

No.10-60705

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

**PDK INVESTMENTS, LLC
Respondent**

**ON APPLICATION FOR ENFORCEMENT
OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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STATEMENT REGARDING ORAL ARGUMENT

Since this single-issue case involves the application of well-established principles to straightforward facts, the Board does not believe that oral argument would be of material assistance to the Court. Nonetheless, if the Court finds that oral argument is would be helpful, the Board requests to participate and suggests that 15 minutes per side would be sufficient.

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BRIEF FOR
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**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) for enforcement of its Order issued August 24, 2010 against PDK Investments, LLC (“PDK”), and reported at 355 NLRB No. 115

(2010). (D&O 1 (2010).)¹ The International Brotherhood of Electrical Workers, Local 20 (“the Union”) was the charging party before the Board.

The Board had subject matter jurisdiction over the unfair-labor-practice proceeding below pursuant to Section 10(a) of the National Labor Relations Act (“the Act”) (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board’s Order is a final order within the meaning of Section 3(b) of the Act (29 U.S.C. § 153(b)). The Order adopts and incorporates by reference the Board’s previous decision (D&O 1-10), issued by two members on April 24, 2009 and reported at 354 NLRB No. 1 (2009).

That prior decision was issued by a two-member quorum of the Board. PDK filed a petition in the D.C. Circuit for review of that Order and the Board cross-applied for enforcement. The D.C. Circuit placed the case in abeyance. The Supreme Court, on June 17, 2010, issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), holding that Chairman Liebman and Member Schaumber, acting as a two-member quorum of a three-member group delegated

¹ “D&O __ (2010)” refers to the Board’s August 24, 2010 decision, which can be found at Volume III of the record. “D&O” refers to the consecutively paginated decision of the Board, including the decision of the administrative law judge, dated April 24, 2009 that was incorporated by reference into the decision under review here. “Tr.” refers to the transcript of the unfair-labor-practice hearing, contained in Volume I of the record. “GCX” refers to the General Counsel’s exhibits and “JX” refers to the parties’ joint exhibits, contained in Volume II of the record. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” refers to PDK’s opening brief.

all the Board's powers in December 2007, did not have authority to issue decisions when there were no other sitting Board members, as they did in the prior decision here. Shortly thereafter, the Board vacated its own order and the D.C. Circuit granted the Board's motion to dismiss the case. A three-member panel of the Board then issued the August 24, 2010 Order that is the subject of these enforcement proceedings.

The Board filed its application for enforcement on August 26, 2010. This application is timely, as the Act places no time limitations on its filing. This Court has jurisdiction over this case pursuant to Section 10(e) of the Act (29 U.S.C. § 160(e)) because the unfair labor practices occurred in Balch Springs, Texas.

STATEMENT OF THE ISSUE

An employer must provide information to its employees' bargaining representative, on request, if the information is relevant to policing a collective-bargaining agreement. The Union sought information clarifying PDK's relationship with a nonunion company when it had an objective basis for its reasonable belief that PDK was operating a nonunion company that could violate the parties' contract. Does substantial evidence support the Board's finding that PDK violated Section 8(a)(5) and (1) of the Act by refusing to produce the information?

STATEMENT OF THE CASE

Acting on an unfair-labor-practice charge filed by the Union, the Board's General Counsel issued an amended complaint alleging that PDK violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with the information requested in its April 4 and June 9, 2008 letters. (D&O 2.) After a hearing, the administrative law judge issued a decision from the bench, finding that PDK had violated the Act since its June 24, 2008 refusal to provide requested information. (D&O 2.) On review, the then-two-member Board (Chairman Liebman and Member Schaumber) affirmed the judge's rulings, findings, and conclusions as to the violations, and adopted his recommended order with a minor modification. (D&O 1.) Following the Supreme Court's decision in *New Process*, a three-member panel of the Board (Chairman Liebman and Members Schaumber and Pearce) issued the Order now before the Court. The Board's Decision and Order adopted and incorporated by reference the previously vacated two-member decision finding PDK had violated the Act. (D&O 1 (2010).)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. **Background: PDK's Business and Its Relationship With the Union**

PDK is an electrical contractor in the construction business, with its offices and place of business in Balch Springs, Texas. (D&O 3; GCX1(e) 1.) PDK is a

member of the North Texas Chapter of the National Electrical Contractors Association (“NECA”) and, as such, has agreed to recognize the Union as the exclusive bargaining representative of its employees performing electrical work within the Union’s trade and geographic jurisdiction. Accordingly, it is also bound by the collective bargaining agreement between NECA and the Union. (D&O 3; Tr. 17-19, GCX2, GCX3, GCX4.) In the past, PDK has done business under various “Guild” names—including Guild, Guild Electric, Guild Technologies, and Guild Electric and Telecommunications. The Union knows PDK by these names. (D&O 9; Tr. 24, 30, 38-39, GCX2.) Indeed, the letter of assent between the Union and PDK states that it is binding on “PDK Investments, LLC (Guild Electric).” (D&O 9; GCX2.) A.C. McAfee is the Business Manager and Secretary of the Union, and is responsible for the day-to-day administration of the contract. (D&O 5; Tr. 17.)

