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# Substantiating "Competitive Disadvantage" Claims: A Broad Reading of *Truitt*

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## Substantiating "Competitive Disadvantage" Claims: A Broad Reading of *Truitt*

Since 1945, the United States has experienced a steady decline in unionization.[1] However, despite their decreasing ranks, labor unions maintain a significant role in determining the wages and working conditions of American workers,[2] making the collective bargaining process important to both union and nonunion employees.

The recession of the early 1980s forced a number of labor unions to accept lower wages in order to preserve job security.[3] This concession bargaining reflected, in part, a trend toward greater cooperation between employers and labor unions in an effort to improve productivity.[4] An integral component of this cooperation was the sharing of information traditionally held only by employers.[5]

The duty of an employer to provide information to its employees' labor union is indirectly derived from the language of the National Labor Relations Act (NLRA).[6] Sections 8(a)(5) and 8(d) of the NLRA require an employer and its employees' bargaining representative (the union) to bargain in good faith.[7] Both the National Labor

1. Between 1945 and 1982 union membership as a percentage of nonagricultural employment declined from 35.5% to 17.9%. *See* D.S. HAMERMESH & A. REES, THE ECONOMICS OF WORK AND PAY 205 (3d ed. 1984) (Table 9.1) (1945 figure) [hereinafter HAMERMESH]; BUREAU OF NATL. AFFAIRS, INC., DIRECTORY OF U.S. LABOR ORGANIZATIONS 1984-85 EDITION 2 (1984) (1982 figure).

2. For example, in 1980, although union membership as a percentage of nonagricultural employment was only 21.9%, approximately 40% of all blue-collar workers and approximately 18% of all white-collar workers had their wages and working conditions subject to collective bargaining. HAMERMESH, *supra* note 1, at 205, 209 (Tables 9.1 & 9.3). Furthermore, collective bargaining agreements often directly affect the wages of nonunion employees because nonunion employers will raise their wages in response to increased wages won by unions to reduce the likelihood that their employees will unionize. Indeed, nonunion employers will often match the union wage in order to retain the benefits of a nonunion work force. Additionally, nonunion employers may be forced to raise wages to union levels in a tight labor market in order to compete with union employers in recruiting workers. *Id.* at 251.

3. D. ROTHSCHILD, L. MERRIFIELD & C. CRAVER, COLLECTIVE BARGAINING AND LABOR ARBITRATION 40-41 (3d ed. 1988) [hereinafter ROTHSCHILD]. *See also infra* notes 126-30 and accompanying text.

4. *See* R. SMITH, L. MERRIFIELD, T. ST. ANTOINE & C. CRAVER, LABOR RELATIONS LAW 46 (7th ed. 1984) [hereinafter SMITH].

5. For example, in a contract negotiated by the United Auto Workers (UAW) and Chrysler in 1981, Chrysler agreed to provide the UAW with monthly financial information that was previously only assembled for the benefit of Chrysler's board of directors. Other employers made similar information-sharing agreements with their employees. ROTHSCHILD, *supra* note 3, at 43, 49 n.54.

6. 29 U.S.C. §§ 151-69 (1982).

7. Section 8(a)(5) reads in part: "It shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees . . . ." 29 U.S.C. § 158(a)(5) (1982).

Section 8(d) reads in part:

Relations Board (NLRB) and the federal judiciary have interpreted the concept of good faith bargaining to create an affirmative obligation on the part of employers to provide unions with various kinds of information upon request.[8] This obligation is rooted in the idea that a union needs certain information to perform its section 9(a) bargaining duties properly.[9]

In general, disclosure is required when the requested information is "relevant" to the bargaining process.[10] When the information concerns wage data,[11] the information is treated as presumptively rele-

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For the purposes of this section, 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, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

29 U.S.C. § 158(d) (1982) (emphasis added).

The concept of good faith bargaining is discussed in Part III *infra.*

8. For example, in Aluminum Ore Co. v. NLRB, 131 F.2d 485, 487 (7th Cir. 1942), the Seventh Circuit stated that the "expressed social and economic purposes" of the NLRA required the employer to disclose information relating to the wage history of its employees to the union. *See also infra* notes 10-18 and accompanying text.

The obligation to supply information to unions runs throughout the life of the collective bargaining agreement as well as during negotiations. NLRB v. Acme Indus. Co., 385 U.S. 432, 436 (1967).

While the Act an imposes equal disclosure obligation on both the employer and the union, most of the case law concerns the employer's obligation.

9. *See, e.g., In re* Aluminum Ore Co., 39 N.L.R.B. 1286, *enforced,* 131 F.2d 485 (7th Cir. 1942); *In re* Sherwin-Williams Co., 34 N.L.R.B. 651 (1941), *enforced,* 130 F.2d 255 (3d Cir. 1942); *In re* Pioneer Pearl Button Co., 1 N.L.R.B. 837 (1936); *see also* Bartosic & Hartley, *The Employer's Duty to Supply Information to the Union—A Study of the Interplay of Administrative and Judicial Rationalization,* 58 CORNELL L. REV. 23, 24 (1972) [hereinafter Bartosic].

Section 9(a) reads in part:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

29 U.S.C. § 159(a) (1982).

10. The test for relevancy is that the information requested by the union must be necessary for it to bargain intelligently over specific issues raised during negotiations. *See Acme,* 385 U.S. at 435-36. *See also infra* notes 113-16 and accompanying text.

The term "relevant" is a misnomer to some scholars. *See* Bartosic, *supra* note 9, at 41 (contending that "[o]nly when 'relevant' is read to mean 'necessary' does the case rhetoric comport with the underlying rationale"). It appears that "relevancy" is merely a legal label. For example, in *Acme,* the Supreme Court described an employer's disclosure obligation to require the disclosure of "needed" information but then later referred to the question as a "relevancy" determination. 385 U.S. at 435-36.

11. "Wage data" has been broadly defined by the courts. *See* Bartosic, *supra* note 9, at 28, 30-35. The term includes time study data (NLRB v. Otis Elevator Co., 208 F.2d 176 (2d Cir. 1953)), job rates and classifications (Taylor Forge & Pipe Works v. NLRB, 234 F.2d 227 (7th Cir. 1956)), merit increases (Otis Elevator Co., 170 N.L.R.B. 395 (1968)), pension data (Electric Furnace Co., 137 N.L.R.B. 1077 (1962)), incentive earnings (*In re* Dixie Mfg. Co., 79 N.L.R.B. 645 (1948), *enforced,* 180 F.2d 173 (6th Cir. 1950)), group insurance data (Stowe-Woodward, Inc., 123 N.L.R.B. 287 (1959)), and factors used in recommending merit increases (International Tel. & Tel. Corp. v. NLRB, 382 F.2d 366 (3d Cir. 1967)).

vant[12] and must be disclosed upon request. With respect to nonwage-related data, however, a union must demonstrate the relevancy of the information.[13] The disclosure rule governing financial and management-related information[14] was established in *NLRB v. Truitt Manufacturing Co.*[15] The *Truitt* Court articulated the "substantiation doctrine,"[16] which requires an employer to substantiate its claims that put in issue the employer's capacity to pay a particular wage demand.[17] *Truitt* is widely considered the primary case regarding an employer's good faith duty to provide unions with information.[18]

During collective bargaining negotiations, an employer can put its economic capacity to pay in issue by making several responses; however, each response may have its own legal consequence. The most direct response is the "inability-to-pay" claim where the employer flatly asserts that it cannot afford to pay the union's wage demand.[19] Less directly, economic capacity claims are often couched in ambiguous terms of competition. These claims may take the form of an employer contending that it would be operating at a "competitive disadvantage" relative to its competitors if it were to meet the union's wage demand.[20]

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12. *See* Boston Herald-Traveler Corp., 110 N.L.R.B. 2097 (1954), *enforced,* 223 F.2d 58 (1st Cir. 1955); Whitin Mach. Works, 108 N.L.R.B. 1537, *enforced,* 217 F.2d 593 (4th Cir. 1954), *cert. denied,* 349 U.S. 905 (1955); *In re* Yawman & Erbe Mfg. Co., 89 N.L.R.B. 881 (1950), *enforced,* 187 F.2d 947 (2d Cir. 1951).

13. *See, e.g.,* International Woodworkers, Local Unions 6-7 & 6-122 v. NLRB, 263 F.2d 483, 485 (D.C. Cir. 1959) (distinguishing presumptively relevant wage data from sales data, which the court considered irrelevant given the particular facts of the case).

14. Management-related information includes an employer's assessment of the company's health, detailed production and sales data, information about products and inventory, techniques and processes used by the employer, long-range forecasts of growth or contraction, and detailed breakdowns of the employer's financial posture (expanding the financial reports ordinarily available to shareholders). Shedlin, *Regulation of Disclosure of Economic and Financial Data and the Impact on the American System of Labor-Management Relations,* 41 OHIO ST. L.J. 441, 445-46 (1980).

15. 351 U.S. 149 (1956).

16. This expression was coined by Florian Bartosic and Roger C. Hartley. *See* Bartosic, *supra* note 9, at 23; *see also infra* section I.A.

17. *See* Teleprompter Corp. v. NLRB, 570 F.2d 4 (1st Cir. 1977); Empire Terminal Warehouse Co., 151 N.L.R.B. 1359 (1965), *aff'd.,* 355 F.2d 842 (D.C. Cir. 1966); Caster Mold & Mach. Co., 148 N.L.R.B. 1614 (1964); Pine Indus. Relations Comm., Inc., 118 N.L.R.B. 1055 (1957).

This Note will use the term "wage demand" to encompass not only hourly wages and salaries, but also anything that would be deemed a labor cost by an employer (*e.g.,* health insurance and vacation time).

18. *See* SMITH, *supra* note 4, at 547 (presenting *Truitt* as the primary case in its discussion of the employer's good faith obligation to supply unions with information); *see also* Bartosic, *supra* note 9, at 43 (describing *Truitt* as the "landmark information decision"); Miller, *Employer's Duty to Furnish Economic Data to Unions — Revisited,* 17 LAB. L.J. 272, 275 (1966) (also describing *Truitt* as a "landmark decision").

19. *See, e.g., Truitt,* 351 U.S. at 150 ("The company answered that it could not afford to pay such an increase . . . ."); *see also infra* section I.B.1.

20. *See infra* sections I.B.2 & 3.

