The Nielsen Lithographing Co. *and* Graphic Communications International Union, Local 508 O–K–I, AFL–CIO. Cases 9–CA–20474 and 9–CA–21292

November 22, 1991

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On May 8, 1986, the National Labor Relations Board issued its Decision and Order[1] in which it found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide to the Union requested financial data and by unilaterally implementing changes in employees' terms and conditions of employment. The Board also found that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate unfair labor practice strikers to their former positions upon their unconditional offer to return to work.

On May 29, 1986, the Respondent filed a motion for reconsideration. On November 20, 1987, the Board denied the motion[2] Thereafter, the Respondent filed a petition for review and the Board filed a cross-application for enforcement with the Seventh Circuit. The court granted the petition, set aside the Board's Order, and remanded to the Board for further proceedings consistent with is decision. *Nielsen Lithographing Co. v. NLRB*, 854 F.2d 1063 (7th Cir. 1988).

On January 18, 1989, the Board notified the parties that it had accepted the remand and invited the parties to submit statements of position. Thereafter, all parties filed statements of position.

The Board has reconsidered this case in light of the court's opinion and the parties' statements of position. For the reasons set forth below, we reverse our previous decision and find that the Respondent has not violated the Act.

The specific question before the Board under *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956), and its progeny is whether the Union needs certain information it requested during bargaining in response to a claim of competitive disadvantage if the Respondent maintained existing employee benefits.

I.

The Union has represented a unit of the Respondent's lithographic employees for about 40 years. On June 28, 1983, the parties began negotiating a new collective-bargaining agreement for a 3-year term. At the second negotiating session on July 5, the Company proposed reductions in employee compensation and benefits. Harold Freeman, the Respondent's attorney and chief negotiator, informed the Union that the Company was still ''making a profit,'' but stated that it needed ''these concessions to compete,'' because increasing ''costs in the [expiring] contract'' were resulting in significant losses of business to competitors. According to Freeman, ''trends'' indicated that ''in the future [the Respondent] was going to have a problem'' with labor cost items and that this would force higher prices.

In support of its proposal for concessions,[3] the Respondent furnished various charts and graphs compiled from company records. These showed, inter alia, labor costs increasing while sales and production decreased during the term of the expiring collective-bargaining agreement. Freeman referred to the Respondent's eroding technological advantage over its competitors, the Respondent's having once attracted business from its pioneering use of the half-web press, now used by the competition as well. The Union did not dispute this claim, and acknowledged that it was ''not any new information to [them].'' The Respondent presented data to support its assertions that it had been losing business to competitors whose wages and benefits were below the Respondent's and that employees consequently had lost work hours and jobs through layoffs.

At later bargaining sessions, Union Executive Vice President and Chief Negotiator Theodore Murphy requested that the Respondent open its books. Murphy also asked the Respondent to allow a union expert to examine its records. Freeman declined, stating that: ''[w]e're not pleading poverty. We're making money, but we're not competitive.'' Murphy testified as follows concerning the Union's policy on requesting employers seeking concessions to open their books:

> Q. Did I understand your testimony correctly, that the Union's policy is, whenever an employer seeks concessions, that you get your auditor involved?
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> A. [Murphy] What I said was, when an employer seeks concessions, that we ask him to open his books, and that would involve, then, the auditor.

[1] 279 NLRB 877.

[2] On November 20, 1987, the Board also issued an Order correcting its earlier decision and modifying the previous make-whole order.

[3] The Respondent proposed an increase in the regular workweek; reduction in health benefits for current employees; elimination of health benefits for future retirees; reductions in Saturday overtime compensation, layoff pay, severance pay, holiday pay, and shift premium rates; elimination of future cost-of-living increases; and elimination of any contractual reference to the Union's geographic jurisdiction.

Our dissenting colleague characterizes the reductions proposed by the Respondent as ''huge.'' The judge made no such finding, nor any finding that the Respondent's proposals evidenced surface bargaining or were otherwise made in bad faith.

> Q. Is the Union's policy to always ask an employer to open its books when it is seeking concessions?
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> A. [Murphy] No, I—you know, I think there are magnitudes—levels of magnitudes of concessions. You know, in this particular case, we're looking at a lot. If it was one small concession, where a reduction of manning, or something like that, is asked for, we'll negotiate that as long as—and we've done that. Where we've had—when the four color 38 came into being, the Employer said that we can't compete with the four color 38 with three people on it. We need to run it with two like the nonunion employers.
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> We said, ''Okay, we'll take a look at that,'' and we did . . . .
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> Q. Other than those limited—that limited example that you described, is it the Union's procedure to request that the books be opened when the company is asking for large concessions?
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> Murphy: Yes.

The Respondent continued to explain throughout the negotiations that it was not pleading poverty or inability to pay and that it continued to be profitable. On August 31, the Union presented the Respondent with a 14-item request for information, including the following data that the Union contended it needed to evaluate the Respondent's claim that it was losing its ability to compete:

> 1. Documents by the Employer to banks for the purpose of obtaining loans, including projected balance sheets and income statements.
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> 2. Financial statement for three years prior, as well as tax returns and current financial statements.
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> 3. Analyses of working capital for the last three years.
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> 4. Charts of all supervisory employees and total compensation.
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> 5. Expense reports submitted by management personnel and owners.
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> 6. List of automobiles leased or owned by the company.
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> 7. List of how many of the non-union employees have been laid off and how long, please list.

Although Murphy stated in bargaining that he was requesting this information in order to verify the Company's claim that it was at a competitive disadvantage, he also testified as follows concerning specific items:

> Q. Let me go back up to Item 7 which is the chart of all supervisory employees and total compensation. Did you already cover the reason why you wanted that information?
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> A. [Murphy] We—we had a feeling—again, the people in the plant had told the committee, and the committee was part of the workers that was on the committee that there was too many chiefs and not enough Indians. Again, if we were going to have to be the one to give concessions, what were some of these people wanting to do? Was the company going to eliminate some of these, what we felt was excessive supervisors, or what were they going to do?
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> Q. . . . Item Number 13, a list of how many nonunion employees have been on—have been laid off and how long: Why did you want that information?
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> A. [Murphy] Like I said earlier, we have people laid off periodically. Some of them were laid off long periods of time, three to six months, maybe longer in this contract. Again, if we were going to have to give concessions because of the company's claim to be noncompetitive, we felt that there were other people in this plant that should be taking lay-offs along with our people, and we wanted to know who those nonunion people were, and whether they had ever been laid off, or whether they were standing around doing nothing.

The Respondent agreed to furnish bargaining-unit-related information that the Union had requested, but declined to provide the above-listed data. According to Union Negotiator Murphy,

> [Freeman] just said we weren't entitled to it; that the company wasn't pleading poverty; that, in fact, they were making money, and the only thing that they were saying is that they were not competitive, and that we were not entitled to the information.

Bargaining continued through December, when the Respondent's president reiterated the Company's position at the bargaining table in a letter to the Union. Thereafter, the Respondent implemented the terms of its most recent contract proposal, and the Union struck. The strike ended July 25, 1984, when the Union offered to return to work.

