We shall also order the Respondent to make employees whole for any loss of earnings and other benefits resulting from its unlawful unilateral changes as prescribed in *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as computed in *New Horizons for the Retarded*, supra.

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[14] The judge properly found that the 2007 financial statement was governed by *American Telephone & Telegraph,* supra. There, although the employer permitted the union to review and copy data from requested employee records relevant to grievances, the Board found that the employer violated Sec. 8(a)(5) by refusing union requests for photocopies of the records. The Board specifically endorsed the judge's finding that "sound policy dictates that required documentary information should be generally furnished by photocopy," except for "unusual cases due to lack of photocopying equipment or because of undue inconvenience to the furnisher of information." 250 NLRB at 47, enfd. *Communication Workers Local 1051 v. NLRB*, 644 F.2d 923, 924 (1st Cir. 1981). Underlying this finding was "the almost universal practice of most businesses of using photocopying equipment in copying documents and the obligation of employers to apply no lesser degree of 'diligence and promptness' in bargaining matters than in 'other business affairs of importance.'" See also *Carpenters Local 35 (Construction Employers Assn. of California)*, 317 NLRB 18 (1995). Here, Stella did not assert that it lacked photocopying equipment or that photocopying its financial statement would be unduly inconvenient.

[15] The judge's decision states that the strike began August 14. As noted by Stella in its exceptions brief, the record establishes that the strike began August 13.

Inasmuch as the terms of the final offer implemented on August 27, 2008, included cessation of contributions to the Union Health Fund, we shall order the Respondent to make whole its unit employees by making all such delinquent fund contributions on behalf of unit employees that have not been made since that date, including any additional amounts due the fund in accordance with *Merryweather Optical Co.,* 240 NLRB 1213, 1216 fn. 7 (1979). We shall also order the Respondent to reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.[16]

ORDER

The National Labor Relations Board orders that the Respondent, Stella D'oro Biscuit Company, Inc., Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 50, Bakery, Confectionery, Tobacco Workers and Grain Millers International, AFL–CIO (the Union) by failing and refusing to promptly furnish, on request, information necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of employees in the unit set forth below.

(b) Unilaterally implementing changes in the terms and conditions of employment of the unit employees as provided for in the collective-bargaining agreement that expired, after extension, on July 31, 2008.

(c) Failing or refusing to immediately reinstate employees engaged in an unfair labor practice strike upon their unconditional offer to return to work.

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

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

(a) Furnish the Union a copy of the Respondent's 2007 audited financial statement.

(b) Upon request of the Union, rescind any and all changes in unit employees' terms and conditions of employment implemented on and since August 27, 2008, and restore and maintain the terms and conditions of the contract that expired, after extension, on July 31, 2008, unless and until the parties bargain in good faith to an agreement or lawful impasse concerning any proposed changes thereto.

(c) Make unit employees whole, with interest, for any loss of earnings and other benefits resulting from its unlawful unilateral changes, in the manner set forth in the amended remedy section of this decision.

(d) Make all delinquent Union Health Fund contributions that have not been made since August 27, 2008, including any additional amounts due the Fund in accordance with *Merryweather Optical Co.,* 240 NLRB 1213, 1216 fn. 7 (1979), and make employees whole for any out-of-pocket expenses ensuing from the failure to make the required fund contributions, in the manner set forth in the amended remedy section of this decision.

(e) Before making any changes in wages, hours, or other terms and conditions of employment of employees in the following appropriate bargaining unit, meet and bargain in good faith with the Union as the exclusive collective-bargaining representative of those employees and, if an understanding is reached, embody such understanding in a signed agreement:

> Included: All employees employed by the Employer at its plant at 184 West 237th Street, Borough of the Bronx, City of New York.
>
> Excluded: All other employees employed in a strictly supervisory capacity, salespersons, drivers, auto mechanics, clerical and office employees, production managers, supervisory maintenance mechanics, engineers, professionals, security guards, and contingent, part-time employees as provided in the parties' collective-bargaining agreement.

(f) Within 14 days from the date of this Order, offer all employees who participated in the unfair labor practice strike that commenced August 13, 2008, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any employees hired to replace them.

(g) Make each of the unfair labor practice strikers whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful failure to reinstate them on their unconditional offer to return to work, in the manner set forth in the amended remedy section of this decision.

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

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

(i) Within 14 days after service by the Region, post at its facility in Bronx, New York, copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 30, 2008.

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

Dated, Washington, D.C. August 27, 2010

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting.

Contrary to my colleagues, I would dismiss, on two separate grounds, the complaint allegation that the Respondent violated the Act by refusing to furnish the Union with its audited 2007 financial statement. First, the Respondent's statements in its negotiations with the Union, taken as a whole, did not amount to a claim of inability to pay within the meaning of Board precedent. Consequently, the Respondent had no obligation to provide information supporting such a claim. Second, even if the Respondent had made a claim of inability to pay, its offer to allow the Union's representatives and experts to review and take notes on the requested financial statement was fully responsive to the information request. Therefore, I would reverse the judge's finding that the Respondent violated Section 8(a)(5) of the Act by failing to provide information. I would further dismiss the entire complaint, as the other violations found by the judge and affirmed by my colleagues all are predicated on the alleged unlawful refusal to provide information.

I. FACTS

The facts pertinent to the alleged refusal to provide information may be summarized as follows. The Respondent, which owns and operates a bakery plant, was acquired by private equity firm Brynwood Partners (Brynwood) in January 2006. Brynwood buys companies with the objective of improving their financial condition and selling them at a profit in 5 to 10 years.

At the time of the purchase, the Respondent and the Union were parties to a collective-bargaining agreement running from June 29, 2005, to June 29, 2008 (and later extended to July 31, 2008). Beginning in May 2008,[1] the Respondent and the Union held a series of bargaining sessions to negotiate a new collective-bargaining agreement. The Respondent's labor counsel, Mark Jacoby, was its chief spokesman. Henk Hartong, who was both a Brynwood managing partner and chairman of the Respondent's board of directors, participated in many of the bargaining sessions.

On May 12, prior to the first bargaining session, Hartong and Dan Myers, the Respondent's chief operating officer, visited the Union's offices. They introduced themselves to Union President Joyce Alston and Secretary-Treasurer Calvin Williams and gave them two documents, a financial summary and a document concerning automation.

At the first bargaining session, on May 30, the Respondent distributed the financial summary document to the union bargaining committee and discussed the document. Jacoby explained that Brynwood bought the Respondent as a distressed asset suffering operating losses, with the goal of making the business profitable within 5 to 10 years. The financial summary showed that the Respondent lost $1.5 million in fiscal year 2007. It also showed that the Respondent's net sales had steadily de-

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

[1] All dates are in 2008, unless otherwise indicated.

clined from $76.7 million in 1992 to $29 million in 2006 and $24 million in 2007, while the prices of ingredients for its products doubled from October 2006 to February 2008 and its transportation costs had increased steadily from January 2007 to March 2008. Jacoby described measures that the Respondent under Brynwood's ownership had taken to improve its financial condition, including introducing new products, raising prices, substituting independent distributors for its in-house trucking system, and investing substantial capital in new automated packaging equipment. Jacoby further explained that, as part of its efforts to improve its financial condition, the Respondent's bargaining objective was to modify its wage structure and reduce overall labor costs. According to Alston, Jacoby also said that the Respondent could not go on with the business unless it was able to further reduce costs and that it had to reduce the costs of the labor agreement in order to stay in business.[2] Alston asked to see documentation supporting the Respondent's financial summary. Jacoby agreed to present the Respondent's financial statement, on which the financial summary was based, at the next bargaining session.

On June 4, at the second bargaining session, Jacoby presented the Respondent's audited 2007 financial statement, which consisted of 19 pages, including the cover and table of contents. He stated that he would allow the Union's representatives to examine it and take notes but not photocopy or keep the document. Jacoby showed Alston that the figures in the previously distributed financial summary document matched the figures in the audited financial statement. The financial figures all appeared on a single page of the report. Alston stated that she wanted the Union's attorney and accountant to examine the statement. Jacoby offered to make the financial statement available to the Union at his office for review. Alston agreed to that procedure.

The Respondent also presented its first economic proposal at the June 4 bargaining session. The proposal included a 5-year contract, a three-tier wage and benefit structure, and a reduction in vacation and sick days. Jacoby explained that the Respondent was prepared to fund losses in the short term and make investments to obtain a return on its investment, but needed a longer contract so that it could see "light at the end of the tunnel." Jacoby stated that Brynwood was "not going to go on forever funding losses." According to Alston, Jacoby stated that the Respondent's proposal represented a savings of $1.5 million in labor costs that the Respondent needed in order to survive.

The third bargaining session took place on June 17. The Union presented its proposal for a new contract, which included certain wage and benefit increases and a 3-year contract term. Alston offered to come to Jacoby's office with an accountant or attorney on June 19 to examine the Respondent's financial statement.

Union Attorney Louie Nikolaidis subsequently advised Alston that the Union had a right to be provided a copy of the Respondent's financial statement. Nikolaidis telephoned Jacoby and informed him that the Respondent was obligated to provide the Union a copy of the financial statement and that Jacoby's offer to allow the Union merely to view it was unacceptable. Consequently, no union representatives visited Jacoby's office to examine the document.

At the fourth bargaining session, on July 8, Jacoby said that he was disappointed that union representatives had not visited his office to view the financial statement. Alston reiterated that the Union had a right to receive a copy of the financial statement. Regarding the Respondent's contract proposal, union committee member Michael Filippou observed that the Respondent could make a profit by simply closing the facility and selling its brand and real estate, but it could realize a greater profit if it obtained the contract concessions it was seeking and sold the business as a going concern. In response, Hartong acknowledged that, while closing the business and selling its assets had been an option since the beginning of Brynwood's ownership, Brynwood's preference was to continue investing funds in the Respondent and to sell it as a profitable company in 5 to 10 years.

On July 22, at the fifth bargaining session, the Respondent modified its wage and benefit proposal for the first year of the contract. Its proposal included ceasing participation in the Union Pension Plan. Noting that ceasing participation in the plan would trigger a $6 million withdrawal liability, Jacoby stated that the Respondent was willing to incur the withdrawal liability to reduce its future cost structure. The Union also presented a modified proposal, adding a substantial wage increase.

On July 23, at the sixth bargaining session, the Respondent again modified its wage and benefit proposal. In turn, the Union offered to freeze wages for the first year of the contract and to reduce its paid holiday and sick day demands by 1 day each. Jacoby responded that the Union's offer did not go far enough.

The Union held a meeting with the unit employees on July 26 to discuss the Respondent's contract offer. After discussion, the employees voted to reject the offer and to strike.

[2] The judge credited the testimony of union witnesses Alston, Williams, and Filippou but found that their testimony was essentially similar to the testimony of the Respondent's witnesses.

The Respondent and the Union met with a mediator on August 6 and 22, but there was no movement in the parties' positions. The employees went on strike on August 14. The Respondent unilaterally implemented its final contract offer on August 27.

On December 4, in the context of bargaining over additional changes, Union Attorney Nikolaidis examined the Respondent's financial statement during a bargaining session. At Nikolaidis' request, Jacoby, on December 16, sent the financial statement to Union Accountant Greg Auteri under an agreement that he could take notes but not photocopy it. Auteri returned the financial statement to Jacoby on January 21, 2009.

II. DISCUSSION

A. The Respondent did not Claim an Inability to Pay

It is well established that where an employer's bargaining position is based upon an *unwillingness* to pay, as opposed to an *inability* to pay, an employer is under no obligation to furnish a union with corporate financial information.[3] Here, the record shows that, in its contract negotiations with the Union, the Respondent was not arguing that it lacked funding to yield to the Union's demands. To the contrary, the Respondent made clear that Brynwood was willing to invest substantial amounts in the Company, with a time horizon for achieving profitability within 5 to 10 years. Brynwood, thus, clearly anticipated that the Respondent might operate at a loss for a number of years and that it would have to underwrite those losses. Moreover, Brynwood already had funded a $3.1 million capital expenditure for the Respondent's new automated packaging equipment, and indicated its willingness to absorb a $6 million withdrawal liability to extricate the Respondent from the Union Pension Plan. Thus, the Respondent plainly was not contending that it lacked funds to meet the Union's contract demands. Rather, it was arguing that it would not, as a matter of business judgment, continue to invest in the business if the wage scales and labor costs were not restructured to help achieve profitability. Thus, the Respondent based its bargaining position on what it was "willing to pay," not what it was "able to pay."

To be sure, the Respondent made statements during bargaining sessions indicating that it was losing money and that it needed concessions from the Union to become profitable. However, it never claimed a present inability to pay the wages and benefits that the Union was requesting. Rather, the statements merely reflected the Respondent's unwillingness to indefinitely continue operating at a loss, and its desire to achieve profitability within 5 to 10 years.