B. Union Representative McAfee Obtains a Report Suggesting That PDK Is Operating a Nonunion Entity; He Requests Information from PDK and Conducts an Investigation that Confirms the Earlier Report

Shortly before April 4, 2008, former PDK employee and union member Rudy Ayala spoke with McAfee and informed him that PDK had approached him and offered work on the “nonunion side” of the company. (D&O 5; Tr. 22.) Ayala reported that PDK told him about a company called Guild Commercial and Tenant Services (“GCATS”) that was operating with the same officers, and out of the

same location as PDK. (D&O 5; Tr. 22-23.) This exchange alerted McAfee to the possibility that PDK was operating a nonunion company in order to avoid its contractual obligations to the Union and its members. (D&O 5; Tr. 23.)

On April 4, 2008, McAfee sent the Union's first information request to PDK's part-owner Keith Zagar. In it, McAfee said that the Union was "aware that [PDK] has been operating Guild Commercial and Tenant Services as a nonunion company" and was investigating the matter. (D&O 5; GCX5, Tr. 21.) McAfee demanded information concerning PDK's relationship with this company "for the purpose of administering the [collective bargaining] Agreement" and, more particularly, in order to "determine the appropriateness of a grievance and/or determine whether these matters can be resolved in negotiations." (D&O 5-6; GCX5.) He attached a questionnaire with 79 questions seeking detailed information about PDK and its purported nonunion affiliate for the time period of the collective bargaining agreement. (D&O 5; GCX5, Tr. 23, 25.)

While he awaited a response to his letter, McAfee further investigated the possible connection between PDK and GCATS. (D&O 6; Tr. 25.) He found a website that confirmed Ayala's information, listing a number of companies with "Guild" names—all operating out of the same address, and with common officers. (D&O 6; Tr. 23-24, 47-48.) McAfee also assigned Union Officer Chris Williams to observe PDK's facilities and work sites. (D&O 6; Tr. 25.) Williams reported

back that he had seen GCATS performing nonunion work at commercial buildings where PDK had previously worked as a union contractor. (D&O 6-7; Tr. 25, 50-51, 59.) Williams also watched a truck with the name “Guild” on the side deliver materials to both union and nonunion jobs. (D&O 7; Tr. 59-62.)

McAfee’s belief that PDK was operating a nonunion entity was further bolstered by the written statement that he received, on or around April 10, from employee and union member Benny Terrell. (D&O 6; Tr. 26.) In it, Terrell reported that PDK’s part-owner, Paul Prachyl, had informed him and employee Tom McMann that “Guild Commercial and Guild Electric [also known as PDK] would be splitting up.” (D&O 6; GCX2, GCX6.) The Guild name would remain with the “open shop” and stay in Balch Springs, while the union side used the “new” name PDK and found new office space. (D&O 6; Tr. 26, GCX6.) Furthermore, Prachyl told Terrell that the union side would thereafter receive direction from Prachyl, and not anyone on the “Guild Commercial side.” (D&O 6; GCX 6.) Prachyl then instructed employees to start painting over the “Guild” tags on their equipment and mark them “PDK” instead; Prachyl said that the trucks would continue to bear the “Guild” name. (D&O 6; GCX6.) According to Terrell, Prachyl explained that the “[t]he union side would sub work from the open shop side as needed.” (D&O 6; GCX6.)