In the previous decision, the Board found that by not turning over all the requested information the Respondent had violated Section 8(a)(5). *Nielsen Lithographic Co.*, 279 NLRB 877 (1986). In refusing to enforce the Board's Order, the Seventh Circuit observed that shortly after the Board had found that Nielsen was obligated to turn over the requested information, the Seventh Circuit had decided *Harvstone*, a similar case[4] *Nielsen Lithographing Co. v. NLRB*, 854 F.2d 1063, 1065 (7th Cir. 1988). In *Harvstone*, the court noted,

[4] *NLRB v. Harvstone Mfg. Corp.*, 785 F.2d 570 (7th Cir. 1986).

the Seventh Circuit, ''[f]ollowing earlier circuit precedent,'' had declined to enforce a Board order directing an employer to turn over similar information that related to a claim of competitive disadvantage. The Seventh Circuit pointed out that in Nielsen the Board had ''actually relied on the very [Board] decision (*Harvstone* . . . .) that . . . [the Court] reversed.'' Id. at 1066.

II.

Unlike information concerning bargaining unit terms and conditions of employment, which is presumed to be relevant,[5] the Union must prove that the requested general financial information is relevant. In this connection, *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956), holds that ''a refusal to attempt to substantiate a claim of inability to pay increased wages may support a finding of a failure to bargain in good faith.'' 351 U.S. at 153.[6] The Court cautioned:

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

Thus, not every claim of inability to pay will result in an obligation to supply substantiating information. In the instant case, as shown below, the Respondent was not even making a claim of inability to pay.

We find that the Respondent's claim of competitive disadvantage is not the same as a claim of financial inability to pay. Thus, the claim does not raise any obligation under *Truitt* to turn over the requested information. We are guided to this conclusion by the Seventh Circuit's opinion in *NLRB v. Harvstone Mfg. Corp*., supra, 785 F.2d 570. In *Harvstone*, the Seventh Circuit rejected the equation of a claim of competitive disadvantage with the assertion of a financial inability to pay. There, four employers during joint bargaining had requested concessions based on a schedule of comparative labor costs within the relevant market that they had furnished the union. The employers explained that they were ''operating at a competitive disadvantage.''[7] When the union sought the employers' financial records, claiming that the employers had put their economic viability at issue, the employers refused, insisting that they were not pleading inability to pay. The Board adopted the administrative law judge's decision finding a violation of Section 8(a)(5) on the theory that the employers had in essence pled poverty.

The Seventh Circuit disagreed. *NLRB v. Harvstone Mfg. Corp*., supra. Citing its decision of 20 years earlier in *United Fire Proof Warehouse Co. v. NLRB*, 356 F.2d 494, 498 (7th Cir. 1966), the court stated that the test of whether an employer's statement that ''it is operating at a competitive disadvantage'' triggers an obligation to disclose financial data is whether the employer said it ''would not'' as opposed to ''could not'' pay the employees' proposed demands. 785 F.2d at 575–576. The court found that of the four employers charged, only one had disclosed in negotiations that it was losing money. The court held that the other three employers had not claimed an inability to pay. They had never said that they ''were financially unable, as opposed to unwilling, to meet the Union's demands.'' Id. at 576. The court construed the employers' claim of competitive disadvantage simply as an acknowledgement of an economic fact of life: if companies ''don't make a reasonable profit so they can be a viable competitive business, they won't stay in business and no one will have jobs.'' Ibid. The court found that the statements of the employers' negotiator, quoted above at footnote 7, were ''nothing more than truisms'' and in context ''did not constitute a plea of inability to pay.'' 785 F.2d at 576–577.

As noted, three of the employers in *Harvstone* did not assert an inability to pay during the term of the

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[5] See *NLRB v. Acme Industrial Co*., 385 U.S. 432, 436 (1967).

[6] Our dissenting colleague implies that because in *Truitt* the employer claimed that a 2-1/2 cent increase would put it out of business, something less than a specific claim of inability to pay can be used to put an employer's economic status in issue (Dissent, fn. 8). In fact, the employer in *Truitt* also specifically claimed that it could not afford to pay the requested increase. *Truitt*, supra at 150.

[7] The administrative law judge in *Harvstone* found that the companies' negotiator (1) ''[I]nsisted that 'business judgment' . . . required them [the companies] to 'more closely align' their labor costs to that of competitors in other regions of the Country 'to be competitive'''; (2) '''relief on labor costs,' because of 'poor competitive positions,' was essential in order for Respondents to 'stay in business [otherwise] no one will have jobs'''; (3) ''the Respondents 'need[ed] economic relief'''; (4) if the Union did not agree to the Respondent's proposed economic concessions, the ''Respondents 'could, but . . . not necessarily . . . would go out of business'''; (5) ''one company was losing money and the rest might if they had to pay the 35 cents [requested by the union]''; (6) ''One company was losing money, and the others would if the 35 cents was put in''; (7) ''[I]f the Union doesn't agree with this concession [demanded by Respondent Employers] . . . those companies [may] but not necessarily so . . . be out of business'' (brackets in original); (8) the Respondents' negotiator was giving the Union negotiator ''the message we were very serious about this labor cost relief we were seeking''; (9) the Respondents needed their ''labor costs more in line with . . . [their] competitors''; (10) the Respondents '''might or might not' ['go out of business if we don't get] the reductions in labor costs that [we] asked for''' (brackets in original); (11) the ''companies 'may or may not' ['lose money if we don't [get] these reductions in labor costs that [we] asked for']'' (brackets in original); (12) the Respondents' negotiator said that he ''had quite a long discussions about competitiveness and if you don't make a profit, you can't be in business.''

The judge also found that *Harvstone*'s president conceded that the Respondents were seeking economic relief from the Union ''by attempting to reduce employees' pay and benefits to the least or lowest common denominator found elsewhere in the Country.'' *Harvstone Mfg. Co*., 272 NLRB 939, 943–944 (1984).

new contract.[8] The court, however, addressed the question whether the claim of competitive disadvantage made by those three employers translated into a claim of present inability to pay:

> Clearly if an employer operates at a competitive disadvantage for a long enough time, its profit margin, as a matter of pure economics, will decline eventually forcing it out of business. There would then come a time when these three companies could be expected to plead inability to pay, but that time has not yet arrived. . . . The relevant time period we must concern ourselves with is that of the term of the new collective bargaining agreement. It is quite conceivable that an employer, already operating at a competitive disadvantage with respect to employee compensation, could afford to pay increased wages during the course of a new agreement. While it is axiomatic that this scenario cannot be played out 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 inability to pay. [785 F.2d at 577. Emphasis added.]

