**ACL Corporation d/b/a Atlanta Hilton and Tower *and* International Brotherhood of Firemen and Oilers, AFL-CIO.** Case 10-CA-19440

14 September 1984

## DECISION AND ORDER

By Chairman Dotson and Members Hunter and Dennis

On 22 February 1984 Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief.

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 brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit employees, and by failing and refusing "to provide the Union with such financial records as would support its contention of financial inability to meet the Union's wage proposals." We reverse.

The facts are undisputed. Since 3 January 1980 the Union has been recognized as the exclusive collective-bargaining representative of the employees in the Property Operations Department. The parties executed at least one collective-bargaining agreement that expired 29 May 1983.[1]

Negotiations for a new contract began 13 May, at the Union's request. The parties stipulated that bargaining sessions were held 13, 17, 18, 26, and 27 May; 2, 7, 14, and 29 June; and 19 and 27 July. A bargaining session was also held 11 October according to evidence developed at the hearing.

On 13 May Union Vice President Jimmy Walker submitted written contract proposals[2] to Hilton General Manager William Utnik. Walker briefly discussed each item, and orally suggested upgrading the painter classification to the level of carpenter. Utnik said he would consider the proposals and respond later.

At the 17 May session Hilton spokesman Jack Colorton acknowledged the Union's timely negotiation request. Walker summarized the Union's proposals and detailed his request for upgrading the painters. Colorton declined to respond "at this time" to the Union's proposals, but requested and received the Union's wage proposals.

On 18 May Colorton said, "The management considers your proposals excessive, and we ask for a one-year extension and reject all your proposals categorically." Colorton then spoke for about 45 minutes according to Walker's undisputed testimony, as follows:

> [A]bout the economy in general, about the automotive industry, the airlines, the steel industry, and just the economy in general, the sad state of affairs and about some of the concessions that some unions were making in order to help the industries out that were in financial trouble.

Colorton refused Walker's request to respond to the Union's proposals, stating he had nothing further to say. Walker replied that he did not necessarily believe that all the companies Colorton had mentioned really had financial problems, and that he had heard that the hotel made a 31-percent profit for the first 9 months of 1982. Colorton said, "That's not true," but when Walker said that he could probably produce proof that one of the hotel executives had made the statement at a meeting, Colorton replied, "Well, I don't deny it or confirm it, I'm asking for a one-year extension." Colorton stated that the Hilton agreed in principle to the Union's unused sick leave proposal but did not want to discuss it at that time.

At the 26 May meeting Walker asked Colorton either to accept the Union's proposals or to make counterproposals. Colorton replied that he wanted Walker to go back to his members and tell them that the Hilton wanted a 1-year extension of the current contract in its present form. Walker stated that the membership was not in favor of an extension because they saw that the hotel was full and thought they deserved some increase. Colorton responded, "Well, that's not necessarily true that we're making money or that we're full or that we will stay full." Colorton referred to upcoming conventions and said "that didn't necessarily prove too much because the future was so uncertain." Walker suggested that, if they were not going to make progress on economic items, they should discuss noneconomic items such as job descriptions. Colorton said, "Well, I don't think job descriptions are necessary . . . I believe that the union has the right to define members' work."[3]

The next day, Colorton again asked for a 1-year contract extension. When asked to make counter-

[1] All dates are in 1983 unless otherwise indicated.

[2] The General Counsel did not introduce the written proposals into evidence.

[3] Contrary to the transcript, the judge found that Colorton said "he did not believe the Union had the right to define employees' work."

proposals, Colorton stated, "I want you to extend the contract for one year, I want you to go back to the members and see if you can get it approved." Walker stated that he had already tried and was unsuccessful. The parties agreed to have a Federal mediator at the next meeting.

On 2 June the Hilton, through the mediator, again asked for a 1-year extension of the agreement with no changes. The Union, replying by the same channel, asked the Hilton to respond to its proposal.

On 7 June the Union requested that the Hilton respond to its proposals and the Hilton again stated through the mediator that it wanted a year's contract extension. The Union agreed to present the hotel's position to the membership for a vote.

The parties stipulated that meetings were held 14 and 29 June, but there was no definitive evidence concerning them.