Although both employer responses are distinct because they may describe different financial situations,[21] they both convey a message to the union that the employer may experience economic harm which could affect its financial position adversely and, accordingly, jeopardize the welfare of the employees.[22] Both claims leave a union in the same quandary: should it press its wage demand or replace it with a lesser one? Without more information about the employer's financial situation and capacity to pay, a union cannot effectively decide the proper course of action and, concomitantly, execute its section 9(a) duties.[23]

The case law applying the *Truitt* disclosure principle is in a state of discordance. Some courts have read *Truitt* narrowly and have ruled that only when an employer asserts an inability to pay a particular wage demand has it placed its economic capacity to pay in issue to the extent that disclosure of substantiating financial information is required.[24] Other courts have loosely interpreted inability-to-pay claims and have ruled that competitive disadvantage claims are tantamount to inability-to-pay claims.[25] Finally, some courts have read *Truitt* broadly and have ruled that the tenets of good faith bargaining require

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21. *See* NLRB v. Harvstone Mfg. Corp., 785 F.2d 570, 577 (7th Cir. 1986), *cert. denied,* 479 U.S. 821 (1987) (footnote omitted):

> While it is axiomatic that [an employer cannot operate at a competitive disadvantage] . . . indefinitely, it does not preclude a finding that, at least for the term of the new collective bargaining agreement, the employer operating at a competitive disadvantage is financially able, although perhaps unwilling, to pay increased wages. In such a case, we think that the employer's claim of competitive disadvantage is not a plea of an inability to pay.

*See infra* notes 107-09 and accompanying text.

22. For instance, in *Harvstone,* 785 F.2d at 570, although the employers who were seeking concessions never said they could not pay the current wages, a letter sent by two of the employers to their employees asserted that the wages paid by them were higher than those of their competitors, and warned that "if we are going to continue . . . as a strong competing employer . . . we must have a relief from this intolerable situation." 785 F.2d at 584 (second ellipsis in original). During the negotiations the employers' bargaining representative asserted that the employers needed relief from labor costs "to stay in business." 785 F.2d at 583. *See infra* part IV.A.

23. *See* Shedlin, *supra* note 14, at 447.

24. *See* Washington Materials, Inc. v. NLRB, 803 F.2d 1333, 1338 (4th Cir. 1986) (" 'At no time did the Respondents assert they were unable to pay what was required under the union contract proposals but rather consistently maintained they wanted to obtain a more competitive position in the industry. The Respondents thus had no *Truitt* obligation to provide the Union with all their financial records . . . .' ") (quoting NLRB ruling); *Harvstone,* 785 F.2d at 575-76; United Fire Proof Warehouse Co. v. NLRB, 356 F.2d 494, 498 (7th Cir. 1966); Advertisers Mfg. Co., 275 N.L.R.B. 100 (1985); ACL Corp., 271 N.L.R.B. 1600, 1601 (1984); Metlox Mfg. Co., 153 N.L.R.B. 1388, 1394-96 (1965); Empire Terminal Warehouse Co., 151 N.L.R.B. 1359, 1360 (1965), *aff'd. sub nom.* Dallas Gen. Drivers, Local No. 745 v. NLRB, 355 F.2d 842 (D.C. Cir. 1966); Caster Mold & Mach. Co., 148 N.L.R.B. 1614 (1964); Taylor Foundry Co., 141 N.L.R.B. 765, 766-67 (1963), *enforced,* 338 F.2d 1003 (5th Cir. 1964); *see also infra* section I.B.1.

25. *See* New York Printing Pressmen & Offset Workers Union No. 51, 538 F.2d 496, 500 (2d Cir. 1976) (The employer ambiguously contended that it "couldn't reach" the proposed wage and "maintain a 'proper balance.' "); NLRB v. Palomar Corp., 465 F.2d 731, 734 (5th Cir. 1972); NLRB v. Bagel Bakers Council, 434 F.2d 884, 887-88 (2d Cir. 1970); United Steelworkers v. NLRB, 401 F.2d 434, 436 (D.C. Cir 1968); Mashkin Freight Lines, Inc., 272 N.L.R.B. 427, 435 (1984); Hiney Printing Co., 262 N.L.R.B. 157, 157 (1982); Hiatt Gen., Inc., 257 N.L.R.B. 960, 965 (1981), *enforced without opinion,* 685 F.2d 444 (9th Cir. 1982); Wheeling Pac. Co., 151

that competitive disadvantage claims, as well as other claims, be substantiated by appropriate financial information.[26]

This Note argues that the broad reading of *Truitt* is correct. It advocates a broad rule which would require an employer to disclose substantiating financial information[27] to its employees' union whenever it claims that meeting a proposed wage demand would place the firm at a competitive disadvantage.[28] Because the appropriateness of substantiating financial information is factually dependent, this Note will not focus on the type or amount of information that should be disclosed.[29] Instead, it will focus on the legal and policy justifications for a broad disclosure rule. Part I reviews *Truitt* and discusses the various interpretations given to it by lower courts and the NLRB. Part II examines some economic concepts and demonstrates that full disclosure of financial information is crucial when evaluating employer bargaining claims made in response to union wage demands. Part III argues that the concept of good faith bargaining as espoused by the Supreme Court and the "relevancy" test support a broad disclosure obligation. Part IV discusses the advantages of a broad disclosure rule that would inure to the benefit of employers, employees, the NLRB, the judiciary, and society.

## I. THE DUTY TO SUPPLY INFORMATION

### A. Truitt: *The "Substantiation Doctrine"*

The primary disclosure case in the context of collective bargaining is *Truitt.* The question in *Truitt* was whether the NLRB could find that an employer was bargaining in bad faith when the employer

N.L.R.B. 1192, 1193 (1965); Cincinnati Cordage & Paper Co., 141 N.L.R.B. 72, 77 (1963); *see also infra* section I.B.2.

26. *See* K-Mart Corp. v. NLRB, 626 F.2d 704, 707-08 (9th Cir. 1980); General Elec. Co. v. NLRB, 466 F.2d 1177, 1183-84 (6th Cir. 1972); NLRB v. General Elec. Co., 418 F.2d 736, 750-52 (2d Cir. 1969); General Elec. Co. v. NLRB, 414 F.2d 918, 922-23 (4th Cir. 1969); Puerto Rico Tel. Co. v. NLRB, 359 F.2d 983, 986 (1st Cir. 1966); NLRB v. Western Wirebound Box Co., 356 F.2d 88, 91-92 (9th Cir. 1966); *see also infra* section I.B.3; Miller, *supra* note 18, at 278.

27. The term "financial information" is intended to encompass management-related information described in note 14 *supra.*

28. The phrase "competitive disadvantage" is intended to encompass all employer claims that suggest the employer would incur some form of cognizable financial or competitive injury if it were to meet a particular wage demand. Competitive disadvantage claims are often used by employers to spurn union wage demands because such claims are perceived as not triggering a disclosure obligation. *See, e.g., Washington Materials,* 803 F.2d 1333; *Harvstone,* 785 F.2d 570; *Western Wirebound,* 356 F.2d 88.

29. Generally, substantiation requires the disclosure of as much information as the union "reasonably requires in order meaningfully to evaluate the employer's claim of a financial inability to pay." Teleprompter Corp. v. NLRB, 570 F.2d 4, 11 n.3 (1st Cir. 1977). Examples of substantiating financial information include: an audit of payroll records and books, the original records and books, cancelled checks, check stubs, quarterly payroll records, as well as the management-related information discussed in note 14 *supra. See* J. O'REILLY, UNIONS' RIGHTS TO COMPANY INFORMATION 54-55 (rev. ed. 1987).

claimed that it could not afford to pay higher wages demanded by the union and refused to give the union information which would substantiate its claim.[30] In particular, the employer responded to the union's request for a wage increase of ten cents per hour with the claim that it could not afford to pay the increase.[31] Further, the employer refused to produce any evidence substantiating the claims, stating that "the information . . . is not pertinent to this discussion and the company declines to give you such information; You have no legal right to such."[32]

On these facts, the NLRB found that the employer had failed to bargain in good faith in violation of section 8(a)(5) and ordered the employer to supply the union with information that would "substantiate [its] position of its economic inability to pay the requested wage increase."[33] On appeal, the Fourth Circuit refused to enforce the order, holding that good faith bargaining required only a sincere desire to reach an agreement and not the disclosure of information respecting "matters which lie within the province of management . . . ."[34]

The Supreme Court granted *certiorari* and reversed the Fourth Circuit. The Court ordered the employer to "substantiate [its] claim of inability to pay increased wages."[35] The Court predicated its holding on section 204(a)(1) of the NLRA, which requires management and unions to "exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions. . . ."[36] The Court reasoned:

> 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. And it would certainly not be farfetched for a trier of fact to reach the conclusion that bargaining lacks good faith when an employer mechanically repeats a claim of inability to pay without making the slightest effort to substantiate the claim.[37]

The *Truitt* Court limited this principle, however, by refusing to establish a per se rule requiring substantiation of all inability-to-pay claims. The Court endorsed, instead, a case-by-case approach where

30. 351 U.S. at 150.

31. The employer also claimed that it was undercapitalized and that it had never paid dividends. 351 U.S. at 150. For a more thorough discussion of the facts, see NLRB v. Truitt Mfg. Co., 224 F.2d 869 (4th Cir. 1955), *revd.*, 351 U.S. 149 (1956).

32. 351 U.S. at 150-51 (ellipsis in original) (quoting employer communication to union).

33. 351 U.S. at 151 (quoting order of NLRB).

34. 224 F.2d at 874.

35. 351 U.S. at 153.

36. 29 U.S.C. § 174(a)(1) (1982).

37. 351 U.S. at 152-53.

"[t]he inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met."[38]

Although the *Truitt* Court did not make reference to section 9(a) of the Act or rely on any of the "relevant" information cases,[39] it is unclear whether the Court intended to establish an entirely separate basis for a disclosure obligation. The Court commented that "both the union and the company treated the company's ability to pay increased wages as highly relevant."[40] Consequently, it is unclear whether a substantiation obligation exists independent of a relevancy inquiry;[41] a merger of the concepts is evident in lower court opinions.[42] Whatever the doctrinal reason, it is apparent that *Truitt* established that good faith bargaining requires an employer to substantiate some economic claims made to a union.

### B. *The Lower Courts' Applications of* Truitt *to Different Employer Claims*

As discussed earlier,[43] employers respond to union wage demands in various ways. Employers do not always take an absolute inability-to-pay stance, as did the employer in *Truitt;* instead, they often couch their responses in terms of competition or economic harm. This section reviews three disparate ways the NLRB and the lower courts have applied *Truitt* to competitive disadvantage claims.

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38. 351 U.S. at 153-54. *But see* Teleprompter Corp. v. NLRB, 570 F.2d 4, 9 n.2 (1st Cir. 1977) (explaining that despite this limitation, *Truitt* has, for all practical purposes, become an automatic rule with respect to inability-to-pay claims). *See also infra* notes 95-98 and accompanying text.

