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CONCESSION BARGAINING: LEGAL AND PRACTICAL CONSIDERATIONS IN LIGHT OF RECENT NLRB AND COURT DECISIONS

Stephen D. Shawe†

The significant increase in employer proposals for concessions at the collective bargaining table has resulted in controversial decisions redefining some of the bargaining rights and obligations of both management and unions. The author discusses the legal and practical differences between concession bargaining during the term of a collective bargaining agreement and at contract termination, examines the financial disclosure requirement which frequently arises, and analyzes the recent NLRB and court decisions which have a significant impact on this area of the law.

I. INTRODUCTION

The recent flurry of wage cuts and freezes implemented through the collective bargaining process has attracted widespread attention because collective bargaining has historically been equated only with higher wages and increased benefits.¹ Commentators on concession bargaining, however, often fail to distinguish between relief sought during the life of a collective bargaining agreement and relief sought at the expiration of the agreement during the ordinary course of contract negotiations. While an employer may be seeking the same type of concessions in both instances, the considerations that govern whether or not an agreement on concessions may be reached are very different. This article examines the practical and legal differences between seeking and obtaining concessions during the term of the collective bargaining agreement and at its expiration. In addition, this article discusses the requirement and the extent to which the employer disclose his finances when he asserts an inability to pay union requested wages and benefits. Finally, the impact of recent case law on the parties to concession bargaining is analyzed.

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1. See generally *Steel Bargaining: The Last Chance*, BUSINESS WEEK, Jan. 17, 1983, at 94; *Firms Find Recession a Good Time To Reduce Employee Benefit Costs*, Wall St. J., Aug. 25, 1982, at 21; *Many Unions Being Asked to Settle for Less to Avoid Big Job Losses*, Washington Post, Jan. 10, 1982, at H9.

II. OBTAINING CONCESSIONS DURING THE TERM OF THE COLLECTIVE BARGAINING AGREEMENT

An employer seeking concessions during the term of a labor contract must realistically consider the chances for success as well as the possible legal effect of requesting mid-term concessions. Initially, the employer should recognize that the union is entitled to stand on its contract rights, and therefore concessions are attainable only if the union membership is convinced that without them substantial numbers of long-term layoffs will result. Furthermore, *Illinois Coil Spring Co.*,² a recent NLRB decision, now imposes upon an employer the duty to obtain union consent before closing one of his facilities and transferring production to another, if the reason for the transfer is related to the economic costs of the labor agreement.³

Historically, the typical three year collective bargaining agreement⁴ has provided for increases in wages and benefits in each of its three years. Such increases have been based on assumptions and estimates made at the time the contract was executed. Wrong assumptions, poor estimates, or simply the desire to avoid a strike often have resulted in uneconomic commitments to labor cost increases. Yet, no matter how obviously uneconomic the commitment to higher labor costs, an employer's proposal for concessions during the life of a collective bargaining agreement stands on the same legal footing as a union proposal to an employer for an increase in previously agreed-to wages. In both cases, the parties are bound by an enforceable contract.

To place in perspective concession bargaining during the term of the contract, imagine the situation where a union approaches the employer with the proposition that in light of inflation and the company's tremendously improved sales volume, the company reopen and modify the contract so that third year wages can be increased. Clearly, the employer could lawfully reject such a request, responding that the union and the employer made a deal during collective bargaining negotiations and that each side is expected to fulfill its commitments.⁵

2. 265 N.L.R.B. No. 28, 111 L.R.R.M. (BNA) 1486 (1982).

3. *Id.* at 16, 111 L.R.R.M. at 1490.

4. Seventy-seven percent of the contracts in a recent BNA survey had three-year terms. *Amendment and Duration*, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS (BNA) § 36:1 (Mar. 3, 1983).

5. Section 8(d) of the National Labor Relations Act (NLRA) provides that neither party shall be required "to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." 29 U.S.C.A. § 158(d) (Supp. 1983).

If the employer fails to comply with the terms of the collective bargaining agreement, the union may seek redress either through an action for breach of contract, or in some instances through the filing of an unfair labor practice charge. Section 301 of the NLRA authorizes suits by or against parties to a collective bargaining agreement for breach of that agreement. *Id.* § 185(a) (1978). Although a breach of contract does not necessarily constitute an unfair labor prac-

In the current context of concession bargaining, however, the situation is reversed. Today an employer may approach the union during the life of the labor contract, insisting that the contract is too onerous and requesting that it be modified to accommodate the employer's needs. However, an employer's approach to a union for concessions is unlikely to succeed if the employer can demonstrate only that he is suffering financial losses. In this situation, a union membership cannot be expected to agree to give up or defer previously agreed-to wage increases much less accept wage cuts. Although unions and their memberships fare better when their employers are financially healthy, organized labor has always resisted subsidizing employer losses from the employees' wage and benefit package.⁶

Because financial loss alone is insufficient, the ingredient which must be present to motivate a union to agree to proposed concessions during the life of a collective bargaining agreement is the prospect of substantial numbers of long-term or permanent job losses.⁷ Even large

tice, compare *Detroit Cabinet & Door Co.*, 247 N.L.R.B. 1415, 1417 n.1 (1980) with *American Vitrefied Prod. Co.*, 127 N.L.R.B. 701, 702 n.1 (1960), the NLRB has consistently held that modification of the wage provision of a contract constitutes an unfair labor practice in violation of section 8(a)(5).