On 8 July Walker wrote a letter to Utnik which stated in relevant part:

> In our last bargaining session on June 29, 1983 the Company indicated they would[4] not give any wage increases to the property operations employees.
>
> The Union hereby requests permission to have a certified public accountant examine the Company's financial records to ascertain the merit of its assertion that it is unable to meet the Union's proposal.
>
> Furthermore, at the last negotiating session the Company refused to discuss our proposal for a wage increase.

Utnik replied by letter on 14 July:

> [I]n response to your letter of July 8, 1983, I wish to set forth the position of the hotel. The Atlanta Hilton and Towers, in the course of protracted negotiations with your union, has never represented that it was financially unable to respond to your economic proposals.
>
> The Atlanta Hilton and Towers has consistently proposed that the union extend its current contract with the hotel for a period of one (1) year and that offer is renewed to you now.

On 18 July the Union presented modified proposals. Company representatives stated that they would take the proposals and respond to them at a later date.

On 26 July Colorton said that they had reviewed the Union's proposals, but the hotel's position remained unchanged due to general economic conditions.

On 11 October Hilton attorney John Marshall stated that the Hilton had made a survey of all the trades in the hotel industry in the Atlanta area and found that its property operations employees received higher wages than those at all but one area hotel which allegedly had a different type of operation. Marshall said that he was prepared to offer unit employees a 20-cent-per-hour increase effective 29 May 1984 (1 year after the previous contract's expiration date).[5] Walker asked Marshall if he had anything else to offer and Marshall said no. Walker stated that he "didn't see any change in [the Hilton's] position from what it's been." Colorton replied, "Well, that fulfills our obligation." Walker responded that was a matter of opinion. The meeting adjourned. No other bargaining sessions have been held.

### The Judge's Decision

The judge found that the Hilton unlawfully refused to provide the Union with financial records to support a contention of inability to pay. The judge rejected the Respondent's position that it never represented it was financially unable to meet the Union's economic demands. Noting that no particular words need be used, the judge concluded that the Respondent asserted an inability to pay the Union's demands when, on 18 May, Colorton told the Union its proposals were excessive, talked for 45 minutes about the economy in general, and spoke about the concessions that other unions were making to help financially troubled industries. He also relied on Colorton's 26 May statement that it was not necessarily true that the hotel was making money or that it was full and would stay full.

In addition, the judge concluded that the Respondent violated the Act by refusing to negotiate in good faith. The judge found that the Hilton had "bargained with no serious intent to adjust differences or to reach any acceptable common ground with the Union." The judge found that the Respondent did not seriously consider the Union's proposals by "categorically" rejecting them. The judge also found that the Respondent made no counterproposals except for a 1-year extension of the last collective-bargaining agreement, notwithstanding union modification of its bargaining position.[6] The judge emphasized that the Respondent

[4] The judge inadvertently substituted "could" for "would."

[5] Marshall also stated that he intended to offer Hilton's other nontip employees a 20-cent-per-hour increase effective October 1983.

[6] The judge found that the Respondent's claimed 11 October counterproposal was in fact no change from its previous bargaining position.

maintained its stance at the same time it illegally refused to provide information to support its economic claims.

Conclusions

A. *Alleged Unlawful Refusal to Furnish Information*

Unions have a presumptive right to certain information about unit employees, such as wage rates. *Whitin Machine Works*, 108 NLRB 1537 (1954), enfd. 217 F.2d 593 (4th Cir. 1954), cert. denied 349 U.S. 905 (1955). The rule, however, is different for profit data or other aspects of an employer's financial condition. The union must show a specific need for the information in each particular case; profit data will not be required merely because it would be "helpful" to the union. See *United Furniture Workers of America (White Furniture Co.) v. NLRB*, 388 F.2d 880 (4th Cir. 1967). An employer may, however, provide justification for requiring profit data to be furnished by claiming financial inability to meet the union's demands. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). In *Truitt*, the Supreme Court held that a refusal to attempt to substantiate a claim of inability to pay increased wages may support a finding of failure to bargain in good faith, as follows (at 152-153):

> Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.