39. *See supra* notes 10-13 and accompanying text.

40. 351 U.S. at 152.

41. *See* Bartosic, *supra* note 9, at 43; *see also* J. O'REILLY, *supra* note 29, at 49 (contending that *Truitt* established a substantiation obligation where "[n]o prior showing of relevance is necessary"); *see also infra* notes 110-12 and accompanying text.

42. For example, in NLRB v. Celotex Corp., 364 F.2d 552 (5th Cir. 1966), the court, in enforcing the NLRB's order requiring an employer to disclose financial information, rested its ruling entirely on a relevancy determination, analogizing it to the relevancy standard in discovery proceedings. The court stated that

> [t]he rule governing disclosure of [financial] data . . . is not unlike that prevailing in discovery procedures under modern codes. There the information must be disclosed unless it plainly appears irrelevant. Any less lenient rule in labor disputes would greatly hamper the bargaining process, for it is virtually impossible to tell in advance whether the requested data will be relevant except in those infrequent instances in which the inquiry is patently outside the bargaining issue.

364 F.2d at 554 (quoting NLRB v. Yawman & Erbe Mfg. Co., 187 F.2d 947, 949 (2d Cir. 1951)); *see also* Puerto Rico Tel. Co. v. NLRB, 359 F.2d 983, 986-87 (1st Cir. 1966); General Elec. Co., 173 N.L.R.B. 164 (1968), *enforced,* 414 F.2d 918 (4th Cir. 1969), *cert. denied,* 396 U.S. 1005 (1970); Fafnir Bearing Co., 146 N.L.R.B. 1582 (1964), *enforced,* 362 F.2d 716 (2d Cir. 1966); GORMAN, LABOR LAW 413-14 (1976) (contending that the employer's assertion of poverty makes the substantiating financial information relevant).

43. *See supra* notes 19-23 and accompanying text.

### 1. Truitt *Limited to its Facts*

Universally, *Truitt* is regarded as having established the rule that a company must generally disclose substantiating financial data whenever it claims an inability to pay a union's proposed wage or benefit.[44] Several courts, and at times the NLRB, have limited *Truitt* to this principle.[45]

*NLRB v. Harvstone Manufacturing Corp.*[46] serves as a recent example of a narrow application of *Truitt. Harvstone* involved four companies seeking wage and benefit concessions from their employees' union. The companies claimed that they were operating at a competitive disadvantage relative to their nonunion competitors in other parts of the United States. To substantiate this claim, the companies prepared and disclosed a schedule comparing the wages paid by their competitors to their own labor costs. However, the union wanted more — it requested the companies' financial records to substantiate their economic problems. The companies responded that they did not have to release their financial records because they were not claiming an inability to pay.[47] The Court of Appeals for the Seventh Circuit cited *Truitt* to pronounce the "well-established" rule "that when an employer makes a claim of financial inability to pay a proposed wage rate, it generally has an obligation, in order to meet its duty to bargain in good faith, to provide substantiating financial data to its employees' bargaining representative upon request."[48]

The court further stated that the relevant test was "to ascertain whether the employer said it 'would not' as opposed to 'could not' pay the employees' proposed demands."[49] "Only in the latter situation[,]" the court continued, "where the employer communicated that it 'could not' pay the demands has [the employer] made a claim of inability to pay."[50] After reviewing the record, the court agreed with the NLRB's finding that one of the four companies pleaded an inability to pay.[51] However, with respect to the other three companies the

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44. *See* Washington Materials, Inc. v. NLRB, 803 F.2d 1333, 1338 (4th Cir. 1986); NLRB v. Harvstone Mfg. Corp., 785 F.2d 570, 579 (7th Cir. 1986), *cert. denied,* 479 U.S. 821 (1987); NLRB v. Billion Motors, Inc., 700 F.2d 454 (8th Cir. 1983); Western Mass. Elec. Co. v. NLRB, 573 F.2d 101 (1st Cir. 1978); NLRB v. Pacific Grinding Wheel Co., 572 F.2d 1343 (9th Cir. 1978); New York Printing Pressmen & Offset Workers Union No. 51 v. NLRB, 538 F.2d 496 (2d Cir. 1976); NLRB v. Rybold Heater Co., 408 F.2d 888 (6th Cir. 1969); International Tel. & Tel. Corp. v. NLRB, 382 F.2d 366 (3d Cir. 1967); Dallas Gen. Drivers, Local Union No. 745 v. NLRB, 355 F.2d 842 (D.C. Cir. 1966); NLRB v. Taylor, 338 F.2d 1003 (5th Cir. 1964).

45. *See supra* note 24 and cases cited therein; *see also* Huston, *Furnishing Information as an Element of the Employer's Good Faith Bargaining,* 35 U. DET. L.J. 471, 486 (1958).

46. 785 F.2d 570 (7th Cir. 1986), *cert. denied,* 479 U.S. 821 (1987).

47. 785 F.2d at 573.

48. 785 F.2d at 575.

49. 785 F.2d at 575.

50. 785 F.2d at 576.

51. 785 F.2d at 576.

court reversed the NLRB because it interpreted the companies' competitive disadvantage response as implying an unwillingness rather that an inability to pay the union's wage demand.[52] Accordingly, the court held that the three companies had not bargained in bad faith when they refused to furnish the requested financial data.[53]

In reaching this holding, the *Harvstone* court explicitly rejected the notion that a claim of competitive disadvantage was tantamount to a claim of inability to pay or that such a claim would trigger a disclosure obligation under *Truitt.*[54]

### 2. *The "Competitive Disadvantage" Claim Interpreted as an Inability-to-Pay Claim*

In contrast, other courts, and at times the NLRB, have broadly construed inability-to-pay claims to encompass employer objections couched in terms of competition or other vague economic terms.[55] This loose definition is demonstrated in *United Steelworkers v. NLRB.*[56] In this case, the employer stated that it "didn't see how [it] could remain competitive" if it increased employee wages.[57] It refused to disclose economic data requested by the union on the ground that it did not claim an inability to pay. The employer asserted that a claim of inability to pay was not made when it claimed that an increase in wages would prevent it from competing. The Court of Appeals for the D.C. Circuit disagreed, reasoning that

> the inability to compete is merely the explanation of the reason why the Company could not afford an economic benefit. In *Truitt,* for instance, the case from which the short-hand expression "inability to pay" is derived, the employer's claim was that "an increase of more than 2 1/2 cents per hour would put it out of business."[58]

The NLRB used similar reasoning in *Wheeling Pacific Co.,*[59] where the employer refused to grant the union's proposed wage increase on the ground that it had to in order to remain competitive. The company in *Wheeling* contended that, because it was not pleading an inability to pay, under *Truitt,* it was not required to disclose the data.

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52. 785 F.2d at 576.

53. 785 F.2d at 577.

54. "[T]he mere assertion by an employer that it is operating at a competitive disadvantage does not, in and of itself, constitute a claim of inability to pay." 785 F.2d at 575.

55. *See supra* note 25 and cases cited therein.

56. 401 F.2d 434 (D.C. Cir. 1968).

57. 401 F.2d at 436 (quoting testimony of company's negotiator). Arguably, when this language is coupled with the company's other claim to the employees that the money "just wasn't there," 401 F.2d at 436, the employer was asserting an inability to pay. *See Harvstone,* 785 F.2d at 575 n.4. However, the Court of Appeals for the D.C. Circuit did not find it to be an explicit "inability-to-pay" claim. 401 F.2d at 436.

58. 401 F.2d at 436 (quoting *Truitt,* 351 U.S. at 150).

59. 151 N.L.R.B. 1192 (1965).

The NLRB disagreed, finding the argument self-contradictory. The Board reasoned that if granting economic benefits would have the effect of reducing the company's competitiveness, it followed that the company was asserting its financial inability to grant the economic benefits.[60] The Board stated that the "basic principles which underlay *Truitt* cannot be considered less relevant merely because [the company] . . . expressed the view that wage increases would ultimately *lead to poverty,* rather than that such increases were precluded by *present* poverty."[61]

Although this approach loosely interprets an inability-to-pay claim to encompass a claim of competitive disadvantage, it still requires that the employer's claim be interpretable as an inability-to-pay claim. The next section discusses cases applying *Truitt* where the courts and the NLRB have given *Truitt* a broader reading.

### 3. Truitt *Applied Beyond Its Facts: The Broad Rule*

Several courts, and in some cases the NLRB, have applied the *Truitt* principle beyond its factual situation and have adopted a broad application of *Truitt.*[62] These cases focus on the proposition stated in *Truitt* that "[g]ood-faith bargaining necessarily requires that claims . . . be honest" and "require[s] some sort of proof of [their] accuracy."[63] Thus, for a number of courts, the nature of the employer's claim is irrelevant; the important principle is that an employer must prove what it claims.[64]

In *NLRB v. Western Wirebound Box Co.,*[65] as in *United Steelworkers* and *Wheeling Pacific Co.,* the *Truitt* principle was extended to cover an employer's claim of competitive disadvantage. The employer in *Western Wirebound* claimed that its employees needed to accept a wage reduction in order for the company to maintain a competitive position. The employer explicitly stated "that he was not saying that the company was unable to pay the wage increase demanded."[66] In response to this "competition" claim, the union requested certain figures relating to productivity, labor and material costs, and price changes, and the opportunity to hire an accountant to look at the employer's books.[67] The Ninth Circuit's rationale for enforcing the

60. 151 N.L.R.B. at 1225 (NLRB adopting the report of the Trial Examiner).

61. 151 N.L.R.B. at 1225 (emphasis in original). This reasoning was rejected in *Harvstone,* 785 F.2d at 577 n.6; *see infra* notes 107-09 and accompanying text.

62. *See supra* note 26 and cases cited therein.

63. 351 U.S. at 152-53.

64. *See generally* Miller, *Employer's Duty to Furnish Economic Data to Unions — Revisited,* 17 LAB. L.J. 272 (1966).

65. 356 F.2d 88 (9th Cir. 1966).

66. 356 F.2d at 89.

67. 356 F.2d at 89.