A clear repudiation of the contract's wage provision is not just a mere breach of contract, but amounts, as a practical matter, to the striking of a death blow to the contract as a whole, and is thus, in reality, a basic repudiation of the bargaining relationship. We believe the jurisdiction granted us under the Act clearly encompasses not only the authority but the obligation to protect the statutory process of collective bargaining against conduct so centrally disruptive to one of its principal functions—the establishment and maintenance of a viable agreement on wages.

Oak Cliff - Golman Baking Co., 207 N.L.R.B. 1063, 1064 (1973); see also *Hiney Printing Co.*, 262 N.L.R.B. No. 22, 110 L.R.R.M. (BNA) 1255 (1982) (unilateral change in terms and conditions of the collective bargaining agreement constitutes a violation of section 8(a)(5) of the NLRA); *Struther Wells Corp.*, 245 N.L.R.B. 1170 (1979) (same); *Precision Anodizing & Plating, Inc.*, 244 N.L.R.B. 846 (1979) (same).

6. The rejection in November, 1982 of mid-term economic concessions by United Steelworkers local union presidents underscores the point. Despite the fact that the executive officers of the Steelworkers Union agreed to and recommended mid-term economic relief for the industry, the rank and file leadership overwhelmingly rejected the package of concessions by a vote of 241 to 131. *Steel's Outlook: Mutual Misery*, BUSINESS WEEK, Dec. 6, 1982, at 95. The steel companies were no doubt able to demonstrate to the union hierarchy the economic needs of the industry, but nonetheless concessions were ultimately rejected. On March 1, 1983, however, the local presidents voted 169 to 63 in favor of a contract which temporarily cut employee wages approximately nine percent. *USW Ratifies Contract with Pay Cuts and Company Promises to Reinvest in Steel*, Wall St. J., Mar. 2, 1983, at 2.
7. The director of U.C.L.A.'s Institute of Industrial Relations, Daniel J.B. Mitchell, not only confirms this assessment but has stated that "[W]age concessions have a job-saving effect only when the firm or plant is near the shutdown point." Mitchell, *What's New in Collective Bargaining Negotiations and Contracts* (BNA) No. 979, 4 (Dec. 9, 1982) (newsletter) (emphasis added).

The closing of Baltimore area grocery stores and the eventual concessions by A&P employees provide some insight into how threatening a situation must be-

numbers of layoffs, if they are judged as temporary, will not normally be sufficient to cause a union and its membership to agree to wage freezes or cuts during the life of an agreement. Employees who have historically experienced substantial layoffs and recalls from such layoffs are unlikely to be receptive to wage freezes or cuts if the only risk in rejecting the proposals is more layoffs. Moreover, when employees believe concessions will not deter layoffs and plant closings, even the prospect of wholesale and permanent job losses may not convince them to accept concessions.⁸

While unions are free to reject mid-term employer proposals for concessions, the employer typically assumes that there can be no harm in asking. However, a recent and controversial NLRB decision indicates otherwise. In *Illinois Coil Spring Co.*,⁹ the Board held that after the employer had approached the union with a proposal for economic concessions during the term of a contract and failed to obtain them, he was required to obtain the union's consent before closing and relocating his business.¹⁰

The employer in *Illinois Coil* operated two production facilities, one with a union and one without. In mid-term, the employer approached the union and explained that the company had lost a major contract with an automobile manufacturer and that the financial situation at the plant was worse than ever. The company proposed relocat-

come before concessions are granted. Immediately following the closing in the Baltimore area of 19 Acme grocery stores and the closing in the Philadelphia area of all A&P stores, Baltimore A&P employees agreed to wage and benefit cuts totaling six million dollars. *The Executive Suite Struggle Behind A&P Profits*, *FOR-TUNE*, Nov. 1, 1982, at 89, 101. The fact that A&P had already shut down operations in Philadelphia, in combination with the fact that Baltimore grocery workers were still sensitive due to the closing of 19 local Acme stores and 45 Pantry Pride stores, worked to convince employees to accept the concessions in mid-term.

8. See *Steel's Outlook: Mutual Misery*, *BUSINESS WEEK*, Dec. 6, 1982, at 95, 97; *Labor Muscle, In an Era of Givebacks, Members of One Union Are of No Mind to Give*, *Wall St. J.*, Apr. 28, 1982, at 1.
9. 265 N.L.R.B. No. 28, 111 L.R.R.M. (BNA) 1486 (1982).

