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Rethinking Financial Information Disclosure Under the National Labor Relations Act

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Rethinking Financial Information Disclosure Under the National Labor Relations Act

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I. INTRODUCTION

The National Labor Relations Act's ("NLRA") central purpose is to reduce industrial strife and stimulate economic growth by promoting collective bargaining between employers and unions.[1] The

1. As originally enacted in 1935, the NLRA (known as the Wagner Act, after its sponsor, Senator Robert Wagner, D-N.Y.) made it an "unfair labor practice" for an employer to "refuse to

1947 amendments to the Act make clear that collective bargaining must be conducted in good faith.[2] Under the Act, as interpreted by the National Labor Relations Board ("NLRB") and the courts, labor and management must bargain collectively in good faith over the "mandatory" subjects of "wages, hours, and other terms and conditions of employment."[3] From its earliest days, the NLRB has interpreted the duty to bargain collectively as requiring companies[4] to

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bargain collectively with the representatives of his employees." Wagner Act § 8(5), 49 Stat. 449, 452-53 (1935), codified at 29 U.S.C. § 158(a)(5) (1988). The Taft-Hartley Act, passed in 1947, retained this language and added the following:

> 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 . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

Taft-Hartley Act § 8(d), 61 Stat. 136, 142 (1947), codified at 29 U.S.C. § 158(d) (1988). In the "Findings and Policy" section of the 1935 Act, Congress made clear why collective bargaining was needed: "The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest . . . ." Wagner Act § 1, 49 Stat. at 449. Congress thought these problems could be remedied by: "encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees." Id.

See also *NLRB v. Insurance Agents*, 361 U.S. 477, 488 (1960) (noting that "[i]t is apparent from the legislative history of the whole Act that the policy of Congress is to impose a mutual duty upon the parties to confer in good faith with a desire to reach agreement, in the belief that such an approach from both sides of the table promotes the overall design of achieving industrial peace"); Archibald Cox and John T. Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 Harv. L. Rev. 389, 389 (1950) (stating: "The purpose of the . . . Act was to facilitate the organization of unions and the establishment of collective bargaining relationships"); Robert Gorman, *Basic Text on Labor Law, Unionization and Collective Bargaining* 399 (West, 1976) (arguing that "[t]he purpose of the Act is to bring to the bargaining table parties willing to present their proposals and articulate supporting reasons, to listen to and weigh the proposals and reasons of the other party, and to search for some common ground . . ."); Lewis B. Kaden, *The Potential of Collective Bargaining in an Era of Economic Restructuring*, in Samuel Estreicher and Daniel G. Collins, eds., *Labor Law and Business Change* 7, 21 (Quorum, 1988) (noting that collective bargaining under the NLRA "offers the best means to promote economic growth in a complex industrial society while ensuring fair treatment for workers and avoiding governmental control over the terms and conditions of employment").

2. Taft-Hartley Act § 8(d), 61 Stat. at 142. See note 1 for the relevant text of the 1947 Act. Although Taft-Hartley made it explicit that the NLRA required "good faith," the NLRB had implied this requirement shortly after the NLRA's passage in 1935. *Aluminum Ore Co.*, 39 N.L.R.B. 1286, 1297 (1942).

3. *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958); *Allied Chemical Workers v. Pittsburgh Glass Co.*, 404 U.S. 157, 164 (1971). This emphasis on "wages, hours, and other terms and conditions of employment" derives directly from the text of the 1947 amendments. Taft-Hartley Act § 8(d), 61 Stat. at 142.

4. Unions have also been required to disclose relevant information to employers, though such disclosure has occured far less frequently because employers seldom have use for information possessed by unions. See generally D. Jeffrey Ireland, Note, *A Union's Duty to Furnish Information to an Employer for Purposes of Collective Bargaining*, 4 U. Dayton L. Rev. 257 (1979).

disclose some information, especially wage and unit data.[5] The NLRB and the Supreme Court have held such information presumptively relevant to the collective bargaining process because, without it, a union would be unable to fulfill its role as bargaining representative.[6]

Disclosure of financial and strategic information, such as balance sheets, income statements, tax returns, and working capital analyses,[7] does not, however, fit neatly within the statutory obligation to bargain collectively. Many negotiations can, and do, go on without the union obtaining financial information.[8] In many cases, however, the union would prefer to have such information to assess its bargaining position better and determine the accuracy of employer statements about its financial condition. The employer, for tactical reasons, ideological bent, or fear of disclosing confidential information, may not want to release this information.[9] Unlike wage or

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5. See *Aluminum Ore Co.*, 39 N.L.R.B. at 1291-94, 1296-97. The NLRB held that Aluminum Ore's failure to disclose wage rates and payroll information about the bargaining unit, including job classification lists, was "inconsistent with the principle of collective bargaining and served to promote controversy rather than to encourage agreement." Id. at 1297. See also *The Sherwin Williams Co.*, 34 N.L.R.B. 651, 667 (1941) (holding tbat employer violated duty to bargain collectively by failing to disclose job rates for other paint manufacturers in the vicinity).

6. Initially, the NLRB required unions to make a showing of relevancy and need before requiring release of company iuformation. *Aluminum Ore Co.*, 39 N.L.R.B. at 1297. Over time, the Board adopted the "presumptively relevant" standard. See *Nielsen Lithographing Co.*, 305 N.L.R.B. 697, 699 (1991) (noting that nonfinancial iuformation is "presumed to be relevant"); *Safeway Stores, Inc.*, 252 N.L.R.B. 1323, 1323 (1980) (quoting *Westinghouse Elec. Corp.*, 239 N.L.R.B. 106, 107 (1978): "The union need not demonstrate that the information sought is certainly relevant or clearly dispositive. . . . The appropriate standard . . . is a liberal discovery-type standard" (citations omitted)); *Whitin Machine Works*, 108 N.L.R.B. 1537, 1541 (1954) (Chairman Farmer, concurring) (finding union entitled to receive information without showing its "precise relevancy"). The Supreme Court approved this standard in *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-36 (1967) (stating: "There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties").

A company may rebut this presumption by raising legitimate confidentiality concerns, *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 314-20 (1979) (finding that union's need for test scores was outweighed by the potential harassment of the examinees), or the possibility of disclosure to competitors or third parties, *Fruit & Vegetable Packers v. NLRB*, 316 F.2d 389, 391 (D.C. Cir. 1963) (holding that the company met good faith disclosure obligation even though it required the union to look at books in employer's office). Additionally, because of cost or inconvenience, the company need not disclose the information exactly as requested, and may request that the union bear some of the costs of disclosure. See *Safeway Stores Inc.*, 252 N.L.R.B. at 1324 (finding that a company's "obligation is to provide the information it bas available, to compile it, or to give the Union access" to it); *General Motors Corp.*, 243 N.L.R.B. 186, 186 (1979) (expressing the expectation that if production of the information involves "substantial costs," the parties will bargain in good faith over allocation of the costs).

7. Other examples include management assessments of profitability, production and sales data, product and technology information, and long-range business and competitor projections. Leslie K. Shedlin, *Regulation of Disclosure*, 41 Ohio St. L. J. 441, 445-46 (1980).

8. Archibald Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1434 (1958).

9. Id. at 1432-33.

unit information, financial information has not been deemed by the NLRB or courts to be presumptively relevant to unions.[10] An employer must disclose this information, therefore, only if failure to do so would violate the Act's good faith requirement.[11] Defining good faith, then, is the crucial inquiry in determining the circumstances in which the NLRA requires disclosure of financial information.[12]

Since 1935,[13] the NLRB, the courts, and commentators have struggled to define the scope of the good faith requirement in the context of the duty to disclose financial information. In 1956, *NLRB v. Truitt Mfg. Co.*[14] squarely presented the Supreme Court with the issue of under what circumstances an employer must disclose financial information. The Court required disclosure of the requested information because management had claimed an inability to pay a union wage demand.[15] The Court correctly linked the question to good faith,[16] but did not resolve many of the fundamental issues,[17] leaving the NLRB, the lower courts, and commentators to pick up the pieces.[18]

10. *Nielsen Lithographing Co.*, 305 N.L.R.B. at 699; *United Steelworkers v. NLRB*, 983 F.2d 240, 243 (D.C. Cir. 1993) (finding "no presumption of relevance when a union seeks access to financial information").

11. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-53 (1956).

12. If financial information disclosure is mandated, an important question remains: What information must an employer disclose? According to one commentator, the courts and NLRB preferred a case-by-case adjudication in the 1950s because of the high value management placed on secrecy and the real possibility that some information may be confidential. Comment, *Employers' Duty to Supply Economic Data for Collective Bargaining*, 57 Colum. L. Rev. 112, 121 (1957).

This observation is still essentially correct, as the Board and courts have generally given employers leeway in both form and scope in presenting financial information. See *Oil, Chemical & Atomic Workers Local Union No. 6-148 v. NLRB*, 711 F.2d 348, 360 (D.C. Cir. 1983) (holding that furnishing data in a form that retains worker anonymity is acceptable); *Metlox Mfg. Co. v. NLRB*, 378 F.2d 728, 730 (9th Cir. 1967) (finding that companies need disclose only a "reasonable amount of explanation and elaboration"). On the other hand, some courts have required full disclosure. See, for example, *International Telephone and Telegraph Corp. v. NLRB*, 382 F.2d 366, 371 (3d Cir. 1967).

13. Although the term "good faith" was not added to the NLRA until 1947, the NLRB implied a similar requirement in the 1935 Act and grappled with financial information disclosure almost immediately after the passage of the Act. See note 2 and *Pioneer Pearl Button Co.*, 1 N.L.R.B. 837, 842-43 (1936).

14. 351 U.S. 149 (1956).

15. Id. at 152-54. The Court reasoned that "[i]f 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," id. at 152-53, and that "[g]ood-faith bargaining necessarily requires that claims made by either bargainer be honest claims." Id. at 152.