The *Truitt* Court added (at 153):

> We do not hold, however, that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn upon its particular facts. [Footnote omitted.][7]

Inability to pay need not be expressed with any particular magic words. *Monarch Machine Tool Co.*, 227 NLRB 1265 (1977). See also *Printing Pressmen Local 51 (Milbin Printing) v. NLRB*, 538 F.2d 496, 500 (2d Cir. 1976) (If the "Employer's refusal reasonably interpreted is the result of financial inability to meet the employees' demand rather than simple unwillingness to do so, the exact formulation used by the Employer in conveying this message is immaterial."); and *NLRB v. Unoco Apparel*, 508 F.2d 1368, 1370 (5th Cir. 1975) (Statement that "employees came to the wrong well . . . the well is dry" constituted a claim of financial inability to afford wage increase.).

Contrary to the judge we find that the Respondent's statements to the Union in the course of bargaining did not amount to a claim of an inability to pay wage increases. Thus *Truitt* does not mandate that the Company provide the Union the requested financial information.

Although no magic words are required to express an inability to pay, the words and conduct must be specific enough to convey such a meaning. At the 18 May meeting, Respondent spokesman Colorton merely characterized the Union's wage proposals as excessive and then discussed the economy in general, noting that some unions in other industries were making financial concessions. Although initially denying that the hotel had made a profit during the first 9 months of 1982, Colorton later would not "deny it or confirm it." At the next meeting, Colorton stated that it was not necessarily true that the hotel was making money or that it was full or would stay full and that the future was uncertain. While referring generally to economic conditions, the Respondent stopped short of asserting that its own financial situation rendered it unable to afford any increases the Union proposed.

Although the Union's 8 July letter requesting the information stated that at a 29 June bargaining session the Company asserted that it "would" not give a wage increase to unit employees, no specific evidence was presented about what transpired.[8]

In sum, we do not find the Respondent's vague references to the economy in general and the hotel's occupancy rate sufficient to constitute a plea of inability to pay within the meaning of *Truitt*. The Union did not rely on these statements to support its request to examine the Company's financial records. Rather, it referred to statements allegedly made at a meeting about which no party presented evidence. Furthermore, the Union's letter requesting the information merely stated that the Company had said it *would not* (not could not) give any wage increases. Under *Printing Pressmen*, above, this distinction is critical, because that case established that words conveying simple unwillingness to meet the employees' demands, rather than inability to do so, do not invoke a *Truitt* obligation. Here, the Respondent expressed an unwillingness rather than an inability to pay, and had no obliga-

[7] Although the Court limited its holding, the case has become widely accepted as establishing for all practical purposes such an "automatic" rule. See *Telepromoter Corp. v. NLRB*, 570 F.2d 4, 9 fn. 2 (1st Cir. 1977), citing inter alia, *C-B Buick v. NLRB*, 506 F.2d 1086, 1091 (3d Cir. 1974); *NLRB v. Southland Cork Co.*, 342 F.2d 702, 706 (4th Cir. 1965).

[8] Union spokesman Walker could not even recall that any such bargaining session occurred.

tion to provide the Union access to its financial records. The Respondent therefore did not violate Section 8(a)(5) and (1) of the Act by refusing the Union's request.

B. *Alleged Failure to Bargain in Good Faith*

Under Section 8(d) of the Act, an employer and its employees' representative are mutually required to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." Both the employer and the union have a duty to negotiate with a "sincere purpose to find a basis of agreement,"[9] but "the Board cannot force an employer to make a 'concession' on any specific issue or to adopt any particular position."[10] The employer is, nonetheless, "obliged to make *some* reasonable effort in *some* direction to compose his differences with the union, if § 8(a)(5) is to be read as imposing any substantial obligation at all."[11]

It is necessary to scrutinize an employer's overall conduct to determine whether it has bargained in good faith. "From the context of an employer's total conduct, it must be decided whether the employer is lawfully engaging in hard bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement."[12] A party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree. *NLRB v. Advanced Business Forms Corp.*, 474 F.2d 457, 467 (2d Cir. 1973).