10. *Id.* at 16, 111 L.R.R.M. at 1490. The significance of this decision is apparent when contrasted with *Ozark Trailers*, 161 N.L.R.B. 561 (1966), where the Board found that the employer had lawfully closed one of its plants mid-term and sub-contracted production without the union's consent. The Board's opinion states:

The argument has been made [that] to compel an employer to bargain about a decision to relocate or terminate a portion of his business would significantly abridge his freedom to manage the business. In the first place, however, as we have pointed out time and time again, an employer's obligation to bargain does not include the obligation to agree, but solely to engage in a full and frank discussion with the collective bargaining representative in which a bona fide effort will be made to explore possible alternatives, if any, that may achieve a mutually satisfactory accommodation of the interests of both the employer and the employees. If such efforts fail, the employer is wholly free to make and effectuate his decision.

Id. at 568; see also *AMCAR Div., ACF Indus.*, 234 N.L.R.B. 1063 (1978); *AM-CAR Div., ACF Indus.*, 231 N.L.R.B. 83 (1977).

ing its assembly operation to the nonunion facility, but indicated a willingness to negotiate with the union on alternatives to the company's relocation plan. The employer explained to the union that the wage and benefit package at the unionized facility totaled \$10.00 per hour, contrasted with a \$5.85 per hour cost at the nonunion facility. The union took those figures to the membership, but they voted down a package which would have required those wage and benefit cuts, and subsequently voted down consideration of any labor contract concessions. The company then proceeded with its program to relocate the assembly operations to the nonunion facility.

Although the NLRB unequivocally acknowledged that the company had bargained with the union over the decision to relocate its assembly operations,¹¹ the Board nevertheless found that the company's decision to transfer the operations and to lay off union employees constituted a violation of section 8(a)(5) of the NLRA.¹² Characterizing the decision as an attempt to obtain mid-term modification of the wage provisions of the collective bargaining agreement within the meaning of section 8(d) of the NLRA, the Board held that it could not be implemented without the union's consent.¹³ As a remedy, the Board ordered the restoration of the assembly operations to the unionized facility and the reinstatement with back pay of the laid off employees.¹⁴

For its decision the NLRB relied on only one case, *Los Angeles Marine Hardware Co. v. NLRB*,¹⁵ and distinguished one other, *The University of Chicago v. NLRB*.¹⁶ In *University of Chicago*, the Court of Appeals for the Seventh Circuit held that the University could lawfully transfer out union work to other university employees, despite the transfer being implemented during the life of a collective bargaining agreement and without the union's consent.¹⁷ The court found that the employer's decision to transfer was not attributable to a desire to avoid

11. *Illinois Coil Spring Co.*, 265 N.L.R.B. No. 28, 12, 16, 111 L.R.R.M. (BNA) 1486, 1490 (1982). A discussion concerning the employer's obligation to bargain over a decision to subcontract, relocate operations to another facility, or shut down completely is beyond the scope of this article. For information regarding this obligation, see M.C. Harper, *Leveling the Road from Borg-Warner to First National Maintenance: The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447 (1982); G.A. Naylor, *Subcontracting, Plant Closures and Plant Removals: The Duty to Bargain and its Practical Implications upon the Employment Relationship*, 30 DRAKE L. REV. 203 (1980-81) (published before *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) was decided); Note, *Employer's Duty to Bargain with Respect to Partial Termination of Business: First Nat'l Maintenance Corp. v. NLRB*, 36 Sw. L.J. 793 (1982).

12. *Illinois Coil Spring Co.*, 265 N.L.R.B. No. 28, 7, 111 L.R.R.M. (BNA) 1486, 1490 (1982).

13. *Id.* at 7, 111 L.R.R.M. at 1490.

14. *Id.* at 17-18, 111 L.R.R.M. at 1490.

15. 235 N.L.R.B. 720 (1978), *enforced*, 602 F.2d 1302 (9th Cir. 1979).

16. 210 N.L.R.B. 190 (1974), *enforcement denied*, 514 F.2d 942 (7th Cir. 1975).

17. 514 F.2d at 949.

the contract wage rate but was instead based on a decision to raise the quality of maintenance work, in keeping with the high standards demanded by the University's professional staff.¹⁸ On the other hand, in *Los Angeles Marine Hardware* the company could not lawfully transfer union work mid-term without the union's consent because the company's motivation was to escape the high labor costs imposed by its contract.¹⁹ Since the Illinois Coil Spring Company premised its decision to relocate the assembly operation on its high union labor costs and its need for economic relief, the Board held that the company could not relocate its business to another facility without first obtaining the union's consent.²⁰

The NLRB's position, in effect, precludes the mid-term transfer of operations from an uneconomic facility without union consent if the reason for the transfer is the need to obtain relief from the terms of the agreement. Good faith bargaining or economic necessity is no defense; what is required is the union's consent.²¹

It is unclear whether the NLRB's holding is considered a new interpretation of section 8(a)(5) and 8(d) obligations or merely the application of old principles.²² The Board's ruling, nevertheless, imposes a substantial risk on an employer who acknowledges that the economic terms of the labor contract had a bearing on his decision to transfer operations. As a result, if a company is aware that the union's consent is required before a transfer of an uneconomic operation will be permitted, it should avoid acknowledging to the union that the conditions of the contract had anything to do with the decision to close and relocate. The employer's alternative, if continued operations are uneconomical, is *not* to present to the union requests for concessions or relief, but instead to premise the necessity to transfer operations on reasons unrelated to the terms of the contract. Ironically, the risk of forthright discussions with the union may prove to be too great.