NLRB's order directing the company to release the data did not rest, however, on the notion that a claim of competitive disadvantage was tantamount to a claim of inability to pay. Rather, the court relied on a broad reading of *Truitt* and ruled that the company's failure to produce data which would have substantiated its competitive disadvantage claim was bad faith bargaining. The court stated:

> [T]he principle announced in *Truitt* is not confined to cases where the employer's claim is that he is unable to pay the wages demanded by the union. That sort of claim, rather, was held to be covered by the stated broad principles that good faith bargaining necessarily requires that claims made by either bargainer should be honest claims, and that if an argument is important enough to present during bargaining sessions, it is important enough to require substantiation.
>
> We see no reason why, under the *[Truitt]* rationale, an employer who insistently asserts that competitive disadvantage precludes him from acquiescing in a union wage demand, does not have a like duty to come forward, on request, with some substantiation. In both cases, the give-and-take of collective bargaining is hampered and rendered ineffectual when an employer mechanically repeats his claim but makes no effort to produce substantiating data. In one case as well as the other this sort of conduct runs counter to section 204(a)(1) of the Act . . . which admonishes both employers and employees to "exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions."[68]

The broad *Truitt* rule has been applied to compel substantiation of various claims made by employers outside of the inability-to-pay context. For example, in *General Electric Co. v. NLRB,*[69] the employer claimed that its offered wage rates were competitive in the local area but refused to release the correlated wage data upon which this assertion was based. The Sixth Circuit cited *Truitt* and ruled that General Electric had to disclose the data. Noting that the *Truitt* rationale was not confined to its facts,[70] the court stated:

> When the company takes the position that its wage rates are competitive in the local areas and has taken wage surveys of the local areas, which presumably would back up the Company's position, then it is only reasonable that the Union should be given sufficient data to determine whether the Company's position is accurate and justified.[71]

Later, reemphasizing its use of the *Truitt* principle, the court proclaimed that "[t]he employer must be ready to back up its wage claims with factual proof which affords the Union an opportunity to fairly understand the merits of the employer's position."[72]

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68. 356 F.2d at 90-91 (citation omitted).

69. 466 F.2d 1177 (6th Cir. 1972).

70. 466 F.2d at 1184 (citing *Western Wirebound,* 356 F.2d at 90-91).

71. 466 F.2d at 1184.

72. 466 F.2d at 1184.

Additionally, the broad *Truitt* principle has been applied to compel the disclosure of cost information for proposed benefits when the employer has asserted that the benefits were simply too costly.[73] An employer's claim that layoffs were for economic reasons was ruled to require that the employer prove the economic reasons existed.[74] The Fourth Circuit ordered an employer to allow the union to conduct independent time studies to substantiate data upon which the employer claimed its hourly rates were based.[75] In a similar vein, the Ninth Circuit required the disclosure of wage scales paid by an employer in other communities to substantiate the employer's claim that it had a policy of paying wages commensurate with local wage standards.[76]

In summary, the case law applying *Truitt* presents three disparate approaches to employer competitive disadvantage claims in response to union wage demands: (1) only inability-to-pay claims must be substantiated; (2) in addition to inability-to-pay claims, competitive disadvantage claims must be substantiated because they are tantamount to inability-to-pay claims; and (3) all competitive disadvantage claims made by an employer must be substantiated, regardless of whether they are interpretable as inability-to-pay claims. Arguably, all three of the approaches are plausible interpretations of *Truitt;* however, as the subsequent sections will show, given the importance of financial information when evaluating competitive disadvantage claims, the doctrine of good faith bargaining supports the third approach's broad rule. The next section will demonstrate the importance of financial information when evaluating an employer's ability to pay a particular wage demand.

## II. The Importance of Financial Information When Evaluating Competitive Disadvantage Claims

Before discussing the policies and legal doctrines that undergird an employer's disclosure obligation, a brief discussion about the impor-

73. *See* NLRB v. General Elec. Co., 418 F.2d 736, 752 (2d Cir. 1969) ("GE's offhanded refusal to submit information on [the cost] issue which it had itself raised . . . amount[s] to an unfair labor practice").

74. Puerto Rico Tel. Co. v. NLRB, 359 F.2d 983, 986-87 (1st Cir. 1966). In this case the court merged the concepts of relevancy and substantiation by ruling that the economic data were relevant because the union wanted the company to prove that the economic reasons which the company raised existed.

75. General Elec. Co. v. NLRB, 414 F.2d 918, 925 (4th Cir. 1969), *cert. denied,* 396 U.S. 1005 (1970) ("The data collected by General Electric [were] that which it relied on, in part, to set hourly rates. General Electric claimed that based upon [these] data the employees involved in wage grievances were not underpaid. Under such circumstances, *it was incumbent on General Electric under § 8(a)(5) of the Act to disclose proof of the accuracy of its position.*") (emphasis added). *See* Bartosic, *supra* note 9, at 48-49.

76. K-Mart Corp. v. NLRB, 626 F.2d 704 (9th Cir. 1980) (citing General Elec. Co. v. NLRB, 466 F.2d 1177 (6th Cir. 1972)).

tance of complete financial information during collective bargaining is appropriate. This section will demonstrate that an employer's bare assertion that meeting a proposed wage demand will cause it economic or competitive harm is meaningless to a union unless the assertion is buttressed by appropriate financial information besides profit and loss data.[77] The discussion first examines the economic implications of a competitive disadvantage claim and then identifies two of the claim's implicit assumptions. Then, the importance of financial information will be shown by demonstrating that the veracity of the two assumptions and, thus, the veracity of the competitive disadvantage claim, can be proved only by resort to the employer's financial information.

The first step in appreciating the importance of financial information to a union when it is evaluating an employer's competitive disadvantage claim is to grasp the economic implications of the claim. Assuming a profit maximizing motivation, an employer's collective bargaining stance (as well as all of its decisions) in response to a union's wage demand turns on the employer's determination of how meeting the demand would affect its net profit.[78] Such an employer, when rejecting a wage demand, is implicitly communicating to the union that meeting the wage demand would result in a net profit below a desirable level. Specifically, the employer is saying that it cannot pass the cost of the wage demand on to its customers in the form of a price increase, absorb the cost as an additional operating cost, or employ a combination of both, and still maintain a desirable profit level.

There are at least two significant implicit assumptions in such a claim. First, the claim assumes that an increase in the price of the employer's product will cause a significant decrease in sales. Otherwise, the employer possibly would be able to pass on the cost of the wage demand to its customers and not suffer a lower net profit. Second, the claim assumes that the demand for the employer's product will remain the same. If this were not the case and demand were to increase, then the employer would experience higher sales and net profits, creating the possibility for it to pay the wage demand without compromising its current profit level. Thus, both of these assumptions are essential to the veracity of the employer's implicit claim. Testing

77. Of course the current and past profit and loss data of an employer are useful to test whether the employer currently has sufficient funds to meet a wage demand and also suggest how the employer's business may do in the future. However, there are other forms of financial information that management uses to predict how its business will be in the future which are very helpful when evaluating competitive disadvantage claims. *See supra* note 14.

78. Economists commonly assume that profit maximization is the primary aim of business enterprises. A profit maximizing firm is concerned with choosing the right level of output to produce, buying the right mix of inputs, and keeping production as efficient as possible. R. MAIN & C. BAIRD, ELEMENTS OF MICROECONOMICS 172 (2d ed. 1981) [hereinafter MAIN]; W. SHEPHERD, A. PUTALLUZ & W.H. ANDERSON, MICROECONOMICS 20 (1983) [hereinafter SHEPHERD].

these assumptions is where financial information plays an important role.

The first assumption can be tested by examining the price elasticity of product demand for the employer's product. Price elasticity of product demand is an economic statistic which measures the responsiveness of consumers to changes in the price of a product.[79] A low elasticity means that a change in price will not have a dramatic effect on the quantity demanded for that product, while a high elasticity means that a change in price will significantly affect the quantity demanded for that product.[80]

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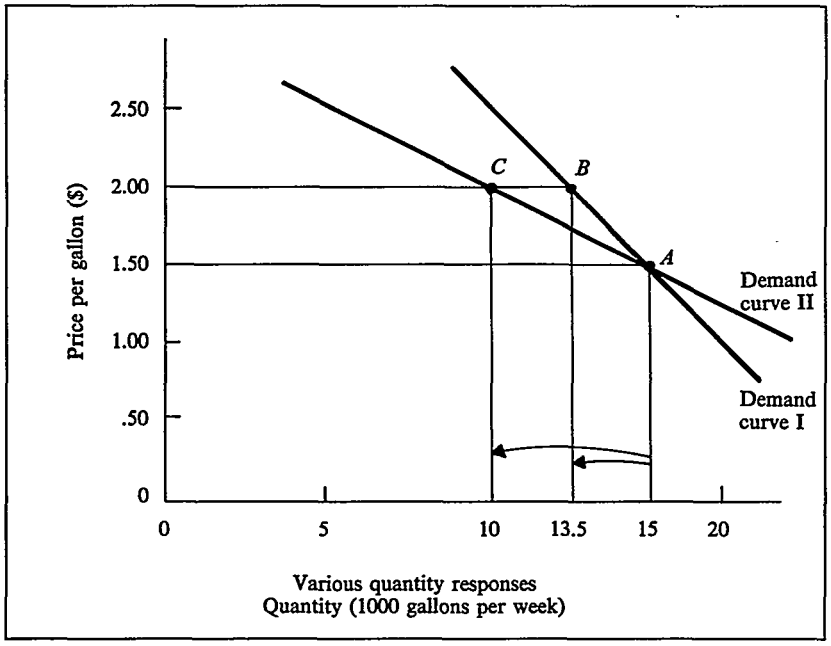
79. MAIN, *supra* note 78, at 71-74; R. MILLER & R. MEINERS, INTERMEDIATE MICROECONOMICS 105 (3d ed. 1986) [hereinafter MICROECONOMICS]; SHEPHERD, *supra* note 78, at 63-67.

80. Price elasticity of product demand is computed by taking the absolute value of the percentage change in quantity demanded divided by the percentage change in price:

$$\text{Price elasticity} = \% \,\delta\, Q \,/\, \% \,\delta\, P$$

This is simply a ratio between a cause and an effect. The cause is the change in price and the effect is the consumers' change in how much of the product they want. For example, take the following demand curves:

Figure 1




The change in price for both curve I and curve II is from $1.50 to $2.00 causing corresponding changes in the quantity demanded. Since elasticity will be different at different points on the demand curve, the midpoint of each quantity range is used by economists as the reference quantity when computing the percentage change in quantity. The price elasticity of product demand for curve I from point A to point B is

$$\% \,\delta\, Q \,/\, \% \,\delta\, P = |-1{,}500/14{,}250 \,/\, .50/\$1.75| = |-10.53/28.57| = .367$$

The price elasticity of product demand for curve II from point A to point C is

$$|-1{,}500/12{,}500 \,/\, .50/\$1.75| = |-12.00/28.57| = .420$$

Knowing the elasticity of an employer's product is very important when testing the first assumption and, thus, evaluating an employer's competitive disadvantage claim. The employer, when making a competitive injury claim, is implicitly contending that the increase in wages will force it to raise prices, resulting in lower sales and profits. However, the severity of this loss turns on the elasticity of the product. If the product has a low price elasticity of demand, then the drop in sales (all other things being equal) would be insignificant, allowing the employer to maintain current profit levels. Conversely, if the product has a high price elasticity of demand, the wage increase ultimately would have a negative effect on the employer's profits. In any event, market studies, indicating the elasticity of an employer's product, would be of great use to the union in testing an employer's competitive disadvantage claim.[81]

The second assumption — that the demand for the employer's product will remain the same — also requires financial information to test its veracity. Basic microeconomics informs us that when the demand for a firm's product increases[82] the firm can sell more of its product at a higher price, resulting in a higher net profit for the firm.[83]

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Thus, at the given price range, a firm with demand curve I would experience a lower loss of sales than a firm with demand curve II as the result of the same price increase. *See* SHEPHERD, *supra* note 78, at 62-66.