We agree with the court's observation in *Harvstone* that an employer's expressed view that its current economic position vis-a-vis competitors would lead to an eventual inability to pay beyond the intended contract term is quite different from an employer's insistence that a union's current bargaining demands are precluded by its condition at the present time or within the intended contract term. 785 F.2d at 577 fn. 6. Analogously, the Board in *Buffalo Concrete*, 276 NLRB 839 (1985), enfd. 803 F.2d 1333 (4th Cir. 1986), found no duty by the employers to disclose financial information where their claim that they were not competitive amounted to an unwillingness, rather than an inability, to accept the union's bargaining proposals. The lesson of both *Harvstone* and *Buffalo Concrete* is that an employer's obligation to open its books does not arise unless the employer has predicated its bargaining stance on assertions about its inability to pay during the term of the bargaining agreement under negotiation.[9]

The difference between the two types of claims is critical. The employer who claims a present inability to pay, or a prospective inability to pay during the life of the contract being negotiated, is claiming essentially that it cannot pay. By contrast, the employer who claims only economic difficulties or business losses or the prospect of layoffs is simply saying that it does not want to pay.

We do not say that claims of economic hardship or business losses or the prospect of layoffs can never amount to a claim of inability to pay. Depending on the facts and circumstances of a particular case, the evidence may establish that the employer is asserting that the economic problems have led to an inability to pay or will do so during the life of the contract being negotiated.

There is a well-established distinction between claims of inability to pay and claims of something short of that. The dissent, however, wishes to draw a new distinction between claims that are objectively verifiable and those that are not. It is true that a claim of present inability to pay may be objectively verifiable. But that does not mean that all objectively verifiable claims are subject to the duty to supply information. (We would entertain the converse.) Rather, it is the fact that it is a claim of ''can't pay,'' rather than a claim of ''does not want to pay.'' There is a certain finality to a claim of ''can't pay.'' If it is proven, the union will be faced with the reality that the ''well has run dry.'' This is the essential meaning of *Truitt* as we understand it. The distinction has always been between claims of ''can not'' and ''will not.'' We would not abandon that distinction in favor of a new distinction.

We find that the statements made by management in this case are even less susceptible to a ''can't pay'' finding than were the statements in *Harvstone*. The Respondent's negotiator repeatedly stated that the

[8] The court summarized *Harvstone*'s position as follows: ''[A]lthough acknowledging in response to Union inquiries that they could lose money and eventually go out of business if their competitive position did not improve, [they] never communicated to the Union that they were financially unable to pay the Union's proposed demands for the duration of the new agreements.'' Id. at 577.

[9] Other Board and court decisions are to the same effect. *Empire Terminal Warehouse Co*., 151 NLRB 1359 (1965), enfd. sub nom. *Teamsters Local 745 v. NLRB* 355 F.2d 842 (D.C. Cir. 1966); *E. I. du Pont & Co*., 276 NLRB 335 (1985) (rejection of principle that an employer's bargaining reference to future market competitiveness in job restructuring proposals gives rise to ''virtually a presumption of economic motive for which the Company should be required to disclose the requested information''); *Advertisers Mfg. Co*., 275 NLRB 100 (1985). *Ameron Pipe Products*, 305 NLRB 105 (1991); *Concrete Pipe & Products Corp*., 305 NLRB 152 (1991); *Georgia-Pacific Corp*., 305 NLRB 112 (1991).

The dissent's cases, in which the Board found violations, are distinguishable. In *Clemson Bros.*, 290 NLRB 944 (1988), where the Employer claimed poor financial health, the Board specifically distinguished the case from one where, as here, the Respondent asserts a claim of competitive disadvantage. Id at 944 fn. 3. In *S-B Mfg. Co*., 270 NLRB 485, 491 (1984), the employer stated specifically that it was ''unable'' to grant a wage increase. Again, no reference was made to competitive disadvantage. In *Unoco Apparel, Inc*., 208 NLRB 601 (1974), the employer's negotiator told the union, in response to the union's request for increased wages and fringe benefits, that ''the well is dry.'' Id. at 610. And in *Facet Enterprises*, 290 NLRB 152 (1988), enfd. 907 F.2d 963 (10th Cir. 1990), the company told the union that it was in ''bad shape,'' reminded the union that one of its plants had ''lost money,'' linked ''continuation of operations'' at another plant to economic concessions, and later approved the contemplated closing of that plant. Id. at 162–163.

Company was still making a profit even though it was losing business to competitors and specifically disavowed any claim of inability to pay during the term of the contract under negotiation. It is clear that the Respondent asserted its anticipation that at an unspecified point ''in the future'' it was going to have a problem with labor costs. Nothing in the Respondent's statements to the Union, however, fairly suggests that the Respondent would be unprofitable and thus unable to pay during the term of the contract under negotiation—only that it might not make as much of a profit as it wished. But, as the Seventh Circuit observed in *Harvstone*, although operating at a competitive disadvantage might ultimately force a company out of business, such predictions do not trigger an obligation to furnish financial information under *Truitt*. 785 F.2d at 577.[10] And, as the Seventh Circuit observed in this case, a company can survive in the short run, and perhaps even in the long run, despite paying higher wages than its competitors. *Nielsen Lithographing Co. v. NLRB*, supra at 1065.[11] Efforts to maximize profits and/or minimize costs or to reallocate expenses among various categories of the production function do not, in and of themselves, constitute a financial inability to pay which then triggers a duty to prove.

We therefore conclude that an employer's obligation under *Truitt* to provide a union with information by which it may fulfill its representative function in bargaining does not extend to information concerning the employer's projections of its future ability to compete. We consider that obligation to arise only when the employer has signified that it is at present unable to pay proposed wages and benefits. We do not equate ''inability to compete,'' whether or not linked to job loss, with a present ''inability to pay.'' As the Respondent has not made a claim that it is at present unable to pay, we will dismiss the 8(a)(5) allegation. We shall also, as a consequence, dismiss the allegation that the Respondent violated Section 8(a)(3) by failing to reinstate unfair labor practice strikers who had struck to protest its failure to furnish information.

ORDER

The complaint is dismissed.

MEMBER OVIATT, concurring.

I agree with the majority's analysis in this case. I wish, however, to emphasize some additional practical considerations underlying that analysis. Simply put, my experience leads me to conclude that requiring the Respondent to supply the information now in dispute would not encourage the practice and procedure of collective bargaining.

The Supreme Court in *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956), held that an employer's claims during bargaining that it is unable to pay a requested wage increase may require it to offer ''proof of . . . [the] accuracy of the claim.'' *Truitt*, supra, 351 U.S. at 152. That implicitly assumes that the claimed inability to pay is susceptible of accurate proof. The Court believed that furnishing financial information in that circumstance would aid collective bargaining generally.

To the extent that the Union wanted the information here to test the Respondent's claims, it was to verify the Respondent's claim that at some future point its competitive disadvantage would have serious, adverse consequences. I do not believe that the Respondent's predictions concerning its competitive stance are capable of sufficiently accurate verification to aid the bargaining process. To the contrary, supplying the requested information might well bog down bargaining in a debate over management's ability to chart the future direction of the Company.