III. OBTAINING CONCESSIONS AT THE EXPIRATION OF THE COLLECTIVE BARGAINING AGREEMENT

A different situation is presented when the employer's proposals for concessions are advanced during collective bargaining negotiations at the expiration of the labor contract. In this situation, the union is not legally entitled to walk away from the employer's proposals,²³ and

18. *Id.*

19. *Los Angeles Marine Hardware Co. v. NLRB*, 602 F.2d 1302, 1307 (9th Cir. 1979).

20. *Illinois Coil Spring Co.*, 265 N.L.R.B. No. 28, 16, 111 L.R.R.M. (BNA) 1486, 1490 (1982).

21. *See Pan-Abode, Inc.*, 222 N.L.R.B. 313, 315 (1976) ("respondent's motivation for instituting such changes is totally irrelevant in determining the existence of a violation of section 8(a)(5). . . .").

22. *See supra* note 10.

23. *Cf. NLRB v. General Electric Co.*, 418 F.2d 736 (2d Cir. 1969) (when an employer refuses to even consider proposals by the union, it has failed to engage in

there is no risk that the employer will be compelled by law to continue to honor uneconomic contractual provisions.²⁴

An employer seeking concessions at the bargaining table may be seeking them for a variety of reasons.²⁵ No matter what the reasons for the employer's desire to obtain concessions, both parties are required to engage in collective bargaining, and from a legal standpoint the employer is in a position to require the union to consider concessions.²⁶

During negotiations, both the employer and union are required to meet and bargain in "good faith with respect to wages, hours, and other terms and conditions of employment."²⁷ Good faith bargaining within the meaning of the NLRA, however, imposes no legal impediment to a healthy and competitive employer seeking concessions. At the collective bargaining table, the employer is free to make proposals involving wage freezes or reductions. Similarly, the union is free to propose wage increases. The statute makes clear, however, that the obligation to engage in good faith bargaining "does not compel either party to agree to a proposal or require the making of a concession. . . ."²⁸

The theory of collective bargaining assumes that any settlement eventually reached will be based on the relative strengths and weaknesses of the employer and the union, tempered by a "rational" exchange of ideas at the bargaining table.²⁹ One court has reaffirmed this legal proposition in the following language:

[T]he matter at hand resolves itself into purely a question of hard bargaining between two parties who were possessed of disparate economic power: a relatively weak Union encountered a relatively strong Company. The Company naturally desired to use its advantage to retain as many rights as possible. We do not believe, however, that that desire is inconsis-

good faith bargaining as required by section 8(a)(5)), *cert. denied*, 397 U.S. 965 (1970).

24. Section 8(d) of the NLRA provides in part that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C.A. § 158(d) (Supp. 1983).
25. The company may be losing money or may feel threatened by a loss of market share. The company may feel that its competitors have more favorable labor costs or it may view the economic climate as ripe for securing wage freezes or concessions, even though the company itself is healthy and competitive.
26. See *NLRB v. General Electric Co.*, 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970).
27. 29 U.S.C.A. § 158(d) (Supp. 1983).
28. *Id.*
29. The factors which shape the result of collective bargaining negotiations include the "particular desires, whim, artifice, strategy, skill, etc., of the parties . . . , the relative bargaining (*i.e.* economic) strength of the parties and the combination of factors (public opinion, patriotism, official pressures, etc.) entering into a decision whether or not to resort to [those economic weapons]." Smith, *The Evolution of the "Duty to Bargain" Concept in American Law*, 39 MICH. L. REV. 1065, 1107-08 (1941).

tent with good faith bargaining.³⁰

Mere financial need, however, does not guarantee securing concessions. Instead, the ability of an employer to obtain concessions probably depends more on his ability to withstand a strike.³¹ If the union and the membership are convinced that an employer cannot withstand a strike, an employer will have minimal ability to secure concessions.

