

R.E.C. Corporation and District Lodge No. 15 of the International Association of Machinists and Aerospace Workers, AFL-CIO. Case 2-CA-24027

April 28, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On June 4, 1991, Administrative Law Judge Steven B. Fish issued the attached decision. The Respondent and the Charging Party filed exceptions and supporting briefs.

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 and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, R.E.C. Corporation, Mount Vernon, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹The Respondent excepts to the judge's finding that it was unaware of the identity of the union auditor until March 1990, rather than December 1989. We find this fact irrelevant as the Respondent never questioned the Union, at any time, concerning the auditor's competence or qualifications.

Geoffrey E. Dunham, Esq. and David E. Leach, Esq., for the General Counsel.

Robert Brinker, of Mount Vernon, New York, for the Respondent.

Larry Cary, Esq. (Vladeck, Waldman, Elias & Englehard, P. C.), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN B. FISH, Administrative Law Judge. Pursuant to charges filed by District Lodge No. 15 of the International Association of Machinists and Aerospace Workers, AFL-CIO (the Union), on December 21, 1989,¹ the Regional Director for Region 2 issued a complaint and notice of hearing on March 28, 1990. The complaint alleges that R.E.C. Corporation (Respondent) has violated Section 8(a)(1) and (5) of the Act by, in substance, refusing to permit the Union to inspect its financial books and records.

The trial with respect to the issues raised in the complaint was held before me on October 10, 1990, in New York, New

¹All dates hereinafter are in 1989 unless otherwise indicated.

York. Briefs have been received from all parties, and have been carefully considered.

On the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a New York corporation with an office and place of business in Mount Vernon, New York, where it is engaged in the manufacture and nonretail sale of industrial fasteners.

Annually, Respondent sells and ships from its facility products, goods, and materials valued in excess of \$50,000 directly to firms located outside the State of New York. It is admitted and I so find that Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted and I find that the Union is a labor organization within the meaning of the Act.

II. PRIOR RELATED CASES

A. *R.E.C. Corporation (R.E.C. I) Case 2-CA-20864*

On December 17, 1985, the Board issued a Decision and Order in the above case (277 NLRB 1107) finding that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to execute a collective-bargaining agreement, the terms of which it had agreed to with the Union on December 20, 1984.² Respondent was ordered to execute, on request the contract to which the parties had agreed, which ran from December 21, 1984, to September 30, 1987. Respondent was also ordered to give retroactive effect to the agreement, and reimburse employees for wages or benefits owed plus interest.

B. *R.E.C. Corporation (R.E.C. II) Cases 2-CA-22108, 2-CA-22658*

On October 11, 1989, the Board issued a Decision and Order in the above-entitled cases (296 NLRB 1293 (1989)), finding that Respondent violated Section 8(a)(1) and (5) of the Act by laying off employees in retaliation for rejecting Respondent's contract modification proposals, ceasing to make payments to the union welfare and pension funds, failing to pay wages specified in the contract, failing to remit union dues, implementing various other unilateral changes in terms of employment of its employees, dealing directly with unit employees and bypassing the Union, and demanding as a condition of consummating a collective-bargaining agreement that the Union agree to a retroactive midterm modification of the prior contract.

The decision found that Respondent as of October 1, 1986 (in an attempt to pressure the Union to agree to modifications of the contract), unilaterally began to fail to make pension and welfare contributions and did not grant a wage in-

²It was found that Respondent refused to sign the contract because the shop steward had refused to execute a retirement letter to which he had allegedly agreed. The Board concluded that Respondent could not lawfully refuse to sign the contract on this basis.

crease provided for in the contract,³ and continued to fail to make such payments past the expiration date of the agreement.⁴

The Board ordered that Respondent abide by the terms of the prior contract, and make whole the employees for any loss of pay and benefits including payments into the Union's funds, from the date of the unilateral changes until a new contract is reached or good-faith bargaining leads to impasse.

III. FACTS

Shortly after the issuance of the Board's decision in *R.E.C. II*, Larry Cary, the Union's attorney, telephoned Robert Brinker, Respondent's president, to arrange a meeting for bargaining concerning a contract. Pursuant thereto, a meeting was scheduled and held on December 1, at Cary's office. Joe Armao, business representative for the Union, was present, along with Cary and Brinker.

Cary began the meeting by asserting that he hoped that the parties could put the years of litigation between the parties behind them and sit down and negotiate a contract. The Union then presented Brinker with a list of its proposals for a new agreement, which included a wage increase of \$1 per hour per employee, and increases in employer contributions to the Union's welfare and pension funds.