16. Id. at 152.

17. Cox, 71 Harv. L. Rev. at 1432 (cited in note 8) (stating that the Court "evaded every issue" in *Truitt*).

18. Financial information disclosure has generated substantial scholarship. Archibald Cox, perhaps the leading expert on the NLRA, published the seminal article on the topic in 1958. See Cox, 71 Harv. L. Rev. 1401. He argued that broad financial information disclosure, though essential to a mature bargaining relationship, should not be mandated by the NLRA in a

In their most recent attempts to resolve the issue of financial information disclosure in the cases involving the Nielsen Lithographing Company,[19] the NLRB and Seventh Circuit Court of Appeals strayed far from the statutory command of good faith.[20] Instead, they adopted the following approaches: limiting *Truitt* to its facts, requiring disclosure only when a company has claimed an inability to pay union demands;[21] asserting that the secrecy of financial information is essential to entreprenuerial control;[22] and claiming that bargaining is, at its root, an economic battle between sophisticated adversaries who should be permitted to fight with all available weapons, including secrecy.[23] For these reasons, recent opinions have held that management must surrender financial information only if it claims an inability to pay or, more colloquially,

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per se fashion. Id. at 1430-35. Other articles addressing financial information disclosure include Russell A. Smith, *The Evolution of the "Duty to Bargain" Concept in American Law*, 39 Mich. L. Rev. 1065, 1094 (1941) (the earliest discussion by a scholar, arguing that financial information should be disclosed in nearly all situations). See also, generally, Brandon David Lawniczak, *Substantiating "Competitive Disadvantage" Claims: A Broad Reading of* Truitt, 87 Mich. L. Rev. 2026 (1989) (claiming that the NLRB and courts have given an unduly narrow reading of the Supreme Court's opinion in *Truitt* and have therefore allowed companies to retain undue control over the information); Christopher T. Hexter, *Duty to Supply Information,* Nielsen Lithographing Co. *Revisited: The Board's Retreat from Collective Bargaining as a Rational Process Leading to Agreement*, 8 Labor Law. 831 (1992) (analyzing recent Board opinions on financial information disclosure and finding them inconsistent with the NLRA's commitment to good faith collective bargaining); Reid Carron and Kathlyn Ernst Noecker, *The Employer's Duty to Supply Financial Information to the Union: When Has the Employer Asserted an Inability to Pay?—or—(The Boss Says Times are Tough: How* Truitt *Is)*, 8 Labor Law. 815 (1992) (approving recent case law, although it is difficult to follow or predict, because it permits employers to avoid financial information disclosure in most cases); Comment, 57 Colum. L. Rev. at 112 (cited in note 12) (finding that NLRB and court precedents went only part of the way in developing a theory of disclosure that accomodates union management interests); Shedlin, 41 Ohio St. L. J. at 441 (cited in note 7) (advocating broad disclosure based on observations of labor-management cooperation in other countries).

There are also many books which give financial information disclosure a quick once-over. See, for example, James T. O'Reilly, *Unions' Rights to Company Information* 50 (U. of Pa., rev. ed. 1987).

19. *Nielsen Lithographing Co. v. NLRB*, 854 F.2d 1063 (7th Cir. 1988) (*"Nielsen I"*); *Nielsen Lithographing Co.*, 305 N.L.R.B. 697 (1991) (*"Nielsen II"*); *Graphic Communications Intern. Union, Local 508 v. NLRB*, 977 F.2d 1168 (7th Cir. 1992) (*"Nielsen III"*).

20. Other circuits have followed the reasoning in the *Nielsen* opinions. See *Torrington Extend-A-Care Employee Ass'n v. NLRB*, 17 F.3d 580, 589-90 (2d Cir. 1994); *United Steelworkers of America, Local Union 14534 v. NLRB*, 983 F.2d 240, 243-45 (D.C. Cir. 1993); and *United Paperworkers Intern. Union v. NLRB*, 981 F.2d 861, 865-66 (6th Cir. 1992).

21. *Nielsen I*, 854 F.2d at 1065; *Nielsen II*, 305 N.L.R.B. at 700; *Nielsen III*, 977 F.2d at 1169; *United Steelworkers*, 983 F.2d at 243-44; and *United Paperworkers*, 981 F.2d at 865-66.

22. *Nielsen III*, 977 F.2d at 1170; *Nielsen II*, 305 N.L.R.B. at 702 (Member Oviatt, concurring).

23. *Nielsen I*, 854 F.2d at 1065; *Nielsen III*, 977 F.2d at 1169-71.

pleads poverty.[24] Two results follow: first, the well-counseled employer can avoid disclosure by speaking carefully at the bargaining table; second, considerations of good faith, or the lack thereof, do not affect the ultimate decision whether the employer must disclose information.

This Note argues that the *Nielsen* decisions rely on a view of bargaining inconsistent with the NLRA and do not apply proper standards of good faith. As a result, the decisions overstate the need for secrecy of financial information. Put simply, in most cases disclosure of financial information vindicates the goals of the NLRA by promoting collective bargaining and bettering industrial relations.

Part II of this Note demonstrates that the Act, its legislative history, and Supreme Court precedent do not support the recent decisions, but rather envision a broader disclosure regime consonant with the requirement of good faith bargaining. Part III closely examines the stated rationales of the *Nielsen* decisions, uncovers their underlying policy goals, and discusses how they overly restrict disclosure. Part IV argues that the *Nielsen* decisions have left unsatisfactory gaps from both a labor and management perspective. Part V suggests that the NLRB and courts should adopt a standard that accounts for the actual good faith of the parties; the union's need for financial information; management's legitimate interests in control and confidentiality; and both parties' need for predictability.

II. FINANCIAL INFORMATION DISCLOSURE IN PERSPECTIVE: THE NLRA, LEGISLATIVE HISTORY, AND SUPREME COURT PRECEDENT

A. *The Statute and Legislative History*

The NLRA requires that employers and employees "bargain collectively"[25] in "good faith" over "wages, hours, and other terms . . . of employment."[26] For purposes of this Note, the central issue to resolve is to what extent good faith requires disclosure of financial information. On its face, good faith does seem to envision a process in which both sides work to reach an agreement, but the phrase is not self-executing on the question of whether disclosure of financial

24. *Nielsen I*, 854 F.2d at 1065; *Nielsen II*, 305 N.L.R.B. at 700; *Nielsen III*, 977 F.2d at 1170; *United Paperworkers*, 981 F.2d at 865-66; *United Steelworkers*, 983 F.2d at 244.

25. NLRA § 8 (a)(5), codified at 29 U.S.C. § 158(a)(5) (1988). See generally note 1.

26. NLRA § 8(d), codified at 29 U.S.C. § 158(d) (1988). See generally note 1.

information is required. In this regard, one must address two fundamental issues when defining the meaning of good faith: first, to what extent does good faith bargaining require information disclosure; and second, whether failure to disclose should be viewed objectively as a per se indication of bad faith or subjectively, as evidence of a bad state of mind.

When a statute cannot be interpreted on its face, the logical and conventional place to turn is its legislative history.[27] Congress enacted the basic obligation to "bargain collectively" in 1935 and amended the NLRA to require "good faith" in 1947.[28] The histories of two Congresses, twelve years apart, are, therefore, relevant to this inquiry.

1. The 1935 Act

Enacted in the shadows of the Depression, the NLRA dramatically altered labor-management relations. As originally introduced, the Act did not contain a requirement that parties bargain collectively.[29] The chief Senate sponsor, Senator Wagner, believed the requirement to be implicit in the bill's mandate that employers recognize workers' right to organize.[30] He made his view clear in Committee and on the Senate Floor by quoting approvingly from the case of *Houde Engineering Corp.*[31] In *Houde*, the old NLRB had

27. Not all agree with this statement, including Justice Scalia and Judge Easterbrook of the Seventh Circuit, who argue that statutes alone should be the basis of judgment. See Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 Tex. L. Rev. 1073, 1084-85 n.55 (1992). In general, the issue of how to interpret statutes has produced a blizzard of recent scholarship on the appropriate uses of legislative materials and changing circumstances in interpreting a statute, with much disagreement among scholars and judges. Compare Frank H. Easterbrook, *The Supreme Court, 1983 Term, Foreward: The Court and the Economic System*, 98 Harv. L. Rev. 4, 13-15 (1984) (taking a textualist view of statutory interpretation), with William N. Eskridge Jr., *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479, 1554-55 (1987) (advocating a dynamic statutory interpretation).

The following discussion of the NLRA's language, passage, and subsequent history will demonstrate that the technique favored by a particular judge is not determinative of the meaning of good faith. Whichever theory is adopted, the resulting framework should be the same, because the statute, the legislative history, and subsequent interpretation have all been characterized by a tension between the desire for substantial bargaining and a concern that the NLRB should not adjudicate substantive positions taken during bargaining. See notes 30-43, 84-87 and accompanying text (providing examples of and explanations for this tension).

28. See note 1 (providing the legislative history of the NLRA).

29. See Smith, 39 Mich. L. Rev. at 1084 (cited in note 18); Cox, 71 Harv. L. Rev. at 1406 (cited in note 8). Both of these articles contain outstanding research and analysis of the passage of the NLRA. This section relies heavily on their research.