In some situations, if the union is willing to make concessions because of the employer's financial need, it is likely to ask for certain commitments from the company in return for these concessions.³² These requests may include commitments by the employer not to close any more plants, to reduce or freeze management salaries and bonuses, or to establish a profit-sharing program. Certainly, if these commitments are contained in the collective bargaining agreement they are enforceable. This fact was emphasized in *Local 461 v. Singer Co.*,³³ where the company, in return for wage and benefit concessions, agreed to spend two million dollars to modernize its plant and to aggressively pursue government contracts. The company did not, however, promise to remain in business regardless of economic conditions. When Singer closed its plant before spending the two million dollars, the union filed suit.³⁴ The court found that while the employer was not obligated to remain in business, he had made a separate and distinct promise to spend two million dollars to improve his plant. The employer's failure to do so was a breach of the collective bargaining agreement for which the court ordered damages in the amount of:

Either the value of the "give-backs" tendered by the union, . . . or the \$2 million Singer promised to spend on the plant, whichever is greater. In this way, the workers will be made whole; they will be no worse off than they would have been had they entered into a collective bargaining agreement without tendering "givebacks" and without extracting the [company's] promises.³⁵

There is, of course, no legal restriction on the ability of a financially healthy employer to propose concessions at the collective bargaining table. The law does not require that an employer's demand

30. *Chevron Oil Co. v. NLRB*, 442 F.2d 1067, 1073 (5th Cir. 1971); see also *NLRB v. Gibraltar Indus., Inc.*, 653 F.2d 1091, 1096 (6th Cir. 1981).

31. Whether an employer is able to withstand a strike is conditioned, to a large extent, on the successful use of his right to permanently replace economic strikers, *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938), and to lockout its employees in an attempt to induce a prompt and favorable settlement. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965).

32. See Jan. 12, 1983 Statement of Steelworkers Union's Wage Policy Committee (available from the United Steelworkers of America, 5 Gateway Center, Pittsburgh, Pa. 15222).

33. 540 F. Supp. 442 (D.N.J. 1982).

34. *Id.* at 443-46.

35. *Id.* at 450.

for concessions be accompanied by a showing of financial need.³⁶ The union's disposition to agree to such employer-proposed concessions depends more on the union's assessment of the employer's ability to withstand a strike than on the merits of the employer's presentation at the bargaining table.

IV. DISCLOSURE OF FINANCIAL INFORMATION

If either during or at the expiration of a collective bargaining agreement an employer places into issue the financial impact on the company of wages and benefits by asserting that he is unable to meet either union demands or the contract terms, he should be prepared for the union's demand to see his financial books and records. This is not true, however, when the employer is merely unwilling, as opposed to unable, to grant union demands. Twenty-five years ago, in *NLRB v. Truitt Manufacturing Co.*,³⁷ the United States Supreme Court stated that when an employer claims he is unable to pay a wage increase, he has put his financial status at issue and must substantiate his claim upon the union's request. If the employer refuses to reveal his finances after the union has requested disclosure, the employer runs the risk of violating the good faith bargaining obligations of the NLRA.³⁸ The NLRB's view of the *Truitt* principle has been expressed as follows:

The Union as the collective bargaining representative of the Company's employees can responsibly perform its statutory function only when it has access to necessary information with which to make a reasoned evaluation of the Employer's bargaining proposals. In the area of wages and other economic issues particularly, the Company alone has control of sufficient, accurate, and detailed data with which to support [its] position. . . . Only by examining the Company's records can the Union make an accurate assessment concerning whether the [employer's] assertion [that it could not afford a wage increase] was correct and whether or not the statistical data supplied was accurate. Such a requirement is fair to everyone because the availability of accurate information tends to promote an intelligent resolution of issues at an early stage and without industrial strife.³⁹

36. For instance a financially healthy employer is free to say at the bargaining table that the company wants to cut its prices to its customers over the next year and accordingly proposes a cut in wages over the ensuing twelve months. In addition, a financially healthy employer could propose the elimination of incentive programs, the elimination of paid sick days, a cut back in holidays, a reduction in health insurance benefits, or the conversion of a noncontributory health insurance program to a contributory one.

37. 351 U.S. 149 (1956).

38. *Id.* at 153-54; see also *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967).

39. *Stamco Div. of Monarch Mach. Tool Co.*, 227 N.L.R.B. 1265, 1268 (1977).

A. *Disclosure Requirements at the Expiration of the Collective Bargaining Agreement*

What conduct or words will trigger an employer's obligation to disclose relevant financial data to the union is the subject of debate. During collective bargaining at the expiration of the contract, the *Truitt* principle is not limited to express pleas of poverty by the employer such as "we can't afford it." According to NLRB and court pronouncements on the issue, language which implies an inability to pay also gives rise to an obligation of financial disclosure. For example, a statement that "If we give any more, I don't see how we can remain competitive,"⁴⁰ or a claim that "price competition is so serious that wage costs must be lessened or at least not increased,"⁴¹ or an assertion that a wage reduction is necessary in order for the company to be competitive and earn the profit to which it is entitled, gives rise to an obligation of financial disclosure.⁴² These employer statements, the Board has held, imply an inability to grant union demands. As Chief Justice Burger, then a member of the Court of Appeals for the District of Columbia, explained, "The Company asserts that a claim of inability to pay is not shown when the Company merely claims that the increase will prevent it from competing. But the inability to compete is merely the explanation of why the Company could not afford an economic benefit."⁴³

The result is different, however, when the employer refuses to accede to a union proposal because of an unwillingness to do so. In this situation, no obligation to disclose financial records arises.⁴⁴ Nor does an obligation to disclose arise when an employer seeks to support its wage proposal by simply pointing to the wages of its competitors or other employees, because the company has not put into issue its own ability to pay.⁴⁵ Similarly, no obligation to disclose arises when a com-

40. Stanley Bldg. Specialties Co., 166 N.L.R.B. 984, 985 (1967), *enforced sub nom.* United Steelworkers of America v. NLRB, 401 F.2d 434 (D.C. Cir. 1968).