Although an adamant insistence on a bargaining position is not of itself a refusal to bargain in good faith, *Neon Sign Corp. v. NLRB*, 602 F.2d 1203 (5th Cir. 1979), other conduct has been held to be indicative of a lack of good faith. Such conduct includes delaying tactics,[13] unreasonable bargaining demands,[14] unilateral changes in mandatory subjects of bargaining,[15] efforts to bypass the union,[16] failure to designate an agent with sufficient bargaining authority,[17] withdrawal of already agreed-upon provisions,[18] and arbitrary scheduling of meetings.[19] None of these indicia is present here. There was, on the other hand, evidence of the Company's good faith, such as its appearance at 13 negotiating sessions, its offer of a 20-cent-per-hour wage increase effective 29 May 1984, the prior successful bargaining relationship between the parties, and the agreement in principle to the Union's sick leave proposal.[20]

The Company's firmness in insisting on a 1-year extension of the current contract does not of itself constitute bad faith.[21] We find that the totality of the Company's conduct throughout the course of bargaining establishes that the Company engaged in hard bargaining, rather than surface bargaining. To hold otherwise in such circumstances would be tantamount to requiring an employer to offer improved benefits over an expired contract or be guilty of bad-faith bargaining.

We conclude that the Respondent did not refuse to bargain in good faith with the Union in violation of Section 8(a)(5) and (1) of the Act.

## ORDER

The complaint is dismissed.

[9] *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960).

[10] *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir. 1953), cert. denied 346 U.S. 887 (1953).

[11] Id. at 135.

[12] *J. D. Lunsford Plumbing*, 254 NLRB 1360, 1370 (1981), quoting from *West Coast Casket Co.*, 192 NLRB 624, 636 (1971), enfd. in relevant part 469 F.2d 871 (9th Cir. 1972).

[13] *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210 (8th Cir. 1965); *Crane Co.*, 244 NLRB 103 (1979).

[14] *NLRB v. Holmes Tuttle Broadway Ford*, 465 F.2d 717 (9th Cir. 1972).

[15] *NLRB v. Fitzgerald Mills Corp.*, 133 NLRB 877 (1961), enfd. 313 F.2d 260 (2d Cir. 1963), cert. denied 375 U.S. 834 (1963).

[16] *Cal-Pacific Poultry*, 163 NLRB 716 (1967).

[17] *Billups Western Petroleum Co.*, 169 NLRB 964 (1968), enfd. 416 F.2d 1333 (5th Cir. 1969).

[18] *Valley Oil Co.*, 210 NLRB 370 (1974).

[19] *Moore Drop Forging Co.*, 144 NLRB 165 (1963).

[20] The Union's proposals were not introduced into evidence, and therefore we draw no conclusions as to their reasonableness.

[21] Having found that the Respondent's refusal to furnish information was lawful, it cannot constitute an indicator of bad faith.

## DECISION

### STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. The hearing in this case held November 1 and December 9, 1983,[1] is based on an unfair labor practice charge filed by the International Brotherhood of Firemen and Oilers, AFL-CIO (Union) on July 28 and a complaint issued on September 2 on behalf of the General Counsel of the National Labor Relations Board (Board) by the Regional Director of the Board for Region 10, alleging that ACL Corporation d/b/a Atlanta Hilton and Tower (Hilton or Respondent) has engaged in unfair labor practice within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act (Act). Specifically the complaint alleges that Hilton refused to bargain in good faith with the Union and that it refused to provide the Union certain relevant financial records it had requested. Hilton filed an answer to the complaint denying the commission of the alleged unfair labor practices.

[1] All dates herein are 1983 unless otherwise indicated.

On the entire record made in this proceeding, including my observation of each witness who testified herein, and after due consideration of briefs filed by Counsel for the General Counsel and Counsel for Hilton, I make the following

## FINDINGS OF FACT

### I. JURISIDCTION

Hilton is a British Virgin Islands corporation with an office and place of business located at Atlanta, Georgia, where it is engaged in the operation of a hotel. During the calendar year, preceding issuance of the complaint, Hilton purchased and received at its Atlanta, Georgia facility goods valued in excess of $50,000 directly from suppliers located outside the State of Georgia. Hilton admits and I find that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

### II. LABOR ORGANIZATION

It was admitted, the record reflects, and I find that the Union is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

### III. THE APPROPRIATE BARGAINING UNIT

The complaint alleges, the parties admit, and I find that the following employees constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees employed by the Hilton at its Atlanta, Georgia facility, in the Property Operations Department, including electricians, t.v. technicians, mechanics, operators, plumbers, helpers, carpenters, carpet men, upholsterers, printers and locksmiths but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

### IV. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. *The Facts*

The facts of the instant case are undisputed.[2] At all times since January 3, 1980, the Union has been the exclusive collective-bargaining representative of the employees in the appropriate unit described above, and has been so recognized by the Hilton. The parties executed at least one collective-bargaining agreement after January 1980. That agreement expired on May 29.