Primarily, the determining factor of a product's price elasticity of demand is the extent to which other products can be substituted for it. A product with many substitutes will have a relatively elastic demand, because, all other things being equal, consumers will opt for cheaper substitutes. On the other hand, a product with few substitutes will have a relatively inelastic demand. *See* MAIN, *supra* note 78, at 58-60; MICROECONOMICS, *supra* note 79, at 166-69; SHEPHERD, *supra* note 78, at 67.

81. This discussion of price elasticity of product demand has assumed that labor cost is a significant cost for the employer. For example, for a labor-intensive employer, labor may be 70% of its total cost. On the other hand, for a capital-intensive employer, labor cost may only constitute 30% of total cost. For the labor-intensive firm, a change in wages will affect its total cost more than the same change in wages would for the capital-intensive firm. Thus, the extent to which price elasticity of product demand analysis is pertinent to a discussion of the effect of a wage increase on an employer's total cost depends on the significance of an employer's labor cost relative to its total cost.

The significance of labor cost to an employer is another example of information that would be valuable to a union when evaluating an employer's competitive disadvantage claim, because if labor is a small component of the employer's cost then an increase in wages may have a nominal effect on the final cost of the employer's product. *See* MAIN, *supra* note 78, at 82-85; MICROECONOMICS, *supra* note 79, at 476-81; SHEPHERD, *supra* note 78, at 311-13.

82. It is important to distinguish the term "change in demand" from the term "change in the quantity demanded." The former, intended here, refers to a shift in a firm's entire demand function, meaning that at every price more of the product will be demanded. The latter term refers to the different quantities demanded along a firm's cost function, depending on the market price of the product. MAIN, *supra* note 78, at 54.

83. Compromising some detail, this can be explained briefly. First, the laws of supply and demand dictate that an increase in demand for a firm's product will result in a higher quantity demanded at a higher price. SHEPHERD, *supra* note 78, at 80. The increase in price that the firm can charge provides the firm with higher profits. This profit is represented by area A in Figure 2. Additionally, since the firm will want to produce at the profit maximizing output, it will follow microeconomic principles and increase its production to an output where the marginal cost of producing the last unit of output is equal to the revenue (the price) it receives for the last unit.

So, for example, if an employer forecasts an increase in demand for its product, then the employer also should predict a higher net profit from which it possibly could pay the union's wage demand and still maintain a desirable profit level. Moreover, a firm may have excess production capacity which would allow it to produce more output at a lower per unit cost, resulting in a higher net profit.[84] Thus, when eval-

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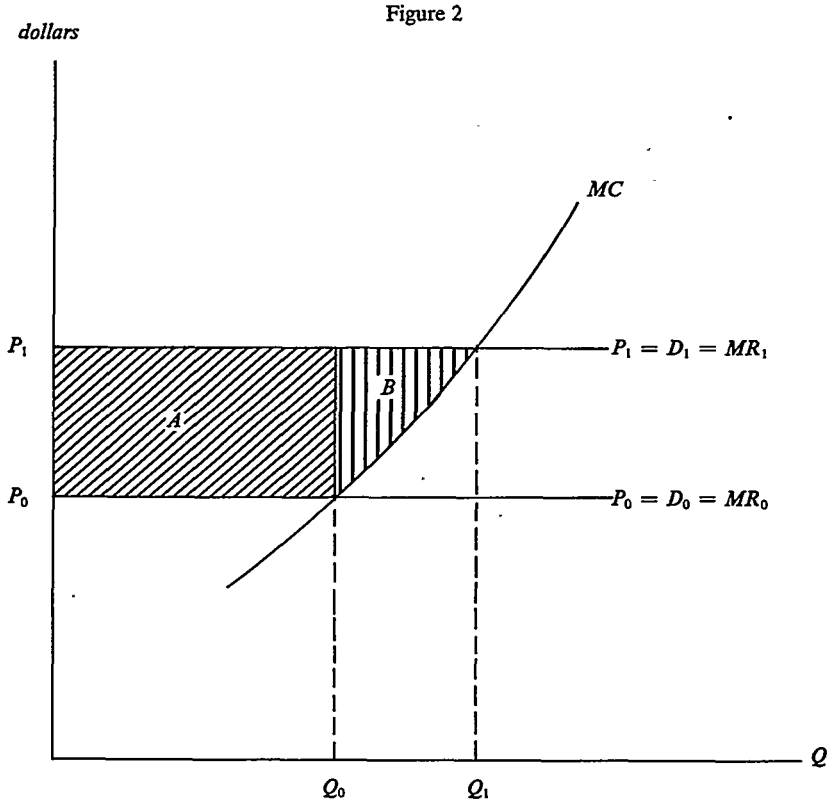
Marginal cost (MC) is the change in a firm's total cost when it produces one additional unit of output. Because a profit maximizing firm never would want to produce a unit if the production cost of that unit exceeded the revenue that could be received for it, but would want to produce a unit if the revenue received exceeded the production cost of the unit, the firm would want to produce at an output where marginal cost equals marginal revenue. This output is represented by Q1 in Figure 2. The profit received by a firm from the sales of the increased production is represented by area B of Figure 2.

Figure 2




For a more thorough microeconomic analysis, see MAIN, *supra* note 78; MICROECONOMICS, *supra* note 79; SHEPHERD, *supra* note 78.

Of course, most firms do not plot their cost curves to guide their economic behavior. Rather, the cost curves and the profit maximization rules describe how successful firms tend to act. E. BROWNING & J. BROWNING, MICROECONOMIC THEORY AND APPLICATIONS 229 (2d ed. 1986).

84. Consider, for example, a tool and die shop that is underusing its production capacity because it has not received enough job orders. If the shop receives more job orders it can fill them by using its extra production capacity. Assuming that we are in the short run, the only additional costs the shop would incur to fill the new orders would be operating costs such as labor, raw materials, and energy. Economists call these costs variable costs because as a firm's

uating the credibility of an employer's competitive disadvantage claim, it is crucial to examine the employer's assessment of its future, and this can only be done by reference to the information upon which the employer bases its claim, which generally comprises sales forecasts, marketing studies, production capacity studies, and other relevant studies about the future of the employer's business.[85]

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output varies these costs vary accordingly. Indeed, if a firm shuts down it will not incur these costs at all. The variable costs of a firm can be divided by the units of output to derive the firm's Average Variable Cost ("AVC"). AVC first decreases and then increases as output increases. This phenomenon is explained by the physical realities of production. For instance, if it takes X number of workers to produce Y units of production, it does not necessarily follow that it will take 2X number of workers to produce 2Y units of production. This is because an additional worker may augment productivity by performing services that were previously performed by her coworkers, allowing the coworkers to produce more than they previously did. For example, suppose the shop's only variable cost is its labor cost and its costs are reflected in Table 1:

Table 1

| Production (units) | Variable Cost ($) | AVC ($/unit) |
|---|---|---|
| 25 | 225 | 9.0 |
| 50 | 400 | 8.0 |
| 100 | 700 | 7.0 |
| 200 | 1000 | 5.0 |
| 250 | 1200 | 4.8 |

MAIN, *supra* note 78, at 133. Its total labor cost when producing 100 units is $700. However, because of additional production capacity the shop can double its production to 200 units but experience only a 43% increase in labor cost (($1000 - $700) / $700). Thus, the AVC decreases from 7 (700/100) to 5 (1000/200). This reduction of AVC will continue until production crowding becomes a problem. Because there is a fixed amount of plant space, machines, and tools in the short run, as more workers are hired the productivity (output per worker) eventually must decline. MAIN, *supra* note 78, at 132. Referring to Table 2, suppose that with one worker the shop can produce 20 units a shift. If another worker is added the various tasks can be divided up allowing the shop to produce 35 units. Likewise, a third worker allows the shop to produce 45 units a shift and produce 50 units with a fourth worker. Notice that the addition of each worker increases the shop's capacity less than the addition of the previous worker:

Table 2

| No. of Workers | Capacity | Marginal Difference |
|---|---|---|
| 0 | — | 20 |
| 1 | 20 | 15 |
| 2 | 35 | 10 |
| 3 | 45 | 5 |
| 4 | 50 | — |

SHEPHERD, *supra* note 78, at 158. Although more is produced, output per worker declines, so operating costs per unit of output (the AVC) increases. This phenomenon is called the law of diminishing marginal returns. Main, *supra* note 78, at 83-84; MICROECONOMICS, *supra* note 79, at 245-51; SHEPHERD, *supra* 78, at 157-58.

Thus, the cost of producing a firm's product varies with the quantity of its output. More specifically, in some circumstances a firm can increase production and experience a drop in the cost of production per unit of output. Thus, information relating to business forecasts, production capacity, as well as loss/profit statements, would be helpful in determining whether an employer has the capacity to pay increased wages without experiencing higher costs per unit of output.

85. *See supra* note 14.

This basic discussion does not purport to explore thoroughly the field of economics or present all forms of important financial information, but it demonstrates the need for financial information when evaluating an employer's competitive disadvantage claim. The disclosure of appropriate financial information to a union would allow it to understand satisfactorily the employer's financial situation which gave rise to the employer's reluctance to pay increased wages or, in some cases, would equip the union with the information necessary to demonstrate the falsity or spuriousness of the employer's claim. A union's need for financial information when evaluating competitive disadvantage claims is relevant to the concept of "good faith" bargaining, which requires that a union be provided with information needed to perform properly its section 9(a) bargaining duties.[86] The next section will demonstrate that good faith bargaining as defined by the NLRB and the judiciary supports the broad disclosure rule articulated in *Western Wirebound Box Co.*,[87] which requires an employer to furnish a union with appropriate financial information to substantiate competitive disadvantage claims.