Moreover, even if one could construe the Respondent's statements as indicating an inability to pay at some point, the Board has made clear, as the majority concedes, that "'[i]nability 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*." *AMF Trucking & Warehousing, Inc*., 342 NLRB 1125, 1126 (2004) (emphasis added). Here, the Union sought a contract of a 3-year duration, and the Respondent sought a 5-year contract. But, as the Respondent's stated goal was to make the Respondent profitable in 5 to 10 years, it clearly contemplated operating at a loss for possibly longer than 5 years. Thus, the judge's conclusion, on which the majority relies, that Brynwood was willing to fund continued losses only for a duration shorter than 5 years is unsupported by the record.[4] Consequently, the Respondent's statements did not constitute a claim of inability to pay such as to give rise to an obligation to provide supporting information.

B. The Respondent's Offer was Sufficient

Assuming arguendo that the Respondent made a claim of inability to pay, its offer to allow the Union and its experts to view and take notes on its audited 2007 financial statement satisfied any obligation it had to provide the Union substantiating information. An employer is not obligated to provide information in the exact form requested by the union. Rather, "[i]t is sufficient if the information is made available in a manner not so burdensome or time-consuming as to impede the process of bargaining." *Cincinnati Steel Castings Co.,* 86 NLRB 592, 593 (1949).[5] Thus, depending on the nature and volume of the information requested, in some cases it is necessary for the employer to provide a copy of the information to the union,[6] while in others it is sufficient to

[3] See *Nielsen Lithographing Co.,* 305 NLRB 697, 700 (1991), affd. sub nom. *Graphic Communications Local 508 v. NLRB,* 977 F.2d 1168 (7th Cir. 1992) ("The difference between the two types of claims is critical. The employer who claims a present inability to pay, or a prospective inability to pay during the life of the contract being negotiated, is claiming essentially that it cannot pay. By contrast, the employer who claims only economic difficulties or business losses or the prospect of layoffs is simply saying that it does not want to pay.").

[4] While, as the judge stated, the Respondent "sought concessions for the term of its proposed 5-year contract *hoping* to become profitable during that period" (emphasis added), the 5-year timeframe for profitability was merely a hope, not a deadline.

[5] See also *Detroit Edison Co. v. NLRB,* 440 U.S. 301, 314 (1979) ("union's bare assertion that it needs information . . . does not automatically oblige the employer to supply all the information in the manner requested").

[6] See *Union Switch & Signal, Inc*., 316 NLRB 1025 (1995); *American Telephone & Telegraph Co*., 250 NLRB 47, 54 (1980), enfd. sub

allow the union to view and take notes on the information.[7] This case falls in the latter category.

At the June 4, 2008 bargaining session, the Respondent showed Union President Alston the operating loss data in its audited 2007 financial statement and matched those figures with the operating loss figures set forth in the financial summary document provided earlier. Alston saw that the figures in the audited 2007 financial statement and the figures in the presentation handout matched. Thus, by the second bargaining session, Alston had fully corroborated the financial data contained in the summary document, which verified that the Respondent had incurred an operating loss of more than $1.5 million in 2007. The Union, therefore, had all the information it needed to confirm the Respondent's assertion that it was losing money.

Even though the Respondent had already shown Alston the relevant supporting documentation from its financial statement, the Respondent went even further and offered to make the complete financial statement available to the Union and its experts for examination and note taking at Jacoby's office. Alston agreed to this proposal at the June 4 bargaining session and reiterated her acceptance at the June 17 bargaining session. Visiting Jacoby's office to examine the financial statement would have imposed little burden on the Union's attorney or accountant, as their offices were in midtown Manhattan near Jacoby's office. Nevertheless, Alston subsequently reneged on her agreement, and the Union never took advantage of the Respondent's offer to examine and take notes on the financial statement.

Had the Union's attorney or accountant examined the financial statement, they would undoubtedly have found that it was a straightforward and uncomplicated document that could easily be reviewed in one visit. Contrary to the judge's finding, the financial statement was not a detailed, complex document, especially for an attorney or accountant familiar with financial statements. As noted above, it consisted of only 19 pages, 2 of which were the cover page and the table of contents. Moreover, a single page of the financial statement, the "statement of operations" section, was the source of the figures in the financial summary document given to the union bargaining committee that showed that the Respondent was losing money.

Consequently, the financial statement appropriately falls into the same category as the similarly straightforward documents in *Abercrombie & Fitch Co*., 206 NLRB 464 (1973), and *Roadway Express*, 275 NLRB 1107, 1107 fn. 4 (1985). The Board in each of those cases found it sufficient for the employer to allow the union to view the documents without being furnished copies. Like the documents in those cases, the Respondent's financial statement is sufficiently short and understandable that it could have been reviewed in a brief session, especially by an experienced accountant.[8]

For the reasons stated above, I find that the Respondent's statements did not amount to a claim of inability to pay and that its offer to allow the Union and its experts to view and take notes on the Respondent's audited 2007 financial statement satisfied any obligation the Respondent would have had if it had made such a claim. Accordingly, I would dismiss the complaint.

Dated, Washington, D.C. August 27, 2010

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with Local 50, Bakery, Confectionery, Tobacco Workers and Grain Millers International, AFL–CIO by failing and refusing to promptly furnish, on request, information necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of our employees in the unit set forth below.

nom. *Communication Workers Local 1051 v. NLRB*, 644 F.2d 923 (1st Cir. 1981).

[7] See *Roadway Express*, 275 NLRB 1107, 1107 fn. 4 (1985); *Abercrombie & Fitch Co*., 206 NLRB 464 (1973).

[8] *Union Switch & Signal, Inc*., 316 NLRB 1025 (1995), relied upon by the majority is inapposite. There, the document in question was a highly complex and technical scientific air quality study.

WE WILL NOT unilaterally implement changes in the terms and conditions of employment of our unit employees as provided for in the collective-bargaining agreement that expired, after extension, on July 31, 2008.

WE WILL NOT fail or refuse to immediately reinstate employees engaged in an unfair labor practice strike upon their unconditional offer to return to work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above, which are guaranteed you by Section 7 of the Act.

WE WILL furnish the Union a copy of our 2007 audited financial statement.

WE WILL, upon request of the Union, rescind any and all changes in unit employees' terms and conditions of employment made on and since August 27, 2008, and restore and maintain the terms and conditions of the contract that expired, after extension, on July 31, 2008, unless and until we bargain with the Union in good faith to an agreement or lawful impasse concerning any proposed changes thereto.

WE WILL make unit employees whole, with interest, for any loss of earnings and other benefits resulting from our unlawful unilateral changes.

WE WILL make all delinquent Union Health Fund contributions that have not been made since August 27, 2008, including any additional amounts due the Fund as provided for in the Board's Order.

WE WILL reimburse, with interest, any of you who incurred out-of-pocket expenses because of our discontinuation of contributions to the Health Fund.

WE WILL, before making any changes in wages, hours, or other terms and conditions of employment of our employees in the following bargaining unit, meet and bargain in good faith with the Union as the exclusive collective-bargaining representative of those employees and, if an understanding is reached, embody such understanding in a signed agreement:

> Included: All employees employed by us at our plant at 184 West 237th Street, Borough of the Bronx, City of New York.
>
> Excluded: All other employees employed in a strictly supervisory capacity, salespersons, drivers, auto mechanics, clerical and office employees, production managers, supervisory maintenance mechanics, engineers, professionals, security guards, and contingent, part-time employees as provided in the parties' collective-bargaining agreement.

WE WILL, within 14 days from the date of the Board's Order, offer all employees who participated in the unfair labor practice strike that commenced August 13, 2008, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any employees hired to replace them.

WE WILL make each of the unfair labor practice strikers whole for any loss of earnings and other benefits suffered as a result of our unlawful failure to reinstate them on their unconditional offer to return to work, less any net interim earnings, plus interest.

STELLA D'ORO BISCUIT COMPANY, INC.

Suzanne K. Sullivan, Esq., for the General Counsel.
Lawrence J. Baer and *Mark A. Jacoby, Esqs. (Weil, Gotshal & Manges, LLP),* of New York, New York, for the Respondent.
Louie Nikolaidis, Esq. (Lewis, Clifton & Nikolaidis, P.C.), of New York, New York, for the Union.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge filed on September 12, 2008 and an amended charge filed on February 17, 2009, by Local 50, Bakery, Confectionery, Tobacco Workers and Grain Millers International, AFL–CIO (Union), a complaint was issued by Region 2 of the Board on March 13, 2009 against Stella D'oro Biscuit Company, Inc. (Respondent or Employer). An amended complaint was thereafter issued on May 7, 2009 and an Order Correcting the Remedial Paragraph of the amended complaint was issued on May 8, 2009.

The complaint, as amended, alleges essentially that on May 30, 2008, the Respondent and the Union began negotiations for a renewal collective-bargaining agreement to replace the agreement which was due to expire on June 29, 2008.[1] The complaint further alleges that on May 30 and continuing throughout the negotiations, the Respondent's bargaining representatives informed the Union that "concessionary bargaining was necessary because the Respondent claimed inability to pay the costs of the collective-bargaining agreement due to expire."

The complaint further alleges that on May 30, and throughout the negotiations, the Union's president Joyce Alston verbally requested that the Respondent verify its claim of financial inability to pay by providing the Union with documentation to support its bargaining position and economic proposal, and that the Respondent verbally failed and refused to furnish the Union with the information requested.

It is further alleged that the employees began a strike on August 14 which was caused by the Respondent's failure and refusal to furnish the information as set forth above, and that on

[1] All dates hereafter are in 2008 unless otherwise stated.

August 27, the Respondent unlawfully declared impasse, unilaterally implemented a wage schedule, and stopped contributing to the Union Health Fund for the unit employees.

Finally, it is alleged that on May 1, 2009, the Union made an unconditional offer to return to work on behalf of the striking employees and that since May 6, the Respondent has failed and refused to reinstate the employees to their former positions of employment.

The Respondent's answer denied the material allegations of the complaint, and on May 12-15, 2009, a hearing was held before me in New York, NY.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following:

Findings of Fact

I. JURISDICTION

The Respondent, a New York corporation having an office and place of business located at 184 West 237th Street, Bronx, New York, has been engaged in the manufacture of baked goods. Annually, the Respondent derives gross revenues in excess of $1,000,000 from its business operations and purchases and receives at its New York facility goods and materials valued in excess of $50,000 directly from suppliers located outside New York. 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. The Employer also admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Stella D'oro company was family owned at its inception decades ago. It was purchased by Nabisco which later sold it to Kraft Foods Global, Inc. In January, 2006, Kraft sold the company to Brynwood Partners, a private equity investment firm. Brynwood solicits investors and uses the funds received to purchase various "portfolio" companies, one of which is Stella D'oro. Its objective is to improve the financial condition of the acquired company and then sell it at a profit in five to ten years.

For at least the past ten years, the Union has been the exclusive collective-bargaining representative of the approximately 134 employees employed at the company in the following admittedly appropriate collective-bargaining unit:

> Included: All employees employed by the Employer at its plant at 184 West 237th Street, Borough of the Bronx, City of New York.
>
> Excluded: All other employees employed in a strictly supervisory capacity, salespersons, drivers, auto mechanics, clerical and office employees, production managers, supervisory maintenance mechanics, engineers, professionals, security guards, and contingent, part-time employees as provided in the parties' collective-bargaining agreement.

The most recent collective-bargaining agreement ran from June 29, 2005 to June 29, 2008.

B. The Bargaining Sessions

Six bargaining sessions were held before the August 14 strike, and two bargaining meetings took place after the strike. The Respondent's chief spokesperson was Mark Jacoby, its labor counsel. Accompanying him were Henk Hartong, a managing partner of Brynwood and chairman of the board of directors of the Respondent, and Dan Myers, its chief operating officer. The Union's chief spokesperson was its president, Joyce Alston. Other attendees for the Union were Calvin Williams, its secretary-treasurer, and shop committee members-employees Raymond Amerino, Michael Filippou, Alonzo Gomez and Gurdip Mann. Union attorney Louie Nikolaidis was present at only the last two sessions in December.

Prior to the first bargaining session, Hartong and Myers visited the Union's office on May 12 and met with Alston and Williams. According to the Union's witnesses, it was a very short visit at which the Respondent's representatives introduced themselves and said that they sought to make the Employer a "viable business" and wanted to work together with the Union in an ongoing relationship. Williams conceded that Hartong left two documents with them including a financial summary and perhaps a document concerning automation. Williams said that Hartong went through the documents quickly and left them with the Union agents.