[10] We disagree with the dissent's conclusion that the thrust of the Respondent's statements raised the issue of the Respondent's present economic condition, unrelated to its claim that it was losing its competitive edge and would continue to do so in the future. The Respondent was not claiming that its current competitive position precluded paying wages and benefits at the existing levels for the next contract. It was saying that if it did not take immediate measures to reduce its labor costs it would at some future, unspecified point be at a significant competitive disadvantage when that would be the case. We do not view as a ''threat'' of imminent job loss the Respondent's statement that, if the Respondent continued to lose business, jobs would be lost. See *Harvstone* at 576. Thus, we disagree with our colleague's contention that, in the face of repeated assurances that the Respondent was making a profit, the employees would nonetheless perceive the Respondent's allusions to future job loss as ''encompassing the immediate term of the contract under negotiation.''

Indeed, there is not a shred of record evidence that the Respondent ever advised the Union that jobs would be lost during the term of the contract under negotiation unless it obtained concessions. Although it is true that in his letter the Respondent's president, Nielsen, stated at one point that ''It is *your* job that is on the line'' (emphasis in original) *in context* it is plain that this did not refer to the present, but to an unspecified point in the future if and when the Respondent would no longer be able to compete. Thus, in the sentences immediately preceding the one quoted, Nielsen observed that: ''to survive we must be able to compete. Our business and our employees' jobs are at stake if *we can't.*'' (Emphasis added.) The conditional phraseology and the general nature of the statement are not consistent with a reference to imminent job loss. Nielsen's comment that jobs ''will also be lost'' is of no help to the dissent's position. In the immediately preceding two sentences, Nielsen noted that: ''[W]e have to be able to compete people-wise also'' and prognosticated that ''*[I]f we don't* the recent trend of losing even greater amounts of work to other companies will continue and the jobs our employees now have will also be lost.'' (Emphasis added.) Nielsen's statement, once again, was conditional, and referred to some unspecified future point when the ''trend'' of losing work got worse.

[11] If the Respondent had premised its proposal for concessions just on the fact that its competitors were paying less in wages and benefits, the dissent would not require disclosure of the information sought here. That is an artificial line. For whether or not a company actually uses the words ''inability to compete and resulting loss of jobs,'' a reference to its competitors' wages and benefits plainly suggests that labor costs may make the firm noncompetitive to the point where business and jobs will be lost.

Assessing a projected future inability to compete requires a sophisticated analysis not only of a company's present condition but also of the company's condition at a specified point in the future. This involves a careful evaluation of the company's projected fixed and variable costs, of its projected capital expenditures (a particularly important consideration where the company is affected by technological change), as well as of its anticipated marketing and pricing strategies. Any responsible analysis of a company's future ability to compete must also account for future conditions in the company's market which in turn may depend upon projections of population trends, industrial growth, and economic conditions in the geographic area in which the company competes. Most importantly, any estimation of the company's future competitive position must include a full evaluation of the company's competitors. Some data on competitors' present financial condition may be publicly available. Other information, such as future capital investment, projected market strategies, and future pricing of the product usually is not in the public domain and to a large extent must be based on assumptions and economic theory.

Even if the Union had all the information that I consider to be necessary to do a future-competitiveness analysis, the result of that analysis would not aid labor and management in reaching a bargaining agreement. Whether or not the Respondent will be a viable competitor 2 or 3 years hence is not sufficiently verifiable to provide the Union with any degree of assurance that the Respondent's claim is accurate or, indeed, inaccurate.

The use of data showing that a firm has been a successful competitor in the past may reveal very little about that firm's competitive prospects. ''Evidence of past production does not, as a matter of logic, necessarily give a proper picture of a company's future ability to compete.''[1] As explained by two antitrust experts, ''[T]he difficulties in proving probable exit from a market [in the future] seem more severe than those involved in establishing imminent insolvency or bankruptcy.''[2] The analysis of future competitiveness is thus ''a matter of probabilities, not competitive certainties.''[3] It involves a high degree of speculation about the company's own projected expenditures and revenues vis-a-vis the competition, whose economic conditions may not be known. One person's necessary capital expenditure is another's discretionary expenditure.[4] In sum, it is much easier to tell whether a company is financially sound now than it is to determine whether it will be in the future.

I do not suggest that a firm's future competitive stance is never capable of proof. I do say that on the same facts reasonable people can reach entirely different conclusions as to a firm's future competitive position.[5] There are critical subjective, judgmental, and theoretical factors that enter into any estimate of a company's ability to compete 2 or 3 years down the road. Thus, I anticipate that, far from encouraging collective bargaining, supplying the requested information to the Union could lead bargaining to degenerate into bickering over judgment and theory and particularly whose consultant's or expert's theoretical assumptions are correct.

Requiring management to furnish information to enable union negotiators to second-guess management decisions with respect to the company's economic future thwarts the collective-bargaining process rather than facilitating it. It sidetracks collective bargaining into a discussion of ancillary issues related to the overall direction of the company and the wisdom of particular managerial decisions[6] That would put us well on the road to having the union ''become an equal partner in the running of the business enterprise,'' a state of affairs of which ''Congress had no expectation . . . .'' *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 676 (1981). Codetermination as utilized in other countries is not part of the fabric of collective bargaining in the United States.

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[1] *U.S. v. General Dynamics Corp*., 415 U.S. 486, 501 (1974).

[2] *Areeda & Turner*, IV Antitrust Law § 926 at 111 (1980).

[3] *Michigan Citizens for an Independent Press v. Attorney General*, 695 F.Supp. 1216, 1220 (D.D.C. 1988).

[4] Compare the analysis of the Supreme Court and the district court of the company's financial position in *U.S. v. Greater Buffalo Press*, 402 U.S. 549, 555 (1971). Also, see the difference of approach to the same facts of the Government and of the Seventh Circuit in *U.S. v. International Harvester Co*., 564 F.2d 769, 775 fn. 12, 776 fn. 13 (1977).

[5] As an example, consider the dispute over the use of accounting rates of return as opposed to economic rates of return on an investment as an indicia of market performance. See Fisher & McGowan, *On the Misuse of Accounting Rates of Return to Infer Monopoly Profits*, 73 Am. Econ. Rev. 82 (Mar. 1983); Fisher, *The Misuse of Accounting Rates of Return: A Reply*, 74 Am. Econ. Rev. 509 (June 1984).

[6] To understand the magnitude of the problem the dissent's approach creates, one only need refer to some of the explanations offered by Union Negotiator Murphy for the Union's need for certain information. Murphy testified on direct, for example, that the Union informed the Respondent during bargaining that it needed the chart of all supervisory employees because the employees and the union bargaining committee ''had a feeling'' that there were ''too many chiefs and not enough Indians. . . . Was the company going to eliminate some of these, what we felt was [sic] excessive supervisors, or what were they going to do.'' Murphy testified that the Union wanted the list of ''how many of the non-union [nonunit] employees have been laid off and how long'' because if the Union was going to have to make concessions ''we felt that there were other people in this plant that [sic] should be taking layoffs along with our people, and we wanted to know who those nonunion people were, and whether they had ever been laid off, or whether they were standing around doing nothing.'' This has more the ring of an intent to use the requested information to involve the Union in managerial decision-making with respect to *how* the Company's competitive position could be improved, or as to the *effects* of the Respondent's loss of its competitive edge, than it does an attempt simply to verify that loss of competitive advantage.

