



RELATED PRACTICE AREAS

Labor Relations

Why It's Critical That Employers Choose Words Carefully At The Bargaining Table

September 20, 2019 | [Labor And Employment, National Labor Relations Board](#)



**Anthony K.
Glenn**
Of Counsel

Employers experienced in collective bargaining know they must toe a fine line in making statements at the bargaining table that could be interpreted as a claim that the employer is unable to pay for some benefit the union is proposing. If a claim of “inability to pay” is made, the union has the right to [force the employer to “open its books”](#) so the union can examine its financial condition and test the veracity of the employer’s claim.

Still, employers often want to make a claim short of inability to pay – such as the desire to be competitive in a competitive market – or a simple unwillingness to pay the union’s requested benefit. A claim of competitive disadvantage or unwillingness to pay does not trigger the obligation to allow the union to examine the employer’s sensitive financial information. However, depending on the circumstances, it may require the employer to provide the union with more limited information to back up the claim. Thus, statements made by employer representatives at the bargaining table are of immense importance in determining the level of information the union is entitled to.

A recent decision from the National Labor Relations Board helped to define the line between statements that require the employer to open its books to the union and those that do not. In [Arlington Metals Corp.](#), the company resisted the union’s request for wage increases and made statements to the effect that production volume was down, and the company faced increased costs, increased taxes, and downward pressure on pricing. Company

representatives stated that competitors were attempting to take away business, and that business had “softened” in recent years with a downturn in both volume and price. They also said that the “iceberg” the company was on was “melting,” and businesses the company competes with had changed.

The NLRB found that these statements did not amount to a claim of inability to pay, but rather a claim that the company would be at a competitive disadvantage if it granted the union’s requests. The Board found it important that the company’s statements “focused primarily on external conditions and competitive pressures,” and that the company “never stated that it did not currently have sufficient assets to meet the Union’s demands or that it would have insufficient assets to do so during the life of the contract, that it was in imminent danger of closing, or that acquiescence to the Union’s demands would cause it to go out of business.” Any of those statements would presumably have required the employer to grant the union access to its sensitive financial information.

This serves as an important reminder to employers that the statements they actually make at the bargaining table will be heavily scrutinized – whether it is what they meant to say or not. Thus, it is exceedingly important that employers carefully tailor the words they use to explain their bargaining positions, or else they could face the prospect of the union examining their finances.