In contrast, Hartong testified that he went into detail about the two documents, one a financial summary and the other a presentation about automation. Those documents were later presented at the first bargaining session. It is not necessary to resolve this dispute as the documents were admittedly reviewed in detail during the bargaining sessions. The fact that a "preview" of the Respondent's financial condition may have been given to the Union prior to bargaining is of no moment.

1. The bargaining session of May 30

According to Union president Alston, Hartong stated that Brynwood bought a "troubled business" and the Employer was losing money. Hartong also said that the Employer "can't survive under the current labor contract" and that the Respondent is not in business to sustain losses. Jacoby said that the Employer "could not go on with the business unless [it was] able to further reduce costs." It had to "reduce the costs of the labor agreement in order for [it] to stay in business." Employee Filippou quoted Jacoby as saying "the business is not too good. We losing money. We losing about a million or a million and a half. And, if we don't recover that kind of money, then we may have to close."

Jacoby described Brynwood as an investor whose purpose is to make an investment and receive a return on that investment. He described the Employer as a "bleeding, distressed asset—a losing proposition" which suffered operating losses. He expressed Brynwood's goal to "turn this business around" so that it could continue to operate and be profitable when it was eventually sold.

Jacoby testified that he set forth the ways in which the Employer attempted to improve its financial condition. It introduced new products and raised the prices of Stella D'oro products twice and intended to raise prices again in September.

Also, the Employer invested $3.1 million in automated equipment in order to save money and cut costs. It also reduced the number of employees at its headquarters and eliminated administrative positions. In addition, Jacoby noted that the Employer saved money by closing its in-house trucking distribution system and replacing it with independent distributors. Jacoby said that despite these measures the Employer was still not profitable, and it had to address its labor costs. Hartong noted that Jacoby said that in spite of all the measures the Employer was taking to improve its performance it will "require a collective effort" in making it profitable and viable. He also stated that Alston remarked that "we are in concessionary bargaining." Alston denied making that comment.

Two documents were distributed. One was a financial presentation, and the other a presentation concerning automation. The documents were explained in detail.

The automation document showed a schematic drawing of the layout of new machinery expected to be installed in June, 2008, a description and pictures of the equipment, and a chart listing the numbers of employees in various job classifications employed before the installation of the equipment and expected to be used after its installation. The document also set forth the expected effects of the new equipment: a workforce reduction of 26 employees, increased production, reduction of worker's compensation risk, and improved material flow within the facility. Jacoby mentioned that the Employer was prepared to make further investments in the Employer's operations. Alston's reply to this presentation was that she was aware that the Respondent had a right, under the contract, to install automated equipment, but that it also was required to bargain over the effects and conditions of such installation.

The financial document consisted of graphs and a "financial summary" which stated that the Employer lost $1.5 million in fiscal year 2007. The graphs showed that net sales had declined steadily from $76.7 million in 1992 to $24 million in 2007. Sales had declined from $29 million in 2006 to $24 million in 2007 in just the two years that the company had been owned by Brynwood. The graphs further showed that from October 2006 to February, 2008, the prices of the ingredients of its products—egg yolks, cake flour, bread flour, and palm shortening had doubled. In addition, transportation costs such as diesel fuel for the trucks which transported its products had gone up steadily from January, 2007 to late March, 2008. When Hartong said that commodities prices of its ingredients and fuel had increased, Alston remarked that the employees too had to pay higher prices for these items.

The document also showed that the Respondent had raised prices 6.5% in July, 2006 across its entire line of products and at the same time eliminated a 5% cash discount it offered to its customers. Further an 8.1% price increase on certain products was imposed in September, 2007, and another 8.1% increase on other products was levied in March, 2008.

Finally, a "financial summary" page showed net sales of $24,057,000, total cost of goods sold of $19,611,000 which consisted of material of $8,212,000, labor of $8,475,000, and factory overhead of $2,924,000, gross margin (profit) of $4,446,000, operating expenses of $6,013,000, and a loss from operations of $1,567,000.

Hartong testified that on May 30 the numbers set forth in the financial summary were presented to the entire workforce.

Alston testified that Jacoby pointed to the $1.5 million loss as a reason why the Respondent needed to "restructure" its labor costs. According to Alston, Jacoby said that the Employer required savings in its labor costs or it would "not be going forward with the business."

Jacoby outlined the three areas he believed were needed to be included in a collective-bargaining agreement in order to modify the wage structure and reduce overall labor costs: (a) a six-day work week which would reduce the amount of overtime being earned in the current five day week (b) a multi-tier wage proposal because the current wage structure was "overly compacted" with the wage levels of the most skilled workers being very close to the wages of the least skilled. He noted that the least skilled employees were overpaid. Jacoby testified that the Employer sought a wage structure that was more competitive with wage rates in the market place and (c) lower benefit levels because they were too costly, with health and welfare and pension costs being about $10.00 per hour.

Alston told Jacoby that the employees earned their benefits after long periods of service to the Employer, but Jacoby insisted that the Employer was losing money and its investors sought to turn the company around but needed an "adjustment" in the labor costs.

In response to the review of the financial document presented, Alston said that the written presentation "tells us nothing," explaining that she did not know the Employer's true operating expenses and that she needed further financial documentation to fully explain the items listed in the financial summary and to support the information provided. She stated that the Union needed the information in order to prove that the Employer was, in fact, losing the amount of money represented and that it needed savings to go forward with the business. Jacoby replied that the items and numbers in the "financial summary" were taken from the Respondent's official financial statements. Alston asked to see those statements which supported the Respondent's claim that it was losing $1.5 million. Indeed, Alston stated that the sales figures were a "surprise and shock" to her and the employee-committee. Alston testified that she asked for the financial documentation at each of the six bargaining sessions held before the strike.[2]

Union secretary-treasurer Williams essentially corroborated Alston's testimony, noting that she told Jacoby that if the Employer is claiming that it is losing money it should show the Union its finances to support that assertion. Jacoby agreed to present the supporting documentation at the next session. Jacoby and Employer official Hartong conceded that Alston asked to see the information that supported the losses claimed in the financial presentation.

Hartong and Jacoby testified that neither of them said, at this meeting or at any other time, that the Employer could not pay its labor costs, or did not have the funding necessary to pay its labor costs. Hartong stated that he advised the Union that the

[2] The notes made by Alston at certain meetings do not reflect that she asked for the financial documents at each of the meetings but it is undisputed that she requested the documents during bargaining.

Employer is a financial investor which has access to capital, that it chooses where it wants to invest its money and that those decisions are made based on where it can generate a return on its investment.

2. The bargaining session of June 4

The Employer presented its first economic proposal. According to Alston, Jacoby stated that this proposal represented a savings in labor costs of $1.5 million or "concessions" that it needed in order to "survive."[3] In fact, Alston stated that Jacoby "reaffirmed" at every meeting that in order to survive and stay in business it needed this level of concessions. As a result, Alston believed that the Respondent "did not have the money to go forward with this business unless we made those labor cost reductions."

Union official Williams testified that at this and at each session Jacoby mentioned that the Employer was losing money and could not continue to operate the business in that manner, and wanted to "turn things around" so that it was making money. He quoted Hartong as saying that the Respondent needed the concessions requested to see an improvement in the business, and that they have been putting money into the business and not receiving any money back or obtaining a profit. According to Williams, Hartong said "we don't buy companies to take losses. We buy it to make a profit. And since we took over since 2006, we have not made a profit." He and employee Filippou quoted Hartong as saying that if the company was not making a profit he would take his "toy" and leave.

Hartong testified that he told the Union's agents that the Employer "was having financial challenges related to generating operating income, and that it was focused on rebuilding the company's financial performance in order to make it a viable company," and that in spite of the efforts the Employer had already taken, it sought a "program that would help us to generate some savings." Jacoby's notes of this bargaining session stated that the "financial picture is bleak and gotten worse over the time since Stella D'oro acquired from Kraft. Lost $6 for every $100 product sold in 2007." Jacoby conceded saying in this meeting that the owners were "not going to go on forever funding losses."

The Employer's proposal set forth the following:

> (a) A five-year contract. Jacoby explained that the Employer was prepared to fund losses in the short term and make investments in order to obtain a return on its investment, but needed a longer contract so that it could see "light at the end of the tunnel."
>
> (b) A three-tier wage and benefit structure consisting of current employees (Tier 1), new and recalled employees (Tier 2), and "contingent" part-time employees (Tier 3).
>
> (c) For Tier 1 employees, a wage schedule providing for wage reductions of 5% to 30% for all employees in the first year of the contract, and a 30 cent per hour raise in years two, three, four and five of the contract.
>
> (d) For Tier 2 and 3 employees, a set wage scale in the first year, and a 30 cent per hour increase in each of the succeeding four years. The first year new employee rate was less than the current employee rate.
>
> (e) Tier 3 employees do not receive any benefits. Tier 1 and 2 employees receive the following benefits:
>
> a. Health and Welfare: For Tier 1 and 2 employees, the Employer contribution would be $5.30 per hour compared to its current $6.63 contribution with employees paying any sum over $5.30 per hour.
>
> b. Pension—For Tier 1 employees, the Employer would contribute $2.73 per hour with the employee paying any additional amount, in comparison with the current $3.40 Employer contribution. Tier 2 employees would be enrolled in the Employer's 401(k) plan with employees contributing to it with the Employer providing a matching amount of up to 3% of their pay.
>
> c. Paid Holidays – For Tier 1 and 2 employees, 10 holidays compared to the current 12.
>
> d. Paid Sick Days – For Tier 1 and 2 employees, 4 days compared to the current 14 days.
>
> e. Paid Vacation – For Tier 1 and 2 employees, a maximum of 4 weeks compared to the current maximum of 5 weeks.

Alston told Jacoby that if the Union accepted this proposal the employees could no longer afford to live in New York. Filippou quoted Jacoby as saying that if the Union did not agree to its proposal "we not going to be able to survive. We might have to close the business." Alston further remarked that the proposal violated the International Union's pension plan agreement in that employees were prohibited from making contributions to the plan, and the employees could not participate in a 401(k) plan without the Employer continuing to contribute to the Union pension plan. She also noted that the Plan required that if some employees are covered they all had to be covered. That would mean that Tier 3 employees, as Union members, would have to pay the health benefits and pension contributions if the Employer did not do so. Jacoby asked for the name of the person at the pension plan who could verify Alston's claims and that information was given to him. Thereafter, Jacoby received the information requested.

Alston testified that she told the Employer that it would incur a withdrawal liability if it withdrew from the Union's pension plan or closed the facility, adding that the Employer's representatives also said that "if they didn't get the concessions" they sought, "they would have to" close the business.

Alston asked for financial documentation which supported the Employer's level of concessions requested. Jacoby presented the audited financial statement of the Employer for the year ending 2007. Union official Williams testified that Jacoby put it in the middle of the table. Alston "went through" the document briefly, but did not examine all the pages. Employee committee member Filippou testified that Alston opened the book and she and Filippou looked at it and immediately noticed that it contained too many numbers and "stuff we didn't understand." Jacoby told her she could look at it but it could not re-

[3] The proposal actually states that it has an annual impact of $1,476,855, less than the $1.6 million allegedly required by the Respondent.

main in her possession when he left. Jacoby offered to let her look at it "all day" while the Employer waited.

Alston conceded that Jacoby brought that document to several bargaining sessions and invited her to stay after the session and look at the document and take notes. Alston declined, telling him that it made no sense for her to review it since she did not know what to look for, did not know what she was looking at, was not a "financial expert," and preferred to have her attorney and accountant review it. The audited financial statement for 2007 presented by the Respondent at the bargaining sessions consists of 19 pages and includes the auditors' report, detailed balance sheets, statements of operations, statements of stockholders' equity, statements of cash flows containing extensive numerical figures, a summary of significant accounting policies, and notes to financial statements.

In this regard, Alston and Calvin Williams testified that they are not accountants and have no familiarity with complex financial statements such as the one presented. Williams testified that as secretary-treasurer of the Union and trustee of the Union's health and welfare plan, he maintains the Union's books and records, reviews invoices and signs checks, and is responsible for money received and expended by the Union. Although he testified that he attends trustee meetings and reviews the financial statements of the Union and the fund and confirms that the books are accurate, another trustee is responsible for the financial reports. Further, his involvement in financial matters is limited to recording what money is received and spent by the Union each month and what invoices are paid. Every two months the Union's accountant reviews the records and ensures that the books are properly maintained. He does not compile the information regarding financial matters.

Alston further stated that Jacoby said that the supporting financial documents are available in his office at which she, the Union's attorney or accountant could take notes. However, Jacoby denied permission to Alston or her attorney or accountant to make copies of the financial statements. Alston agreed to that procedure.