This is not a case where a company is seeking concessions because it is ''in the red'' or losing money and in imminent danger of ''going broke,'' or because the ''well is dry.'' Cf. *Continental Winding Co*., 305 NLRB 122 (1991). In fact, the Respondent's negotiators conveyed to the Union just the opposite: the Company was still making a profit. Neither is this a case where company negotiators informed the union that the company simply could not meet the union's contractual demands. The record is devoid of any statements by the Respondent's negotiators of this sort. Rather, this is a case where the Respondent is reluctant to continue to pay wages and benefits at the level sought by the Union because paying employees at that level puts the Respondent at a disadvantage vis-a-vis competitors who do not pay as much. That competitive disadvantage, according to the Respondent's negotiators, would translate at some unspecified future point into a loss.

Relying on just any employer statements concerning its ''economic condition'' as the basis for opening a company's books would considerably enlarge a company's obligation to supply information under *Truitt*. Now when an employer bases a bargaining position on a claim of present inability to pay, the employer must upon request supply financial information to support that claim. *Truitt Mfg. Co*., supra. Similarly, an employer's bargaining claim that it will be unable to pay during the life of the contract being negotiated must be supported by financial information, upon request. See *NLRB v. Harvstone Mfg. Corp*., 785 F.2d 570, 577 (7th Cir. 1986). See also *Continental Winding Co*., supra. But there is nothing in these cases that reasonably could be read to require the Respondent in this case to open its books to union scrutiny simply because the Respondent has put at issue its ''economic condition'' upon a claim of competitive disadvantage.

There are many statements related to the condition of the employer, made in the course of bargaining, that could be proven or disproven if subjected to a painstaking search for objective truth. The collective-bargaining process is not a scientific or litigative search for truth, however. It is a search for agreement. I would not divert the parties from what they should be doing—trying to reach agreement on a new contract—to an uncertain and unrewarding fact-finding exercise which in my view is not required by *Truitt*.

CHAIRMAN STEPHENS, dissenting.

If this were a case in which the Respondent's claims in bargaining were limited to general assertions of future competitive disadvantage alone, as the majority concludes, I would join them in dismissing the complaint. The record shows, however, that although the Respondent's officials made the statements quoted by the majority, they also made other statements that went beyond a mere claim of possible competitive disadvantage in the distant future. Thus, in conjunction with its statements regarding future competitiveness, the Respondent raised serious factual questions regarding its present and immediate economic condition and the effect that condition would have on its business and on employees' jobs, not in the far distant future, but today and tomorrow. It told the Union that it already was losing business, that employees already were losing jobs, that trends showed that it would have an even worse problem in the future, and that if the Union did not agree to the concessions that the Respondent proposed, jobs that employees currently held would also be lost.

By virtue of this bargaining posture, the Respondent linked its need for concessions to its immediate economic condition, as it characterized that condition to the Union. The Respondent effectively took the position that anything less than the Union's agreement to take deep concessions was precluded by the Respondent's unsatisfactory economic condition, i.e., one marked by the loss of business and jobs and the prospect of more of the same, or even worse. Because the Respondent specifically relied on its unsatisfactory economic condition as a justification for its need for deep concessions, its economic condition became relevant to the Union's decision whether or not to grant those concessions. Accordingly, economic information pertinent to assessing the Respondent's actual economic condition was relevant to the bargaining process and, in my view, the Respondent violated the Act when it refused to disclose such information.[1]

I.

The record shows the following. In June 1983 the Union and the Respondent commenced negotiations on a successor collective-bargaining agreement. Beginning with the second negotiating session, on July 5, 1983, and continuing thereafter, the Respondent sought economic concessions from the Union, including concessions pertaining to the regular workweek and total wage compensation, layoff pay, health benefits, overtime pay, and other cost items. At the July 5 bargaining session, the Respondent presented to the Union data composed of graphs, charts, and other documents pertinent to its productivity. The Respondent informed the Union that there had been a substantial reduction in work hours because it had lost business to other companies, and that the Respondent had less work than it previously had enjoyed.

[1] If the Respondent's statements were limited to the comparison of its labor costs and its competitors' costs, or the like, a disclosure obligation would still arise under *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956). However, because only comparative wage and market information would be relevant to the claims asserted, financial information, such as that at issue here, would not be subject to disclosure. See *International Telephone & Telegraph Corp*., 159 NLRB 1757, 1790 (1966), enfd. 382 F.2d 366 (3d Cir. 1967).

The Respondent's chief negotiator, Harold Freeman, testified that he informed the Union at the July 5 session that the charts reflected that the Company was losing business and that ''we had less volume, we had reduced the number of people by layoff or attrition and that overall we had less work and we had less hours . . . that the work wasn't there and they know it.'' Freeman testified:

> Q. Was it the Company's position during negotiations that you would continue to lose all this business to other companies, unless you got concessions from the Union?
>
> A. Our position was, we wanted to reverse the trend. If that's the same thing as what you're asking me then, the answer is yes. But I—the way we were talking about it was we felt if we got the adjustments that we were seeking or substantially all the adjustments, that what we judge was the reason for losing the work would be eliminated.
>
> Q. I'm not sure whether or not that is an answer to the question, I'm wondering if it was your position that you wouldn't retain the business that you had and that you would in fact lose business to other companies unless you got these concessions from the Union, is that why you wanted the concessions?
>
> A. We wanted the concessions because we wanted to get back the business we'd lost.
>
> Q. Fine.
>
> A. We wanted to be more profitable is what we wanted to be but we felt like it would provide more work for the employees in the process.
>
> Q. And I think you indicated that the point of this [the charts and other data] was that it represented to the Company that there had been a substantial lose [sic] of work, the number of impressions was down?
>
> A. Well, we—yes. This—most of this—most of the Joint Exhibit 21 was an attempt by us to have some specific numbers that would back up what we thought the Union committee already knew. Namely, that the work level in Nielsen had dropped dramatically during the three-year contract period. But we wanted to have some specific information so that we weren't talking just generalities.
>
> Q. And did this chart represent to the Company that there had in fact—and show the company that there had in fact been a lose [sic] of work?
>
> A. Yes.
>
> Q. Number of impressions was down?
>
> A. Yes.
>
> Q. Was it the Company's position, during negotiations, that this lose [sic] of work was due to the higher labor costs that your company was paying as against other companies?
>
> A. That's essentially correct. That's what I've said several times today.

Freeman testified further that the Respondent informed the Union that its labor costs were not competitive with other businesses. Freemen indicated to the Union that ''We need these changes to compete,'' ''that there [is] a problem with competition now that [we haven't] had in the past,'' and that the ''trends showed'' it ''would have a worse problem in the future.''