Sometime prior to May 13, the Union made a timely request of Hilton for contract negotiations. Negotiations commenced on May 13, and 13 negotiating sessions had been beld by the time of the trial herein.[3]

Inasmuch as the complaint alleges not only a failure on the part of Hilton to provide information but also alleges that it failed to bargain in good faith, I shall set forth the pertinent facts of each bargaining session.[4]

1. May 13 meeting

At the first meeting which was held at the Hilton[5] International Vice President Jimmy Walker presented written proposals[6] to Hilton General Manager William Utnik.[7] Each proposal was briefly gone over and thereafter Walker made a verbal proposal to upgrade the painters classification to that of a carpenter. Utnik received the proposals and told the Union he would consider them and respond at a later date.

2. May 17 meeting

Hilton Spokesperson Colorton opened the meeting by acknowledging that the Union had made a timely request for negotiations and informed the Union that although Utnik, Parsons, and he were agents of the owners, the owners themselves might be present at some of the negotiating sessions, particularly if the Federal Mediation and Conciliation Service became involved in the negotiations. Union spokesperson Walker summarized the Union's previously presented proposals and a brief discussion was had about upgrading the painters' pay scale to that of the carpenters. Walker asked Colorton if the Hilton wanted to respond to the union proposals and Colorton stated not at that time. Colorton then asked the Union for its wage proposals and Walker gave them to Colorton. That ended the May 17 bargaining session.

3. May 18 meeting

Hilton spokesperson Colorton informed the Union at the beginning of the bargaining session that "management considers your proposals excessive, and . . . ask[s] for a one-year extension [of the collective bargaining agreeement] and reject[s] all your [Union] proposals categorically." Colorton thereafter spoke for approximately 45 minutes to the group on the economy. Colorton talked "about the economy in general, about the automotive industry, the air lines, the steel industry . . . the sad state of affairs, and about some of the concessions that some unions were making in order to help the industries out that were in financial trouble." Union spokesperson Walker asked Colorton to respond to the Union's proposals and Colorton told him he had nothing further to say. Walker stated he did not believe all the stories he

[2] The Respondent rested without calling any witnesses or presenting any evidence.

[3] The parties stipulated that bargaining sessions were held on May 13, 17, 18, 26, and 27; June 2, 7, 14, and 29; and July 19 and 27. Evidence was developed that a bargaining session was also held on October 11.

[4] Counsel for the General Counsel did not develop any direct detailed information with respect to at least two of the bargaining sessions.

[5] All meetings were held at the Hilton except for the June 2 and 7 meetings which were held at the Federal Mediation and Conciliation Service offices in Atlanta, Georgia.

[6] Counsel for the General Counsel did not attempt to make available the written proposals.

[7] Walker acted as spokesperson for the Union. The Union's negotiating team was comprised at various times of the following employees: Richard Whittan, Jerome Rucker, Icel Roberts, and Robert Gray. At all meetings after May 13 Jack Colorton (the Hilton in its brief referred to Jack Colorton as Jack Cullierton; however the record spelling of his name was Colorton) acted as spokesperson for the Hilton. Colorton was assisted by Director of Personnel Parson and General Manager Utnik.

had heard about the economy and that regardless of the problems some companies were having he had heard that the Hilton had made a 31 percent profit for the first 9 months of 1982. Colorton denied that was the case. Walker told Colorton he could produce proof that one of the hotel executives had made such a statement and he could probably produce written proof of it. Colorton told Walker, "Well, I don't deny it or confirm it, I'm asking for a one-year extension." Hilton stated it would agree in principle to the Union's proposal on unused sick leave but did not wish to discuss it at that time. The meeting then adjourned.

4. May 26 meeting

Union spokesperson Walker asked Hilton spokesperson Colorton to either accept the Union's proposals or make counterproposals. Colorton told Walker he wanted him to go to the union membership and tell them that the Hilton wanted a 1 year extension of the contract without any change. Walker told Colorton he did not think he could do that, because he had already talked to the membership and they were not in favor of that, because the membership saw that the hotel was full and therefore the membership thought they were entitled to some increase. Colorton said it was not necessarily true that the hotel was making money or that they were full or would stay full. Colorton discussed upcoming conventions at the hotel and stated the future was so uncertain. Walker suggested that if they were not going to make progress on economic items to discuss noneconomic items. Colorton asked what the Union had in mind and Walker told him job descriptions. Colorton said he did not believe the Union had the right to define employees' work. The meeting adjourned.