Alston testified that later in the negotiations, Jacoby offered to send the documents by courier to the International Union or whoever Alston wanted to see them, and the courier would wait while they were reviewed and notes taken by the recipient. However, no copies could be made. Jacoby told her that the documents would be available at his office; she did not recall him saying that they would be available at the Employer's premises. Alston also stated that later in the negotiation process, Jacoby offered to bring the documents to the negotiating session where she could review them and take notes. She told him that she could not adequately get the information she needed by reviewing them and taking notes. She told him that she did not have the "expertise" to examine the documents since she did not know what to look for, adding that the Union had the right to the documents. He did not offer that she could bring her accountant or attorney to the bargaining sessions to look at them.

Alston offered to sign a confidentiality agreement stating that no one else would look at the document but the Union's attorney and accountant. Jacoby testified that he replied that inasmuch as the Employer was a privately-held company, and the report was private information, the financial report was confidential containing financial information which he did not want revealed, being particularly concerned that the information might be disclosed to the Employer's competitors, vendors or customers.[4] He added that confidentiality agreements are hard to enforce, hard to prove, and that it was difficult to obtain damages for a violation of such a clause. Alston denied that she would do so, saying that any disclosure would hurt the employees the Union represents.

Hartong and Jacoby testified that Alston asked to see a copy of the financial statement for 2007 and further asked that the Union's accountant or attorney review it. Jacoby told her that the Union's committee and experts could look at the documents and take notes but he would not provide a copy.

Jacoby showed Alston that the numbers in the "financial summary" page of the document previously shown to Alston at the May 30 meeting matched the numbers in the "statement of operations" section of the audited financial statement. Specifically, the figures for net sales, cost of sales, gross profit (margin), operating expenses, and loss from operations were identical.

Alston insisted on having the Union's expert look at the document. Jacoby repeated his offer to have them look at the document in the bargaining room and also in his office or the plant, but that they could not make copies. Hartong also confirmed that Alston offered to sign a confidentiality agreement and Jacoby refused on the ground that if the company's competitors, vendors or customers learned of its losses it could harm the company. Jacoby testified that he expected, at that time, that the Union would honor any confidentiality agreement it entered into.

Hartong was asked why, if the Employer presented the numbers on the "financial summary" to the entire workforce on May 30, it refused to provide a copy of the entire 2007 audited financial statement to the Union thereafter. He testified that the financial summary contained limited, incomplete data which did not include the balance sheet and cash flow statement and management comments which were contained in the audited statement.

Alston conceded that she agreed to have the Union's attorney and accountant visit Jacoby's office for the purpose of reviewing the documents.

3. The bargaining session of June 17

The Union presented its proposals for a new contract. They included:

(a) A three year contract.

(b) Maintain the existing Health & Welfare Benefits in the current contract.

(c) Add a Retiree Health Benefit provision.

(d) Increase the Employer's contributions to the pension plan by $100 each year.

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[4] Jacoby noted that if vendors became aware that the Respondent was operating at a loss, they might refuse to extend credit, and if competitors and customers had such information, customers could be persuaded to purchase products elsewhere.

(e) Unspecified increases in wages in certain job classifications.

(f) Employer contribution to the 401(k) plan.

(g) Add two paid personal days.

(h) Unspecified increase in severance pay.

According to Alston, Jacoby made no specific response to the proposal, but said that the parties have a "long road to go" and that if the Employer was unable to obtain the kind of concessions it needed it would "get rid of the business."

Jacoby testified that the Union's proposal would result in an increase in labor costs causing the Employer to be unable to receive a return on its investment. The notes he made while at that bargaining session state "if not making profit, close and sell . . . bleeding badly—not going to go on—time doesn't make money . . . - question: will be do people want to work here or not, even if pay is less." Jacoby testified that he made these notes during a management caucus in the bargaining session "as an outline of what I was going to say, in checklist . . . when I came out and spoke to them. Sometimes, I'll create a checklist of comments that I'm going to address. I definitely spoke about these topics." He stated that when he spoke to the Union he "clearly elaborated" on those notes.

According to Jacoby, Alston said that she had to educate the employees that the Employer would be engaging in "concessionary bargaining." Alston denied making that statement.

The parties executed an agreement extending the collective-bargaining agreement, scheduled to expire on June 29, for one month, to July 31.

The Union canceled the next bargaining session set for June 19. According to Jacoby, Alston offered to come to his office on that day with an accountant or an attorney to look at the documents. Alston admits that she offered to do so, but then called Union attorney Nikolaidis and advised him that, at bargaining, the Employer claimed that it could not afford to pay and that without significant concessions it would close its business. She told Nikolaidis that she asked to see financial records to substantiate those statements and the Employer refused to provide them with a copy to keep. Alston stated that Nikolaidis advised that the Union had the right to be provided with a copy and was not limited to looking at the documents and making notes.

Nikolaidis phoned Jacoby on June 18. He testified that he told Jacoby that the Employer was alleging an inability to pay and was therefore obligated to supply a copy of its financial documents. Jacoby replied that the Employer did not have an obligation to supply the Union with documentation. He gave undenied testimony that he told Nikolaidis that the Employer had not claimed an inability to pay or lack of funding, and that the Employer's bargaining position was simply a decision by its investment managers as to how to deploy their assets. Nikolaidis repeated Alston's offer to sign a confidentiality agreement. Nikolaidis quoted Jacoby as saying that such agreements are ineffectual, and denied that the Employer had an obligation to supply the documents, but rather making them available in his office was sufficient. Nikolaidis replied that the Employer was required to give the Union a copy of the document for its inspection. Jacoby testified that he told Nikolaidis that he had invited Alston to have an accountant or attorney come to a bargaining session or the plant or his office to view the documents. Nikolaidis responded that that was unacceptable.

In fact, no visits were made to Jacoby's office or the plant by a Union accountant, attorney or other expert to view the financial document.

4. The bargaining session of July 8

Jacoby expressed his disappointment that no Union agent visited his office to view the financial documents. Alston requested the documents, saying that she believed that the Union was entitled to a copy, and should not have to pay an accountant or attorney to sit in Jacoby's office and take notes. Jacoby and Hartong essentially confirmed that she made that statement.

Alston also noted that although she believed that the Union was entitled to the documents she was prepared to continue to bargain in an attempt to reach agreement on a new contract.[5] According to Williams, Alston also said that she needed a copy because she did not know what she was looking at and the size of the document made looking at and understanding the information contained therein difficult. Williams told Jacoby that he was asking the Union to inform the workers that the Employer is losing money, but the Union needed something to show them. According to Jacoby, Alston said that the Union would not treat the bargaining as concessionary bargaining. Alston denied making that statement.

Employee Filippou suggested that the Employer could close the facility and sell its brand and real estate and make a profit, or if it could obtain the concessions it sought, it could sell the business for a greater profit. Hartong agreed that the Employer could take that course of action but stated that it wanted to invest in the operation and make it profitable. Hartong pointedly responded to Filippou, saying "but you're right, if we can't do that, then we have the other option of closing it and selling the brand and selling the real estate and we'll probably make a profit that way too." Jacoby admittedly responded to the "two-alternative scenario painted by Filippou" by saying that the employees' choice in bargaining is to have jobs at lower pay or no jobs at all.

Apparently a comparison of other similar companies was made. Hartong offered the opinion that the Employer could not compete with Nabisco or Pepperidge Farm because their labor costs were much less. Alston replied that the International Union represents the employees at Nabisco, and that those workers made more money and receive the same benefits as at the unit employees here. She added that although Pepperidge Farm was nonunion, its wages and benefits were comparable to those at the Employer. She also said that the wage and benefit proposals "cut too deep."

Jacoby presented the Employer's contract language proposal in which he made changes to the expiring contract, including the insertion of a broad management-rights clause. According to Alston, Jacoby said that the Employer needed to have such language in the contract in order to "go forward with the business."

[5] Williams testified that Alston made that comment at the next meeting which was held on July 22.

5. The bargaining dession of July 22

The Employer modified its wage and benefit proposal for the first year of the contract as follows:

(a) The wage rates for all employees for the first year of the contract were raised from the Employer's offer of June 4. However, as compared to the current wage rate, the July 22 proposal raised wages 50 cents/hour for 6 positions; 75 cents/hour (20 positions); and $1.50/hour (11 positions).

(b) In addition, the July 22 proposal reduced wages in the first year from the current rate by $2.42/hour (2 positions); $2.60/hour (3 positions); $3.04/hour (17 positions); $3.18/hour (2 positions); $3.30/hour (7 positions); $3.63/hr (7 positions); $3.72/hour (6 positions); $3.74/hour (3 positions); and $3.91/hour (1 position).

(c) Further, the current wages of seven positions remained the same in the first year as in the Employer's July 22 proposal.

(d) Wage increases of 30 cents per hour for all classifications in each of the next four years of the contract.

(e) Cease participation in the Union's health and welfare plan. Implement an Employer plan with a 3% Employer match for all employees.

(f) Cease participation in the Union pension plan and institute a 401(k) plan with a 3% Employer match.

(g) Paid holidays – 10.

(h) Paid sick days – 4.

(i) Paid vacation - maximum 4 weeks.

Again, according to Alston, Jacoby said that the Employer needed to have these cost savings in order for the business to go forward. Jacoby distributed information concerning the proposed health and welfare plan. The Union asked for and received the rates under COBRA in order to compare the proposed rates to the current rates. Alston remarked that the Employer's health and welfare plan appeared to be more costly to the Employer than the Union's current plan.

Alston also mentioned that if the Employer ceased its participation in the Union's pension plan it would incur a withdrawal liability. Jacoby said that he believed that such liability would be about $6 million. Union international vice president Art Montminy, who was present, agreed with that estimate. Jacoby remarked that the Employer was willing to incur that liability in order to reduce the Employer's cost structure in the future. According to Jacoby, Alston remarked that the Employer's ceasing its contribution to the Union's pension plan is a "non-starter" for reaching agreement, and "we're not going to get a deal on that basis."

Alston rejected the Employer's proposed changes in contract language, remarking that such changes, particularly in the management's rights clause, were so broad that it would render the Union "ineffective." According to Alston, Jacoby replied that the changes were needed so that it could "go forward."

The Union presented a modified proposal. The proposal was the same as that offered on June 17 with the addition of a "substantial" but without particulars, wage increase. Alston explained that the Union wanted to remain flexible concerning the exact extent of the wage increases because it sought a "package" of important items such as pension and health and welfare, and depending upon whether its demands in those areas were met it would consider a lesser wage increase in order to maintain and "protect" employees' existing benefits. Alston conceded that its demands would not result in a decrease in the Employer's costs, but would increase them.

6. The bargaining session of July 23

The Employer presented another proposal for a five year contract as follows:

(a) Wages: Certain wage rates were increased and others were reduced from its July 22 proposal for the first year of the contract. For example, of the 29 job classifications, the wage rate in one classification was raised, 21 were reduced, and 7 remained the same.[6] The proposal provided for wage raises of 30 cents per hour across the board in the remaining 4 years of the contract.

(b) Maintain the existing Union health and welfare plan with an Employer contribution of $5.30 per hour, and an employee contribution of $1.33 per hour. The Employer would pay 80% of any increases in cost and the employee would pay 20%.

(c) Pension Plan—remain in the Union's pension plan with Employer contributions of $3.40 per hour.

(d) Paid holidays – Ten days, the same as in the Employer's July 22 offer.

(e) Paid sick days—zero as compared to 4 in the Employer's July 22 offer.

(f) Paid vacation—maximum 4 weeks, effective January 1, 2009.

Regarding the wage proposal, Jacoby's explanation at trial was that job classifications were reduced to three groupings with the most skilled receiving a 50 cent wage raise in the first year and 30 cent per hour increases in years 2–5; the mid-level skilled group had its current wages frozen in the first year and then raised by 30 cents per hour in the remaining years of the contract; and the least skilled group suffered a drop in wages from the current $18.74 to $14.00 per hour and then increased by 30 cents per hour in each year of the contract. There were other refinements not relevant here. His notes of the bargaining session state "need to fix to make it viable." Those notes were written in a management caucus as a "checklist" of what he would say or topics he would cover with the Union.

Alston testified that she told Jacoby that "in order for us to consider the type of concessions that [the Employer] was asking for, we need documentation. Our members would never support or ratify a contract without us being able to prove that this company really needed the type of concessions that they were asking for."

The Union made another proposal. It offered to freeze salaries the first year with wage increases of 35 cents and 40 cents per hour in the second and third years. The Union also offered to have no increase in pension in the first and second years of the contract and a $100 increase in the third year. The Union further offered to reduce its paid holiday and sick day demands

[6] The number of employees in each job category is set forth in GC Exhibit 5.

by one day each. The Union did not agree to an employee contribution to health and welfare benefits, and did not agree to reduce the amount of paid vacation. The Union also proposed that the contract language remain the same.

According to Alston, Jacoby responded that the Union's offer did not go far enough and that the Employer needed $1.6 million in concessions, according to Alston, in order to "go forward" with its business. He estimated that by the end of the Union's proposed three year contract the Union's proposals would cost $750,000 higher than the costs under the expiring contract.