30. Smith, 39 Mich. L. Rev. at 1084-85.

31. Cox, 71 Harv. L. Rev. at 1407 (cited in note 8). See *Houde Engineering Corp.*, 1 N.L.R.B. (old) 35 (1934).

interpreted the National Industrial Relations Act,[32] the NLRA's precursor, to require that employers negotiate in good faith by accepting proposals or matching them with counter-proposals.[33] Eventually, the requirement to bargain collectively was placed in the bill. The Senate Report explained the provision as requiring employers to negotiate with the union in a bona fide effort to reach agreement.[34]

Fearful of NLRB overreaching, however, Senator Wagner stated emphatically that the NLRA did not permit governmental supervision of agreements reached through the process of collective bargaining.[35] In fact, Senator Wagner made clear that the bill permitted either party to withdraw if negotiations proved unsatisfactory.[36] Apparently sharing the same concerns, Senator Walsh, the Chairman of the Senate Labor Committee, stated that once a union had been recognized, and bargaining had commenced, the NLRB should not inquire into the substance of the negotiations.[37]

When Senator Wagner's first statement in favor of *Houde* is matched against his second statement expressing concern about government overreaching, a conflict arises in the context of financial information disclosure. On the one hand, Senator Wagner's approval of *Houde* and the idea that management should either accept a union proposal or present one of its own implies an expansive model of bargaining. Such a broad model would undoubtedly require financial information disclosure. On the other hand, Senators Wagner and Walsh made it clear that the government should allow each party great flexibility in the bargaining room. Under this narrow view, financial information disclosure would surely not be required. The 1935 Act and its legislative history reflect, therefore, a tension between government supervised bargaining and private autonomy.[38]

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32. Held unconstitutional by the Supreme Court in *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537-40 (1934).

33. *Houde*, 1 N.L.R.B. (old) at 35.

34. Smith, 39 Mich. L. Rev. at 1085 (cited in note 18).

35. Id. at 1086.

36. Id.

37. Cox, 71 Harv. L. Rev. at 1402 (cited in note 8). Senator Wagner's statement in full was:

> When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of the employer and say, "Here they are, the legal representatives of your employees." What happens behind those doors is not inquired into, and the bill does not seek to inquire into it.

Id.

38. See id. at 1409 (describing the tension in the Act); Theodore J. St. Antoine, *The Collective Bargaining Process* in Charles J. Morris, ed., *American Labor Policy, A Critical*

2. The 1947 Amendments

In 1947, spurred by a sense that union power had gone too far,[39] Congress enacted the Taft-Hartley Act. In so doing, Congress refined the requirement to bargain collectively in response to NLRB decisions it found improper.[40] Believing that NLRB decisions intruded on the substance of negotiations, Congress specifically relieved employers of any duty to make or offer concessions to unions.[41] At the same time, however, Congress inserted a proviso that labor and management must meet in "good faith" to discuss "wages, hours, and other terms and conditions of employment."[42] These two provisions reflect a tension similar to that found in the 1935 Act. Congress did not want to require employers to accept certain proposals, or even to offer proposals, yet it wanted both sides to bargain in good faith over mandatory issues.[43]

While it is tempting to try to resolve this tension, neither the statutory language nor the legislative history will permit it. In evaluating bargaining claims, the goal must be to preserve the tension.[44] To be true to the statute, the NLRB and the courts must devise a legal regime that does not require specific concessions or proposals, but still requires employers and employees to bargain in good faith.

B. Supreme Court Precedent

1. *NLRB v. Truitt* and the Preference for Rational, Good Faith Bargaining

In *NLRB v. Truitt*,[45] the company claimed that it could not afford a union wage request, yet it refused a union demand to see the company's financial books.[46] The NLRB found, and the Supreme

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Appraisal of the National Labor Relations Act 215, 217 (BNA, 1987) (discussing the disclosure debate).

39. Gorman, *Basic Text on Labor Law* at 5 (cited in note 1).

40. Labor-Management Relations Act of 1947, H. Rep. No. 510, 80th Cong., 1st Sess. (June 3, 1947), reprinted in 1947 U.S.C.C.A.N. 1135, 1139.

41. 29 U.S.C. § 158(d).

42. Id.

43. St. Antoine, *The Collective Bargaining Process* at 217-18 (cited in note 38).

44. See Cox, 71 Harv. L. Rev. at 1416 (cited in note 8) (discussing the need to encourage good faith bargaining).

45. 351 U.S. 149 (1956).

46. Id. at 150-51.

Court affirmed, that the NLRA's good faith requirement mandated disclosure of the information.[47] According to the Court, Congress mandated good faith in the hope that it would lead to agreements.[48] Because the union and management treated the company's ability to pay a wage increase as relevant to the negotiations, agreement could be reached only if all relevant information was on the table.[49] Also, the Court indicated that good faith required claims of poverty to be truthful;[50] thus, the Court held that an employer's failure to substantiate claims justified the NLRB's finding that management violated the statutory requirement of good faith bargaining.[51]

While the Court affirmed the NLRB's decision, it did not agree with the NLRB's reasoning that an employer violated the good faith requirement any time it failed to disclose financial information after making an inability to pay claim.[52] Instead, the Court stated that every case turns on its specific facts.[53]

Commentators, especially Archibald Cox, the foremost authority on U.S. labor law at *Truitt*'s time, were dismayed by the Court's reasoning. Cox argued that if each case really turned on its particular facts, and good faith was viewed subjectively, then the Court should have remanded the case to the NLRB. Since the Court did not remand *Truitt*, but made a decision on the merits, Cox concluded, the Court must really have endorsed the per se objective standard adopted by the NLRB.[54] In the almost forty years since *Truitt*, Cox's reading has become standard hornbook law[55] and the basis for many decisions.[56] A per se standard should place financial information in the same category as wage and unit data, which the union generally may obtain.[57] As the NLRB and Seventh Circuit demonstrated in *Nielsen*, however, most courts are unwilling to permit disclosure of financial information except in narrow situations.[58] Believing that *Truitt* leaves them with no other alternative than a per se objective

47. Id. at 151-54.

48. Id. at 152.

49. See id. at 152-53 (discussing the need for accurate information in the bargaining process).

50. Id at 152.

51. Id. at 152-53.

52. Id.

53. Id. at 153.

54. Cox, 71 Harv. L. Rev. at 1430-33 (cited in note 8). See also Comment, 57 Colum. L. Rev. at 116 (cited in note 12).

55. O'Reilly, *Unions' Right to Company Information* at 50 (cited in note 18). See also Lawniczak, 87 Mich. L. Rev. at 2044 (cited in note 18).

56. See Lawniczak, 87 Mich. L. Rev. at 2044 n.98 (listing cases).

57. See note 6.

58. See notes 19-24, 107-46 and accompanying text.

standard, they limit *Truitt* to its facts and apply a per se standard only to inability-to-pay claims.[59]

Even a cursory reading of *Truitt*, however, demonstrates that it cannot be easily squeezed into a per se mold. The Court's willingness to examine each case on its own facts[60] and its requirement that companies should not be permitted to deceive unions through false claims of poverty belies any suggestion that the Court adopted a per se standard.[61] Rather, these requirements suggest a situation-specific inquiry into the particular information sought and the parties' interests in it. Additionally, a sole focus on inability to pay neglects *Truitt*'s finding that relevance has a role to play in information disclosure.[62] Disclosure in *Truitt* was premised, at least partially, on the fact that the company's ability to pay increased wages was highly relevant to the union.[63] The Court did not limit the relevance concept to substantiation claims, but instead acknowledged that the union's perspective was equally important to management's in determining relevance.[64]

At times, the NLRB and many courts have recognized *Truitt*'s broader statements to reach results quite different than in *Nielsen*. For example, the NLRB and courts have issued many opinions requiring financial information disclosure even when the employer made no direct claim of inability to pay.[65] Many of these cases relied on the "relevancy" standard discussed in *Truitt*.[66] While these decisions have been more faithful to *Truitt*, they ultimately have not become the dominant paradigm because *Truitt* itself, as Professor Cox pointed out, did not put forward a coherent theory that courts can follow.[67]

On the other hand, several cases have denied unions access to financial information even when an employer's statements might generally require substantiation.[68] These cases differ from the

59. See notes 107-09 and accompanying text.

60. *Truitt*, 351 U.S. at 152-53.

61. In *Detroit Edison v. NLRB*, 440 U.S. 301, 314-15 (1979), the Court explicitly stated that it believes a subjective standard is appropriate in evaluating good faith. See notes 88-93 and accompanying text.

62. *Truitt*, 351 U.S. at 152.

63. Id.

64. Id.

65. See notes 134, 139, 149 and accompanying text.

66. See note 139 and accompanying text.

67. See note 54 and accompanying text.

68. See notes 69-71. The majority in *Nielsen II* recognized this neglected holding of *Truitt*, but used it to argue that inability to pay is a necessary, but not sufficient, precursor to financial information disclosure. This interpretation misconstrues *Truitt*. Instead, the Court's statement

majority of substantiation cases because they involve situations in which the union acted in bad faith,[69] or the information sought was too confidential to permit disclosure, at least in the form requested by the union.[70] Additionally, the NLRB has held that companies need not disclose information in the exact form or manner that the union requested.[71]

2. *Truitt*'s Theoretical Underpinnings

Although *Truitt*'s reasoning is ultimately unsatisfactory because of the flaws discussed by Professor Cox, the Court's opinion offers a theoretical basis from which to form a more satisfactory answer than that found in the *Nielsen* decisions. Most importantly, *Truitt* definitively held that a primary purpose of the NLRA was to foster agreements.[72] *Truitt* advocates the theory that informed, rational bargaining will lead to better labor relations.[73]

The Court has echoed *Truitt*'s preference for rational bargaining in many other situations. For instance, in *NLRB v. Jones & Laughlin Steel Corporation*,[74] the first Supreme Court interpretation of the NLRA, the Court stated that though no agreement could be compelled under the Act, negotiation would promote industrial peace.[75] In *H.J. Heinz Co. v. NLRB*,[76] the Court held that bargaining is a requirement of the Act, and an employer, though he may not want to do so, must bargain.[77] In *Teamster's Union v. Oliver*,[78] the Court spoke of collective bargaining in good faith as a means to preserve

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was meant to allow the NLRB flexibility to handle diverse fact situations, not to preserve all other information from disclosure. See notes 60-64 and accompanying text.