Following the Respondent's initial bargaining demands, the Union requested that the Company ''open its books'' so as to permit an auditor to examine the Company's records. The Respondent declined. On August 31, 1983, the Union made a written request for information in order to verify the Respondent's claims and ''to get our people to understand what the company is saying.''[2] The Respondent declined to provide requested economic information pertaining to nonlabor cost data, including financial statements, analysis of working capital, management expense reports, projected balance sheets and income statements, and supervisory compensation.[3] The Respondent provided certain other information pursuant to the Union's request pertaining to employee layoffs and overtime, subcontracting, sick leave absences, listing of supervisory employees, and profit sharing.

At a bargaining session on December 9, 1983, Freeman presented to the Union a letter from the Respondent's president, Simon C. Nielsen, outlining the Respondent's position. In that letter, Nielsen made the following statements:

> It's as simple as this—to protect the jobs of our employees we must protect our ability to compete . . . to survive we must be able to compete. Our business and our employees' jobs are at stake if we cannot! The loss of sales and work volume is the problem we are seeking to solve. Without solving it we will continue to lose work and thus

[2] The majority implies that the Union only sought the information requested because of a general union policy seeking disclosure when an employer seeks concessions. The Union's chief negotiator, Theodore Murphy, however, testified specifically that the Union requested economic information to examine the Respondent's economic trends and to verify its claims, as well as to justify to its membership that the Respondent needed relief.

[3] The Respondent failed to furnish the following information that the Union requested:

1. Documents by the Employer to banks for the purpose of obtaining loans, including projected balance sheets and income statements.
2. Financial statement for 3 years prior, as well as tax returns and current financial statements.
3. Analyses of working capital for the last 3 years.
4. Chart of all supervisory employees and total compensation.
5. Expense reports submitted by management personnel and owners.
6. List of automobiles leased or owned by the company.
7. List of how many of the nonunion employees have been laid off and how long, please list.

> the jobs will disappear. . . . It is your job that is on the line . . . . [W]e have to be able to compete . . . . [I]f we don't the recent trend of losing even greater amounts of work to other companies will continue and the jobs our employees now have will also be lost.

On December 19, 1983, the Respondent unilaterally implemented terms contained in its most recent contract proposal. Thereafter, on January 28, 1984, the Union commenced a strike, which terminated on July 25, 1984, upon the Union's tender of an unconditional offer to return to work on behalf of the strikers. The Respondent notified the Union that permanent replacements had been hired in the interim and that no positions were available at that time.

II.

As indicated at the outset, I would find that the representations of Chief Negotiator Freeman and President Nielsen linked the Respondent's need for concessions to its unsatisfactory economic condition which, as they repeatedly told the Union, threatened further loss of jobs. Freeman steadfastly adhered to the position that the Union should accept concessions because the Respondent was losing business and employees were losing jobs and work hours[4] In his letter to the Union's bargaining committee, presented on December 9, Nielsen repeatedly emphasized the economic reality faced by the Respondent—the loss of ''even greater amounts of work'' and the loss of ''the jobs our employees now have.''

Thus, the record reveals a bargaining posture that firmly links the need for union concessions with the Respondent's portrayal of its economic condition, marked by job losses, business losses, and the prospect of worse to come. In seeking broad economic concessions, the Respondent expressed not only a desire to remain competitive, but invoked its recent loss of employee positions through layoff and attrition, its actual loss of business coupled with its objective assessment that these unsatisfactory trends likely would be worse in the future, and its assessment that the jobs of current employees were ''on the line'' and ''will also be lost'' if economic trends continue without economic concessions. The Respondent's overall words and conduct during bargaining belie the notion that it was simply expressing a subjective unwillingness to consider more favorable economic terms divorced from objective, verifiable claims that its economic condition required that employees choose between their jobs and their current level of pay and benefits. Indeed, the threats of job loss came on the heels of *already implemented* reductions in the employee complement.[5]

In these circumstances, most of the requested information was relevant to the core claim asserted at bargaining—that the Respondent's economic condition, characterized as one of job loss past, present, and future, could be alleviated only by the Union's granting of the concessions demanded by the Respondent. The financial information requested by the Union could either substantiate or tend to disprove the Respondent's contention that the employees' wages and benefits were responsible for the continuing loss of their jobs. This, in turn, might give the Union a basis for reassessing, and possibly altering, its own bargaining posture. It would know whether there was a source of funds for continued payment of the wages and benefits of current employees. Cf. *Mary Thompson Hospital v. NLRB*, 943 F.2d 741 (7th Cir. 1991) (requested document might reveal source of funds for employees' severance pay and accrued benefit claims). The Union would also therefore have a basis for recommending a bargaining position to the unit employees—who doubtless would be concerned about both the Respondent's predictions of continuing job loss and the prospect of smaller paychecks and reduced fringe benefits if the Respondent's demands were agreed to.

In finding that the Union is entitled to substantiating information, however, I do not conclude that the Union is automatically entitled to every item on its request list. Thus, on the present record I would not find that the information about leased automobiles and management expense reports is relevant. In short, I do not view it as a proper purpose of the Union to critique individual expense vouchers or use of company cars[6]

[4] It is also clear that Freeman did not rely merely on a general turndown in the economy. Thus, in describing the various charts and graphs presented to the Union at the July 5 bargaining session, he indicated that ''we understand the economy, generally, is [sic] gone down, but, in our case, it has gone down. *What we're looking at is our situation*. And we have lost work, and we think we have lost work to competitors.'' (Emphasis added.)

[5] The majority contends that ''there is not a shred of record evidence'' that the Respondent took the position at bargaining that jobs would be lost during the term of contract under negotiation in the absence of concessions from the Union. That assertion is belied by uncontradicted record evidence showing that the Respondent repeatedly emphasized to the Union that jobs already had been lost and, as President Nielsen pointedly told the Union, ''we *will continue* to lose work and thus the jobs will disappear.'' Nielsen also stated that ''the recent trend of losing even greater amounts of work to other companies *will continue* and the jobs our employees now have will also be lost'' in the absence of concessions (emphasis added). This is clearly more than a reference to job loss only at ''some unspecified future point'' beyond the term of the contract. According to the majority, when the Respondent used the term ''will continue'' to describe the continuum of job loss into the future from the present, it actually meant that job loss, which was ongoing, would be suspended for a period of time that happened to coincide with the term of the contract under negotiation, perhaps only to resume at a ''future point'' some years later. This strikes me as a rather unorthodox construction of the term ''will continue.''

[6] See *Metlox Mfg. Co.*, 153 NLRB 1388, 1395 (1965), enfd. 378 F.2d 728 (9th Cir. 1967), cert. denied 389 U.S. 1037 (1967). Thus, details as to who used a company car and how much someone spent

Continued

But, in my view, the Union's auditor, Dr. Dale Kiefer, adequately explained in his testimony at the hearing in this case the need for the rest of the information to assess the factual basis for the Respondent's claims.[7]

III.