According to Jacoby, he made another proposal, and the Union made another counteroffer. Jacoby responded that the Union's proposal is "adding significant costs and it's nowhere near . . . and we need some help . . . in terms of negotiating for the future that this proposal doesn't provide." He concluded by saying that his last proposal was the Employer's final proposal and it would make no further changes. He asked Alston to take that offer to the membership for a vote. Hartong testified that at this meeting the parties agreed that they were at an impasse in bargaining.

C. The Authorization to Strike and the Strike Vote

1. The union meeting of July 12

In the event the employees decided to strike, permission to do so must first be obtained from the International Union. Union official Williams held such a meeting on July 12. Its purpose was to hold a vote on a request for permission to strike, and not a vote to actually engage in a strike. The employees voted to engage in a strike if one was authorized. That day, Alston wrote to the International Union advising that at the meeting, 100 Union members in a unit of 120 were present, and that those present voted unanimously for a strike. She requested permission to strike.

On July 22, the International Union wrote to Alston approving the request for permission to strike "if and when final adjustment efforts fail. . . ."

2. The union meeting of July 26

Substantially all the unit employees attended a Union meeting at which Alston read, page by page, from the Employer's July 23 proposal, including the wages, benefits proposals, and the changes in the contractual language proposed by the Employer, including the management's rights clause. The purpose of the meeting was for the unit to decide whether to accept or reject the Employer's proposal. Alston told those assembled the following:

> The Union had requested the financial documentation to support whether or not the company actually needed these type[s] of concessions to stay in business. They had refused to supply copies. They would only allow the Union to go to the company's office and make Union's accountant or the attorney go to the company's office and take notes. We didn't think that that was sufficient. We would be pursuing that by filing a charge. We believed that they should be obligated and are obligated to provide us with that documentation so that we can verify that when we come to them and say "look, they really are in trouble. These are some real issues." We could say that to them. And, until that time, we could not do that. We felt that the company had not negotiated in good faith. There wasn't any real negotiations. It's basically here it is. This is what we need and what we have to have. They did not provide us with the documentation that we needed to support the kind of concessions that they were asking for.

According to Williams, Alston told those assembled that the Union did not recommend that the employees accept the Employer's last offer, but such a decision was up to the workers. He stated that Alston told the employees that she asked for the financial reports and offered to sign a confidentiality agreement, asking "how could she inform the employees that the Employer is losing money when I don't have anything to show them." One employee asked how the Employer could tell them prior to the negotiations that the business was "doing great" and then when negotiations began, business was bad. Alston answered that she could not answer that question. "I never got a chance to look at the financial report."

Employee Mesfun Kahssay was present at the meeting. Confirming Alston, Kahssay said that she explained all the terms of the proposed contract in detail including the salary rates, benefits, and the contract language proposed by the Employer. He testified that Alston explained that the negotiations were difficult and the Employer was trying to take away most of their benefits. She told them that the Respondent claimed it lost money for the past two years and she requested proof of such loss, but that the Employer refused to provide such evidence to the Union. Alston added that if the Employer failed to provide such proof it was very hard for the Union to determine whether it actually lost money or to believe its claims of such loss.

Kahassay's pre-trial affidavit stated that inasmuch as the Employer's proposal was not acceptable, the employees had "no choice but to strike," adding that Alston "said that the company said that they didn't make enough money last year and they couldn't pay us what we wanted. She said, we asked them to show us the books if they were losing money. She said that the company refused to provide the Union with the books. She said, if they don't provide us the books, there's no way we can verify if they are losing money or if they are making money." At hearing, Kahassay added that the employees had no choice but to strike because of the economic basis of the proposal and that the Employer did not want to "provide the evidence that they lost money. That was the main point for me." He added that Alston told the workers that the Employer showed her financial documents but that she was not an accountant and could examine it but would not understand it. She told the group that she told the Employer that she had to take the document to someone "who's qualified for this to understand" and then she would respond to it.

Employee bargaining member Filippou testified that Alston told the workers that since the Employer's demands were so great the Union asked to see its financial records and the Employer refused to do so, and she believed that it was not negotiating in good faith. Later he testified that Alston told the employees that the Employer "refuse[d] to give us the books to take it to our office, examine it"—"they offer us a book in the negotiations, but they don't allow us to take it to the Union

office." His pre-trial affidavit stated that "they refused to give us the books. The only way to see the books is if we go to the attorney's office."

The employees voted unanimously to reject the Employer's offer. Alston advised them that they could strike but the consequences of the strike were "not easy," the process was long and difficult, they may not be successful, and the Employer could replace them. She told them that the Union would be pursuing the matter by filing a charge but cautioned that there was no guarantee that a complaint would be issued, and even if it was, the process would be "long and hard." The employees then voted unanimously to strike.

In the period September and October, the Union issued four flyers which stated that the employees: (a) "were forced to strike because of the unreasonable and unethical wage and benefit cuts demanded by Brynwood and its captive Stella D'oro management" (b) "were forced on strike because of the unreasonable and unethical concessions demanded by its plant management, led by Chief Operating Officer Dan Myers" (c) "began a job action because of the unreasonable and unethical concessions demanded by the company at the bargaining table" and (d) "were forced on strike because of the unreasonable and unethical concessions demanded by its new owners private equity company Brynwood Partners." There was also evidence that the strike signs used during the strike did not mention the issue concerning the Respondent's refusal to provide the Union with a copy of its financial statement.

D. Subsequent Events

On July 31, the Union sent the Employer a two-day notice, pursuant to provisions of its expired contract, that due to the expiration of the extension agreement and the lack of progress during negotiations, it would strike.[7] The strike did not occur at that time. A New York State mediator became involved and asked Alston to withdraw the strike notice. Alston refused but said that the Union would not strike if negotiations resumed.

On August 6, a session was held with a New York State mediator. Alston stated that no face to face negotiations were held, although Jacoby testified that he reaffirmed his last offer, adding that a part of that offer would remain on the table only until August 20. No movement in the parties' positions was made. Alston stated that she told the mediator that the Union did not have the financial documents to support the kind or level of concessions the Employer sought, adding that the employees would not ratify a contract with the extent of concessions demanded without verification that the Employer's demands were justified.

A second strike notice was sent on August 6, and on August 14 the employees went out on strike.

On August 22, another mediation session was held with a different mediator. No face to face discussions were held, and no movement in the parties' positions took place.

On August 27, the Employer sent a letter to the Union and the employees which stated that "in light of the continuing impasse in negotiations, and the strike which has been ongoing for two weeks, the Company has decided to proceed with implementation, effective immediately, of changes in terms and conditions of employment consistent with its last offer as presented at the bargaining session on July 23. . . ." The letter added other particulars, including that health benefits would be provided through an Employer plan as presented at the July 22 session, that pension benefits and contributions would remain "unchanged at this time," and that the language changes in the contract presented on July 8 would also be implemented.

The complaint alleges that, by letter of August 27, the Respondent unlawfully declared impasse, unilaterally implemented a wage schedule, and stopped contributing to the Union Health Fund for the unit employees.

On November 3, the Employer sent a letter to the Union modifying its July 23 offer which was implemented by its August 27 letter. The letter stated that the Employer "intends to cease participation in the International Union's Pension Fund and will instead offer the unit employees the opportunity to participate in the Employer's Union Local 50 Retirement 401(k) Plan, amended to provide for an Employer match of 50% of the first 6% of pay the employee contributes to the plan through salary deferral." The letter noted that the Respondent intended to withdraw from the Pension Fund no later than November 30, 2008, and invited the Union to bargain over this change or any other terms and conditions of employment.

The Union responded on November 6, saying that the Employer could not unilaterally terminate its participation in the Pension Fund and was willing to negotiate this matter. The letter stated that in order to make such bargaining "useful" it needed information, including correspondence between the Employer and the Pension Fund concerning possible withdrawal from the Fund, correspondence between the Employer and third parties concerning the Employer's withdrawal, all reports and studies concerning the Employer's decision to withdraw, a copy of the Employer's most recent income tax filings and the most recent financial statement and/or audit, and any documents concerning the vested status of the Employer's employees in the Union's Pension Fund. Thereafter, the Employer provided the information requested.

On December 4, the Union committee with its attorney Nikolaidis met with Jacoby. The 2007 financial statement was in the possession of Nikolaidis during the day and was returned to Jacoby at the end of the session. Jacoby gave undenied testimony that he asked Nikolaidis if he needed more time to look at the document and Nikolaidis said that he was finished taking notes.

Nevertheless, Nikolaidis said that he wanted the document sent to the Union's accountant. Jacoby offered to send it with the condition that no copies be made by the accountant, and that the courier would wait while the accountant reviewed it and then take it back with him. On December 16, Jacoby sent Union accountant Greg Auteri the 2007 audited financial statement under an agreement that he could take notes but not photocopy it, promptly return it after his review, and use it only for the purpose of consulting with the Union. Jacoby testified that he agreed to send it to Auteri because he was an independent Certified Public Accountant and not affiliated with the Union. He further stated that the confidentiality of the statement

[7] Alston stated that her term "lack of progress" referred to the fact that the parties were far apart in their economic proposals.

was less urgent at this time because the information was older, the strike was well known to competitors, vendors and customers, and Auteri had agreed to confidential treatment of the document. Auteri returned the document to Jacoby on about January 21, 2009.

E. The Offer to Return to Work

On May 1, 2009, the Union sent the following letter to the Employer:

> Please be advised that all of the Stella D'oro Biscuit Company employees represented by Local 50, Bakery, Confectionary, Tobacco Workers and Grain Millers, AFL–CIO are hereby unconditionally offering to return to work immediately under the terms of the June 29, 2005 through June 19, 2008 collective bargaining agreement. Please call my office so that we can make arrangements for an orderly transition back to work.

On May 6, the Employer replied:

> We are in receipt of your letter dated May 1, 2009 by which you purport to convey an "unconditional" offer on behalf of Stella D'oro's striking employees to "return to work immediately under the terms of the June 29, 2005 through June 29, 2008 collective bargaining agreement." As you know, that collective bargaining agreement expired without further extension on July 31, 2008, and Stella D'oro advised the Union by letter dated August 27, 2008 that it was modifying the terms of employment, as described in that letter, following the impasse reached in negotiations. Accordingly the Company regards your offer to be conditional, rather than unconditional, and the Company does not accept the condition specified in your letter.

The letter added that the Union declined to continue negotiations after one meeting on March 24, 2009 with a mediator appointed by Mayor Bloomberg, but the Employer remained willing to resume negotiations in an effort to reach agreement on a renewal of the contract and an end to the strike.

Analysis and Discussion

I. THE ISSUES TO BE DECIDED

The complaint sets forth certain specific allegations that the Employer violated the Act. The decision in this case is based on whether or not those allegations have been proven by the General Counsel. The decision is not based on whether the economic demands of the Employer were excessive, unreasonable or unethical as set forth in the Union's flyers.

The essential question before me is whether the Employer, during negotiations for a new collective-bargaining agreement, asserted that it was financially unable to pay more in wages and benefits than it was offering, thereby triggering an obligation under *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149 (1956), to furnish financial information that would enable the Union to evaluate that assertion. If I find that it made such a claim of inability to pay, the next question which must be answered is whether the Union requested documentation to support that claim and whether the Respondent unlawfully refused to supply such information.

Other questions which must be decided include whether the strike which ensued was caused by the Employer's alleged unfair labor practice of refusing to supply the information, whether the Union's offer to return to work was unconditional, and whether the Employer unlawfully implemented its last proposal without a valid impasse in bargaining having been reached.

II. THE ALLEGED CLAIM OF INABILITY TO PAY

Where an employer, either in response to bargaining demands from the union, or in support of its own proposals, makes a claim of inability to pay, the duty to bargain in good faith requires it to provide requested financial information to substantiate its claim. *Truitt,* above.

> In determining whether an employer has incurred a duty to open its books, the Board examines whether the employer's communication, reasonably interpreted, communicates "financial inability to meet the employees' demand rather than simple unwillingness to do so."
> No magic words are required to express an inability to pay so long as the employer's words and conduct [are] specific enough to convey such a meaning. *Atlanta Hilton & Tower*, 271 NLRB 1600, 1602 (1984).

The standard that the Board uses is set forth in *Neilsen Lithographing Co*., 305 NLRB 697, 701 (1991), in which it stated that the *Truitt* duty to provide information arises "only when the employer has signified that it is at present unable to pay proposed wages and benefits."