In any event, the Board, in *Nielsen*, held that a claim of inability to pay forces the disclosure of information. *Nielsen II*, 305 N.L.R.B. at 701.

69. See *NLRB v. A.S. Abell Co.*, 624 F.2d 506, 511 (4th Cir. 1980) (recognizing that "legitimate fear of harrassment" of employees who had crossed picket lines justified non-disclosure of information).

70. *Detroit Edison*, 440 U.S. at 317-20 (permitting company to withhold specific test information due to sensitive nature of the results and slight burden on union). See also id. at 318 n.14 (citing cases).

71. *Ingalls Shipbuilding Corp.*, 143 N.L.R.B. 712, 718 (1963).

72. *Truitt*, 351 U.S. at 152.

73. In contrast, the Seventh Circuit in *Nielsen III* viewed negotiations as a prelude to economic war. See notes 150-54 and accompanying text.

74. 301 U.S. 1 (1937).

75. Id. at 45.

76. 311 U.S. 514 (1941).

77. Id. at 525-26.

78. 358 U.S. 283 (1959).

industrial peace.[79] These precedents evidence a commitment to rational, good-faith bargaining.

3. The Role of Economic Weapons[80]

Concurrent with the endorsement of rational, good-faith bargaining, the Court has also approved the use of economic weapons.[81] In *NLRB v. Insurance Agents International Union*,[82] the Court overturned an NLRB determination that a union had not negotiated in good faith because it had directed its members to arrive late at work, refuse to attend conferences, and undertake other measures harmful to the employer. Reasoning that collective bargaining is not an academic search for truth and that labor and management often have antagonistic views of how to divide the economic pie, the Court upheld the use of economic weapons even in the midst of bargaining.[83]

Insurance Agents did not diminish the role of collective bargaining, however.[84] The Court in *Insurance Agents* did not subordinate good faith bargaining, but rather made sure that the NLRB did not subordinate the legitimate use of economic weapons.[85] Instead, the Court stated that the requirement of good faith and the use of economic weapons existed side by side.[86] Thus, *Insurance Agents* does not depart from *Truitt*; rather, it recognizes the tension inherent in the Act.[87]

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79. Id. at 295-96.

80. Examples of economic weapons from the union side are strikes, slowdowns, and pickets. From the management side, examples are lock-outs and permanent replacements. See generally Charles J. Morris, ed., 2 *The Developing Labor Law* 995-1282 (BNA, 2d ed. 1983).

81. *NLRB v. Insurance Agents International Union*, 361 U.S. 477, 489 (1960).

82. 361 U.S. 477.

83. Id. at 488-89.

84. The Seventh Circuit seems to have adopted the view that economic weapons are more important than collective bargaining. *Nielsen III*, 977 F.2d at 1171 (stating that information need not be disclosed because the union can either "knuckle under to the company's demands or call a strike").

85. In *Insurance Agents*, the Court stated that notwithstanding the existence of economic weapons, good faith bargaining imposed upon parties a duty to make a "serious attempt to resolve differences." 361 U.S. at 486.

86. Id. at 489-91, 494-95.

87. See notes 30-43 and accompanying text.

4. *Detroit Edison*: Confirming the Preference for Good Faith Bargaining

In *Detroit Edison Co. v. NLRB*,[88] the Court confronted an employer that withheld employee testing information from the union. Detroit Edison sought to be excused from disclosure of this nonfinancial information because of concern that leaks by the union could compromise future testing and violate privacy interests of those who took the test.[89] The Court refused to require disclosure,[90] and in so doing affirmed a flexible view of good faith consistent with *Truitt*. While acknowledging the general principle that unions are entitled to relevant information,[91] the Court cautioned the NLRB against rules that fail to account for confidentiality and legitimate business concerns.[92] The Court found the ultimate touchstone to be subjective good faith; because the company's actions were in good faith, the NLRA did not require disclosure.[93]

In summary, the NLRA and Supreme Court precedent indicate that courts should evaluate bargaining positions under the rubric of good faith. While economic weapons are legitimate, once in the bargaining room, management and labor are expected to search for agreement. Unfortunately, as discussed below, the Seventh Circuit, and the NLRB to a lesser extent, have abandoned this reading of the statute.

III. THE *NIELSEN* DECISIONS

A. *Facts and Holdings*

In June 1983, the Graphic Communications International Union, Local 508, and Nielsen Lithographing Company began negotiating a new contract.[94] The union had represented workers at the plant for forty years.[95] Nielsen asked for wage and benefit reductions, despite claiming profitability, because its labor costs exceeded those of

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88. 440 U.S. 301 (1978).
89. Id. at 313, 317.
90. Id. at 319-20.
91. As did *Truitt*. See notes 49, 62-64 and accompanying text.
92. *Detroit Edison*, 440 U.S. at 314, 319.
93. Id. at 320.
94. *Nielsen II*, 305 N.L.R.B. at 697.
95. Id.

other printers.[96] Without these concessions, the company claimed that future business losses would result in a reduction of union jobs.[97] The union asked the company to substantiate these claims with financial information, but the company denied the request.[98] The union struck, and the company permanently replaced the workers.[99] The union filed a charge with the NLRB, claiming that Nielsen's nondisclosure was an unfair labor practice in violation of the NLRA's good faith bargaining requirement.[100] The company would have had to reinstate the workers if the union proved its case.[101]

Labor and management then engaged in a six-year litigation marathon. The administrative law judge ("ALJ") who first heard the case ruled that the employer had a duty to release the financial information requested by the union.[102] The NLRB subsequently adopted the ALJ's judgment without writing its own opinion.[103] The Seventh Circuit refused to enforce the NLRB's order and stated that the NLRA did not impose a duty to release the financial information.[104] On remand, the NLRB reversed its earlier decision and adopted the Seventh Circuit's view.[105] The Seventh Circuit subsequently affirmed this decision.[106]

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96. Id.

97. *Nielsen I*, 854 F.2d at 1065.

98. *Nielsen II*, 305 N.L.R.B. at 697. The information requested included:

> 1. Documents by the Employer to banks for the purpose of obtaining loans, including projected balance sheets and income statements.
> 2. Financial statement for three years prior, as well as tax returns and current financial statements.
> 3. Analyses of working capital for the last three years.
> 4. Charts 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 non-union employees have been laid off and how long, please list.

Id. at 698.

99. *Nielsen III*, 977 F.2d at 1169.

100. Id. See note 1 and accompanying text for the language of the NLRA.

101. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-346 (1938).

102. *Nielsen Lithographing Co. and Graphic Communications International Union, Local 508*, 279 N.L.R.B. 877, 877 (1986). Because this opinion simply affirmed the ALJ's determination, and was subsequently overturned by the NLRB, it is not relevant to the NLRB's current position on the subject. It is, therefore, beyond the scope of this Note.

103. Id.

104. *Nielsen I*, 854 F.2d at 1067.

105. *Nielsen II*, 305 N.L.R.B. at 701.

106. *Nielsen III*, 977 F.2d at 1171. Because the two Seventh Circuit opinions were written by Judge Richard Posner, and advocate different aspects of the same position, this Note treats them as one. See *Nielsen I*, 854 F.2d at 1064; *Nielsen III*, 977 F.2d at 1168.

B. The Nielsen *Tests*

1. The Substantiation Test

As interpreted in the *Nielsen* cases, good faith bargaining requires the disclosure of financial information by the employer only if the employer pleads poverty to a given wage or benefit demand.[107] When the union requests substantiation of poverty claims, management must provide the information.[108] Both the Seventh Circuit and the NLRB relied on the narrowest reading of *Truitt* for this proposition.[109] *Truitt* requires companies to substantiate claims of poverty with financial information,[110] but, as discussed above,[111] *Truitt* did not limit the possibility of disclosure to a poverty situation.

The Seventh Circuit offered two reasons why Nielsen's statements about its business problems did not constitute an inability to pay. First, the court laid heavy emphasis on Nielsen's contention that it was profitable and could afford to pay the wages requested by the union.[112] For the Seventh Circuit, these statements amounted to a position by Nielsen that although it could, it simply would not meet the union's demand.[113] According to the court, Nielsen's statement that its wages were not competitive with other companies did not constitute an inability-to-pay claim requiring substantiation because wages and labor costs, in general, are not the only factors in business competition.[114] Other advantages, such as greater efficiency, better technology, or an expanding market, may permit a company with noncompetitive wages to remain profitable.[115] From the Seventh Circuit's perspective, the company's statements about stiff

107. *Nielsen I*, 854 F.2d at 1065; *Nielsen II*, 305 N.L.R.B. at 699-700; *Nielsen III*, 977 F.2d at 1170.

108. *Nielsen I*, 854 F.2d at 1065; *Nielsen II*, 305 N.L.R.B. at 699-700; *Nielsen III*, 977 F.2d at 1170.

109. *Nielsen I*, 854 F.2d at 1065; *Nielsen II*, 305 N.L.R.B. at 699-700; *Nielsen III*, 977 F.2d at 1170.

110. *Truitt*, 351 U.S. at 152-53. Notably, however, the Supreme Court did not adopt a per se approach even when poverty was claimed, advocating case-by-case determinations of good faith. Id. at 153. Although the NLRB noted this wrinkle in its opinion, *Nielsen II*, 305 N.L.R.B. at 699, its holding would lead to disclosure of information any time a poverty claim was made. *Nielsen II*, 305 N.L.R.B. at 701 (stating that "financial inability to pay . . . triggers a duty to prove").

111. See notes 49, 62-64 and accompanying text.

112. *Nielsen I*, 854 F.2d at 1065.