The parties discussed the Union's proposals in some detail, after which Brinker presented counterproposals on behalf of Respondent.

These proposals included a request for a wage reduction of \$1.20 per hour per employee from current wages, in the first year of the contract. The parties proceeded to discuss all of Respondent's proposals, with particular emphasis on its demand for a wage reduction. Cary asked Brinker why Respondent needed to reduce the wages. Brinker replied that he would be willing to explain why, but he demanded that the Union make a request for an explanation in writing. Cary responded that he didn't understand why it was necessary to make a written request for an explanation of Respondent's position, but stated that as an accommodation and courtesy to Brinker, he would do so. Cary then tore a piece of paper from his yellow pad, and wrote out a request for an explanation of Respondent's basis for proposing a reduction.

After reading the request, Brinker cited three reasons for Respondent's proposal to reduce wages. They were: (1) general downturn in the capital industry, including a substantial reduction in the amount of business done with one particular customer, (2) Respondent's bank had called a \$500,000 note, and (3) Respondent's estimate that it owed \$100,000 as a result of the NLRB decision in *R.E.C. II*.

Cary asked twice if what Brinker was saying was that Respondent could not afford to either grant a wage increase or maintain current wages. Brinker twice responded yes that is what he was saying. Cary then told Brinker that the Union might want to send in an auditor to verify the truthfulness of Respondent's assertion of an inability to pay.

Brinker replied that he would provide the Union with Respondent's financial statements for the 3 previous years,

which were uncertified, plus certified financial statements for the 3 years previous to those 2 years. Cary answered that the uncertified statements for the past 2 years would not be sufficient for the Union to verify the truthfulness of Respondent's assertions, since Brinker himself had prepared these documents. Cary added that the Union had information that Respondent was paying some employees with checks drawn on a different corporate name, and there had been testimony during the earlier trial that Respondent paid some employees in cash. Thus, Cary asserted that because of the "looseness" in paying employees, and given the uncertified nature of the financial records, he would not accept those documents as proof of Respondent's inability to pay.

Brinker responded that he might consider a request for an auditor to look at his records if the Union would pay for the audit. The discussion then turned to the other items in Respondent's proposal.

The parties subsequently returned to the request for a pay cut, and the Union's request for an audit. Again, Brinker asserted that he would consider it, if the Union paid for the auditor. Cary then asked for a caucus.

During the caucus, Cary asked Armao if the Union was willing to pay for an auditor. Armao replied that the Union would pay for an auditor if necessary, and told Cary that the Union uses an accounting firm where his son, Sal Armao, was employed to perform such services.

After the caucus, Cary informed Brinker that the Union did wish to audit Respondent's records and was willing to pay for the auditor. Initially, Brinker responded that he would refuse to permit an audit, but then asserted that he would consider the request if the Union made the request in writing. Cary replied that he didn't think that Brinker had the right to demand that the Union make the request in writing, but as a courtesy he would make the request in writing. Brinker then changed his position again, and reverted to asserting that he would refuse to permit an audit.

Brinker then asked to continue discussing the rest of the proposals. Cary explained that since Respondent was stating quite clearly that it could not afford to maintain current wages, before the Union could discuss Respondent's proposals, it was necessary to verify the truth of Respondent's financial inability to pay and the Union needed to do an audit. The meeting concluded on that note. There was no discussion at the bargaining session between the parties concerning who the Union would use as the auditor, nor was there any mention of Sal Armao at that time. Shortly after the meeting, Cary called Sal Armao and asked what kinds of records he would need to have access to, in order to perform an audit, particularly where there was a possibility of employees being paid out of a different corporate account. Pursuant to Armao's responses, Cary prepared a letter to Brinker, dated December 12. This letter after summarizing the events at the December 1 meeting, makes the request that Respondent permit the Union to audit its records. The letter requests that "our auditor be given your financial statements and access to any and all books and records or original entity [sic], including if they exist the general ledger, sales journals, purchase journals and records of cash receipts and of cash disbursements, all bank statements and canceled checks of REC Corporation, as well as copies of corporate tax returns and payroll tax returns. This request should be considered by you to run to any other entity by another name through which

³The contract involved was apparently the collective-bargaining agreement that Respondent was ordered to sign in *R.E.C. I*, which was executed on March 13, 1986.

⁴The parties had agreed to extend the contract to October 10, 1987.

you are conducting the business of R.E.C. Corporation.” The letter further indicates that the Union’s auditor is available to conduct an audit on January 8, 1990, and is expected to need 10 business days at the Respondent’s premises to complete the audit.