In *Nielsen*, the employer, although expressly stating that it was profitable, asserted that it needed reductions in wages and benefits to be competitive because it was losing business to competitors. The Board, adopting the reasoning in *NLRB v. Harvstone Mfg. Corp*., 785 F.2nd 570, 576–577 (7th Cir. 1986), held that in this context, the employer's claim of inability to compete, as well as its assertions of past and future job losses because of this inability, did not amount to a claim of inability to pay. 305 NLRB at 699–701, and fn. 10. However, the Board expressly disclaimed any intent to establish a per se rule in this regard, instead adopting a totality of circumstances approach, stating, at 700;

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

A claim that an employer "cannot, as opposed to will not, pay a union's proposed wage demand is not dependent on the words used but rather on the substance of the employer's assertions. . . . Regardless of the words used, if an employer's claims can be interpreted either as a present inability to pay or a prospective inability to pay during the contract term, it is obligated to provide the union with data supporting its assertions." *Conagra, Inc.*, 321 NLRB 944, 944 (1996).

Here, the Respondent's statements during negotiations and its bargaining posture compel a finding that in justifying the concessions it sought, it effectively claimed a present inability to pay the wages and benefits that the Union was requesting, or an inability to pay during the life of the contract being negotiated.

I credit the mutually consistent testimony of Union witnesses Alston, Williams and Filippou who essentially stated that the Respondent's agents said that they could not continue to run the business at a loss, it could not survive under the current labor contract and had to reduce those costs to stay in business, that the concessions it sought were needed for the survival of the company and if it did not obtain them it would close, that it required savings in its labor costs or it would not be going forward, and it did not have the money to go forward with its business unless it implemented the labor cost reductions it proposed. As set forth below, their testimony in this regard is essentially similar to the testimony of the Respondent's witnesses.

Respondent's bargainers Jacoby and Hartong deny that they made a claim at any time that the Respondent was unable to afford the costs of the expiring contract. I agree that the Respondent did not expressly plead an inability to pay. Rather, the Respondent's representatives asserted that the company had lost money in each of the two years of its ownership, and had undertaken cost-savings measures, but that it was still not profitable and it needed to make significant reductions in its labor costs in order to turn the company around and make the company profitable. They told the Union that the Employer was prepared to fund its continued losses "in the short term," that it had already invested $3 million in new equipment and would invest more money if there was a likelihood that such an investment would result in the Employer earning a profit.

However, the Respondent had alternative options "if Respondent was unable to achieve the labor cost restructuring it sought in bargaining, including closing the bakery operation and selling the Stella D'oro brand and the real estate for a profit on the price paid to Kraft to acquire the business."[8] In addition, Jacoby informed the Union that the Employer bought a "distressed, bleeding" company which was losing money in the two years in which they owned it, that sales had declined and the costs of producing its product had increased. He told the Union that the Employer's "financial picture is bleak and gotten worse" and that it if it was not making a profit, it could "close and sell."

Accordingly, the testimony of the Union's witnesses is essentially similar to the testimony of the Respondent's witnesses, who further said that the Union's help was necessary to make the Employer viable, it was experiencing financial challenges related to generating operating income, and it would not go on forever funding losses. Further, if the Employer was not making a profit, and if the concessions it sought were not agreed to, an option it could consider is to close and sell the brand and the real estate. In presenting its proposed concessions, it asked whether the employees want to work here or not, even if the pay is less.

It is important to note the context of bargaining which the Respondent explained to the Union. It advised the Union that the owners are investors who wanted to see a return on their investment, but that the investors could not fund its continued losses forever and that they chose where to invest their money. At the same time, the Respondent made it very clear that it had to reduce its $1.5 million loss by lessening its labor costs in order to "turn the company around" and begin making a profit within a "period of time." The Respondent was apparently not seeking to become profitable immediately and chose a five year contract because it believed that it would take that amount of time to achieve the actual labor cost reductions needed to "turn the business around" and within that time hoped that the Employer would provide a "decent return on investment." However, the Employer was not willing to maintain the current terms and conditions for five years. It told the Union that if it did not agree to the concessions sought it may close and the workers may lose their jobs.

The clear implication from the above statements is that the Respondent was currently operating at a loss and was willing to fund its losses in the short term. Its proposed reductions in labor costs were designed to reduce its losses and, over time, achieve a profit. However, if the concessions it requested were not agreed to and if the Respondent was not able to achieve the savings it sought and operate at a profit, its investors may choose to cease funding the Employer's losses and invest their money elsewhere. By withdrawing their investment capital, the Employer would no longer be able to afford to operate the business. The end result, as stated by Jacoby at the June 17 bargaining session, would be that if the Employer failed to make a profit—"close and sell."

The Respondent made it very clear to the Union that its financial condition was "bleak." Admittedly, the company, a "bleeding, distressed asset," when it was purchased by the Employer was losing money and continued to lose money in the two years of its ownership. The Respondent advised the Union's agents that in fiscal year 2007 its sales had declined $5 million, and it had a net loss of $1.5 million. The Union was advised that the investment company that purchased Stella D'oro was willing to continue funding losses but would not do so "forever," adding that the business "was not going to go on, time doesn't make money" and "if not making profit, close and sell."

Thus, the Respondent made a direct connection between its need for significant labor-cost concessions and its immediate financial condition. The Union was told that despite certain cost-savings measures it had adopted, the Employer was still not profitable. In addition, the Union was advised of the effect of its financial condition on its business and the jobs of its employees. Thus, the Employer advised that its investors wanted to see a return on their investment, they could not go on "forever" funding the company's losses but that they would do so in the "short term." If the Employer could not generate a profit from the labor-cost concessions it sought and its other cost-savings measures one option would be to close the plant and sell the business, the real estate and the brand.

[8] R. Br. 3.

Accordingly, the Respondent's message to the Union was that its need for labor-cost concessions was directly connected to its immediate unprofitable economic condition. The Respondent's bargaining posture made it plain to the Union that if the Employer's significant concessions were not agreed to the investors could not achieve the savings they sought and would cease funding the operation. The choice laid out was whether the employees wanted "jobs at lower pay or no jobs at all."

A reasonable employee or union official would interpret the Employer's statements to mean that without the concessions it sought, there would be no future for it or jobs for its employees. As set forth above, no magic words are required to express an inability to pay. The Employer's statements "reasonably interpreted" were "specific enough to convey" and "effectively communicate" that it was unable to pay as an explanation to justify the concessions it sought.

By stating that its future depended on the Union's agreement to its proposed concessions and that if it did not obtain the concessions it sought it might close the business and dismiss its employees, the Respondent clearly pleaded an inability to pay within the meaning of *Truitt.*

The purpose of the Employer's presentation was that the concessions it sought were necessary to improve its financial position and that such improvement was needed to permit the company to continue in operations and to save jobs. In *Nielsen,* the Board observed that "[n]othing in the employer's] statements to the [u]nion . . . fairly suggests that the [employer] would be unprofitable and thus unable to pay during the term of the contract under negotiation. . . ." 305 NLRB at 701. That language implies that if Nielsen had claimed unprofitability, the Board may have found that it had thereby also claimed an inability to pay. *Nielsen* and its progeny do not limit an inability to pay claim to assertions of "immediate insolvency." Rather, in *Nielsen*, the Board adopted the approach of the Seventh Circuit in *NLRB v. Harvstone*, above at 577, where the court held that the relevant time period to determine the duty to furnish information is that of the term of the new collective-bargaining agreement. *Burruss Transfer, Inc*., 307 NLRB 226, 228 (1992), confirmed this test—"the duty to provide financial information under *Truitt* is triggered only where an employer claims it cannot currently meet union demands or cannot satisfy those demands during the term of the contract being negotiated." The Respondent sought concessions for the term of its proposed five-year contract hoping to become profitable during that period. Clearly, if its concessions were not agreed to during bargaining it could not hope to achieve profitability during a five year term without, as happened here, unlawfully declaring impasse and imposing the terms of a five-year agreement.

The Respondent argues that its bargaining posture simply indicated an unwillingness to consider more favorable economic terms rather than an inability to pay. I do not agree. The Employer's overall approach was one that emphasized the possibility that the company would not continue to operate if significant concessions were not agreed to. Thus, its economic circumstances were characterized by the fact that the company was losing money when it was purchased, it continued to suffer a decline in sales, and had a net loss of $1.5 million in its current fiscal year. Accordingly, the Respondent's statements and conduct clearly conveyed to the Union that the Respondent pleaded an inability to pay for its continued operation as a justification for its requested concessions. Thus, when considered in their entirety and as reasonably interpreted, the statements made by the Respondent and its bargaining posture constituted a claim of inability to pay which triggered an obligation by the Respondent to provide the Union with the requested information.

In this respect, in *Cowin & Co.,* 277 NLRB 802 fn. 1 (1985) is instructive. In finding that the employer expressed an inability to pay, the Board noted that the employer stated that there was a "real question of whether we shall be in business at the termination of this contract unless prior contractual concepts are radically changed." The employer also "raised as justifications for its wage reduction proposals its financial losses for the previous 3 years."

Stroehmann Bakeries, Inc., 318 NLRB 1069, 1078–1079 (1995), is similar on its facts to this case. Stroehmann, a bakery company, was a subsidiary of Weston Foods. Both Stroehmann and Weston lost money from their operations due to reduced sales, falling prices of its products and rising prices of its ingredients. Nevertheless, Weston continued to fund Stroehmann's losses, but would not continue to do so without certain changes including a drastic reduction in wages and benefits in order to decrease its financial losses. The employer requested concessions to reduce its losses. The Board found that the employer based its contract proposals on financial hardship and an inability to pay, holding that where an employer "predicates its bargaining position as a matter of necessity by reason of current alleged financial losses, the bargaining union is entitled to information. . . ."

The Board noted the similarity between *Stroehmann* and *Steelworkers Local 5571 v. NLRB (Stanley-Artex Windows),* 401 F.2d 434, 436 (D.C. Cir. 1968), in which the employer asserted that although its parent corporation was making money, the employer involved was not and the employer had to stand on its own. The court held that the contention that the employer had to stand on its own and that it could not remain competitive if it granted the union's demands "puts ability to pay in issue," and the union's request for information to verify the employer's losses was upheld. Similarly here, the investors of the Respondent were not willing to fund its losses forever and, apparently, if the concessions sought were not agreed to, would invest their money elsewhere, thus leaving the Respondent without funds to operate.

In *Gas Spring Co*, 296 NLRB 84, 97 (1989), where the employer was liquid although unprofitable, the Board stated that "no matter what particular words have been said, when an employer has steadfastly relied on its own poor financial condition and projected injury to its business, it has been required to produce information to support its claim."

In *Shell Co*., 313 NLRB 133, 134 (1993), the Board found that the employer "effectively pleaded that it was presently unable to pay" when it told the union that economic conditions had affected the company "very seriously," and that its present circumstances were "bad" and a "matter of survival." As here, the employer advised the union of the steps it had already taken to cut its costs. The Board found that the "essential core of the

employer's bargaining posture as a whole, as expressed to the union, was grounded in assertions amounting to a claim that it could not economically afford the most recent contract at its . . . operation, that it was faced with a present threat to that operation's survival, and that, therefore, it was at present unable to pay those terms in the successor contract." The Board's finding in *Shell* that the employer claimed an inability to pay was further based on the "immediacy of the employer's claims concerning its operation's present survival and critical condition.

Similarly, in *Clemson Bros*., 290 NLRB 944, 944 (1988), the Board found that the employer, in telling the union that it had sustained large losses over four years and had to substantially reduce labor costs over the next three years "specifically linked its bargaining position to economic hardship" by its "repeated claims that, because of the plant's unprofitability, it needed concessions." The Board held that such claims amounted to an assertion of inability rather than unwillingness to pay. . . ."

In *Lakeland Bus Lines*, 335 NLRB 322, 323 (2001), the employer demanded a wage freeze and other concessions, saying that the acceptance of that offer would enable the employer to "bring the bottom line back into the black" so that employees may "retain your jobs," and that the employer's future "depends on it." The Board found that by these statements the employer "effectively communicated" and "reasonably conveyed" that the employer was losing money, was presently unprofitable, and was unable to afford anything more than that contained in its final offer. [9]

To the same effect in *Continental Winding Co.*, 305 NLRB 122, 125 (1991), the Board found that the employer "went beyond the expression of a mere unwillingness to pay wage increases . . . and effectively conveyed to the union that it could not at that time afford any increased labor costs. Continental's claim of inability to pay a wage increase was clearly grounded in its then-current financial situation, and its statements during bargaining plainly conveyed its then-inability to pay position."

The Respondent cites cases to the contrary, including *Nielsen Lithographing Co.,* 305 NLRB 697, 701 (1991), where the Board held that the *Truitt* obligation arises "only when the employer has signified that it is at present unable to pay proposed wages and benefits. In *Shell,* above, the Board distinguished *Nielsen* on the ground that the *Nielsen* employer stated that it was still making a profit and the thrust of its economic assertions related to its future economic competitiveness.