113. Id.

114. Id.

115. Id.

competition were evidence of a simple want for more profits. According to the court, such a desire could not be substantiated.[116] The court held that disclosure should not be required when no substantiation is possible.[117]

Second, the court grappled with the ALJ's factual finding that Nielsen's statements amounted to a prediction that the company would probably go out of business without concessions.[118] The Seventh Circuit held that a prediction of job losses due to competition did not amount to a claim of inability to pay, unless the predicted losses would occur during the term of the contract.[119] Since these were long-term predictions, the court reasoned that they were nothing more than "truisms"[120]—a business that has higher wages vis-à-vis its competition will not be able to withstand competition in the future.[121] Because the court characterized Nielsen's statements as benign forecasts, the court refused to require disclosure.[122]

The court relegated *Truitt*'s disclosure requirement to situations in which an employer pled poverty within the contract term. In this situation, the Seventh Circuit reasoned, a lack of disclosure wonld leave the union with a "Hobson's choice," whereby a union would have to agree to possibly unjustified terms or risk members' jobs by striking.[123] If the employer was telling the truth, and truly could not pay the wages, the strike would force the employer to hire permanent replacements at lower wages to preserve itself.[124] Requiring the union to make this choice would be, in the court's words, "Russian ronlette," and violate the good faith bargaining requirement.[125]

On remand, the NLRB adopted the Seventh Circuit's view and held that Nielsen's statements did not constitute an inability to pay.[126] Unlike the Seventh Circuit, which had found profitability to be a

116. Id.
117. Id.
118. Id.
119. Id. at 1065-66.
120. Id. at 1066 (citing *NLRB v. Harvstone Corp.*, 785 F.2d 570, 577 (7th Cir. 1986)).
121. Id. (citing *NLRB v. Harvstone Corp.*, 785 F.2d 570, 577 (7th Cir. 1986)).
122. Id. at 1065.
123. Id.
124. See id. (explaining that a union that could not look at the books of an employer who was claiming that it was incapable of paying a wage increase would be faced with a "Hobson's choice of acceding to a quite possibly exaggerated claim of poverty or risking its members' jobs [if the company was forced to shut down or hire new workers]").
125. Id.
126. *Nielsen II*, 305 N.L.R.B. at 701.

defense to disclosure,[127] the NLRB concluded that an employer's statements would be examined in all situations to determine if they contained an inability-to-pay claim requiring substantiation.[128] Additionally, the NLRB signaled that its view of what constituted an inability-to-pay claim was broader than the Seventh Circuit's by stating that claims of noncompetitiveness could be considered poverty pleas in certain circumstances.[129]

In his dissent to the NLRB's decision, Chairman Stephens accepted the inability-to-pay standard, but argued that Nielsen's statements amounted to a plea of poverty.[130] Chairman Stephens focused on Nielsen's statement that without reductions, high union wages would result in a loss of competitive position and union jobs.[131] These statements amounted to, in the chairman's opinion, a claim that Nielsen was unable to pay current wages.[132] Given these findings, he found an obligation to disclose the information under *Truitt*.[133] Ironically, in cases pre-dating *Nielsen*, Chairman Stephens' view had often prevailed at the NLRB and in the federal courts of appeal.[134]

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127. See notes 112-17 and accompanying text. See also Clifford R. Oviatt, Jr., *The Bush NLRB in Perspective: Does the Playing Field Need Leveling?*, 11 Hofstra Lab. L. J. 47, 56 (1993) (former NLRB member stating that NLRB looks to the entirety of an employer's conduct when determining whether an inability-to-pay claim was made).

128. *Nielsen II*, 305 N.L.R.B. at 701.

129. Id. at 700. The text of the NLRB decision is instructive:

> 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 particular 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.

Id. This statement is far broader than the Seventh Circuit's and leaves the NLRB with substantially more room to make case-by-case judgments.

130. Id. at 703 (Chairman Stephens, dissenting).

131. Id. at 704.

132. Id. at 706-07.

133. Id. at 708.

134. See, for example, *Facet Enterprises, Inc. v. NLRB*, 907 F.2d 963, 980-81 (10th Cir. 1990); *Pertec Computer Corp.*, 284 N.L.R.B. 810, 811-12 (1987); *NLRB v. Palomar Corp.*, 465 F.2d 731, 734-35 (5th Cir. 1972); *International Telephone and Telegraph Corp. v. NLRB*, 382 F.2d 366, 370-71 (3d Cir. 1967); *NLRB v. Western Wirebound Box Co.*, 356 F.2d 88, 91 (9th Cir. 1966) (stating: "We see no reason why . . . an employer who insistently asserts . . . competitive disadvantage . . . does not have a . . . duty to come foward, on request, with some substantiation").

Neither the NLRB nor the courts have been consistent in resolving these cases, however, as they sometimes refuse to order disclosure in similar situations. See, for example, *Buffalo Concrete*, 276 N.L.R.B. 839, 840-841 (1985), enforced in *Washington Materials v. NLRB*, 803 F.2d 1333, 1338-39 (4th Cir. 1986).

One reason why the NLRB may have rejected Chairman Stephens' view was the nature of the union's request. Instead of requesting only financial information, the union asked for

2. The Relevancy Standard

Although the NLRB adopted the inability-to-pay standard, its opinion began with the statement that the important inquiry for information disclosure cases is relevancy.[135] In other contexts, the NLRB and courts have held that information related to the bargaining unit is presumptively relevant to the union as bargaining representative.[136] For financial information, however, the NLRB stated in *Nielsen II* that the union bears the burden of demonstrating relevance.[137] The NLRB then decided the case by considering only whether management had made an inability-to-pay claim. Absent any union showing of relevancy, the NLRB's decision gives a well-counseled employer the power to decide, by choosing when to plead poverty, what is relevant to the negotiations.[138]

This anomalous result is inconsistent with previous decisions. When focused on relevancy as the primary standard, courts generally have required disclosure of financial information.[139] This requirement is logical because financial information is often helpful to the union in assessing its bargaining position.[140] Another strength of the relevancy standard is that it also accounts for the union's perspective.[141]

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information that was partly within management's sole prerogative. See note 98 and text accompanying notes 201-05 (discussing the problems with aspects of the union's request).

135. *Nielsen II*, 305 N.L.R.B. at 699.

136. See note 6 and accompanying text.

137. *Nielsen II*, 305 N.L.R.B. at 699.

138. The "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." *Nielsen II*, 305 N.L.R.B. at 700 (citations omitted).

139. For examples of cases holding that financial information should be disclosed based on a "relevancy" rationale, see *NLRB v. Blevins Popcorn Co.*, 117 Legal Rel. Ref. Man. (BNA) 2425, 2429 (D.C. Cir. 1984); *Curtiss-Wright Corp., Wright Aeronautical Division v. NLRB*, 347 F.2d 61, 69 (3d Cir. 1965); *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863, 867-68 (9th Cir. 1977). These courts have placed the burden on the union to demonstrate that the requested information is relevant to the issues at hand. *Curtiss-Wright Corp.*, 347 F.2d at 69; *San Diego Newspaper Guild*, 548 F.2d at 867-68.

140. NLRB Chairman Stephens, in his *Nielsen II* dissent, adopted a relevance test: "Because the Respondent [Nielsen] 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." *Nielsen II*, 305 N.L.R.B. at 703 (Chairman Stephens, dissenting).

141. The Supreme Court has accepted this union-based perspective in a different context. In *Fall River Dyeing & Fininshing Corp. v. NLRB*, 482 U.S. 27, 43-44 (1987), a plant closed and was purchased by a former employee who reopened it seven months later. The Court, reversing the Board, found the new owner a successor, and therefore under obligation to bargain with the union that previously had represented the workers. Id. at 45-46, 52. The Court adopted a worker-based perspective and placed heavy weight on the fact that the new plant did similar work and used workers in the same manner as did the old plant. Id. at 43-44.

The union-based perspective adopted in *Fall River Dyeing* indicates that the Supreme Court might look favorably on an argument for a similar point of view in financial information disclo-

Finally, from the union's point of view, disclosure was relevant to avoid the "Hobson's choice" the Seventh Circuit found incompatible with the NLRA.[142]

Predictably, the Seventh Circuit did not view relevancy in this manner. Instead, the court adopted a cramped view of relevance under which financial information is not relevant to the union unless the employer makes an inability-to-pay claim.[143] By equating relevancy with inability-to-pay claims, the Seventh Circuit closed off any avenue that the union could use to obtain the information, besides one completely controlled by the employer.[144]

Because it did not categorically adopt such a standard, however, the NLRB left itself with more room to modify its judgment in succeeding cases than did the succeeding cases. A union with a strong relevancy claim may be able to convince the NLRB to consider its request in the absence of an inability-to-pay claim by the employer, especially if the NLRB is persuaded to consider a union's perspective.[145] Because lack of information in bargaining makes informed bargaining difficult,[146] allowing fair relevancy claims to force disclosure is sensible. The standard adopted by the Seventh Circuit and NLRB in *Nielsen* sets up management as the sole arbiter of relevancy and leaves the union, absent management beneficence or imprudence, groping in the dark.

3. The Discovery Standard

The Seventh Circuit also analogized the request for information to a discovery request.[147] According to the court, the union desired financial information to prove that the company could afford

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sure cases, especially given that unions must base their crucial decision to strike on their measure of employer strength.

142. *Nielsen I*, 854 F.2d at 1065.

143. *Nielsen III*, 977 F.2d at 1169-70.

144. See id. at 1170-71.

145. This would be consistent with the Supreme Court's *Fall River Dyeing* decision, in which the Court expressly adopted an employee-based perspective. See note 141.

146. "Without the disclosure of relevant information . . . contract negotiations . . . would be hampered. Merely meeting and conferring without a prior exchange of requested data, where such is relevant, does not facilitate *effective* collective bargaining and, therefore, does not meet the requirements" of the NLRA. *Curtiss-Wright Corp.*, 347 F.2d at 68 (emphasis in original).