Respondent replied by letter dated December 15, 1989. The letter stated, “R.E.C. will not permit your auditor to examine R.E.C.’s books.” The letter also requested that the Union reconsider its position not to change its demands without looking at the books, and asked to continue negotiations.

On December 21, the Union filed its charge with the Board in the instant case, alleging that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to agree to allow the Union’s auditor to examine Respondent’s books and records.

On January 2, 1990, Respondent filed a charge against the Union in Case 2–CB–13076, alleging that the Union has violated Section 8(b)(3) of the Act, by refusing to continue negotiations with Respondent. The charge asserts that the Union at the December 1 meeting, “demanded as a condition of bargaining that the Union be permitted to examine R.E.C.’s books.” Robert Brinker, president of R.E.C. rejected the Union’s demand.

The charge further refers to the December letters between the parties, characterizing the Union’s letter as “requesting that the Union audit R.E.C.’s books,” and Respondent’s reply as “rejecting his request.”⁵

On or about March 2, 1990, Brinker telephoned Cary, and asked if Sal Armao⁶ was Joe Armao’s son. Cary acknowledged this fact and added that the accounting firm for whom Sal Armao works, does work for the Union. Brinker asked if Sal Armao was the accountant for the Union’s pension fund. Cary replied that he had no idea.

Brinker then informed Cary that he did not “trust” Joe Armao’s son, and he did not like the idea of Sal Armao performing an audit on Respondent’s records. Brinker told Cary that he wanted the Union to agree to use a “different” auditor. Cary responded that he would discuss the matter with the Union. Cary did so, and the Union decided that there was no point in getting into a discussion about what auditor would be permitted by Respondent, and that it would not negotiate with Respondent over which accountant to use. Since Respondent had raised no questions about the competence or ability of Sal Armao to act as an accountant, Cary and the Union felt that Respondent had no right to tell the Union whom it could use as an auditor.

Brinker then sent a letter to Cary, dated March 5, in which he purports to summarize that March 2 telephone conversation. Brinker asserts therein his position on an audit, that he would not let a “*Union auditor*” look at his books, because a *union audit* would not “be an objective and fair audit.

On March 29, 1990, Respondent further clarified its position on the issue. This letter reads as follows:

Dear Larry:

After our phone call yesterday I felt that a misunderstanding existed between us about R.E.C.’s willingness

⁵ Although this charge was not introduced into the record, it is appropriate to and I shall take official notice of such charge. Cf. *Advertisers Mfg. Co.*, 275 NLRB 100, 102 (1985).

⁶ Cary’s December 12, 1989 letter to Brinker, listed Sal Armao as the recipient of a carbon copy of the letter.

to have its financial statements audited. Let me try again to make our position clear.

R.E.C. has been and is willing to provide you with annual profit/loss statements and balance sheets. If you wish to have these statements audited R.E.C. has been and is willing to consider having the financial information audited by a mutually acceptable *independent* public accountant at your expense.

I’m sorry if you thought I mislead you on this matter; but my concern (which I gather you did not recognize) is that I do not consider the business agent’s son as an independent and unbiased auditor. I refuse to let him audit R.E.C.’s books because his audit may not reflect the true financial condition of R.E.C.

Once again I request that you meet with me to try to resolve the problem of finding a way to have R.E.C.’s hourly employees receive a wage increase. Also I would like to try to negotiate a new labor agreement with the Machinists. These things cannot be done if you refuse to meet with me.

Please call me. Thank you.

Very truly yours,
Robert S. Brinker

The instant complaint was issued on March 28, 1990. On September 4, 1990, Brinker sent another letter to Cary, repeating Respondent’s offer to meet and bargain with the Union. The letter also refers to the question of supplying information. After offering its uncertified financial statements as he had previously, Brinker again discussed the question of an audit. The letter states, “If you require more financial information and/or substantiation of the statements R.E.C. will be glad to supply to an independent mutually acceptable public accountant all the information that he would require to do a review of our financial statements.”

Cary responded by letter dated September 19, 1990. He recounted the history of Respondent’s December refusal to permit the Union’s auditor to examine Respondent’s books and referred to its March 5, 1990 letter wherein Brinker asserted that he did not consider the Union’s auditor to be objective and fair. Cary observed that apart from this assertion, Brinker did not add a single fact to establish that the auditor selected by the Union was not professionally qualified, and that Brinker did not ask about the auditor’s professional qualifications.

Thus, Cary continued to insist that the Union be free to select its own auditor, and offered to make such an auditor available. Cary also reiterated the Union’s position that until its auditor has had the opportunity to verify Respondent’s assertions about its financial conditions, the Union cannot rely upon its unaudited financial statements, and Respondent’s word that it must lower wages as proposed at the December 1, 1989 session. Thus, Cary concludes by again urging Respondent to permit “our audit.”