The Respondent also relies on *North Star Steel Co.,* 347 NLRB 1364 (2006), and *AMF Trucking & Warehousing*, 342 NLRB 1125, 1126 (2004). *AMF* involved a company which had purchased a business "in distress" and was "fighting to [stay] alive." In finding that no claim of present or future inability to pay had been made, the Board noted that the employer must be "incapable of meeting the union's demands, and 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." Further, the Board observed that the employer has "neither claimed insufficient assets nor stated that acquiescence to the union's demands would cause it to go out of business." Here, in contrast, it may fairly be said that if the Union did not agree to the Respondent's demand for concessions, the Respondent expressed that its investors would take their money elsewhere, and it would close.

It has been noted that the Board's decisions occasionally result in opposite conclusions on seemingly similar facts. *Richmond Times-Dispatch,* 345 NLRB 195, 202 fn. 4. (2005). "The Board cases in this area are difficult to reconcile." *Ameron Pipe Products,* 305 NLRB 105, 111 (1991); see also *Lakeland Bus*, above, 335 NLRB at fn.11, and the dissenting opinions in *Richmond Times-Dispatch*, *North Star Steel Co*., and *AMF Trucking,* above.

It is true that the Respondent claimed that it sought to reduce its labor costs in order to maximize its profits. Such a goal does not amount to an inability to pay unless the company "took the position that the concessions it sought were linked to [its losing money.]" *Georgia-Pacific Corp.,* 305 NLRB 112, 116 (1991). Here, it is clear that the Respondent made that connection. Thus, Jacoby told the Union that in order to reverse the losses the Employer was experiencing "we needed to address the restructuring of the labor costs[10] that we believed was needed together with a number of other actions . . . that were being taken and would . . . have to be taken to make this company a profitable company over a period of time" In addition, Hartong quoted Jacoby as saying that it would require a "collective effort" to make the Respondent profitable and viable. Thus, the Respondent sought the concessions it proposed in order to reduce its $1.5 million loss and become profitable.

Where the employer's "financial condition [is] a central issue in the negotiations, as it related to the economic proposals on which the parties could not agree" the documents supporting that condition must be produced. *Lakeland Bus*, above at 326.

I accordingly find and conclude that the Respondent, during negotiations for a new collective-bargaining agreement asserted, as justification for the concessions it sought, that it was financially unable to pay more in wages and benefits than it was offering.

Inasmuch as the Employer's claim that its sales were declining and that it lost money in 2007 was relied on by it in seeking concessions from the Union, the Union was justified in seeking documentation in order to decide whether it should agree to those concessions. Thus, financial documentation related to the economic condition of the company was relevant to the bargaining process.

Accordingly, I find that the Union justifiably sought the documentation of such losses for two reasons. It wanted to verify the Employer's claims of economic distress, and then use the documents to persuade its members that the concessions sought were based in fact if that were the case. Thus, they would be helpful for the Union to determine whether it should agree to the concessions requested.

[9] I am aware that the courts of appeals denied enforcement to the Board's decisions in *ConAgra*, *Stroehmann* and *Lakeland Bus*. However, I am bound by Board precedent and not court of appeals law, unless the Board's decision is overruled by the Supreme Court. *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963).

[10] Written as "labor cross" in the transcript.

III. DID THE RESPONDENT FAIL AND REFUSE TO FURNISH DOCUMENTS

The complaint alleges that on May 30, and throughout the negotiations, the Union requested that the Respondent verify its claim of financial inability to pay by providing the Union with documentation to support its bargaining position and economic proposal, and that the Respondent failed and refused to furnish the Union with the information requested.

It is undisputed that at the first bargaining session on May 30, Alston asked to see financial documentation as proof that the Respondent needed the concessions it sought. On June 4, Jacoby brought the Respondent's year ending 2007 audited financial statement to the bargaining session held that day. It is also undisputed that Jacoby offered to permit the Union's bargaining committee, its attorney and accountant to view the document at each of the following bargaining sessions, and offered to permit them to take an unlimited time to make notes of the document, but would not permit a copy of the document to be made. The Union declined the Employer's offer to have its attorney and accountant view the document at the bargaining sessions or at Jacoby's office or the plant.

It is also undisputed that Jacoby did not permit copies of the document to be made at any time and did not release the document to the Union or its agents until December, 2008, four months after the strike began when it sent it to the Union's accountant. It is further undisputed that Alston offered to sign a confidentiality agreement and Jacoby refused.

Accordingly, the question is whether the limitations placed on the Union's examination of the document was lawful. Specifically, whether the Respondent's refusal to permit the Union to take the document and have its experts copy it constitutes an unlawful failure and refusal to furnish the information. As set forth above, Alston and Williams, who were permitted to view the report, claimed that, as laypeople, they had no expertise in the examination or understanding of complex financial statements such as the one they were shown and therefore needed the advice of the Union's experts in interpreting the statement and determining whether it supported the Respondent's claim that it had been losing money in the past two years.

An employer is not obligated to furnish information in the exact form requested. When determining the lawfulness of the form and manner in which an employer provides information, the Board considers (a) the volume and nature of the information involved (b) whether furnishing photocopies would have given the union greater assurance of the accuracy and completeness of the information requested and (c) the comparative cost and convenience to the employer and the union of providing copies rather than note-taking. *American Telephone & Telegraph Co.*, 250 NLRB 47, 54 (1980). In addition, the nature of the information must be considered. Copies must be furnished where reports consisted of many pages that could not be assimilated in a brief review.

The Respondent's reliance on *Roadway Express*, 275 NLRB 1107, n. 4 (1985), and *Abercrombie & Fitch Co*., 206 NLRB 464 (1973) is misplaced. In both cases, the Board held that the employers were not required to furnish photocopies of brief documents consisting of a single-page customer letter which could be "easily read and understood in a matter of minutes," and 3-1/2 pages of uncomplicated records with on-premise examination and note-taking. Here, in contrast, the 19 pages of detailed, complex financial figures and closely written auditor's notes were not susceptible of such easy and quick comprehension.

Similarly, the Respondent's citation of *NLRB v. St. Joseph's Hospital*, 755 F.2d 260 (2d Cir. 1985), is inapplicable. That case held that an employer acted lawfully in establishing certain qualifications for the union's auditor who was to examine the employer's financial records. The union in *St. Joseph's* failed to cooperate with the employer in reaching an accommodation as to the qualifications of the records examiner. Here, in contrast, the Union offered to sign a confidentiality agreement, and I find that the Employer failed to present a reasonable explanation why it would not accept such an accommodation. See *Conagra, Inc*., 321 NLRB 944, 987 (1996), where the Board found that the employer failed to establish a need for a confidentiality agreement. The Union's efforts to satisfy the Employer's concerns are much greater here, where the Union offered to sign such an agreement.

The Union's agents are not accountants, nor are they familiar with complex financial documents. The document displayed consisted of 19 pages of financial figures and reports. In requesting a copy of the document, the Union acted reasonably. The 2007 financial statement contained complex information. Apparently recognizing this, Jacoby permitted the Union and its agents to take an unlimited amount of time to review it in person and take notes. Alston and Williams declined that offer upon the reasonable basis that they did not understand the meaning of the document and did not know which parts were important, or what to look for. They accordingly, properly asked that a copy be made and shown to the Union's attorney and accountant.

Clearly, the cost of copying the document was negligible. The benefit of the Union's professionals having possession of a copy was obvious. They could examine it in detail, verify the Employer's claims of financial distress and advise the Union on its bargaining approach. There was no legitimate reason as to why the Union's attorney or accountant should have to travel to the bargaining session, the plant or the Employer attorney's office to view the document and take notes.

I find no merit in the Respondent's arguments justifying its refusal to furnish a copy of the financial statement to the Union or its professional advisers. First, I cannot find, as argued by the Respondent, that the Union abandoned its request for the documents by not requesting such documents after the July 8 meeting. Alston credibly testified that she requested a copy of the document at each meeting. Indeed, after that time the Union's attorney made a request on December 4, pursuant to which a copy was sent to the Union's accountant.

In addition, although Alston at first agreed to have the Union's attorney or accountant visit Jacoby's office to view the document, she then understandably withdrew from that agreement, stating that the Union should not have to pay for their time in traveling to those locations.

In *Pennsylvania Power Co.,* 301 NLRB 1104, 1105 (1991), the Board held that where an employer alleges that certain requested information is confidential, it is "required to balance a

union's need for the information against any 'legitimate and substantial' confidentiality interests established by the employer. . . . The party asserting confidentiality has the burden of proof. Legitimate and substantial confidentiality and privacy claims will be upheld, but blanket claims of confidentiality will not. Further, a party refusing to supply information on confidentiality grounds has a duty to seek an accommodation."

Here, Jacoby refused to furnish a copy of the 2007 audited financial statement on the ground that the information contained therein was confidential, asserting that if the Employer's competitors, vendors and suppliers became aware of the Respondent's poor financial condition, they would cease dealing with it. These are legitimate concerns.

However, Alston agreed to sign a confidentiality agreement ensuring that the document would not be disclosed. Jacoby unreasonably refused to agree, citing the confidential nature of the information set forth therein. He gave no compelling reason why a confidentiality agreement would not suffice to satisfy the Employer's concerns. His stated reasons were that such agreements were hard to enforce, hard to prove, and it would be difficult to obtain damages for their breach. In *Facet Enterprises, Inc*., 290 NLRB 152, 165 (1988), the Board rejected the employer's restriction of the examination of certain information to its office or its accountant's office. The Board called the employer's defense "specious" since it offered no support for such a limitation including a refusal to agree to a confidentiality agreement signed by the union's attorneys. Here, there was no proof that the Union could not be expected to honor its proposed confidentiality agreement and upon rejecting its offer of such an agreement the Employer did not claim that it could not trust the Union. *Island Creek Coal Co*., 289 NLRB 851 fn. 1 (1988). That is an important factor in assessing the employer's confidentiality defense. *Reiss Viking*, 312 NLRB 622 fn. 4 (1993).

Moreover, the Respondent gave some of the same information contained in its audited financial statement to its entire workforce on the first day of bargaining, May 30, when it disclosed the financial summary page of its presentation. That document showed net sales of $24,057,000, total cost of goods sold of $19,611,000, gross margin of $4,446,000, operating expenses of $6,013,000, and a loss from operations of $1,567,000. As Hartong testified, such data was much more limited than that contained in the audited financial statement, but, at a minimum, the summary's release to the workforce served to show that not all the information in the financial statement was considered confidential by the Employer. In fact, the financial summary page shows the exact amount of its loss, the main item the Employer sought to conceal from its vendors, customers and competitors.

Finally, I reject the Respondent's argument that the Union waived its request for the information by stating that it would proceed with bargaining even though it did not receive a copy of the financial statement. Alston testified as to the reality of bargaining—the Union sought to reach agreement on a new contract to replace the one that had already expired. She understandably would not withdraw from bargaining because the Union did not receive a copy of the financial statement. By continuing to bargain the Union did not waive its request for the information that it requested. I further find, as alleged in the complaint, that the information requested was necessary for, and relevant to, the Union's performance of its duties as the collective-bargaining representative of the unit employees. The information related directly to a critical issue in bargaining—proof of the Respondent's alleged inability to pay.

I accordingly find and conclude that the Respondent unlawfully failed and refused to provide the requested information to the Union by refusing to supply a copy of its 2007 audited financial statement.

IV. WAS THERE A VALID IMPASSE

The complaint alleges that, by letter of August 27, the Respondent unlawfully declared impasse, unilaterally implemented a wage schedule, and stopped contributing to the Union Health Fund for the unit employees.

As set forth above, on August 27, the Employer sent a letter to the Union and the employees which stated that "in light of the continuing impasse in negotiations, and the strike which has been ongoing for two weeks, the Company has decided to proceed with implementation, effective immediately, of changes in terms and conditions of employment consistent with its last offer as presented at the bargaining session on July 23. . . ." The letter also stated that health benefits would be provided through an Employer plan as presented at the July 22 session, and that the language changes in the contract presented on July 8 would also be implemented.

Inasmuch as I have found, above, that the Respondent has claimed an inability to pay and has unlawfully failed to furnish information to the Union by refusing to provide it with a copy of its 2007 audited financial statement, it therefore follows that no valid impasse in bargaining has taken place. In a *Truitt* case, the Board found that the employer's "refusal to bargain in good faith by not providing the union with requested information meant that no genuine impasse was reached in the negotiations between the parties. Consequently, the respondent was not free to unilaterally implement the changes it made in its employees' wages and other terms and conditions of employment. In doing so the respondent violated Section 8(a)(5) and (1) of the Act." *United Stockyards Corp*., 293 NLRB 1, 3 (1989).