147. *Nielsen III*, 977 F.2d at 1169. The discovery analogy has been used generally in the nonfinancial context. When used, it has led to an order that the company disclose such information. See, for example, *Acme Industrial Co.*, 385 U.S. at 437-38 (reasoning that discovery of information allows for early evaluation of a claim's merits); *NLRB v. Pfizer*, 763 F.2d 887, 889 (7th Cir. 1985) (noting that the relevance of particular information "is determined under a 'discovery-type' standard"). Notably, Judge Posner was a member of the panel that decided *Pfizer*. 763 F.2d at 888.

to retain existing wage levels. The court reasoned that the employer admitted that it could afford to pay the request, but chose not to. This admission, according to the court, mooted the union's request because the employer had not made an effective plea of poverty.[148] This line of reasoning leads once again to total employer control over information disclosure.

The court based its analysis on an underlying assumption that an employer either unambiguously makes an inability-to-pay claim or it does not. Real life is far more indefinite. While not explicitly claiming an inability to pay, *Nielsen* had made several statements that could have led the union to fear job losses if it rejected the wage decrease. From the union's perspective, therefore, the company's statements had not mooted the information request, but rather had prompted it. Although not noted by the Seventh Circuit, at least one other court relied on similar reasoning to require disclosure of financial information.[149]

C. Theoretical Bases for the Nielsen *Opinions*

1. The Seventh Circuit

In its *Nielsen* opinions, the Seventh Circuit laid out a coherent theoretical justification for its position. It stated that unions often make information requests to harass employers.[150] According to the court, this harassment occurs in three ways: (1) by embarrassing a profitable employer into paying more; (2) by creating a legal issue; or (3) by delaying the inevitable defeat, and thereby retaining benefits for as long as possible.[151] The court indicated that unless it limited disclosure to the narrow case of an inability-to-pay claim, unions would achieve their harassing goals. The Seventh Circuit was content to leave the union in the position of having to, in Judge Posner's colorful phrase, "knuckle under to the company's demands or call a strike."[152] The court's reasoning reveals a deep hostility to the

148. *Nielsen III*, 977 F.2d at 1170-71. In the case of a car accident, an admission by the driver that her driving was negligent would moot that point and obviate the need for discovery.

149. See *Blevins Popcorn*, 117 Labor Rel. Ref. Man. (BNA) at 2429 (noting: "The standard [in financial information disclosure cases] is a liberal one, much akin to that applied in discovery proceedings" (quoting *Local 13, Detroit Newspaper Printing and Graphic Communications Union v. NLRB*, 598 F.2d 267, 271 (D.C. Cir. 1979))).

150. *Nielsen III*, 977 F.2d at 1169-70.

151. Id. at 1170.

152. Id. at 1171.

negotiation process and a preference for confrontation and the use of economic weapons.[153] The court effectively ignored the NLRA's mandate to promote collective bargaining.[154]

The Seventh Circuit also justified its explicit adoption of an employer-based approach[155] by claiming that to hold otherwise would be to require management to bargain over core management prerogatives.[156] The view that management need not bargain over or sacrifice management prerogatives is firmly entrenched in Supreme Court and NLRB precedent.[157] Especially when the matter is only tangentially related to collective bargaining, but at the heart of management control of the enterprise, management need not bargain with the union.[158] While labor may not invade this realm that is within this core area of management control, the Seventh Circuit's assertion that financial information is generally of such importance to management is suspect. If taken seriously, this view would lead to complete nondisclosure, a position even the Seventh Circuit was unwilling to adopt. A more sensible stance is that certain requests should be denied on the basis of true management prerogatives, while other requests should not be construed to cut as deeply. This Note, Part V, suggests a way that courts can consider management prerogatives without eliminating almost all disclosure.[159]

Additionally, the Seventh Circuit and Member Oviatt, who concurred in the NLRB's decision, believed that a broad disclosure requirement would lead to codetermination.[160] They relied upon *First*

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153. For examples of economic weapons, see note 80.

154. See note 1 and accompanying text.

155. See notes 143-44 and accompanying text.

156. *Nielsen III*, 977 F.2d at 1170.

157. The classic formulation is Justice Stewart's:

> Nothing . . . should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment. . . .

Fibreboard Paper Products v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring). See also Julius G. Getman and Bertrand P. Pogrebin, *Labor Relations: The Basic Processes, Law and Practice* 5 (Foundation, 1988) (observing that "the Act has from the beginning been interpreted in such a way as te minimize interference with managerial authority and entrepreneurial decision making").

158. *Fibreboard*, 379 U.S. at 223; Getman and Pogrebin, *Labor Relations* at 5.

159. See notos 182-207 and accompanying text.

160. *Nielsen III*, 977 F.2d at 1170-71; *Nielsen II*, 305 N.L.R.B. at 702 (Memher Oviatt, concurring). Codetermination is the theory that labor and management should have an equal say in the direction of the business enterprise. For example, in Germany larger companies are required to have a labor-management "works council" to discuss and shape the overall direction of the enterprise. See Tracy H. Ferguson and John Gaal, *Codetermination: A Fad or a Future in America?*, 10 Empl. Rel. L. J. 176, 176-80 (1984).

National Maintenance Corp. v. NLRB,[161] in which the Supreme Court stated that Congress did not expect or require management to make the union an equal partner in the business.[162] While the Supreme Court has rejected codetermination, this fact is not relevant to financial information disclosure in most cases, because few information requests would lead to impermissible union knowledge or control of the company.[163] When matters fundamental to functioning of the business are at issue, however, the concerns raised by *First National Maintenance* are similar to those raised in the preceding paragraph and will be dealt with in Part V.

2. The NLRB

In contrast to the Seventh Circuit and Member Oviatt, the NLRB majority did not lay out a theoretical justification for its decision. Rather, it simply asserted that precedent commanded disclosure only if an employer claimed an inability to pay.[164] The nature of the union's request may have fueled an NLRB concern of overreaching into management prerogatives,[165] but the NLRB did not explicitly rest its decision on this concern. Unlike the Seventh Circuit's narrow conception of a plea of poverty, the NLRB's loosely written definition of inability to pay left the NLRB considerable flexibility to decide future cases on a case-by-case basis.[166]

As discussed above,[167] Member Oviatt, who concurred in the NLRB's judgment,[168] limited disclosure in part because of fears of codetermination similar to those of the Seventh Circuit. He also believed that the indeterminacy and complexity of financial

161. 452 U.S. 666 (1981).

162. Id. at 676. For a contrary view, see Shedlin, 41 Ohio St. L. J. at 453-56 (cited in note 7) (advocating that financial disclosure could be the catalyst for greater cooperation).

163. In any case, *First National Maintenance* is inapplicable to this situation, because it dealt with a decision to close a plant, a nonmandatory subject of bargaining. *First National Maintenance*, 452 U.S. at 676-77. The Court found the subject nonmandatory because the decision to move a plant concerns the scope and direction of the business and does not turn on labor considerations. Id. Neither the employer nor the union has an obligation to bargain over nonmandatory subjects. *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). Where the discussion focuses on issues such as wages and benefits, as in *Nielsen*, the NLRA requires good faith bargaining. Id.

164. *Nielsen II*, 305 N.L.R.B. at 699-701.

165. Following a statoment by the union's chief negotiator that the company had "too many chiefs and not enough Indians," the union sought information concerning Nielsen's management structure. Id. at 698. See note 98 for a list of union demands. See also notes 201-05 and accompanying text.

166. See also note 145.

167. See notes 160-63 and accompanying text.

168. *Nielsen II*, 305 N.L.R.B. at 701-03.

information would slow the bargaining process without yielding benefits to either party.[169] As Chairman Stephens noted in his dissent, this view, taken to its logical conclusion, would permit the NLRB to deny disclosure in all situations.[170]

IV. GOOD FAITH BARGAINING AND THE *NIELSEN* DECISIONS

Because the genesis of a financial information disclosure requirement is the statutory command of good faith bargaining, it is important to examine the *Nielsen* decisions' notion of good faith. Under the opinions, an employer that unambiguously makes an inability-to-pay claim and fails to substantiate it will be held in violation of the Act for not bargaining in good faith, regardless of any honest desire to reach agreement. On the other hand, an employer that avoids using the magic words signaling a plea of poverty will be held to have met the good faith requirement and not be required to disclose information, even if the employer has no desire for agreement and is avoiding disclosure for purely strategic reasons.

It is difficult to characterize this good faith standard as objective or subjective. Employers are judged solely on the statements they make as evidence of their intent, which seems to be the essence of a subjective, case-by-case, standard. However, only certain trigger phrases[171] raise the obligation to disclose, making the standard seem objective.[172] Paradoxically, then, the *Nielsen* decisions appear to endorse a case-by-case objective good faith standard. Other federal courts have also adopted this standard and looked at particular statements without fully evaluating their context.[173]

Problematically, this standard allows a well-counseled employer to escape disclosure by avoiding magic words such as "poverty" or "inability to pay," yet still convey to the union that failure

169. Id. at 701-02.

170. Id. at 707 n.10 (Chairman Stephens, dissenting).

171. The Seventh Circuit's test is far more rigid than then NLRB's on this point. See notes 127-29 and accompanying text, with special attention to the quoted language in note 129.

172. The NLRB could adopt another objective standard based on industry practice, under which the NLRB would survey various industries to determine if employers generally disclose the requested information to unions. No reported case has adopted this position. There are several apparent problems with the idea. It is unclear whether all industries would be guided by the same rule or by different rules depending on the type of business enterprise involved. A more serious problem is that an industry-practice standard would negate any factors particular to a specific bargaining situation. Finally, such a standard would permit employers to keep information secret by allowing employers to set the level of disclosure through their own practices.

173. See note 20.

to accept the concessions will result in job losses.[174] The NLRB, however, reserved the right to judge the particular facts and circumstances of each case.[175] This approach allows the NLRB to give the appearance of employing the Seventh Circuit's quasi-objective standard, while actually judging the subjective intentions of the parties in each case. Although this approach avoids the problem of allowing trigger phrases to dictate results, it does not give employers or unions real guidance to determine when nondisclosure will violate the good faith bargaining requirement.