IV. ANALYSIS

It is well settled that an employer has a statutory obligation to provide a union with relevant information that the union needs for the proper performance of its duties as a collective-bargaining representative. *NLRB v. Acme Industrial*, 385 U.S. 431 (1967); *Doubarn Sheet Metal*, 243 NLRB 821, 823 (1979). It is equally well established that where an em-

ployer, 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 supply relevant information, requires the employer to provide, on request, financial information to the union to substantiate its claim. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Clemson Bros.*, 290 NLRB 944 (1988).

However, the union's interest in arguably relevant information does not always predominate over all other interests. There are situations where an employer may be justified in limiting or conditioning the disclosure of otherwise relevant information. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); *Yakima Frozen Foods*, 130 NLRB 1269, 1273 (1960), enf. in pertinent part 316 F.2d 389 (D.C. Cir. 1963).

In evaluating a requested condition, the important question to be decided is whether the employer has asserted a legitimate and substantial justification for limiting the disclosure. *Detroit Edison*, supra; *Plough, Inc.*, 262 NLRB 1095, 1096 (1982). The party asserting the need for the limitation or condition has the burden of proof on that question. *Washington Gas Light Co.*, 273 NLRB 116, 117 (1984); *Boise Cascade Co.*, 279 NLRB 422, 431 (1986); *McDonnell Douglas Corp.*, 224 NLRB 881, 890 (1976).

An equally well-established principle holds that "in the absence of special circumstances, an employer does not have the right of choice either affirmative or negative as to who is to represent employees for any of the purposes of collective bargaining." *Oates Bros.*, 135 NLRB 1295, 1297 (1962); *Procter & Gamble Mfg. Co.*, 237 NLRB 747, 751 (1978). Thus, in order to justify its refusal to meet and bargain with a particular individual, an employer must present persuasive evidence that the presence of that individual would result in such "ill will" or "conflict of interest as to make good faith bargaining impractical." *Teamsters Local 70 (Kockos Bros.)*, 183 NLRB 1330 (1970); *General Electric v. NLRB*, 412 F.2d 512, 517 (2d Cir. 1969); *KDEN Broadcasting Co.*, 225 NLRB 25, 35 (1976). This line of cases has been applied in cases involving an employer's purported conditions on supplying information under *Truitt*. *St. Joseph's Hospital*, 269 NLRB 862, 866 (1984), enf. denied 755 F.2d 260 (2d Cir. 1985); *Facet Enterprises*, 290 NLRB 152 (1988).

Moreover, it is also clear that an unreasonable delay in furnishing relevant information can be as much of a violation as a refusal to furnish the information at all. *Tubari Ltd.*, 299 NLRB 1223 (1990); *Valley Inventory Service*, 295 NLRB 900 (1989); *Globe Gear Co.*, 189 NLRB 422, 424 (1971).

Turning to the facts herein, Respondent concedes and the record fully supports that it has pleaded an inability to pay, in support of its refusal to agree to the Union's demands, and its own request to reduce wages. Thus, the issue to be determined is whether Respondent complied with its obligations under *Truitt* to relevant information to the Union to substantiate its bargaining position.

Respondent argues initially that on December 1 it offered to supply the Union with information adequate to support its claim of financial inability to pay. *Albany Garage*, 126 NLRB 417, 418 (1960). I do not agree.

While Respondent did offer to supply the Union its financial statements for the past 5 years, these statements for the past 2 years were not certified, and more importantly, were prepared by Brinker himself. The Union refused to accept

these statements as proof of Respondent's inability to pay and insisted on having an audit performed on Respondent's records. Cary explained that the Union had information that Respondent was paying employees with checks drawn on a different corporate name, and testimony during the previous unfair labor practice trial had revealed that Respondent paid some employees in cash. In my view, the Union's legitimate concern for the "looseness" of Respondent's payment practices is more than sufficient grounds for it to insist on an audit of Respondent's records. Indeed even absent such evidence of financial "looseness" of employers, uncertified financial statements have not been deemed sufficient to meet the employers' obligations under *Truitt*. *American Model & Pattern*, 277 NLRB 176, 184 (1985); *Hiney Printing Co.*, 262 NLRB 157, 162 (1982); see also *Tony's Meats*, 211 NLRB 625, 626 (1974). (Employer must permit CPA to examine employer's records.)