41. Western Wirebound Box Co., 145 N.L.R.B. 1539, 1545 (1964), *enforced*, 356 F.2d 88 (9th Cir. 1966).

42. See Palomar Corp., 192 N.L.R.B. 592, 597 (1971), *enforced*, 465 F.2d 731 (5th Cir. 1972).

43. United Steelworkers of America v. NLRB, 401 F.2d 434, 436 (D.C. Cir. 1968).

44. See New York Printing Pressmen & Offset, Etc. v. NLRB, 538 F.2d 496, 500-01 (2d Cir. 1976).

45. See, e.g., Empire Terminal Warehouse Co., 151 N.L.R.B. 1359, 1360 (1965), *aff'd*, 335 F.2d 842 (D.C. Cir. 1966); Charles E. Honaker, 147 N.L.R.B. 1184, 1187-88 (1964).

Although financial disclosure is not required, when an employer states that its wages are competitive within the locality but refuses to reveal all the data on which it relies to substantiate its claims, the Board may find a violation of section 8(a)(5). In General Electric Co., 188 N.L.R.B. 911 (1971), the Board held that mere disclosure of a survey of local wage rates and the employers who were surveyed, without correlating each employer with his own wage rate, constituted a refusal to bargain, despite employer assertions that such information had been obtained on a confidential basis. The employer volunteered information as to the names of the companies surveyed, the average wage for each job for all the com-

pany advances its bargaining position to maintain or enhance customer demand and sales potential,⁴⁶ to make the company's financial situation more secure,⁴⁷ or to accommodate a desire to allocate the available money to repairs and new equipment instead of increased labor costs.⁴⁸

Unfortunately, not even the courts agree where the line between "inability to pay" and "unwillingness to pay" is to be drawn. In *Milbin Printing, Inc.*,⁴⁹ the employer at the bargaining table asserted that it "couldn't reach the Union's numbers" and that the company had to limit employee wages in order to maintain a "proper balance" for the business. The NLRB, in a 2 to 1 decision dismissing the union's complaint, found that the company did not refuse to bargain in violation of section 8(a)(5) of the NLRA because it never claimed that it could not afford to pay more because business was bad. Rather, the Board agreed with the employer that maintaining a "proper balance" meant that the business would continue to have the opportunity to grow, to reinvest in new equipment, to pay for appropriate advertising, and that management would continue to be paid its accustomed salary. Thus, the Board determined that the employer's assertion was not the type of "inability to pay" claim contemplated by the Supreme Court's *Truitt* principles.⁵⁰

On appeal, the Second Circuit reversed and agreed with the dissenting Board member. The court viewed the employer's expressions of "couldn't reach the Union's numbers" and "couldn't give . . . any more" as evidencing an inability to pay.⁵¹ According to the court, had the employer stated at the bargaining table that it "wouldn't give any more," the situation would have been different: "[b]ecause the Board found that the Employer stated 'wouldn't' when the evidence discloses that it claimed it 'couldn't' meet the Union's demands, we are compelled to reverse the Board's decision."⁵²

panies surveyed, the high and low average for each job, the average rate of pay at its own plant, and the total number of employees surveyed doing a particular type of job. The Board determined that the company was required to correlate the rates with their respective employers because the information would enable the union to independently evaluate the company's data and consequent stance in bargaining. *Id.* at 911.

46. See *Empire Terminal Warehouse Co.*, 151 N.L.R.B. 1359, 1360 (1965) ("The respondent's only position on the wage issue was that it was placed at a competitive disadvantage and was therefore unable to get more business because it was paying substantially more in wages than were its competitors."), *aff'd*, 335 F.2d 842 (D.C. Cir. 1966).
47. See *Vore Cinema Corp.*, 254 N.L.R.B. 1288, 1292 (1981) (fact that a reduction in guaranteed hours may be economically advantageous to an employer does not constitute an inability to pay).
48. See *Century Electric Motor Co.*, 192 N.L.R.B. 941, 945 (1971).
49. 218 N.L.R.B. 223 (1975), *rev'd sub nom.* *New York Printing Pressmen & Offset, Etc. v. NLRB*, 538 F.2d 496 (2d Cir. 1976).
50. 218 N.L.R.B. at 223.
51. 538 F.2d at 499-500.
52. *Id.* at 501.