5. May 27 meeting

Hilton again asked the Union to extend the collective-bargaining agreement for 1 year without any changes. The Union asked Hilton to make counterproposals and reminded them that they had not as of that date made any counterproposals. Hilton spokesperson Colorton stated, "That's right, I want you to extend the contract for one year, I want you to go back to the members and see if you can get it approved." Walker stated he had already tried that and it did not work. Walker requested, and it was agreed, that they would have a Federal mediator present at the next meeting.

6. June 2 meeting

This bargaining session took place at the offices of the Federal Mediation and Conciliation Services. Mediator Jack Bates assisted the parties. The Union asked through the mediator that the Hilton respond to its proposals. The Hilton informed the Union through the mediator that it desired a 1-year extension of the collective-bargaining agreement without any changes.

7. June 7 meeting[8]

The Union[8] requested that the Hilton respond to its proposals. The Hilton indicated through the mediator that it desired a 1-year extension of the collective bargaining agreement without any changes.

The Union agreed at the conclusion of the meeting to place the Hilton's offer of a 1-year extension of the collective-bargaining agreement without change before the membership of the Union.

8. June 14 and 29 meetings

The parties stipulated that meetings were held on June 14 and 29, however, Union spokesperson Walker could not recall any such bargaining sessions. Union committee member Icel Roberts recalled that a bargaining session took place in early June. Roberts testified Hilton spokesperson Colorton opened the June meeting by talking about the economic crisis that other companies faced and then stated that the Hilton wanted a 1-year extension of the collective-bargaining agreement with no changes.

9. Letters of July 8 and 14

Union spokesperson Walker wrote Hilton General Manager Utnik on July 8, requesting certain information. The letter stated in pertinent part:

> In our last bargaining session on June 29, 1983 the Company indicated they could not give any wage increases to the property operations employees.
>
> The Union hereby requests permisssion to have a certified public accountant examine the Company's financial records to ascertain the merit of its assertion that it is unable to meet the Union's proposal.
>
> Furthermore, at the last negotiating session the Company refused to discuss our proposal for a wage increase. [G.C. Exh. 4.]

General Manager Utnik responded in writing on July 14. Pertinent parts of Utnik's letter are as follows:

> . . . in response to your letter of July 8, 1983, I wish to set forth the position of the hotel. The Atlanta Hilton and Towers, in the course of protracted negotiations with your union, has never represented that it was financially unable to respond to your economic proposals.
>
> The Atlanta Hilton and Towers has consistently proposed that the union extend its current contract with the hotel for a period of one (1) year and that offer is renewed to you now. [G.C. Exh. 5.]

10. July 19 meeting

The July 19 meeting was held at the hotel. The Union presented certain modifications to its earlier proposals.

[8] This meeting also took place at the Federal Mediation and Conciliation Services offices and a mediator served as spokesperson between the separated paties.

The Hilton stated they would respond to them at a later date.

11. July 26 meeting

This meeting lasted approximately 10 minutes with Hilton spokesperson Colorton stating that the Hilton had reviewed the Union's proposals and, because of general economic conditions, the hotel's position remained unchanged from previous meetings.

12. October 11 meeting

Hilton attorney John Marshall stated at this meeting[9] that the Hilton had made a survey of all the trades in the hotel industry in the Atlanta, Georgia area and had found that the property operations employees of the Hilton were paid higher wages than those at the other area hotels with the exception of the Peachtree Plaza Hotel. Marshall commented that the Peachtree Plaza Hotel was a different type operation than the Hilton hotel. Marshall told the negotiators that the survey showed that other employees of the Hilton were lower paid than their counterparts in the Atlanta area and that, based on his findings, he was prepared to make the engineering deparment a proposal of 20-cent-per-hour increase effective May 29, 1984.[10] Marshall also informed the negotiators that the Hilton was going to give its other employees (nontip employees) a 20-cent-per hour increase effective October 1983. Union spokesperson Walker asked Marshall if he had anything else to offer. Marshall responded, "No, that's about it." Walker stated that he "didn't see any change in your [Hilton's] position from what it's been." Hilton spokesperson Colorton stated, "Well, that fulfills our obligation." Walker told Colorton that was a matter of opinion and the bargaining session ended.