Albany Garage, supra, cited by Respondent is clearly distinguishable. There the Board concluded that the employers had furnished the union financial statements, plus comparative profit and sales and profit statements; no question was ever issued regarding the accuracy of the financial information submitted by the union; these statements had been accepted as adequate by banks with which respondent did business and the Internal Revenue Service (IRS); and the union had been furnished in prior years with the same records and had never rejected such documents as inadequate. Here, the factors relied on by the Board in *Albany Garage* were not present. Most importantly, the Union did question the accuracy of the documents offered by Respondent, and in fact had reasonable grounds for making such a contention. Moreover, there is no evidence that these records had been accepted as adequate by the IRS or by any bank served by Respondent and the Union had never, as in *Albany Garage*, been satisfied with such documents in prior negotiations.

Accordingly, I conclude that Respondent has not satisfied its obligations under *Truitt* by its offer on December 1 to submit uncertified statements prepared by Brinker himself.

With respect to Respondent's response to the Union's demand for an audit, its position was somewhat ambiguous during the December 1 meeting. At first, Brinker refused the request, then asserted that he would consider it if he received a written request, and finally Brinker again asserted that he would not permit such an audit.

However, after the Union, as Respondent had demanded, made such a written request, dated December 12, Respondent unequivocally refused by its response dated December 15. I conclude that Brinker's statement in the letter, "R.E.C. will not permit your auditor to examine R.E.C.'s books," can have no other meaning in the instant circumstances. Respondent argues, however, that its position in December was the same as its position in March 1990, i.e., that it would not permit the business agent's son to conduct the audit. I find this contention untenable, and not supported by any record testimony or evidence.

Thus, while it is true that the Union did discuss in its caucus on December 1 that it might use Sal Armao as the auditor, it did not communicate this to Respondent at that time. Nor does the record contain any evidence that Respondent was aware of the Union's discussions in this regard or its possible intention to use Armao or the firm for whom Armao

works to audit Respondent's books.⁷ It is undisputed that Respondent made no reference to the Union's use of Armao as the auditor, either at the December meeting or in its December letter refusing the Union's request. Moreover, Respondent's unfair labor practice charge, filed in January 1990, states only that it rejected the Union's request to examine Respondent's books (while requesting that the Union continue bargaining), and made no reference to either the Union's use of Armao as the auditor, or any question about the identity of the auditor as a reason for Respondent's refusal.

Therefore, I conclude that Respondent by its letter of December 15 has refused to permit the Union to audit its records, and has thereby violated Section 8(a)(1) and (5) of the Act.

Subsequently, Brinker in a March 2 telephone conversation with Cary, for the first time objected to the Union's use of Sal Armao as the auditor and wanted the Union to agree to a "different" auditor. Whether or not this offer would be sufficient to meet Respondent's *Truitt* obligations, since it was made 3 months after the request was made (and after an initial refusal by Respondent), and no explanation was given for the delay, I conclude that Respondent's delay in offering to comply with its obligations was unreasonable and in further violation of Section 8(a)(1) and (5) of the Act. *Grey Line Scenic Tours*, 283 NLRB 58, 67-68 (1987) (delay of 2 months unreasonable); *Globe Gear*, supra at 424 (delay of 2 months plus 9 days unreasonable); *International Credit Service*, 240 NLRB 715, 718-719 (1979) (delay of 6 weeks unreasonable).

Turning to the legality of Respondent's position subsequent to March 1990, I note that whether the matter is construed as an attempt by Respondent to limit or condition the disclosure of otherwise relevant information, or to interfere with the Union's choice of representatives, Respondent faces a heavy burden of establishing the necessity for its limitation of the Union's rights. As noted, either the Respondent must establish "a legitimate and substantial justification for limiting disclosure" of the information to Sal Armao, *Detroit Edison*, supra; *Plough*, supra; *Washington Gas*, supra; *Boise Cascade*, supra, and/or present persuasive evidence that the presence of Sal Armao would result in such "ill will or conflict of interest as to make good faith bargaining impractical" *Kockos Bros.*, supra; *General Electric*, supra; *KDEN*, supra.

I conclude that Respondent has fallen far short of meeting either of the above-required justifications for its position. I note initially that Brinker did not testify, so he has not explained under oath Respondent's reasons for rejecting Sal Armao as the auditor. Respondent is content to rely on the evidence of record with respect to this issue, which consists of Brinker's statements and letters to Cary. Essentially, Respondent's position appears to be that it does not "trust" Sal Armao, since he is the business agent's son, to be an "independent and unbiased auditor." Thus, Respondent will not allow him to audit its books "because his audit may not reflect the true financial condition of R.E.C." Finally, Respondent offered to have its books audited by "a mutually acceptable independent public accountant."