## III. The Concept of Good Faith Bargaining

Given the importance of financial data when evaluating employers' competitive disadvantage claims, the broad interpretation of *Truitt* comports with the basic notion of good faith bargaining. The concept of "good faith" was imported to the law of collective bargaining in order to assure a high quality of labor negotiations.[88] The duty to bargain in good faith is an "obligation . . . to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement . . . ."[89]

In theory, determining whether a party is bargaining in good faith is a subjective test where the inquiry is whether an employer has "an open mind and a sincere desire to reach an agreement."[90] However, because in reality the employer's state of mind can only be determined

86. *See supra* notes 8-9 and accompanying text.

87. 356 F.2d 88 (9th Cir. 1966); *see supra* notes 65-68 and accompanying text.

88. Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1413 (1958). Although § 8(d), which contains the "good faith" expression, was not added to the NLRA until 1947, the NLRB and the courts had previously imposed a good faith requirement on collective bargainers. *See, e.g.* NLRB v. Montgomery Ward & Co., 133 F.2d 676, 684 (9th Cir. 1943); NLRB v. Reed & Prince Mfg. Co., 118 F.2d 874, 885 (1st Cir.), *cert. denied*, 313 U.S. 595 (1941); NLRB v. Boss Mfg. Co., 118 F.2d 187, 189 (7th Cir. 1941) ("Collective bargaining requires that the parties involved deal with each other with an open and fair mind and sincerely endeavor to overcome obstacles or difficulties existing between the employer and the employees . . . ."); Globe Cotton Mills v. NLRB, 103 F.2d 91, 94 (5th Cir. 1939) ("[T]here is a duty on both sides, though difficult of legal enforcement, to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement . . . .").

89. *Montgomery Ward*, 133 F.2d at 686.

90. 133 F.2d at 686.

by inference from the employer's conduct during negotiations, the case law has established objective criteria for determining what is bad faith bargaining in violation of sections 8(a)(5) and 8(d).[91] As a result, the courts and the NLRB focus on the parties' conduct during the negotiations when making a good faith determination.[92] This leads to the incongruous result of the NLRB and the courts regulating the manner in which collective bargaining is conducted regardless of the actor's actual state of mind.[93] However, in order to facilitate resolution of bargaining disputes, reality must compromise theory:

> In every case, the basic question is whether the employer acted like a [person] with a mind closed against agreement with the union. The [NLRB] can judge [the employer's] subjective state of mind only by asking whether a normal employer, willing to agree with a labor union, would have followed the same course of action.[94]

The *Truitt* Court, wary of creating an inflexible per se rule of conduct, limited its holding by saying that "[e]ach case must turn upon its particular facts."[95] Nevertheless, the dissenters in *Truitt* were critical of the majority's opinion because they thought that the bad faith determination was based only on the employer's refusal to substantiate its inability-to-pay claim. The dissenters contended that in any case where good faith was in issue the "totality of the conduct of the negotiation" must be considered.[96] Because such an inquiry had not been made, the dissenters concluded that the case should be returned to the NLRB for a good faith determination under the totality of conduct standard.[97] Despite the dissenters' admonitions and the majority's limitation, the case law applying *Truitt* demonstrates that an employer's refusal to substantiate an inability-to-pay claim has become objective evidence of per se bad faith bargaining.[98]

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91. *See* GORMAN, *supra* note 42, at 409 ("Although the *[Truitt]* Court has rejected a rule which would automatically result in a finding of bad-faith bargaining . . . the Board and the courts have over time developed a number of principles which facilitate an assessment in advance of the employer's duty to disclose different kinds of information.").

92. Cox, *supra* note 88, at 1430.

93. *Id.*

94. *Id.* at 1419; *see* NLRB v. Katz, 369 U.S. 736, 747 (1962) ("[T]he Board *is* authorized to order the cessation of behavior which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion, or which reflects a cast of mind against reaching agreement.") (emphasis in original).

95. 351 U.S. at 153.

96. 351 U.S. at 155.

97. 351 U.S. at 157.

98. *See* Cox, *supra* note 88, at 1430 (describing *Truitt* as a per se case); *see also* Teleprompter Corp. v. NLRB, 570 F.2d 4, 9 n.2 (1st Cir. 1977); New York Printing Pressmen & Offset Workers Union No. 51 v. NLRB, 538 F.2d 496, 500-01 (2d Cir. 1976); C-B Buick v. NLRB, 506 F.2d 1086, 1091 (3d Cir. 1974); NLRB v. Palomar Corp., 465 F.2d 731, 734 (5th Cir. 1972); NLRB v. Bagel Bakers Council, 434 F.2d 884, 888 (2d Cir. 1970), *cert. denied,* 402 U.S. 908 (1971); NLRB v. Southland Cork Co., 342 F.2d 702, 706 (4th Cir. 1965). *But see* International Woodworkers, Local Unions 6-7 & 6-122 v. NLRB, 263 F.2d 483 (D.C. Cir. 1959); Taylor Forge & Pipe Works v. NLRB, 234 F.2d 227 (7th Cir. 1956), *cert. denied,* 352 U.S. 942 (1956).

*NLRB v. Jacobs Manufacturing Co.*,[99] cited with approval by the *Truitt* majority,[100] also demonstrates the application of the good faith bargaining test in the context of an employer's refusal to substantiate its inability-to-pay claim. In *Jacobs,* the employer took the position that it was unable to raise wages because business conditions made it financially unable to do so. The employer refused the union's request to examine the employer's books and sales records to prove to the union that the company was not able to increase wages. The company subsequently refused to meet with the union unless the union submitted a new written proposal. The Second Circuit ruled that the employer had bargained in bad faith when it refused to meet with the union and when it refused to substantiate its economic claim. The *Jacobs* court defined good faith bargaining to require "cooperation in the give and take of personal conferences with a willingness to let ultimate decision follow a fair opportunity for the presentation of pertinent facts and arguments."[101] The court continued that "[t]his . . . was not satisfied by . . . the bare assertion of a conclusion made upon facts undisclosed and unavailable to the union which was not acceptable without a presentation of sufficient underlying facts to show, at least, that the conclusion was reached in good faith."[102]

The thrust of the *Jacobs* decision was that the employer was required to show via disclosure that it had in good faith reached a decision that it could not meet union demands. The court was evidently not concerned with the actual *reasons* the employer did not want to open its books. Rather, the court seemed to expound that good faith bargaining inherently requires substantiation of economic incapacity claims regardless of the bargainer's actual subjective intent.[103]

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99. 196 F.2d 680 (2d Cir. 1952).

100. 351 U.S. at 153 n.6.

101. 196 F.2d at 683.

102. 196 F.2d at 683; *see also* Southern Saddlery Co., 90 N.L.R.B. 1205 (1950) ("[B]y maintaining the intransigent position that it was financially unable to raise wages and, at the same time, by refusing to make any reasonable efforts to support or justify its position, [the employer] erected an insurmountable barrier to successful conclusion of the bargaining."); Pioneer Pearl Button Co., 1 N.L.R.B. 837, 843 (1936) (The employer "did no more than take refuge in the assertion that [its] financial condition was poor; [it] refused either to prove [its] statement, or to permit independent verification. This is not collective bargaining.").

103. In other areas of labor law intent is imputed to the employer when it should reasonably know the effects of its conduct will be contrary to the principles of the NLRA. In NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963), in the context of employer discrimination against union members, the Supreme Court stated: "[The employer's] conduct *does* speak for itself — it *is* discriminatory and it *does* discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended." 373 U.S. at 228 (emphasis in original). By imputing bad faith intent to an employer who refuses to substantiate its economic claims knowing that this refusal will hamper the negotiations, the incongruous result of looking to employer conduct rather than subjective intent is less unsettling.

## IV. Good Faith Bargaining Requires Substantiation of Competitive Disadvantage Claims

By deemphasizing the semantics of the employer's claim and focusing instead on the implications of the claim, the principles of good faith bargaining can be applied best. This is evident from an application of the substantiation doctrine and the relevancy test.

### A. *Good Faith Bargaining and the Substantiation Doctrine*

The concept of good faith bargaining, as espoused by the NLRB and the courts, supports the rule that employers should have to substantiate competitive disadvantage claims or be guilty of bad faith bargaining. There is little doubt that many reasons exist to explain why an employer might refuse to substantiate a competitive disadvantage claim with financial data other than the employer's subjective bad faith.[104] However, it is equally true that the effect of an employer's refusal to substantiate a competitive disadvantage claim interferes with the bargaining process to the same extent, as in *Jacobs* and *Truitt,* as a refusal to substantiate an inability-to-pay claim. In both cases, the refusal to substantiate hinders the bargaining process because a union is unable to evaluate intelligently the employer's position. A union is in no better position to evaluate an employer's position or to determine that an employer's decision was reached in good faith when an employer responds to union demands in abstract terms of competition or economic harm than it is when an employer responds with an inability-to-pay claim. The *Harvstone* rule allows an employer to take refuge in a claim of competitive disadvantage to the same extent as an employer who claimed it was unable to pay a wage or benefit before *Truitt* was decided. As the court in *Western Wirebound Box Co.* noted: "In both cases, the give-and-take of collective bargaining is hampered and rendered ineffectual when an employer mechanically repeats his claim but makes no effort to produce substantiating data."[105]

The *Truitt* substantiation doctrine should apply with full force to an employer's competitive disadvantage claim. If good faith bargaining requires that an employer's claims be honest, and during negotiations the employer has presented the union with a competitive disadvantage claim, then this implication of impending economic harm should be substantiated with financial information so the union can adequately assess the employer's position.

Although an employer's claim of competitive disadvantage is not

104. For example, an employer may be reluctant to disclose substantiating data because it does not want to impair its credit rating, engage in long discussions with union members who lack financial experience, or chance a leak to a competitor, or because it simply has a penchant for secrecy. Cox, *supra* note 88, at 1432.

105. 356 F.2d at 91.

an assertion that it absolutely cannot pay a proposed wage or benefit, it does imply that paying the proposed wage or benefit will cause economic harm to the employer. In *Truitt,* the Court emphasized that a relevant concern of the parties during labor negotiations was whether a company could pay a proposed wage or benefit without harm to its business:

> We think that in determining whether the obligation of good faith bargaining has been met the Board has a right to consider an employer's refusal to give information about its financial status. . . . In their effort to reach an agreement here both the union and the company treated the company's ability to pay increased wages as highly relevant. The ability of an employer to increase wages *without injury to his business* is a commonly considered factor in wage negotiations. Claims for increased wages have sometimes been abandoned because of an employer's unsatisfactory business condition; employees have even voted to accept wage decreases because of such conditions.[106]

Evidently, the *Truitt* Court was concerned with more than inability-to-pay claims. The Court was concerned with any economic claim which suggested that paying a proposed wage or benefit would cause significant harm to (not just the demise of) the employer's business.