The fact that claims of poverty are often difficult to distinguish from claims that the employer is simply unwilling to accede to union demands was further evidenced in *Boulevard Storage & Moving Co.*⁵³ In that case a company which was engaged in the hauling of household furniture refused to divulge its overall corporate financial data. The company's refusal was based on its assertion at the bargaining table that the *local* hauling portion of its business, not the overall activities of the company, was suffering from "very severe competitive and economic problems."⁵⁴ The Board, again in a 2 to 1 decision, found that the employer failed to bargain in good faith when it limited its financial disclosures to the local hauling portion of the business and refused to disclose information relating to the company's overall operation.⁵⁵

On appeal, the Seventh Circuit agreed with the dissenting Board member and denied enforcement.⁵⁶ The court stated:

In [this] situation, further financial information from the employer's records would be interesting and perhaps useful to the union, but not required; for such information cannot convert stubborn resolution into an excuse for failure to grant a wage increase or provide the basis for mutual bargaining concessions occasioned by a common understanding of financial plight.⁵⁷

53. 152 N.L.R.B. 539 (1965), *rev'd sub nom.* *United Fire Proof Warehouse Co. v. NLRB*, 356 F.2d 494 (7th Cir. 1966).

54. 152 N.L.R.B. at 541.

55. *Id.* at 541-42.

56. 356 F.2d at 498.

57. *Id.* In a case noteworthy for the fact that it provides a factual situation similar to *United Fire*, but with a contrary result, the First Circuit enforced a Board order requiring the employer to furnish the local union with documentation of the profitability of the subsidiary with which the local was bargaining. *Teleprompter Corp. v. NLRB*, 570 F.2d 4 (1st Cir. 1977). The employer maintained that, inasmuch as its decision to freeze wages company-wide was based on the overall economic health of the parent corporation and was not related to the profitability of its individual subsidiary, it was required to disclose only documentation regarding the company's overall financial status. In rejecting the employer's position, the First Circuit quoted the Board's decision:

An employer who has generally opted for single location or system bargaining as opposed to area or nationwide bargaining should [not] then be allowed to make a nationwide "plea of poverty" without providing data as to single or local systems. Regardless of what factors the employer takes into consideration in determining the wage structure at a particular facility, clearly it is essential for each local to have profitability statements regarding the local system whose employees it represents so it may knowledgeably consider [the employer's] position.

Id. at 10. Compare the above language with the Seventh Circuit's language in *United Fire*:

The employers' position with regard to furnishing financial data . . . was that they felt that regardless of whether they were making an overall profit, or even assuming that they were, they were determined to decrease wages because of the loss of profit in local moving. In their view, their financial records were irrelevant, for no matter what they revealed, they still wished to make local moving profitable through an overall

B. *Disclosure Requirements in Mid-Term*

The NLRB and the courts have agreed that the *Truitt* principle applies during the life of the agreement when the parties have entered into negotiations.⁵⁸ If an employer advances proposals for economic concessions the company will be required to disclose its financial records if the union requests them. From a practical perspective, if the company refuses to honor the union's request for financial information the union is unlikely to be receptive to the company's proposals for a wage freeze or cut. In most cases, a company pressing for mid-term contract concessions will seek to justify its position to the union by pointing to the financial or competitive strain imposed by its labor costs, and under the *Truitt* principle will be legally required to honor a union's request for financial data.

In *Hiney Printing Co.*,⁵⁹ the employer requested mid-term concessions in an attempt to keep his plant open. When the company and the union failed to agree on the concessions, the company began to curtail its operations and refused to pay certain cost of living and general pay increases called for by the collective bargaining agreement.⁶⁰ In concluding that the company had an obligation to divulge its financial records upon the union's request, the NLRB stated:

Where, as here, an employer has notified the union of the pos-

wage decrease. No matter how irrational the employers' position appeared to be as a reason for an overall wage cut, the trial examiner found that they had maintained this position earnestly and consistently. In such a situation, he reasoned, their respective financial records relating to overall profitability of their businesses were irrelevant because, in effect, *overall* profit was never an issue or dispute between the union and the employers.

United Fire Proof Warehouse Co. v. NLRB, 356 F.2d 494, 497-98 (7th Cir. 1966) (emphasis added).

58. *Hiney Printing Co.*, 262 N.L.R.B. No. 22, 110 L.R.R.M. (BNA) 1255 (1982); *Goodyear Aerospace Corp.*, 204 N.L.R.B. 831 (1973), *enforcement granted in part and denied in part sub nom.* *NLRB v. Goodyear*, 497 F.2d 747 (6th Cir. 1974). In *Goodyear*, the Sixth Circuit distinguished bona fide mid-term negotiations from just "sparring":

Neither the Union nor the Company was required to negotiate at the time of their meetings. If they entered into negotiations, however, the fact that they were mid-term in existing contracts would not have relieved (the company) of the duty to provide information needed by the union in carrying out its duties as bargaining representative However, the Union served notice at the first meeting that it would only listen and was not involved in negotiations

We do not believe that the responses of either party to the requests of the other reflect the give-and-take of good faith bargaining. Both were sparring, but neither was able to commit itself to genuine negotiations. Since neither was required to negotiate, (the company) was not compelled to supply information at a time when the union was only willing to listen.