C. PDK Asks the Union to Clarify Its Reason for the Information Request; McAfee Offers a More Detailed Explanation and Seeks Additional Information

In a letter to the Union dated April 18, Zagar acknowledged PDK's receipt of the Union's April 4 letter and questionnaire, but did not provide the requested information. (D&O 7; GCX7.) Instead, Zagar demanded that McAfee explain the "particular relevance of each question and subpart of the question" in the questionnaire so that PDK could "evaluate [the] request for this voluminous information." (*Id.*)

On or around June 9, McAfee completed his investigation and responded to PDK's letter. (D&O 7; Tr. 29-30, GCX8.) He explained in his letter that the request was based on information that furloughed union members were being asked to do work for the "nonunion side of the shop." (D&O 7; GCX8.) He related that the Union's investigation revealed that PDK was sharing an office, mailing address, website, warehouse, equipment, and personnel with "Guild Electric, Guild Technologies, and/or GCATS." (D&O 7; GCX8.) He further noted the Union had learned about the "alleged 'non-union side'" of PDK performing work that used to be union work. (D&O 7; GCX8.) Finally, he noted that "Guild, Guild Technologies, PDK and GCATS" had recently made "several operational changes." (D&O 7; GCX8.) Therefore, McAfee requested additional detailed information regarding those changes, including whether tools had been

retagged, offices had moved, supervisors had been reassigned, or payroll practices had changed. (D&O 7; Tr. 31, GCX8.)

D. PDK Again Fails to Provide Information and Answers to the Union's Questionnaire

By letter dated June 24, Zagar responded to the Union by letter, claiming that McAfee's failure to explain the relevance of each individual question in the questionnaire demonstrated that it was on a "fishing expedition." (D&O 7; Tr. 32, GCX9.) The letter provided limited answers to some of the questions raised in the June 9 letter. (D&O 7; GCX9.) Specifically, PDK admitted it had recently moved its offices. (D&O 7-8; GCX9.) The letter did not provide any response to the April 4 questionnaire or to the Union's June 9 question regarding the retagging of tools and equipment. (D&O 7-8; Tr. 32, GCX9.) It is undisputed (Br. 26-28) that PDK continues to refuse to provide any further information. (D&O 2; Tr. 32, 59, 71-72.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Liebman and Members Schaumber and Pearce) affirmed the judge's rulings, findings, and conclusions and adopted his recommended order to the extent and for the reasons stated in the earlier two-member opinion, which it incorporated by reference. (D&O 1 (2010).)

The Board concluded that PDK violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by failing and refusing to furnish the Union, on

request, with relevant information that was necessary for the Union to perform its duties. (D&O 1 (2010), D&O 1-2, 9-10.) The Board's Order requires PDK to cease and desist from the unfair labor practices found, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act (29 U.S.C. § 157). (D&O 1 (2010), D&O 1-2.) Affirmatively, the Board's Order directs PDK to furnish the Union with information requested in its April 4 letter, to advise the Union whether PDK's tools had been retagged, and to post a remedial notice.² (D&O 1 (2010); D&O 2.)

SUMMARY OF THE ARGUMENT

In this case, the Board applied its well-established standard involving a union's request for information. The Board found that the Union had demonstrated the relevancy of the information and that its request was founded on a reasonable belief based on objective evidence. Specifically, the Board found that when the Union requested information from PDK, it had a reasonable belief, based on an investigation involving several sources, that PDK was operating a nonunion entity and that operation of this entity could affect its contractual obligations. The Union's evidence, drawn from multiple corroborating sources, certainly suggested such a relationship. Indeed, after Union Business Manager McAfee heard that

² The Board determined that a general bargaining order was not warranted to remedy the information request violation, but adopted the judge's recommended order in all other respects. (D&O 1 n.3.)

PDK had offered a job to an employee on the “nonunion” side of the company that was being run out of the same location and with the same officers, his follow-up investigation revealed a common address and offices for several Guild companies; a Guild truck delivering materials to union and nonunion jobs; and GCATS working at buildings that previously contracted with PDK. Moreover, McAfee later received information that PDK’s management announced it was “splitting up” the company into union and nonunion shops, and subcontracting work to the latter shop. Under this scheme, management announced that PDK would move to a new location and leave the name “Guild” on company trucks. As part of this effort, PDK management had employees retag tools to read “PDK.” In its June 24 letter, PDK confirmed some of this information when it admitted to moving its offices.

Any attempt by PDK to circumvent the collective-bargaining agreement through a relationship with a nonunion entity would be pertinent to contract administration and collective bargaining. Thus, the Union had a relevant purpose in seeking to clarify the nature and depth of PDK’s relationship with GCATS. The Union amply disclosed its purpose in its information requests and included several of the facts supporting its position. Therefore, the Union was entitled to the requested information in order to make an intelligent decision about whether to go forward with any contract claims or unfair-labor-practice charges.