In *Wilshire Plaza Hotel,* 353 NLRB 304, 305 (2008), the Board held that "[A] finding of valid impasse is precluded where the employer has failed to supply requested information relevant to the core issues separating the parties." *Caldwell Mfg. Co.,* 346 NLRB 1159, 1170 (2006). Here, the Union sought information relating to the Employer's financial condition in order to satisfy itself and its members that the Employer was indeed justified in requesting that the Union agree to concessions in wages and benefits. The parties were not able to agree to the economic terms and conditions of a new contract. If the Union was provided with a copy of the requested 2007 audited financial statement it may have amended its bargaining position. Accordingly, the requested statement was related to the core economic issues separating the parties.

It has been long held that an employer fails to meet its statutory obligation to bargain in good faith when, absent an impasse in negotiations, it changes employees' terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736, 742–743

(1962). Inasmuch as no valid impasse could be reached since the Employer did not provide the Union with a copy of its financial statement, the Employer was not free to impose the changes in working conditions set forth in its August 27 letter.

I accordingly find and conclude that no valid impasse in negotiations was reached, and the Employer unlawfully implemented certain changes in its employees' terms and conditions of employment.

V. WAS THE STRIKE AN UNFAIR LABOR PRACTICE STRIKE

The complaint alleges that the employees' strike was caused by the Respondent's failure and refusal to furnish the information as set forth above.

It has been long held that a strike is an unfair labor practice strike where the unfair labor practices were a "contributing cause" of the strike. *Larend Leisurelies v. NLRB*, 523 F.2d 814, 820 (6th Cir. 1975). The Board stated that the "correct test" is whether the strike is "caused in whole or in part" by an unfair labor practice; whether the strike "was at least in part the direct result of the employer's unfair labor practices"; and whether the employer's unlawful conduct "played a part in the decision to strike." *Boydston Electric*, 331 NLRB 1450, 1452 (2000).

I credit Alston's testimony that she told the workers in detail at the July 26 Union meeting that the Employer refused to supply a copy of the requested financial document. Employees Filippou and Kahssay corroborated such testimony, noting that Alston told the employees that the Employer refused to permit the Union to take the books to its office to examine them. Williams, on the other hand, testified that Alston said that she never had an opportunity to look at the report. Of course, Alston did view the document at the bargaining session. However, Williams also noted that Alston said that she had nothing to show the workers regarding the Employer's claimed losses. That statement was correct in that she did not have a copy of the financial statement to show the employees.

The Respondent argues that the Union's flyers distributed after the strike began establish that the reason for the strike was not related to the Respondent's alleged refusal to provide financial documentation. As set forth in the flyers, above, the strike was caused by the "unreasonable and unethical concessions" demanded by the Employer. Further, the strike signs did not refer to the refusal of the Employer to provide a copy of the statement to the Union. The Board has held that "the absence of picket sign language stating that the strike was in protest of an unfair labor practice does not establish that unlawful conduct was not a cause of the strike." *Child Development Council of Northeastern Pennsylvania*, 316 NLRB 1145 fn. 7 (1995). It has also been noted that picket sign legends are "aimed at generating the broadest possible support for a labor organization's strike activity. They are a form of advertising. . . ." *Decker Coal Co*., 301 NLRB 729, 748 (1991). In an appeal for "public sympathy it was only natural that the union would emphasize the economic issues involved in the negotiations, rather than respondent's failure to [supply information]—an issue which might appear to be of little, if any, significance to the general public." *Lifetime Door Co.,* 179 NLRB 518, 523 (1969).

I find that the Respondent's position of being unable to pay and failure to produce proof that it was unable to grant increases and needed concessions constituted a substantial cause of the strike. *Gas Spring*, above at 100; *Genstar Stone Products*, 317 NLRB 1293, 1294 (1995), where the Board found that the employer was "seeking substantial concessions from the union in the area of health care. It became a major dividing point in negotiations. Further, union officials informed the membership immediately prior to the . . . strike vote that the respondent was bargaining in bad faith by failing to provide the requested information. In these circumstances, we find that there was a causal relationship between the respondent's unfair labor practices and the strike."

Accordingly, I find that immediately prior to the strike vote, Alston informed the employees of the Respondent's failure to provide the information requested in a form that could be utilized by the Union. Therefore a causal relationship existed between the advice give to the workers of the Respondent's unfair labor practice and the strike. Inasmuch as the Respondent's failure to provide a copy of its financial statement was an unfair labor practice, it therefore follows that the strike was an unfair labor practice strike from its inception.

The Respondent argues that the Union would have struck even if it had furnished a copy of its financial statement. However, I find that what prevented progress in the negotiations was the Union's inability to present a copy of the Employer's financial statement to the Union's accountant and attorney for their examination and report as to whether the Employer justifiably demanded the concessions sought. If the Union had that document and its experts concluded that the Respondent's financial situation required some or all of the concessions demanded, the Union's bargaining position may have been altered, agreement reached and a strike avoided.

VI. WAS THE OFFER TO RETURN TO WORK AN UNCONDITIONAL OFFER

Finally, it is alleged that on May 1, 2009, the Union made an unconditional offer to return to work on behalf of the striking employees and that since May 6, the Respondent failed and refused to reinstate the employees to their former positions of employment.

"Under well-established Board law, an employer is required to reinstate unfair labor practice strikers upon their unconditional offer to return to work." *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956); *NLRB v. Koenig Iron Works, Inc.,* 681 F.2d 130, 145 (2d Cir. 1982); *Boydston Electric,* above at 1453.

Accordingly, an employer violates Section 8(a)(3) and (1) of the Act when it fails to offer immediate reinstatement to unfair labor practice strikers who have communicated to it their unconditional offers to return to work. *NLRB v. Fleetwood Trailer Co*., 389 U.S. 375, 378 (1967); *NLRB v. Glover Bottled Gas Corp*., 905 F.2d 681, 686 (2d Cir. 1990).

As set forth above, the Union offered to return to work under the terms of the expired collective-bargaining agreement. The Respondent rejected the offer on the grounds that it was ineffective and conditional because it insisted that the returning employees work under the same wages and working conditions that were in effect at the time the employees began their strike.

In identical circumstances, the Board found that such an offer is unconditional where the employer unlawfully implemented new terms and conditions, and the unfair labor strikers offered to return to work under the "terms and conditions that existed under the expired collective bargaining agreement." The Board stated that "an employer's offer to reinstate unfair labor practice strikers based on terms and conditions that have been unlawfully imposed is not a valid offer." The Board held that the employees' offer to return to work under the expired contract's terms was a valid unconditional offer. *Spentonbush/Red Star Cos.,* 319 NLRB 988, 990 (1995); *Alwin Mfg. Co.,* 326 NLRB 646 fn. 2 (1998). *Western Equipment Co*., 152 NLRB 1014, 1015–1016 (1965).

The Board's decision in *Spentonbush* is supported by well-settled principles that once unfair labor practice strikers offer to end their strike they are entitled to reinstatement to their original, substantially equivalent, terms of employment. That applies to cases where, as here, the employer's unlawful changes were made after the employees began their strike. *Brooks, Inc.*, 228 NLRB 1365, 1368 (1977). Here, the Union simply insisted on what the employees were legally entitled to—the restoration of the terms and conditions that existed prior to the Employer's unlawful declaration of impasse.

Accordingly, I find that the Union's offer in behalf of the employees to return to work under the terms and conditions in the expired contract was unconditional and that the Respondent was required to immediately reinstate them under the terms of that contract. *Spentonbush, above* at 990. By refusing the Union's unconditional offer, the Respondent violated Section 8(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. By failing and refusing to provide the Union with a copy of its 2007 audited financial statement, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. By unlawfully declaring impasse on August 27, 2008 and unilaterally implementing its own terms and conditions of employment, the Respondent violated Section 8(a)(5) and (1) of the Act.

3. The strike which commenced on August 14, 2008, was caused at least in part by the Respondent's unfair labor practices as set forth in paragraph 1, above.

4. An unconditional offer to return to work was made by the Union on May 1, 2009, on behalf of all the unfair labor practice strikers.

5. By, since May 1, 2009, failing and refusing to offer to reinstate the employees who engaged in an unfair labor practice strike, the Respondent has violated Section 8(a)(3) and (1) of the Act.

REMEDY

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

I shall order that the Respondent be ordered to provide the Union with a copy of its 2007 audited financial report.

I shall also order that the Respondent immediately and unconditionally reinstate all employees who participated in the unfair labor practice strike which began on August 14, 2008, and make them whole for any loss of earnings and other benefits from and after May 6, 2009, the date of receipt of their unconditional offer to return to work, with backpay and interest thereon computed on a quarterly basis as prescribed in *Ogle Protection Service,* 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Inasmuch as I have found that the Respondent's unlawful refusal to provide the Union with information precluded a lawful impasse, and that therefore the Respondent was not free to impose its own terms and conditions of employment on August 27, 2008, I shall also order that the Respondent restore all the terms and conditions in the contract that expired on June 29, 2008, and which was extended to July 31, 2008.

The General Counsel seeks compound interest computed on a quarterly basis for any monetary awards. I deny this request since the Board has not adopted such a remedy, adhering to its current practice of assessing simple interest. *Cox Ohio Publishing*, 354 NLRB No. 32, slip op. at 4 fn. 5 (2009); *Glen Rock Ham*, 352 NLRB 516 fn. 1 (2008).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Stella D'oro Biscuit Company, Inc., Bronx, New York , its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain, on request, with Local 50, Bakery, Confectionery, Tobacco Workers and Grain Millers International, AFL–CIO, by not promptly complying with the Union's request for information necessary and relevant to the performance of its duties as the exclusive collective-bargaining representative of the unit employees, including providing a copy of its 2007 audited financial statement to the Union.

(b) Unilaterally implementing the terms and conditions of employment set forth in its letter dated August 27, 2008, without a valid impasse in bargaining having been reached.

(c) Failing or refusing to immediately reinstate employees engaged in an unfair labor practice strike upon receipt of their unconditional offer to return to work.

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

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

[11] 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.

(a) On request, bargain in good faith with the Union as the exclusive representative of the employees.

(b) Supply to the Union a copy of the Employer's 2007 audited financial statement.

(c) Restore, maintain, and give full effect to the terms and conditions of employment provided in the contract which expired on June 29, 2008 and which was extended to July 31, 2008, rescinding all changes made on and since July 31, 2008.

(d) Make whole the unit employees for any loss of earnings and other benefits suffered as a result of the unlawful unilateral implementation of terms and conditions of employment set forth in its letter dated August 27, 2008.

(e) Offer immediate and unconditional reinstatement to all employees who participated in the unfair labor practice strike which commended on August 14, 2008. Such reinstatement shall be to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, displacing, if necessary, any employees hired as replacements for them.

(f) Make whole each of the unfair labor practice strikers for losses they incurred by reason of their not having been reinstated on May 6, 2009, with interest thereon computed in the manner set forth in the remedy section of the decision, and by making payments on their behalf to the trust funds provided for in the 2005–2008 collective-bargaining agreement.

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

(h) Within 14 days after service by the Region, post at its facility in the Bronx, New York, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 30, 2008.

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

Dated, Washington, D.C. June 30, 2009

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

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain, on request, with Local 50, Bakery, Confectionery, Tobacco Workers and Grain Millers International, AFL–CIO, by not promptly complying with the Union's request for information necessary and relevant to the performance of its duties as the exclusive collective-bargaining representative of the unit employees, including providing a copy of its 2007 audited financial statement to the Union.

WE WILL NOT unilaterally implement the terms and conditions of employment set forth in our letter dated August 27, 2008, without a valid impasse in bargaining having been reached.

WE WILL NOT fail or refuse to immediately reinstate employees engaged in an unfair labor practice strike upon receipt of their unconditional offer to return to work.

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

WE WILL on request, bargain in good faith with the Union as the exclusive representative of our employees in the collective-bargaining unit represented by the Union.

WE WILL supply to the Union a copy of our 2007 audited financial statement.

WE WILL restore, maintain, and give full effect to the terms and conditions of employment provided in the contract which expired on June 29, 2008 and which was extended to July 31, 2008, rescinding all changes made on and since July 31, 2008.

WE WILL make whole our unit employees for any loss of earnings and other benefits suffered as a result of our unlawful unilateral implementation of terms and conditions of employment set forth in our letter dated August 27, 2008.

WE WILL offer immediate and unconditional reinstatement to all employees who participated in the unfair labor practice strike which commenced on August 14, 2008. Such reinstatement shall be to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously en-

joyed. We will displace, if necessary, any employees hired as replacements for them.

WE WILL make whole each of the unfair labor practice strikers for losses they incurred by reason of their not having been reinstated on May 6, 2009, with interest thereon, and make payments on their behalf to the trust funds provided for in the 2005–2008 collective-bargaining agreement.

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

STELLA D'ORO BISCUIT COMPANY, INC.