Respondent argues in its brief that the use of Sal Armao as the auditor "has the potential for a gross misrepresentation of R.E.C.'s financial position. The business agent's son would clearly have a conflict of interest as he reviewed R.E.C.'s records." However, Respondent has adduced no evidence or facts to support its concern that Armao would be likely to misrepresent Respondent's financial position. Respondent's position is purely speculative and anticipatory. *KDEN*, supra at 35 (an employer cannot refuse to meet with a bargaining committee that included a managerial employee who had access to confidential records of the employer). See *Kockos*, supra at 1330 (Union violated the Act by refusing to meet with representative of the employer who had previously been president of the Union). See also *Milwhite Corp.*, 290 NLRB 1150, 1152 (1983) (an employer cannot refuse to meet with the president of the union, who is also an employee of competitor of employer). But cf. *Bausch & Lomb Optical Co.*, 108 NLRB 155 (1954) (an employer was justified in refusing to bargain with a union which established a company in direct competition with the employer).

Significantly, Respondent misperceives the rationale behind the *Truitt* requirement to produce records to substantiate a claim of inability to pay. The purpose of the auditor is not to act as a neutral arbitrator to adjudicate the differences between the parties. The auditor will act as an aid to the Union in attempting to verify the truthfulness of Respondent's claims of poverty. There would be no incentive for the Union to obtain inaccurate information about Respondent's finances. Respondent's purported fear that Sal Armao will "misrepresent" its financial condition makes no sense. It is in the Union's interest to receive accurate information as to Respondent's ability to grant increases and the necessity for it to reduce wages. Thus, it is only when the Union is in possession of such accurate and complete information, that it can make an intelligent decision as to whether to take economic action, to reduce its demands, to agree to Respondent's wage reductions, and/or to convince the employees in the unit of Respondent's precarious financial condition as a basis for such agreements. None of these decisions can be properly made by the Union, should its accountant "misrepresent" Respondent's financial situations. Therefore, I find absolutely no rational basis for Respondent's assumption that Armao would be likely to misrepresent Respondent's financial records.⁸

Respondent's reliance on *Yakima*, supra, in support of its position is misplaced. There, the Board concluded that the employer in that case could lawfully insist that its books and records be audited by "a qualified accountant not in the Union's general employ." However, in that case, the employer's representative had explained that he didn't wish to have the union agent present when its books were examined, because he was "afraid to let the Union know his sources of supply and his consignees for fear of secondary boycotts; but he believes that a licensed public accountant, a professional man, would not disclose confidential information." *Id.* at 1271. Indeed, as part of the conditions found reasonable by the Board, was the insistence by the employer that "no

⁷I note in this connection that Brinker did not testify herein.

⁸I would also note that Sal Armao as an accountant can be presumed to perform his job, absent evidence to the contrary, in a professional manner and in accordance with the ethical standards of the profession.

information pertaining to whom sales or from whom purchases were made be taken out of the office.” Id at 1270.

However, Respondent has expressed no such concerns in the instant case. It made no reference to any fear of secondary boycotts or any fears of the Union becoming aware of his customers or suppliers. It is thus clear that the reasonableness of the employer’s condition in *Yakima* of requiring an accountant not in the union’s general employ was based on these reasonable fears, and not as in the instant case, Respondent’s unreasonable belief that Armao or a “Union” accountant was likely to misrepresent Respondent’s financial records. Respondent has raised no question as to Armao’s qualifications, and in fact he is not in the Union’s general employ.

Moreover, I would also note that even applying the literal language of *Yakima*, Respondent’s position is not supported. Thus, the employer was permitted to insist on its books and records being audited by a qualified accountant not in the union’s general employ.

While there may be some circumstances where an employer may be permitted to insist on certain qualifications for an auditor to examine its records, *NLRB v. St. Joseph’s Hospital*, 755 F.2d 260 (2d Cir. 1985), generally the Board will defer to the union’s selection of who, what kind and the nature of the audit to be performed. *Facet Enterprises*, 290 NLRB 152 (1988). (An employer could not lawfully insist on a CPA selected by the union, but “approved” by the employer. An administrative law judge affirmed by the Board found this requirement to be tantamount a veto power proven over the union’s selection, and inconsistent with good-faith bargaining.) *Tama Meat Packing Co.*, 291 NLRB 657 (1988) (an employer may not lawfully insist on a full scale ACIPA audit); *American Meat Packing Co.*, 301 NLRB 835 (1991) (an employer may not condition audit on the union’s conducting an extensive and costly audit covering a period of 5 years).