I recognize that although repeatedly asserting the loss of jobs and business, the Respondent also stated that it was profitable and that it was not pleading ''poverty.'' It did not assert specifically that it lacked either the means to pay or that it specifically was ''unable'' to pay. To my colleagues in the majority, these disclaimers coupled with references to noncompetitiveness are dispositive. Under their view, an employer who claims profitability but who, at the same time, relies on specific evidence of present and immediate financial setbacks (loss of jobs, business, etc.) to justify its bargaining demands does not trigger a duty to disclose economic information. Given the record in this case, the majority is necessarily finding that by making general statements that it is profitable and is not pleading poverty or inability to pay, an employer may escape the necessity of providing requested substantiating financial records regardless of the specificity and concreteness of its claims about a linkage between continuing financial difficulties and the unit employees' wages and benefits. In my view, this represents a cramped reading of *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956), and cases relying on it that my colleagues do not purport to overrule.

The classic *Truitt* dichotomy, as it has evolved, between ''inability to pay'' and ''unwillingness to pay'' is intended to distinguish between an objective factual claim (subject to verification) and a subjective claim (not subject to verification). Hence, it is not critical whether the claim asserts an imminent collapse of the business, i.e., a duty may arise without the employer's saying ''we will go out of business and into bankruptcy tomorrow if we pay.''[8] What is critical is the linkage between the employer's bargaining posture and its stated unsatisfactory economic status, i.e., reliance on factual, objective conditions of distress necessitating that employees choose between their jobs and their current pay and benefit levels. *Truitt* essentially is a standard for determining relevance: has the employer's claim placed at issue in bargaining a matter that is subject to verification of accuracy? A claim of inability to pay raises a matter that is subject to verification and therefore subject to disclosure as a concomitant of good-faith bargaining. As the Court explained in *Truitt*:

> Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy. [351 U.S. at 152–153.][9]

In remanding this case to the Board, the court of appeals recognized the critical distinction between an assertion that is subject to verification and one that is not. I fully agree with the court's observation that an employer has no duty to provide requested economic information if its bargaining posture is limited to the claim that ''its costs are higher than its competitors' and it wants to reduce them.'' As the court reasoned persuasively:

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for a business lunch are unlikely to shed much light on a claim that employees can save their jobs only if they accept cuts in their wages and benefits. Major items such as costs of nonbargaining unit labor, however, are clearly relevant to this claim. Even information on car leasing and management expense reports could become relevant if other records indicate that totals of those items are an unusually large part of the Respondent's recent expenditures. The Union might reasonably seek to examine the Respondent's records to discover, for example, if these were costs incurred in connection with a one-time project or were likely to be recurring expenditures. This, of course, is the same sort of inquiry that might be made if the Respondent claimed that its current financial state was so poor that it faced imminent bankruptcy—a classic *Truitt* claim.

[7] As the reviewing court noted in this proceeding, requests for economic information must be reasonable and not burdensome in scope. I note Dr. Kiefer's testimony regarding the mechanics of disclosure and the attempts customarily undertaken to avoid undue inconvenience to the employer. *Nielsen Lithographing Co*., 279 NLRB 877, 880–881 (1986). I also note that the Respondent has not contested the information request on the grounds of burdensomeness.

[8] In *Truitt*, the employer stated, inter alia, that an increase of 2-1/2 cents would ''put it out of business.'' However, an employer may put its economic status into issue through a variety of statements along the economic spectrum. It may rely on business losses incurred in recent years. *Clemson Bros.*, 290 NLRB 944 (1988). It may state that it is in ''bad shape'' and refer to business lossses and questionable prospects in the future. *Facet Enterprises*, 290 NLRB 152, 153 (1988), enfd. 907 F.2d 963 (10th Cir. 1990). It may refer to its decreasing sales, increasing inventory and costs, and loss of employee work hours, *S-B Mfg. Co*., 270 NLRB 485 (1984), or descriptively indicate that ''the well is dry.'' *Unoco Apparel*, 208 NLRB 601, 608 (1974).

The majority's attempt to fit these cases within their overly narrow reading of *Truitt* is unpersuasive. In *Clemson Bros.*, the Board expressly held that it does not require an express plea of poverty to invoke the application of *Truitt* and that it is sufficient if the employer's words and conduct ''specifically link its bargaining position to economic hardship.'' 290 NLRB at 944 (footnote omitted). In *S-B Mfg. Co*., the Board found a disclosure obligation because the employer relied on its ''financial condition,'' which amounted to a plea of financial ability to pay ''or its equivalent.'' 270 NLRB at 491–492. In Facet Enterprises, the Board specifically rejected the employer's contention that it had merely claimed competitive disadvantage and found that a disclosure obligation was triggered by the employer's description to the union of its unsatisfactory economic condition. In *Unoco Apparel*, the Board stated that disclosure of relevant economic information is required when an employer asserts an inability to pay ''or a related type reason.'' 208 NLRB at 610.

[9] Because relevancy turns on the factual circumstances of each case, the court found that the duty to disclose must turn in each case upon its particular facts, even in inability to pay cases.

> A need is objective; it can be substantiated. But how do you substantiate a want? If a company says it wants to make higher profits by reducing its labor costs, what data would falsify its statement? [854 F.2d at 1065.]

In the instant case, the Respondent did not merely assert an unverifiable ''want.'' The Respondent informed the Union that it needed concessions in order to reverse the recent trend of losing jobs and losing work because of its labor costs. As president Nielsen stated:

> [I]f we don't the recent trend of losing even greater amounts of work to other companies will continue and the jobs our employees now have will also be lost.

In my view, the Respondent's statements are not simply the expression of a ''subjective desire'' to reduce costs. Nor can it be said either that the Respondent's assertion of a linkage between a failure to grant wage and benefit concessions and a continued loss of jobs was a matter inherently incapable of verification or, as Member Oviatt argues, not ''capable of sufficiently accurate verification to aid the bargaining process.'' The Respondent purported to be stating a matter of fact concerning its current and evolving financial condition, and it therefore could reasonably be understood as asserting that this condition was ascertainable on the basis of financial information known to it. It did not argue that these matters were so complex that it could not discern whether concessions were necessary to forestall employees' loss of their jobs and that the uncertainty alone justified its proposals.[10] Because the bargaining process stalled over the Respondent's demands that the Union agree to huge reductions in pay and benefits, it would appear to me that the process would be aided by the Respondent's disclosure to the Union of the requested information. As Theodore Murphy, the Union's chief negotiator, testified, if the Respondent's records ''proved that the [Respondent] did need relief . . . we would be able to . . . justify to [the unit employees] that we ought to consider something.''[11] In short, I do not agree that the Union was required to accept at face value the Respondent's claim that employee job loss could be avoided only by substantial wage and benefit concessions.

> 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.

My disagreement with the majority therefore does not concern whether a duty to disclose economic information is triggered by a claim limited to future inability to compete. We all agree that it is not. It appears to me that our disagreement concerns the extent to which the concept of ''relevance'' under *Truitt* applies to claims of economic hardship. In their view, only a claim of abject poverty, i.e., that the employer is in imminent danger of going out of business, can trigger a duty to disclose economic information under the relevance standard of *Truitt*.[12] In my view, a *Truitt* obligation is triggered when an employer, as here, effectively claims hardship that will result in employees' continuing to lose their jobs unless the union acquiesces to the employer's demands as to pay and benefits. In both instances, the employer's assertions render its economic condition relevant to bargaining. In both the employer is not merely stating an economic truism concerning something that has yet to materialize or a subjective desire to operate more profitably, but is asserting that its economic condition is such that it cannot continue to employ all of the unit employees unless the union accepts its bargaining proposals for cuts in pay and benefits.