This interpretation of *Truitt* eliminates the need to make the tenuous argument that a competitive disadvantage claim is tantamount to an inability-to-pay claim.[107] Certainly if an employer continues to operate at a competitive disadvantage relative to its competition, it will ultimately be in a position to plead honestly an inability to pay.[108] However, a competitive disadvantage claim does not assert a *present* inability to pay,[109] and it is better to insist on substantiation of an implication of future economic or competitive harm than to strain the meaning of a present inability-to-pay claim.

### B. *The Relevancy Test*

It is unclear whether the *Truitt* Court grounded its holding on a relevancy determination.[110] Ostensibly, the *Truitt* substantiation doctrine and the relevancy test are analytically distinct,[111] although arguably the relevancy inquiry collapses into *Truitt*'s substantiation doctrine.[112] In any event, application of the "relevancy" test supports

106. 351 U.S. at 152 (emphasis added) (footnote omitted).

107. *See supra* section I.B.2.

108. *See Harvstone,* 785 F.2d at 576-77.

109. 785 F.2d at 577.

110. *See supra* notes 39-42 and accompanying text.

111. *See* Bartosic, *supra* note 9, at 47-49.

112. As Professor Gorman noted: "[I]t is the company's assertion of poverty that makes [the substantiating financial information] relevant." GORMAN, *supra* note 42, at 413; *see also* Puerto Rico Tel. Co. v. NLRB, 359 F.2d 983, 987 (1st Cir. 1966) ("Clearly the data concerning volume of business, earnings, wage savings due to layoffs, etc., became relevant once the company raised the economic issue as the reason for the layoffs."); O'REILLY, *supra* note 29, at 49 ("Once the

the broad disclosure rule.

From the inception of the NLRA, the NLRB has required an employer to provide information needed by the union for the proper performance of its bargaining responsibilities.[113] The courts and the NLRB created a disclosure obligation under the aegis of the NLRA — which is silent on the subject of disclosure — because it was clear that good faith collective bargaining could only be realized if both labor and management had the necessary information regarding the relevant issues of negotiation.[114] Under the rule today, unless the information is wage data,[115] the union has the burden of explicating how the information is relevant to the performance of its collective bargaining activities.[116]

Once an employer has made its financial position an issue by responding to a wage demand with a competitive disadvantage claim, it is hard to conceive of anything being more relevant to a union in formulating its demands during collective bargaining than information about the extent of the employer's capacity to meet its wage demand.[117]

The Third Circuit recognized this reasoning in *International Telephone & Telegraph Corp. v. NLRB,*[118] where the court applied the relevancy test and required an employer to substantiate its competitive disadvantage claim. In this case, the employer maintained that for it to remain competitive, it had to lower the cost of fringe benefits because it was losing contracts to competitors. The union requested financial data regarding the employer's competitive position and corresponding labor costs.[119] Enforcing the order of the NLRB, the court cited *Truitt* for the proposition that "[g]ood-faith bargaining requires that relevant factual statements made during the course of collective bargaining be supported, on request, by available proof as to

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employer has made a claim of inability to pay during negotiations, that claim establishes the pertinence of the corroborating data.").

113. *See, e.g.,* Aluminum Ore Co., 39 N.L.R.B. 1286, *enforced,* 131 F.2d 485 (7th Cir. 1942); *see also* Bartosic, *supra* note 9, at 24.

114. *See* Shedlin, *supra* note 14, at 441-43.

115. *See supra* note 11 and accompanying text.

116. *See supra* note 13 and accompanying text; *see also* Bartosic, *supra* note 9, at 24.

117. *See* SMITH, *supra* note 4, at 600 ("Could anything be more 'relevant' to a union in formulating its demands in preparation for collective bargaining than knowledge of the employer's capacity to pay?"). Shedlin argues that management-related information should be deemed relevant to mandatory subjects of bargaining:

> [T]he Board and courts should be willing to accept the argument that given the duty to bargain over a severance pay clause, the long-range prospects of the company are relevant and necessary to decide whether presently to bargain for severance pay or to seek an immediate wage increase. Moreover, the union needs to know about ultimate plans for plant expansion or contraction because such plans are relevant to bargaining about seniority.

Shedlin, *supra* note 14, at 455.

118. 382 F.2d 366 (3d Cir. 1967), *cert. denied,* 389 U.S. 1039 (1968).

119. 382 F.2d at 370-71.

their accuracy" and found that the requested information was relevant to the union's function as a bargaining agent.[120] The court then held that the employer's "failure to honor the request for disclosure of relevant data in this case was a clear violation of [section 8(a)(5) and (1)]."[121]

Given the importance of financial information when evaluating an employer's ability to meet a particular wage demand, the principles of good faith bargaining manifested in the substantiation doctrine and the relevancy test support the broad rule because, in the face of a competitive disadvantage claim, the union needs substantiating financial information to perform properly its section 9(a) bargaining duties. Beyond the legal support for the broad rule, there are several practical advantages that would inure to the benefit of the NLRB, the courts, and the collective bargaining process. The next section discusses the advantages of the broad disclosure rule.

## V. The Advantages of the Broad Disclosure Rule

Applying the broad rule to require substantiation of competitive disadvantage claims would have several beneficial consequences without interfering with the collective bargaining process. First, it would produce more efficient and less antagonistic labor negotiations by creating a beneficial flow of information between the negotiating parties. The free flow of information would allow the union, based on a realistic appraisal of the employer's financial situation, to bargain for a reasonable allocation of the employer's available resources.[122] For example, if a union is informed of an employer's fiscal situation and therefore is unable to ignore the problems of a struggling company, it may be willing to offer worker productivity increases in order to increase the firm's earning power, enabling the firm to pay higher wages and still stay competitive.[123]

The Supreme Court in *Truitt* emphasized that an informed union may be willing to capitulate on a proposed wage demand once the "unsatisfactory business condition" of the employer is made apparent to the union.[124] The Court referred to several then-contemporary examples of union capitulation.[125] In the late 1970s and early 1980s, labor negotiations were marked by union wage concessions in the face

120. 382 F.2d at 371.

121. 382 F.2d at 371. For cases using a similar rationale, see cases cited *supra* note 42.

122. Shedlin, *supra* note 14, at 452.

123. *See* N. Chamberlain & J. Kuhn, Collective Bargaining 369-70 (1965). Additionally, the union would be apprised of any danger that increased wages would lead to a substitution of capital for labor.

124. 351 U.S. at 152.

125. 351 U.S. at 152 n.5 (citing, *inter alia, Union Votes Wage Freeze to Aid Rice-Stix*, St. Louis Globe-Democrat, Nov. 25, 1954, at 1, col. 4; *Studebaker Men Vote for Pay Cuts*, N.Y. Times, Aug. 13, 1954, at 1, col. 5).

of a weak economy and employers besieged by foreign competition. For example, in 1979 the United Auto Workers (UAW), cognizant of the Chrysler Corporation's financial crisis, negotiated a contract with Chrysler which was less demanding than those subsequently reached with Ford and General Motors in order to facilitate a federal financial aid package which eventually saved Chrysler and the jobs of its workers. By January 1981, the concessions granted by the UAW to Chrysler totaled $924 million.[126] Similarly, in 1982, the UAW granted Ford and General Motors a series of concessions in order to abate the number of plant closings and to provide UAW members with more job security.[127] The trucking[128] and steel[129] industries also won concessions from unions because of the hard economic times. Indeed, of all collective bargaining agreements negotiated in 1983, approximately one third provided for an initial pay freeze or pay reduction.[130] It seems apparent from these examples that unions are willing to compromise their demands once they are made aware of their employers' financial woes.

The broad rule also eliminates the gamesmanship which is contrary to the statutory policy of cooperation and successful bargaining. An express purpose of the NLRA was to "encourag[e] practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions . . . ."[131] The *Harvstone* rule allows an employer essentially to take an inability-to-pay position during the bargaining process and then later deny that it was in fact taking such a position because it skillfully avoided using the precise words "poverty" or "can't."[132] This gamesmanship, characterized by disingenuous claims, is hardly in accord with a spirit of cooperation and friendly resolution of differences.

The broad rule would reduce this form of harmful gamesmanship by not allowing employers to hide their true intentions behind vague claims of competitive disadvantage. Specifically, an employer, rebuffing a union demand, would have to be honest with the union and either give a reason unrelated to competition or economic harm or, if the reason for the rebuff is related to competition or economic harm,

126. *See* ROTHSCHILD, *supra* note 3, at 41-43.

127. Fraser, *Collective Bargaining: A New Era of Breakthroughs in Job Security and Worker Participation,* 14 U. TOL. L. REV. 255 (1983). *See generally* ROTHSCHILD, *supra* note 3, at 43-45.

128. In 1982, the Teamsters agreed to a contract which provided for no general increase in wages. *See* ROTHSCHILD, *supra* note 3, at 46.

129. In 1983, the United Steelworkers approved a contract that provided for a pay cut of $1.25/hour, eliminated one holiday and a week of vacation, reduced overtime, and reduced COLA payments. *See* ROTHSCHILD, *supra* note 3, at 48.

130. *Median Contract Settlement in 1983,* 115 Lab. Rel. Rep. (BNA) (Jan. 30, 1984) (Summary of Developments); ROTHSCHILD, *supra* note 3, at 49.

131. 29 U.S.C. § 151 (1982).

132. *See Harvstone,* 785 F.2d at 582 (Sywgert, J., concurring in part and dissenting in part).

provide the union with appropriate financial information supporting the claim. This would eliminate the guessing game created by ambiguous claims where the union is left unclear about the employer's ability to meet the union's wage demands.

Moreover, the broad rule would relieve the NLRB and the courts of the onerous judicial task of reviewing protracted negotiations to determine whether or not the employer said "could not" as opposed to "would not."[133] Under the *Harvstone* rule, the NLRB or reviewing court must engage in a difficult factual review[134] to determine the position taken by the employer during negotiations. The court or the NLRB must engage in a difficult inquiry where, "[a]lthough no magic words are required to express an inability to pay, the words and conduct must be specific enough to convey such a meaning."[135]

The broad rule would eliminate this expense of judicial time. Instead of having to decide whether a series of comments about competition amounts to an inability-to-pay stance, under the broad rule any employer response that suggests economic or competitive harm would trigger the disclosure obligation. Rather than having a "would not"/"could not" test, the broad rule would have a tighter "would not"/"could cause harm" test which leaves less room for employers to equivocate. For instance, in *NLRB v. Celotex Corp.*,[136] the employer specifically denied it was claiming an inability to pay and stated to the union: "We can pay whatever we think is right to pay."[137] However, the employer additionally made comments regarding the competitiveness and survival of one of its plants.[138] The Court of Appeals for the Fifth Circuit enforced the NLRB's order that the employer disclose substantiating financial information.[139] Under the "would not"/"could not" test this is a difficult case because the employer specifically said it could afford the union's demand. It strains the meaning of the phrase "inability to pay" to characterize the *Celotex* employer as taking such a stance. On the other hand, under the broad rule this is an easy case because the employer clearly was trying to intimate that meeting the union's demand would cause it financial troubles.