At the time of the trial no other bargaining sessions had been held. The Hilton at no time made any written proposals but rather maintained its oral position that it wanted a 1-year extension of the collective-bargaining agreement without change.

B. *Analysis and Conclusion—Duty to Provide Information*

An employer's duty to bargain in good faith includes an obligation to provide information needed by the employees' bargaining representative to properly perform its bargaining duties. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). The Supreme Court stated in *Truitt*, "Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." The right to receive information arises by operation of the statute after a proper request has been made and is limited only by considerations of relevancy. *Ellsworth Sheet Metal* , 224 NLRB 1505 at 1509 (1976), and the cases cited therein. The Supreme Court has established a very broad discovery-type standard in determining the relevance of information sought by the bargaining representative for utilization in the bargaining process. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Simply stated, an employer must provide information if it is of probable or potential relevance in assisting the bargaining representative in performing its duty under the statute. *National Cleaning Co.*, 265 NLRB 1352 (1982).

In the instant case it is without dispute that the Union requested that the Hilton allow it to have a certified public accountant examine its financial records to ascertain whether the Hilton was unable to meet its wage increase proposals (G.C. Exh. 4). It is likewise undisputed that the Hilton did not allow or honor the request of the Union and in doing so the Hilton stated it had never been its position that it was financially unable to respond to the Union's economic proposal (G.C. Exh. 5). The Hilton contends that to bring the *Truitt* case into play there must be a claim of an inability to pay and then and only then does one reach the question of whether the requested substantiation must be furnished. The Hilton contends it never pled an inability to pay and therefore has no duty to permit the Union to have access to its financial records. The Hilton contends that its negotiators made reference only to the economy in general while saying little or nothing about the hotel's financial condition in particular.

As set forth below, the Board adopted Administrative Law Judge Maloney's rationale in *Hiney Printing Co.*, 262 NLRB 157 (1982), regarding what it took to bring the *Truitt* requirements into play:

> Inability to pay a union demand need not be expressed in any set formula before the obligations set forth in *Truitt* comes into play. An employer need not use the magic words "can't afford." *Monarch Machine Tool Co.* [227 NLRB 1265 (1977)]. The statement "if we give anymore, I don't see how we can remain competitive" gives rise to an obligation of financial disclosure to back up that contention. *Stanley Building Specialties Co.*, 166 NLRB 984 (1967). Such statements as "we can't reach your numbers," "your numbers are too high for us," and "we can't afford your total package" trigger a disclosure obligation. [262 NLRB 162.]

I reject, as not being factually borne out, the Hilton's contention that it never represented it was financially unable to respond to the Union's economic proposals. It is clear that no magic or particular acts or words needs to be used to bring about the requirement that information be provided on the financial status of a company. In the instant case the Hilton, at the very next bargaining session after the Union made its wage proposals, told the Union its proposals were excessive and then for the next 45 minutes talked about the "economy in general," "the sad state of afairs," and about the concessions that some other unions were making in order to help out industries that were in financial trouble. In my opinion, the Hilton

[9] It appears this was the first and only negotiating session attended by Attorney Marshall.

[10] It is noted that May 29, 1984, would be exactly 1 year after the expiration date of the previous collective-bargaining agreement between the parties.

was clearly asserting an inability to pay the Union's demands. This conclusion is further buttressed by the statements of Hilton's chief spokesperson that it was not necessarily true that the hotel was making money or that it was fully occupied or that it would remain fully occupied. The Hilton negotiator made the statement after insisting on a 1-year extension of collective-bargaining agreement without change. Still later, at other negotiating meetings, the Hilton continued to take the position that it wanted a 1 year extension of the collective-bargaining agreement without change and continued to talk about the economic crises that other companies were having and of general economic conditions. The request by the Union to the Hilton to allow it to have a certified public accountant examine its financial records is clearly a request for relevant information going to the very heart of the Union's ability to fulfill its statutory bargaining obligation.