Although I would find that the Respondent was obligated to furnish relevant financial information, I acknowledge that there are circumstances in which assertions concerning an employer's economic status are simply too vague to trigger a requirement to disclose any economic information.[13] An employer may be under no disclosure obligation when it merely claims to be operating at a competitive disadvantage and makes vague and ambiguous statements regarding its business. In such circumstances, an employer's claims simply are not subject to verification by reference to economic information. Thus, in *Atlanta Hilton & Tower*, 271 NLRB 1600 (1984), the Board found no

[10] In any event, complexity might also be raised as an argument against disclosure in classic *Truitt* cases. It might not always be indisputable from a reading of a balance sheet that an employer would be ''unable to pay'' wages and benefits at a given level in order to stay in business during the term of a contract. The balance sheet might, for example, reveal other large expenses that either could or, likely would, be eliminated during that same period. See fn. 6, supra. Member Oviatt's reasoning reflects an implicit rejection of *Truitt* itself.

[11] As the Court noted in *Truitt* (351 U.S. at 152):

[12] As the majority found in *Concrete Pipe & Products*, 305 NLRB No. 21 (1991), the employer there ''did not assert that it was losing money or that its business was at some imminent risk of closing down.'' Slip op. at 3.

[13] See e.g., *Concrete Pipe & Products Corp*., supra, in which I recently concurred in finding that an employer had no duty to furnish economic information when its statements regarding ''survival'' were vague and general and, in contrast to the instant case, unaccompanied by assertions pertaining to the employer's present or immediate financial condition.

duty to disclose where the employer, in seeking a 1-year contract extension rather than negotiating a successor agreement, made reference to general conditions in the economy coupled with highly ambiguous references to its business and indicated simply that the future was ''so uncertain.'' Likewise, in *Advertisers Mfg. Co.*, 275 NLRB 100 (1985), the Board found that an employer's general reference to its ''level of business,'' as well as other expressions of a subjective managerial unwillingness to pay employees a bonus, did not create an obligation to provide economic information.[14]

In sum, in defining the test for the relevance of information about an employer's financial condition, I would adhere to the following statement of the law adopted by the Board in *Gas Spring Co.*, 296 NLRB 84 (1989), enfd. mem. 908 F.2d 966 (4th Cir. 1990), cert. denied Sup. Ct. No. 90–797 (Feb. 19, 1991):

> An analysis of the relevant decisions . . . demonstrates that no matter what particular words have been said, when an employer has steadfastly relied upon its own poor financial condition and projected injury to its business, it has been required to produce information to support its claim. To the contrary, where the employer has made no statements about its own finances, and merely talked about the general economy or its relationship with its competitors, no unfair labor practice has been found [296 NLRB at 97].

IV.

In its decision remanding this case to the Board, the court of appeals was justifiably disturbed by our initial failure in this case to consider the court's opinion in *NLRB v. Harvstone Mfg. Corp.*, 785 F.2d 570 (7th Cir. 1986), in which the court found that three employers had no disclosure obligation.[15] The employers' assertions in *Harvstone* included statements that if they did not make a reasonable profit and remain a viable competitive business, ''they won't stay in business, and no one will have jobs,'' that the employers ''need economic relief,'' and that if concessions were not granted, the employers ''could, but . . . not necessarily . . . would go out of business.'' 785 F.2d at 576 and 272 NLRB at 943–944. (Emphasis added.) The *Harvstone* court found that these statements of future dire economic circumstances were ''nothing more than truisms,'' because they were not sufficiently tied to the present or to the immediate future, i.e., to the term of the new collective bargaining agreement. As the court explained (785 F.2d at 577):

> Clearly, if an employer operates at a competitive disadvantage for a long enough time, its profit margin, as a matter of pure economics, will decline eventually forcing it out of business. There would then come a time when [the employers] could be expected to plead inability to pay, but that time has not yet arrived. In context [the employers'] statements did not constitute a plea of inability to pay. The relevant time period we must concern ourselves with is that of the term of the new collective bargaining agreement. [785 F.2d at 577.]

In its decision remanding this case, the *Nielsen* court indicated that the facts of the instant case possibly might ''place it halfway between *Truitt* and *Harvstone*'' if the Respondent's statements were construed as threatening layoffs in the near term, thereby ''perhaps bringing the case within the gravitational field of *Truitt*.'' For the reasons stated above, I find it within that ''gravitational field.'' I therefore disagree with the majority's view that the Respondent's statements are even less susceptible to a disclosure requirement under *Truitt* then were the employers' statements in *Harvstone*.[16]

In sum, the Respondent directly placed its economic condition at issue by its repeated references to the specific loss of jobs and business that already had occurred, and by its statements that additional losses would continue to occur in the absence of union concessions. I would find that the Respondent was obligated to supply requested information that would allow the Union to assess the accuracy of those claims. I would accordingly find that the Respondent violated

[14] *Craig & Hamilton Meat Co.*, 271 NLRB 853 (1984), relied on by the majority, is distinguishable from the instant case for a somewhat different reason. In that case, an employer stated that competitive market forces required it to redirect its resources from meat processing to jobbing. The Board adopted the judge's finding that the only matter placed at issue was the Respondent's changing role from processor to jobber and that the economic information sought by the Union did not pertain to that claim. By the same token, a claim limited solely to competitive disadvantage only places at issue the employer's position vis-a-vis other competitors. However, when an employer, as in the instant case, describes in detail its ongoing loss of business, ongoing loss of employees' jobs, and continuing prospects of worse to come, it is putting at issue its economic health, in sharp contrast to the scenario in *Craig & Hamilton*.

[15] The court found that an additional employer pleaded inability to pay and had a disclosure requirement.

[16] I find it unnecessary to the decision of this case to decide whether *Harvstone* itself should be overruled. I note, however, that the statements made in *Harvstone* regarding the future were unaccompanied by the kind of statements present in the instant case concerning past and immediate job losses and the continuation of present unfavorable economic trends. I would, however, overrule the Board's decision in *Buffalo Concrete*, 276 NLRB 839 (1985), enfd. 803 F.2d 1333 (4th Cir. 1986). I would do so not because I disagree with the Board's general observations in that case about the applicable legal test but because I disagree that the Board correctly characterized the employers' statements about employee job losses as referring merely to ''a general loss of jobs in the unionized sector of the industry.'' 276 NLRB at 841. In my view, the employers directly linked the continued existence of the jobs of the employees represented by the union there to the union's acceptance of the employers' ''take-aways.'' Id. at 853.

Section 8(a)(5) and (1) of the Act by its refusal to supply such requested information.