The broad rule also would remove the inconsistency and unpre-

133. *See Harvstone,* 785 F.2d at 575; *see also* J. O'REILLY, *supra* note 29, at 50 ("Much of the litigation on disclosure of financial information has centered on whether ambiguous statements in a bargaining context amount to a claim of inability to pay.").

134. "As Justice Burger, then Circuit Judge, said . . . , in the whole complex of industrial relations there are few issues less suited to appellate judicial appraisal than evaluation of bargaining processes . . . ." *Harvstone,* 785 F.2d at 582 (Swygert, J., concurring in part and dissenting in part).

135. *Harvstone,* 785 F.2d at 575 (quoting ACL Corp., 271 N.L.R.B. 1600, 1602 (1984)).

136. 364 F.2d 552 (5th Cir. 1966).

137. 364 F.2d at 553 (quoting comment by company official during negotiations with union).

138. 364 F.2d at 553.

139. The court grounded its ruling on a relevancy determination. 364 F.2d at 554. *See supra* note 42.

dictability currently plaguing the courts. Under the *Harvstone* rule, the meaning of what an employer said is essentially determined by the meaning the NLRB or court chooses to give it. This open-ended test has allowed the NLRB and different courts to give different interpretations to very similar competitive disadvantage claims, creating inconsistent decisions. Under the *Harvstone* rule an employer may or may not have to substantiate a competitive disadvantage claim, depending on the political bent of the NLRB[140] or the circuit precedent of the reviewing court.

The broad rule would provide more consistency and predictability for two reasons. First, as demonstrated in the *Celotex* example, there is a clearer distinction between a "would not" claim and a "could cause harm" claim than there is between a "would not" claim and a "could not" claim. Thus, the disclosure consequences of bargaining claims would be clearer to employers, union representatives, the NLRB, and the courts. Second, and related to the first reason, because the broad rule leaves less room for employer equivocation, the NLRB and the courts would be required less often to interpret ambiguous employer claims which would reduce the frequency of disparate interpretations being given to similar language.[141]

An employer may be concerned that the broad rule would result in wholesale disclosure of financial data to unions. However, this concern is unwarranted because the employer would still control the trigger for the disclosure obligation. For example, a financially healthy employer, predisposed against disclosure, could avoid disclosing its financial information by responding to a union wage demand with the explanation that the union's price is more than the employer is willing to pay.[142] A financially languid employer, with the same predisposi-

140. Under the Reagan administration, for example, the NLRB rejected its previous view that a claim of competitive disadvantage was *ipso facto* a claim of inability to pay. *Harvstone,* 785 F.2d at 575 n.4.

141. *See supra* section I.B.

142. Of course this "unwillingness" response also could be repeated mechanically. However, the precepts of good faith bargaining would require some elaboration on the reasons underlying the employer's unwillingness. An employer could articulate several reasons besides economic harm for its unwillingness to meet union demands which would not require substantiation under the broad rule. For instance, an employer could assert a desire to reinvest profit in new equipment or advertising to ensure continued growth. The employer could also express a desire to maintain a particular profit margin or fashion of life style to which the employer has become accustomed. *See* Milbin Printing Inc., 218 N.L.R.B. 223 (1975). Although these claims would require some form of substantiation, it would be less than that required by a competitive disadvantage claim. For example, in Dallas General Drivers, Local Union No. 745, 355 F.2d 842 (D.C. Cir. 1966), the employer claimed that it would not grant the union's wage increase demand because it was already paying wages in excess of the prevailing rates of its competition in the same labor market. 355 F.2d at 845. The NLRB and the Court of Appeals for the District of Columbia Circuit construed the employer's claim not to be an inability-to-pay claim. Under the broad rule, the result would be the same because the employer did not suggest that paying the higher wage would cause economic or competitive harm. For instance, the employer may not want to raise wages out of principle. However, if pressured for an explanation, it would be incumbent on the employer to explain the reason for its reluctance to raise wages. If the em-

tion, could employ the same tactics, or it may decide that documenting its financial situation to the union would expedite union capitulation.[143] In short, the extent of disclosure rests in the hands of the employer. Rather than result in a wholesale disclosure of financial information to unions, the broad rule would result in more candid negotiations because an employer would no longer be able to make strategic use of ambiguous claims of impending economic harm.

Additionally, an employer may be concerned that the broad rule would compromise an employer's confidentiality concerns or be unduly burdensome to the bargaining process. However, the NLRB and the courts recognize several reasons for not requiring an employer to disclose relevant information,[144] and these would still be available to employers. For instance, if an employer could show that the reason behind the union's request for substantiating financial information is to harass or publicly embarrass the employer, then the NLRB or court may not require disclosure.[145] The employer would not be required to disclose the financial information in the exact manner or form requested by the union as long as the employer's objection is meritorious,[146] and the alternative mode of conveying the information communicates the essence of the substantiating financial data.[147] Although, as a general rule, an employer's confidentiality objection will not be sustained,[148] if an employer can establish that it has a legitimate business interest in preserving confidentiality, the courts and the NLRB will generally attempt to strike a balance between the interests of the union and the employer and fashion a suitable disclosure scheme.[149]

Perhaps the best way to allay skepticism about the broad disclosure rule is to look at the broad disclosure rules mandated by statutes in other industrial countries. For instance, Great Britain, West Germany, and Belgium impose, by statute, an affirmative duty on employers to disclose a broad range of information.[150] In Great Britain, under the Employment Protection Act of 1975 and the British Code of Practice on Disclosure of Information to Trade Unions for Collective Bargaining Purposes,[151] an employer must disclose information in the

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ployer were to explain its reluctance in terms of feared economic or competitive harm then the broad rule would mandate some form of substantiation with financial information.

143. *See supra* notes 124-30 and accompanying text.

144. *See generally* GORMAN, *supra* note 42, at 415-18.

145. *See* NLRB v. Robert S. Abbot Publishing Co., 331 F.2d 209, 212 (7th Cir. 1964).

146. *See* Emeryville Research Center v. NLRB, 441 F.2d 880, 885-86 (9th Cir. 1971).

147. *See* General Elec. Co., 186 N.L.R.B. 14, 17 (1970).

148. *See* Curtis-Wright Corp. v. NLRB, 347 F.2d 61, 71 (3d Cir. 1965).

149. *See* Kroger Co. v. NLRB, 399 F.2d 455 (6th Cir. 1968).

150. *See generally* Shedlin, *supra* note 14, at 456-60.

151. Advisory, Conciliation, & Arbitration Service, Code of Practice 2 (1977) (*discussed in* Shedlin, *supra* note 14, at 456-57) [hereinafter Code of Practice].

areas of pay and benefits, condition of service, manpower, performance, and finances.[152] This information goes well beyond information regarded as "presumptively relevant" by the NLRB.[153]

The Works Council,[154] under West German law,[155] must be informed by employers about planned changes in working areas, procedures, routines, technical facilities, and jobs.[156] Additionally, the Works Council must be given information on personnel planning, including current and future personnel demands.[157] Every company with more than one hundred employees must establish an Economic Committee *(Wirtschaftsausschuss)* to consult the employer on financial matters and to report to the Works Council.[158] The Economic Committee must be furnished with detailed information relating to the employer's economic and financial situation; production and sales figures; investment programs; new manufacturing methods; any reduction or shutdown of production; any relocation or merger; and various other information that is material to the employees' interests.[159]

The laws of Belgium require vast disclosure to a council similar to West Germany's Works Council.[160] The council is composed of representatives of both management and labor, and serves to review and establish policies relating to employee welfare.[161] Employers must disclose information including the company's market position, financial structure, personnel expenses, budget, production costs, and the employer's assessment of the company's future.[162] Additionally, the employers must furnish quarterly reports[163] and independently inform the council of events or decisions of consequence to the company.[164]

Thus, as the examples of other countries illustrate, the disclosure

152. Code of Practice, *supra* note 151, ¶ 11.

153. *See supra* notes 10-12 and accompanying text.

154. In West Germany, a major player in worker representation is an institution called the *Betriebsrat* or Works Council, which is distinct from but closely associated with the labor unions. *See* Shedlin, *supra* note 14, at 458.

155. *See* Law of Jan. 15, 1972, § 80(1), Bundesgesetzblatt I 13, 29 [hereinafter Law of Jan. 15, 1972] (outlining the duties of the Works Council).

156. Law of Jan. 15, 1972, *supra* note 155, at § 90.

157. Law of Jan. 15, 1972, *supra* note 155, at § 92(1).

158. Law of Jan. 15, 1972, *supra* note 155, at § 106(1).

159. Law of Jan. 15, 1972, *supra* note 155, at § 106(2), (3). However, the duty to disclose only exists if disclosure would not endanger the employer's technological and business secrets. *Id.* at § 106(2).

160. *See* Decree of Nov. 27, 1973, chs. 1-2, 3 Les Codes Larcier 310 (1975) [hereinafter Decree of Nov. 27, 1973].

161. The council in Belgium, called the *conseil d'entreprise,* comprises at least two employee representatives, plus an equal number of substitute representatives, and the employer, plus one or more of the employer's representatives and their substitutes. *See* J.-P. DE BANT, CCH BUSINESS GUIDE TO BELGIUM ¶ 807 (1978).

162. Decree of Nov. 27, 1973, *supra* note 160, at ch. 2, art. 4.

163. Decree of Nov. 27, 1973, *supra* note 160, at ch. 4, art. 24.

164. Decree of Nov. 27, 1973, *supra* note 160, at ch. 5, art. 25.

of management-related information is workable and does not result in catastrophic consequences.

## CONCLUSION

By forbidding an employer to hide its true intentions behind claims couched in terms of competition, the ideal of full and fair presentation of pertinent issues in collective bargaining can be more readily achieved. The case law demonstrates that some courts, and at times the NLRB, have abandoned the good faith inquiry by applying a narrow construction of *Truitt,* which ignores the importance of having appropriate financial information when evaluating an employer's ability to pay a particular wage demand. Once the importance of financial information is recognized, an application of the substantiation doctrine and the relevancy test reveals that good faith bargaining precludes an employer from taking refuge in a claim of competitive disadvantage without offering substantiating data. In addition to making legal sense, the broad rule would foster more cooperative collective bargaining and more consistent and predictable decisions, and would eliminate the need for an onerous review of labor negotiations — without jeopardizing employers' confidentiality concerns.

— *Brandon David Lawniczak*