497 F.2d at 751-52.

59. 262 N.L.R.B. No. 22, 110 L.R.R.M. (BNA) 1255 (1982).

60. *Id.* at 2, 110 L.R.R.M. at 1255-56.

sibility that it might close and that it needed and desired contractual relief, the same considerations exist concerning full disclosure of financial data in the face of a plea of inability to pay. These considerations compel the same result as if the parties to this case were in the posture of negotiating an entirely new contract.⁶¹

The *Hiney* decision is further illustrative of the types of financial books and records that the employer is obligated to disclose. The company, in its initial approach to the union for concessions, provided the union with copies of its profit and loss statements for 1977, 1978, 1979, and the first quarter of 1980.⁶² The union engaged accountants to analyze the profit and loss statements and developed from those statements an elaborate list of additional information to be extracted from the company. The accountant listed twenty-one specific items or questions which required additional information or explanation. The requested data included: (1) corporate federal income tax returns for the years covered by the profit and loss statements; (2) questions concerning the manner in which the company handled its inventory; (3) a detailed listing of real and personal property, with an explanation of the method used by the company's accountant for depreciation of machinery and equipment; (4) the accounting method used to recognize sales and to record bad debts; (5) explanations as to why life insurance cash value had not increased since 1977; (6) why there had been increases for rent, sales promotion, membership dues, entertainment, subscriptions, repairs and maintenance; and (7) why there had been a large drop in machinery depreciation in 1979.⁶³ The NLRB found a violation of section 8(a)(5) of the NLRA when the employer refused to provide the additional documents and information requested by the union.⁶⁴

Although the "inability to pay" concept appears to be a simple one, its application has been both inconsistent and exceptionally lib-

61. 262 N.L.R.B. at 8.

62. *Id.* at 4.

63. *Id.*

64. *Id.* at 10; *cf.* *Metlox Mfg. Co.*, 153 N.L.R.B. 1388, 1394-96 (1965), *enforced*, 378 F.2d 728 (9th Cir. 1967), *cert. denied*, 389 U.S. 1037 (1968). The union in *Metlox* countered the employer's plea of inability to pay a wage increase by suggesting that the inability might be linked to the intentional bleeding of assets by controlling stockholders through excessive management compensation. The Ninth Circuit enforced the Board's order which required the company to furnish information concerning management salaries, finding such information relevant and "reasonably necessary" to the union's role as bargaining agent," 378 F.2d at 730 (citing *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 68 (3d Cir. 1965)), and that the profit and loss statements alone were insufficient to enable the union to independently evaluate the company's claim that it could not afford a wage hike.

The Board has affirmed, on occasion, that an employer may withhold information on officers' salaries and bonuses, unless the union can demonstrate a special need for that type of sensitive information. *Manitowoc Co.*, 186 N.L.R.B. 994, 1006 (1970); *White Furniture Co.*, 161 N.L.R.B. 444, 447 (1966), *aff'd sub nom.* *Furniture Workers v. NLRB*, 388 F.2d 880 (4th Cir. 1967).

eral. Discerning whether an employer has in fact asserted an inability to pay is often difficult, resulting in a strained and sometimes inconsistent application of the rule. Furthermore, even though an employer is required, at least theoretically, to substantiate only those claims he makes, the employer's obligation has been liberally extended to include substantiation of claims not asserted by the employer and disclosure of unusually detailed financial documentation. Regardless of whether the *Truitt* principles have been properly applied, the cases have undoubtedly left this area uncertain and consequently place employers in the uncomfortable position of not knowing the parameters of their bargaining obligation with respect to financial disclosure.

V. CONCLUSION

In the past, it was the unusual case when employer-proposed concessions were presented with serious conviction to the union and its membership for approval. During the recent recession, however, it could no longer be said that serious employer proposals for concessions at the collective bargaining table presented the unusual situation. In fact, now employers are disposed more than ever to pursue vigorously their requests for concessions, despite the fact that to obtain them they may place their financial status in issue and be required to open their books for review upon request. Such vigorous pursuit, as evidenced by *Illinois Coil Spring Co.*⁶⁵ may be stifled by the requirement of union consent when the employer's failure to obtain concessions results in the need for relocation or consolidation of operations. Not surprisingly therefore, the NLRB has been faced with an increasing number of charges associated with, or generated by, concession bargaining, and has been forced to decide whether old rules fit the new situations or whether new rules should be formulated.⁶⁶

65. 265 N.L.R.B. No. 28, 111 L.R.R.M. 1486 (1982). For a discussion of *Illinois Coil* see *supra* notes 9-22 and accompanying text.

66. The standard report by the NLRB General Counsel, covering the first six months of 1982, is devoted exclusively to the legal ramifications of an employer's need to reduce labor costs either through contract modifications or restructuring of production methods through consolidation, relocation, or subcontracting. 112 L.R.R.M. (BNA) 61 (Jan. 24, 1983).