See also *St. Joseph’s Hospital*, 269 NLRB 862 (1989), where the Board rejected an employer’s attempt to impose restrictions on the union’s choice of auditor, by insisting on the use of an accountant with sufficient expertise and experience in auditing hospitals, particularly with knowledge of the New York State reimbursement system. I am cognizant of the fact that *St. Joseph’s*, supra, was reversed by the Court of Appeals for the Second Circuit. See 755 F.2d 260. While noting of course that I am bound by the Board and not court precedent, *Gas Springs*, supra, and cases cited therein, the court’s decision in *St. Joseph’s* provides no solace or support for Respondent’s position herein. The court simply disagreed with the Board’s assessment of the necessity for expert qualifications imposed by the employer therein. The court also relied on what was viewed as a reasonable fear by the employer of labor strife should an inaccurate report be submitted to the union, and noted the legislative history of the health care amendments which demonstrated an overriding congressional concern that organizational activities not be allowed to disrupt health care. Id. at 264–265.

The opinion also relied on *Yakima*, supra, and its discussion of that case only reinforces my findings above as to the significance of that case. Thus, the court of appeals judge in *St. Joseph’s* emphasized that the employer’s conditions in *Yakima* were based on the fact that the “company was afraid to let the union know its sources of supplies and consignees

for fear of secondary boycotts, but believed that a licensed public accountant would not disclose such confidential information.” 755 F.2d at 264.

Here, as noted, on the contrary, Respondent has expressed no fear about letting the Union know about its customers or suppliers, or about secondary boycotts, but rested its opposition to the use of Armao solely on its fear that the alleged conflict of interest of Armao might lead to an inaccurate audit. Moreover, Respondent at no time expressed any qualms about Armao’s competence or qualifications, and indeed asked no questions about his ability to perform an audit. Therefore, since unlike in *St. Joseph’s*, there is no evidence of any special competence or knowledge required to audit Respondent’s books and records, and no congressional concern not to disrupt Respondent’s operations, *St. Joseph’s* and *Yakima* are simply not dispositive of the instant matter.

Finally, Respondent argues that the Union has been acting in bad faith by refusing to continue bargaining, and that Respondent has at all times been bargaining in good faith, as exemplified by its constant request to the Union to continue bargaining. I do not agree with either of Respondent’s contentions.

As far as the Union’s position is concerned, I find it perfectly reasonable and not indicative of bad faith for the Union to refuse to continue bargaining, until Respondent permits an audit of its books, under the instant circumstances. Respondent has entered negotiations by demanding a wage reduction of \$1.20 per hour, while the Union is seeking raises. Such a large gap in the positions of the parties, motivated by Respondent’s alleged financial problems, makes it reasonable if not essential, for the Union to be able to verify Respondent’s claims, before any fruitful bargaining can take place. Furthermore, as noted above, the Union was aware of evidence of Respondent’s involvement with another company and payments to employees in cash which leads to grounds for suspicion of Respondent’s good faith. Also, Respondent had twice before been found guilty of violations of refusals to bargain with the Union, as well as other unfair labor practices, which provide further support for the Union’s view that Brinker’s assertions during bargaining may be questionable, and that documentary support for these assertions are necessary before the Union can intelligently resume bargaining.

Additionally, Respondent’s contention that it has bargained in good faith at all times during the instant negotiations is also incorrect. Indeed, I have found that Respondent has unlawfully refused in December to supply requested information to the Union and to permit the Union to audit its records, and then unlawfully delayed for 3 more months, before it even made an offer to, albeit subject to conditions, to allow an audit of its records. Moreover, Respondent further demonstrated its bad faith by insisting, without explanation, that the Union request in writing that Respondent explain its reasons for seeking a wage cut, and then again demanding that the Union make another request in writing for an audit of Respondent’s records. Such demands by Respondent are hardly conducive to good-faith bargaining.

Therefore, I conclude that unlike the employers in *Yakima* and *St. Joseph’s*, Respondent did not seek to impose its conditions on the Union’s rights to obtain information, in the context of good-faith bargaining, which is further demonstra-

tive of the inapplicability of these cases as support for Respondent's actions.⁹

In sum, I conclude that Respondent has not met its burden of substantiating the necessity for its proposed limitations on the Union's admitted right to audit Respondent's records, and to do so with an auditor of the Union's own selection. Thus, Respondent has further violated Section 8(a)(1) and (5) by unlawfully conditioning the audit of its records in March 1990, and thereafter, on the Union's not using Sal Armao for that purpose.