Decisions immediately preceding and following *Nielsen* demonstrate the difficulties with the NLRB standard. Cases with facts almost indistinguishable from *Nielsen* have come out both ways.[176] Although the NLRB attempted to find distinctions in some of these cases,[177] a management lawyer found these attempts unconvincing and concluded that NLRB and court decisions are inconsistent and have provided employers with little guidance.[178] In *Circuit-Wise Inc.*,[179] a case decided after *Nielsen*, the NLRB required financial information disclosure on facts similar to those in *Nielsen*. In *Circuit-Wise*, the union requested balance sheets and fund flow statements to evaluate a management proposal for a profit-based retirement plan.[180] Management denied the request and the union filed a charge with the NLRB. Without mentioning *Nielsen*, the NLRB required disclosure, stating that the information was relevant to the union.[181]

In summary, cases before and after *Nielsen*, as well as the NLRB's opinion in *Nielsen*, leave employers and unions with little sense of where the NLRB will go next. The Seventh Circuit adopted clear substantiation and relevance standards that leave all control in

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174. *Nielsen II*, 305 N.L.R.B. at 706 (Chairman Stephens, dissenting); Hexter, 8 Labor Law. at 843-44, 846-47 (cited in note 18). The Board itself warned against such facile analysis in *Atlanta Hilton & Tower*, 271 N.L.R.B. 1600, 1602 (1984) (stating: "Inability to pay need not be expressed with any particular magic words").

175. See notes 127-29 and accompanying text.

176. Cases which have come out against disclosure include *United Paperworkers*, 981 F.2d at 865-66; *United Steelworkers*, 983 F.2d at 243-45; *Beverly California Corp.*, 310 N.L.R.B. 222, 226-27 (1993) (NLRB's decision not to require disclosure was upheld in *Torrington Extend-A-Care Ass'n v. NLRB*, 17 F.3d 580, 588-89 (2d Cir. 1994)); and *Burrus Transfer*, 307 N.L.R.B. 226, 227-28 (1992). In *Nielsen II*, the Board approved the following cases that require disclosure: *Clemson Bros.*, 290 N.L.R.B. 944, 944-45 (1988); *S-B Manufacturing Co.*, 270 N.L.R.B. 485, 491 (1984); *Unoco Apparel, Inc.*, 208 N.L.R.B. 601 (1974); and *Facet Enterprises*, 290 N.L.R.B. 152 (1988).

177. See *Nielsen II*, 305 N.L.R.B. at 700 n. 9 (distinguishing similar cases).

178. Carron and Noecker, 8 Labor Law. at 819 (cited in note 18).

179. 306 N.L.R.B. 766 (1992).

180. Id. at 767-68.

181. Id. at 768. Specifically, the Board stated that "good-faith bargaining encompasses a party's right to relevant information. . . ." Id.

the hands of the employer. These standards reflect the court's view that financial information is generally within management's prerogative and that the full force of economic weapons should decide the outcome of negotiations. Only when expressly commanded by the narrowest reading of *Truitt* will the Seventh Circuit require disclosure. The NLRB, under the sway of the Seventh Circuit, has agreed with this substantiation standard, but refuses to commit itself to a theory that will make its decisions predictable.

Even more troubling than the lack of predictability, however, is the *Nielsen* decisions' failure to articulate a vision of financial information disclosure consonant with the statutory and Supreme Court requirements of good-faith bargaining. An interpretive scheme is needed that permits disclosure of financial information when it furthers collective bargaining yet does not compromise fundamental and legitimate management interests; in other words, a solution that preserves the tension inherent in the Act.

V. Reconstructing Financial Information Disclosure

The first step toward a better understanding of financial disclosure is to remember the Supreme Court's statements in *Truitt* and *Detroit Edison*. In both cases, the Court was clear that the particular facts of each case, especially as regards overall good faith, should be of paramount importance.[182] Moreover, the NLRA, its legislative history, and *Truitt* command that any solution to information disclosure must retain the tension between requiring labor and management to bargain seriously, while not forcing either to sacrifice its prerogatives.[183] Additionally, and this is where *Truitt* is at its weakest, the Court should create solid guidelines for labor and management relations so that these matters need not continually go before the NLRB.

Unfortunately, the Seventh Circuit's reasoning in *Nielsen* does not embody these principles. Instead, fears of codetermination and a desire for a clear rule produce a deck stacked against the union. The NLRB appeared to adopt much of the Seventh Circuit's reasoning, while leaving itself several means to extricate itself when needed. Neither approach is satisfactory. What is needed is a way of thinking about financial information disclosure that retains the subjective good

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182. See notes 53, 60, 88-93, and accompanying text.
183. See Parts II and IV.

faith elements endorsed by the Supreme Court, preserves the mandated tension in the Act, and gives management and unions an idea of what to expect if the issues come before the NLRB. Following is a proposal that should achieve these goals.

Because the Supreme Court has held that topics within management prerogative are not proper subject of bargaining,[184] financial information that falls within management's sphere should not have to be disclosed. The first question, therefore, is to what extent the control over financial information is within a management prerogative. The answer depends on the interrelation of two factors: first, the breadth of management prerogatives; and second, the impact a particular information request has by cutting into the prerogatives as defined. An abstract definition of management prerogatives has little value in making these determinations, so it may be best to think in terms of concrete examples. Financial information can be broken into two broad categories. The first is forward-looking information, such as profitability and dividend projections. The second is data regarding past events, such as profit-loss statements, sales records, market share information, and arrearages, among many others.

The first group seems clearly to be within management prerogative. While it is easy to see how forward-looking information would "substantiate" a company's claim of economic difficulty, or be relevant to a union in its decision regarding how hard to press a particular demand, predictions of future performance are subjective, produced solely by management, usually without an intent to affect labor-management relations directly,[185] and are generally not publicly disclosed.[186] Unless the company has previously disclosed the information to a public source outside the company, a refusal to disclose this information should not result in a violation of the requirement to bargain in good faith.

184. See *Fibreboard Corp.*, 379 U.S. at 223 (Stewart, J. concurring); notes 157-58 and accompanying text.

185. While labor costs may have some effect on future profitability or other projections, these costs are not generally the focus of, or the reason for, the projections. This secondary effect should not force disclosure. See notes 157-63 (especially note 163) and accompanying text.

186. Courts generally have not required companies to disclose such forward-looking information under federal securities laws. See generally Bruce A. Hiler, *The SEC and the Courts' Approach to Disclosure of Earnings Projections, Asset Appraisals, and Other Soft Information: Old Problems, Changing Views*, 46 Md. L. Rev. 1114 (1987). Exceptions to this rule include the following cases: when disclosure of such information is necessary to avoid investor misunderstanding of a company statement (whether at the time of the statement or at some later date if changing circumstances create possible confusion); or if the information would amount to a "material" qualification of a company statement. Id. at 1127-28.

The second category, past information, is capable of additional subdivision. Federal securities laws and other federal and state regulatory schemes require disclosure of much of this information.[187] Other information is often voluntarily disclosed through press releases or other means. Since the union could access this information by buying a share of stock, poring through submitted documents, or attending press conferences, the NLRB and courts should not allow a company to claim management prerogatives when the union asks for the same information during bargaining.[188] Especially when obtaining the information proves difficult for the union, the failure to disclose such information would show a lack of good faith bargaining and constitute a violation of the statute.[189]

A second type of past information is that which the employer has chosen not to disclose publicly. It is this information that poses the most difficulty. Both the NLRA and Supreme Court precedent emphasize the need to preserve the tension between bargaining requirements and freedom of contract while also considering subjective good faith. The Seventh Circuit recognizes that the NLRB and courts must also weigh management prerogatives and the need for certainty in the law governing good faith.

A proper analysis begins where the Court did in *Truitt* with a belief that bargaining is most fruitful when all information is on the table.[190] Absent countervailing pressures, a proper interpretation of good-faith bargaining would permit disclosure of financial information sought by the union. The doctrines of substantiation and relevancy, both adopted in *Truitt*,[191] are helpful here. When a company makes a claim that economic conditions foreclose a wage increase, or require a concession, the company should be required to substantiate that claim with financial information. The *Nielsen* decisions recognize this avenue to disclosure.[192] The substantiation standard should continue

187. For an overview of which companies must disclose, and what they must disclose, see Thomas Lee Hazen, *The Law of Securities Regulation* 31-33, 58-61, 232-40 (West, 1984).

188. Professor Robert Covington first suggested this approach to the Author. See Robert Covington, *Shall We Dance—Or Must We: Bargaining Over the Transfer of Work* 42-43 (unpublished manuscript on file with the Author). This proposal would theoretically result in greater disclosure by publicly traded corporations than by privately held entities. To the extent this is so, it results from the mandate in other federal laws and not from this proposal. Whether it is fairer to treat companies differently because of their size and corporate structure is beyond the scope of this Note.

189. If the information is easily obtainable through some public means, the NLRB or court could simply require the union to obtain it on its own.

190. See notes 47-51 and accompanying text.

191. See notes 41-51, 62-64 and accompanying text.

192. See notes 107-34 and accompanying text.

to provide unions with an avenue to gain financial information. The NLRB should avoid the "magic word" implications of the substantiation standard in *Nielsen*[193] and look carefully at the intentions and interests behind the statements.

Even without a claim of inability to pay, however, company statements may have relevance to the union's decision-making process. As the *Truitt* Court stated, relevancy is an appropriate basis for information disclosure.[194] The problem is, however, that all information is arguably relevant to the union in its role as bargainer. A pure relevance standard would not maintain any balance between union and management interests. There are several ways that the concept of relevancy can be narrowed. The first, discussed above, is that non-public, forward-looking information could be denied. This information is the most sensitive to the company because it includes the forecasts desired by competitors and investors.