On the above, I find that since July 14, 1983, the Hilton has refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act by failing and refusing to provide the Union such financial records of the Hilton that would support the Hilton's contention that it is financially unable to meet the Union's wage proposals.

### C. *Analysis and Conclusion—Refusal to Bargain in Good Faith*

The decisive issue in this portion of the instant case is whether in violation of Section 8(a)(5) and (1) of the Act the Hilton refused to bargain in good faith with the Union. The statutory bargaining obligation is derived from various sections of the Act. Section 7 of the Act states, in part: "Employees shall have the right . . . to bargain collectively through representatives of their own choosing." Section 8(d) states, in part: "To bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." It is with this caveat of good faith as an essential element of bargaining that Section 8(a)(5) of the Act then makes it unlawful for an employer "to refuse to bargain collectively with the representatives of his employees." Section 8(a)(5) of the Act establishes a duty to bargain collectively with an open fair mind and with the purpose of finding a basis for agreement. *NLRB v. Herman Sausage Co.* 275 F.2d 229, 231 (5th Cir. 1960). The Supreme Court in *NLRB v. Insurance Agents (Prudential Insurance Co.)*, 361 U.S. 477 at 485 (1960), held:

> Collective bargaining, then, is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of "take it or leave it"; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining agreeement.

The obligation to meet and bargain does not compel either party to agree to a proposal or make a concession *NLRB v. American National Ins. Co.*, 343 U.S. 395 (1952). The key to good faith bargaining is that the parties enter into negotiations with a serious intent to adjust differences and to reach an acceptable common ground.

Guided by the above principles I have considered the course of bargaining in the instant case. I am persuaded that the Hilton has not fulfilled its statutory bargaining obligation in that it bargained with no serious intent to adjust differences or to reach any acceptable common ground with the Union. The evidence establishes that the Hilton never seriously considered the Union's proposals. For example it informed the Union very early in negotiations that it "categorically" rejected the Union's proposals yet it never made any counterproposals other than to insist on a 1-year extension of the collective-bargaining agreement without change on a take-it-or-leave-it basis. Even after the Union modified its own proposals and urged the Hilton to either accept them or make counterproposals, the Hilton insisted on only a 1-year extension of the collecive-bargaining agreement without change. Not only did the Hilton insist on a 1-year extension without change, based on alleged economic considerations, but it, at the same time, refused to provide the Union with requested information to support its economic claims. The Hilton's claimed counterproposal made at the October 11 bargaining session was, in fact, no change from its previous position in that its proposal was, in actuality, a request for a 1-year extension of the collective-bargaining agreeement. The evidence indicates the Hilton only went through the motions of negotiation with no serious intent to adjust differences with the Union or to reach any common ground with the Union.

I conclude from the foregoing that the Hilton refused to negotiate in good faith with the Union and in so refusing it violated Section 8(a)(5) and (1) of the Act.

### CONCLUSIONS OF LAW

1. The Hilton is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of th Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the certified bargaining agent for the Hilton's employees in the following appropriate unit:

> All full-time and regular part-time employees employed by the Hilton at its Atlanta, Georgia facility, in the Property Operations Department, including electricians, t.v. technicians, mechanics, operators, plumbers, helpers, carpenters, carpet men, upholsterers, printers and locksmiths, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

4. Since about May 13, 1983, and at all times thereafter the Hilton has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith with the Union as the exclusive bargaining representative of the employees in the unit set forth above.

5. By failing and refusing since about July 14, 1983, to provide the Union with such financial records as would support its contention of financial inability to meet the Union's wage proposals, the Hilton has engaged in and is

engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

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

## Remedy

Having found that by the aforementioned conduct the Hilton has violated Section 8(a)(5) and (1) of the Act, I shall recommend that it cease and desist from such conduct in the future and take certain affirmative action designed to effectuate the policies of the Act.

Having found the Hilton refused to provide the Union relevant information it had requested, I shall recommmend that the Hilton be ordered to provide to the Union any such financial records as would support its contention of financial inability to meet the Union's wage proposals or that the Hilton allow the Union and its certified public accountant to examine any such documents. I also recommend the Hilton be ordered, on request, to bargain collectively in faith with the Union as the exclusive bargaining representative of its employees in the above unit and, in the event that an understanding is reached, embody such understanding in a signed agreement, and to post the attached notice.

[Recommended Order omitted from publication.]

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