THE REMEDY

Having found that Respondent has violated Section 8(a)(1) and (5) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action to effectuate the purposes of the Act.

The Charging Party observes that Respondent has been found guilty of unfair labor practices in *R.E.C. I* and *R.E.C. II*, as outlined above, as well as violating the law again in the instant matter. Therefore, the Charging Party argues that Respondent through Brinker "has evidenced a complete disregard for its obligations under the Act and a complete contempt for the Board's orders." Thus, the Charging Party requests that Respondent be ordered to reimburse the Union for its legal expenses in *R.E.C. I*, *R.E.C. II*, and the instant case.

However, Respondent's defense herein can hardly be described as "frivolous," particularly in view of *Yakima*, supra, which at least arguably supports Respondent's position, although I have found as noted that *Yakima* is distinguishable from the instant case. Therefore, it is not appropriate to grant Charging Party's request for litigation expenses. *Park Inn Home*, 293 NLRB 1082 fn. 3 (1989); *Heck's, Inc.*, 215 NLRB 765 (1964). See also *Tama Meat*, supra.

CONCLUSIONS OF LAW

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

2. District Lodge No. 15, International Association of Machinists and Aerospace Workers, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material and continuing to date, the Union has been the exclusive representative of all employees in the appropriate unit described below for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

All production and maintenance employees employed by Respondent at its facility, excluding office clerical employees, guards and supervisors as defined in the Act.

⁹I also note that in *Yakima*, the Board observed that the union had specifically conceded to the employer that its conditions were reasonable. Here, not only did the Union not concede that Respondent's conditions were reasonable, but had, as I have discussed, ample grounds to distrust the good faith of Respondent's purported offer to fulfill its statutory obligations.

4. By the following acts and conduct, Respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

(a) Refusing to furnish the Union information requested in the Union's letter of December 12, 1989.

(b) Refusing on December 15, 1989, and thereafter to permit the Union to conduct an examination of Respondent's books and records, to substantiate its plea of inability to pay.

(c) Unreasonably delaying offering to permit the Union to conduct an examination of Respondent's books and records, to substantiate its plea of inability to pay.

(d) Refusing on and after March 2, 1990, and thereafter to permit an auditor designated by the Union to conduct an examination of Respondent's books and records, to substantiate its plea of inability to pay.

(e) The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

ORDER

The Respondent, R.E.C. Corporation, Mount Vernon, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively in good faith with District Lodge No. 8 of the International Association of Machinists and Aerospace Workers, AFL-CIO as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

All production and maintenance employees employed by Respondent at its facility, excluding office clerical employees, guards and supervisors as defined in the Act.

(b) Refusing to furnish the Union information requested in the Union's letter of December 12, 1989.

(c) Refusing to permit the Union to conduct an examination of Respondent's books and records, to substantiate its plea of inability to pay.

(d) Unreasonably delaying offering to permit the Union to conduct an examination of Respondent's books and records, to substantiate its plea of inability to pay.

(e) Refusing to permit an accountant designated by the Union to conduct an examination of Respondent's books and records to substantiate its plea of inability to pay.

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

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

(a) On request, bargain in good faith with the Union as the exclusive bargaining representative of the employees in the unit described above and, if an understanding is reached, embody such an understanding in a signed agreement.

¹⁰If 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.

(b) On request, furnish to the Union the information requested by the Union in its letter to Respondent of December 12, 1989.

(c) On request, permit an accountant designated by the Union to examine Respondent's books and records to substantiate its plea of inability to pay.

(d) Post at its business office in Mount Vernon, New York, copies of the attached notice marked "Appendix."¹¹ 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 immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employee 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.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

¹¹ 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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively in good faith with District Lodge No. 15 of the International Association of Machinists and Aerospace Workers, AFL-CIO as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All production and maintenance employees employed by us at our facility excluding office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to furnish the Union information necessary to substantiate our plea of inability to pay.

WE WILL NOT refuse to permit the Union or an accountant designated by the Union to conduct an examination of our books and records, in order to substantiate our plea of inability to pay.

WE WILL NOT unreasonably delay offering to permit the Union, or an accountant designated by the Union, to conduct an examination of our books and records, to substantiate our plea of inability to pay.

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

WE WILL, on request, bargain in good faith with the Union as the exclusive bargaining representative of our employees in the unit described above and, if an understanding is reached, embody such an understanding in a signed agreement.

WE WILL, on request, furnish to the Union the information requested by the Union in its letter to us of December 12, 1989.

WE WILL, on request, permit the Union or an accountant designated by the Union to examine our books and records to substantiate our plea of inability to pay.

R.E.C. CORPORATION