Beyond this fundamental protection, cases throughout the years have demonstrated several ways that disclosure can be structured to preserve legitimate management concerns. First, management should be able to shape the form of disclosure to minimize costs and possible use of information by competitors. The NLRB and courts could also require the union to bear some of the costs of preparing the data.[195] Second, management should be able to raise legitimate confidentiality concerns.[196] Trade secrets and patents, for instance, should not be subject to disclosure, except under carefully circumscribed conditions.[197] Third, evidence of bad faith in the union's request should be grounds for limited disclosure, or in an extreme

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193. See note 174 and accompanying text.

194. See notes 62-64 and accompanying text.

195. See *Safeway Stores Inc.*, 252 N.L.R.B. at 1324 (stating that if the production of information will involve substantial costs, the parties must then bargain as to who should bear such costs); *General Motors Corp.*, 243 N.L.R.B. at 186 (same); and *Oil, Chemical and Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348, 363 (D.C. Cir. 1983) (stating that the cost of the union's request may in certain circumstances relieve the employer from the obligation to provide some or all of the information to the union). Although the company may request that the union bear some of the cost, such concerns do not justify a categorical refusal to disclose. *Oil, Chemical and Atomic Workers*, 711 F.2d at 363. See also note 12.

196. *Detroit Edison*, 440 U.S. at 316-20. See also *Fawcett Printing Corp.*, 201 N.L.R.B. 964, 974 (1973), in which the NLRB permitted management to withhold certain information based on fears that if released, the information would damage business prospects. In many ways, this case is a model; the NLRB did not compel release of most of the information the company deemed confidential, but still allowed the union te obtain enough information to fulfill its statutory role as bargaining agent. Id. See also note 6.

197. *Oil, Chemical and Atomic Workers*, 711 F.2d at 362. This exception, too, should not justify the withholding of all information. Id.

case, nondisclosure.[198] Similarly, management bad faith in other negotiation matters should weigh in favor of disclosure.[199]

To these safeguards, three additional requirements should be imposed. First, the union should have the burden of proving that the information requested is relevant.[200] This restriction would prevent broad, discovery-type requests. Second, this burden must be met for each type of financial information requested. These first two requirements would serve two purposes. First, they would blunt the possibility that the union would use disclosure requests as a means of harassment. Second, it would give courts the ability to separate meritorious requests from spurious ones.

The third additional requirement is that judges and NLRB members should consider the overall nature of the union's request for information to determine if a union's purpose in asking for the information is in good faith. If it develops that the union is using the request to harass the employer, or to question management's decisions on issues properly within management control, courts and the NLRB should either deny or limit the union request.

These relevancy and substantiation standards reflect a view of good faith that is largely objective, but with a serious attempt to inquire into the parties' motives. They are objective because once the union establishes the relevancy of a particular piece of information or the employer makes a claim requiring substantiation, failure to sup-

198. For instance, a refusal to bargain seriously has been held to justify nondisclosure. *NLRB v. Goodyear America Corp.*, 497 F.2d 747, 752 (6th Cir. 1974). Additionally, legitimate employer fears that a union desires the information to barass nonunion employees bas excused tbe need for disclosure, so long as the company has acted in good faith. See *A.S. Abell*, 624 F.2d at 512-13; *Sign and Pictorial Union Local 1175 v. NLRB*, 419 F.2d 726, 738 (D.C. Cir. 1969).

199. For example, it is well-established that management conduct to discredit the union violates the NLRA's good faith requirement. *NLRB v. Katz*, 369 U.S. 736, 747 (1962). In *Katz*, management offered union negotiators a package that included substantially less paid sick leave and lower wages than it unilaterally offered the workers later. Id. at 744-45. The Supreme Court held that this action was calculated to undermine employee faith in the union, a prohibited action under the NLRA. Id. at 747 (noting that "[u]nilateral action by an employer . . . will often disclose an unwillingness to agree with the union").

It is possible to imagine a similar dynamic in the financial information disclosure arena. In a given case, management may illegitimately deny information to the union to demonstrate to the rank and file members that the union is ineffective. *Nielsen*'s facts hint at this possibility; management refused to share information with the union after a 40-year bargaining relationship. *Nielsen II*, 305 N.L.R.B. at 697. Especially when there is a long history of bargaining, and the union's behavior gives no indication of bad faith, the NLRB and courts should scrutinize management's refusal for the possibility that it is the opening salvo in a campaign to discredit the union. If such behavior is found, disclosure would be appropriate.

200. The Third Circuit did, at one time, adopt this view to financial information disclosure. *Curtiss-Wright Corp.*, 347 F.2d at 69 (stating that "as to other requested data, however, such as employer profits and production figures, a union must, by reference to the circumstances of the case, as an initial matter, demonstrate more precisely the relevance of the data it desires").

ply the information leaves the company in violation of the Act. The safeguards outlined above, however, allow the employer to offer several good faith defenses to such claims and permit a judge or NLRB member to inquire into the union's motive and forestall disclosure if the union lacks good faith.

Applying these principles to the facts of *Nielsen*, the first issue to be addressed is whether any of the information is forward-looking and should not be disclosed in any circumstance. A part of request one, which asked for projected balance sheets, falls into this category.[201] Thus, these requests should be denied unless the information has been publicly distributed.[202] Next, the Board would need to determine if the company had released any of the requested information to federal securities regulators or the public. Assuming that the information was not already disclosed, the NLRB should next determine if the company made statements that require substantiation. The NLRB decided this question in *Nielsen* and found the employer's statements had not risen to that level.[203] As discussed above, there is much to criticize in this finding, primarily because, from the union's perspective, the employer statements can easily be read to require substantiation.[204]

Assuming the NLRB was correct on substantiation, the next issue is relevancy. As a preliminary matter, the union would not have met the burden advanced in this section requiring it to justify each request. Assuming such justifications were made, items four, five, and six fail the tests laid out above. Information requested on expense reports, automobile leasing, and composition of supervisory personnel fall into the category of matters which are only tangentially related to collective bargaining, but are central to management decision making. Testimony by the union negotiator confirms this hypothesis, for he stated that the information was requested because the union believed that the company employed too many managers.[205]

Items one, two, and three, which are classic financial information disclosure issues, must be considered individually. In each case, the union must make a showing that the particular piece of informa-

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201. See note 98 for the union's information request.

202. Filing with a bank te obtain financing should not in itself lead to disclosure because the information revealed in these applications are for limited distribution by the company and often include the type of projections that would he especially valuable to competitors.

203. *Nielsen II*, 305 N.L.R.B. at 700-01.

204. See notes 130-31, 140-42 and accompanying text.

205. *Nielsen II*, 305 N.L.R.B. at 698. Item seven, which asked for information regarding laid-off employees, is not a financial information disclosure issue, and as such is beyond the scope of this Note.

tion is relevant to the bargaining process. All three appear facially relevant. Depending upon the nature of the union's request, or its general negotiating tenor, the NLRB may determine that the request was designed to harass the employer or otherwise made without good faith. The company could also raise defenses of confidentiality or trade secret. Finally, the company could seek to limit the particular information disclosed based upon cost or convenience. Notwithstanding Nielsen's possible defenses, it appears that Nielsen should have been required to disclose the information requested in items one, two, and three, save for the forward-looking information in item one.

Those who suspect that unions' only motive is control over the enterprise will not support the plan outlined above because the relevancy and substantiation standards will permit significant amounts of financial information to be released. The advantages of the proposal, however, are many. If adopted, the suggestion would lead to more predictable results, by establising a general presumption in favor of disclosure of past information. It would also vindicate the primary command of the statute by endorsing good faith bargaining and requiring disclosure when it would further the chances of agreement,[206] while preserving legitimate management prerogatives.[207] In so doing, this proposal reflects the balance struck in the passage of the NLRA and preserves the tension found in the legislative history and Supreme Court cases.

VI. CONCLUSION

For nearly sixty years, the NLRB and courts have struggled with the issue of when the NLRA's good faith provision requires a company to disclose financial information to unions. Depending upon their reading of the Act or their particular ideology, judges have limited or expanded union access to company records. The recent trend, as found in a troika of recent opinions involving the Nielsen Lithographing Company, is to require disclosure in only the narrowest of circumstances.

Courts have differed widely on this question because, at its root, the NLRA represents a compromise between those who would mandate government-imposed equality between labor and

206. See notes 1, 73-79 (arguing that the NLRA and Supreme Court precedent advocate agreements through collective hargaining).

207. See notes 157-63 and accompanying text.

management and those who would leave labor-management relations to the free market. To achieve the compromise, Congress often employed vague and conflicting language. For instance, the NLRA requires that labor and management bargain collectively in good faith, but also forbids the NLRB or courts from invading the substance of negotiations. While the statutory compromises may appear flawed at first, they actually reflect a careful balance of the legitimate perspectives of labor and management.

The fundamental flaw of the *Nielsen* decisions is that instead of recognizing this tension in the Act, they have attempted to resolve it by emphasizing employer freedom to retain control over the company. The resulting scheme, which would force disclosure only if the owner specifically claims an inability to pay a wage or benefit demand, permits employers to control the flow of financial information and often leaves unions without information they need to represent their membership effectively.

The NLRB and courts should revisit the issue of financial information disclosure. Instead of resolving the tension found in the Act, they should attempt to preserve the tension and devise a regime that accounts for both labor and management interests when interpreting the Act's good faith requirement. This Note proposes that unions be able to obtain information not only when the company claims an inability to pay, but also when the information is relevant to the union in its role as collective bargaining agent. When management can show that such information is central to its control of the enterprise, however, it should be able to limit or refuse disclosure. Additionally, management should be able to shape disclosure to meet confidentiality or cost concerns. Finally, the Note proposes that the NLRB and courts carefully review the union request and management response for indications of a lack of good faith.

If adopted, this proposal would support the balance achieved by the NLRA by promoting good faith bargaining, while preserving the legitimate interests of both labor and management.

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