PDK makes no attempt to refute McAfee's credited testimony that he had seen, heard, and believed this objective evidence at the time of his request. Instead, PDK mounts an attack on the Board's well-established standards for evaluating information requests. PDK primarily attacks the reliability of the Union's sources and its reliance on hearsay evidence—consciously ignoring court-approved Board precedent holding that such inquiry is irrelevant. After all, an information request decides nothing about the merits of any of the Union's potential claims at this stage. If the Union's information is wrong, it is within PDK's power to dispel the misunderstanding by simply providing the requested information that is within its control. Otherwise, the Union is entitled to information necessary to evaluate its position and take any necessary action to enforce its contractual rights. Either way, PDK remains obligated to provide the relevant information requested by the Union.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT PDK VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO COMPLY WITH THE UNION'S REQUEST FOR RELEVANT INFORMATION

Substantial evidence supports the Board's finding that PDK has unlawfully failed and refused to provide the Union with relevant information in response to its April 4 and June 9 requests. Under settled Board law, the Union is entitled to relevant information necessary to police its contract with PDK. Based on corroborating information obtained through an investigation that included observations by several employees, internet searches, and statements by PDK management, the Union had a reasonable suspicion that PDK was operating a nonunion company to evade its contractual obligations to the Union. Thus, the Union was entitled to information from PDK that would assist it in investigating possible contract violations and determining whether or not to take further action. As such, the Board found, since June 24, 2008, PDK has violated the Act by flatly refusing to supply the requested information.

A. An Employer Violates Section 8(a)(5) and (1) of the Act by Refusing To Provide the Union with Information Relevant to Determining Whether There Has Been a Violation of the Collective-Bargaining Agreement

Under Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)), it is an unfair labor practice for an employer to "refuse to bargain collectively with the representative

of [its] employees.”³ It is well settled that the duty to bargain includes the duty “to provide information needed by the bargaining representative for the proper performance of its duties.” *NLRB v. Acme Indus.*, 385 U.S. 432, 435-36 (1967) (citing *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956)). The duty to bargain “unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement.” *Acme Indus. Co.*, 385 U.S. at 436. The parties accordingly have an ongoing obligation to provide one another with information “requested in order properly to administer and police a collective bargaining agreement” *Oil, Chem. & Atomic Workers v. NLRB*, 711 F.2d 348, 358 (D.C. Cir. 1983). Accordingly, an employer’s failure to provide relevant information upon request constitutes a violation of Section 8(a)(5) and (1) of the Act. *Acme Indus. Co.*, 385 U.S. at 438; accord *NLRB v. CJC Holdings, Inc.*, 97 F.3d 114, 117 (5th Cir. 1996).

The key inquiry “is whether the information sought by the Union is relevant to its duties.” *NLRB v. Leonard B. Herbert, Jr. & Co.*, 696 F.2d 1120, 1124 (5th Cir. 1983). Where, as here, the requested information does not directly concern bargaining unit members, the union has the threshold burden of establishing its relevance to the performance of the union’s statutory duties. *Id.*; *Shoppers Food*

³ A Section 8(a)(5) violation results in a derivative violation of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)). See *Tri-State Health Serv., Inc. v. NLRB*, 374 F.3d 347, 350 n.1 (5th Cir. 2004).

Warehouse Corp., 315 NLRB 258, 259 (1994). But “the Union’s burden is not a heavy one.” *Lenox Hill Hosp.*, 327 NLRB 1065, 1068 (1999) (citing *Leland Stanford Jr. University*, 262 NLRB 136, 139 (1982), *enforced*, 715 F.2d 473 (9th Cir. 1983)). The standard for assessing relevancy of information is a “liberal, discovery-type standard.” *NLRB v. Leonard B. Herbert*, 696 F.2d at 1124 (citing *Acme Indus. Co.*, 385 U.S. at 437 n.6, 438). *Accord NLRB v. Associated Gen. Contractors of Cal.*, 633 F.2d 766, 770 (9th Cir. 1980). Accordingly, requested information is deemed relevant if it is germane to the collective-bargaining relationship between the parties and if there is a “probability” that it will be of use to the party requesting it. *Acme Indus. Co.*, 385 U.S. at 437.

When seeking information about a relationship with a nonunion entity, a union satisfies its burden of proving relevance by showing a “reasonable belief supported by objective evidence for requesting the information.” *Shoppers Food Warehouse*, 315 NLRB at 259. *Accord Advanced Construction Serv., Inc. v. NLRB*, 247 F.3d 807, 812 (8th Cir. 2001). *See also Contract Flooring Systems, Inc.*, 344 NLRB 925, 928 (2005) (union must “demonstrate a reasonable objective basis for believing” that such a relationship exists). Notably, however, the Union’s burden does not require proof that its evidence is “accurate or ultimately reliable” and its “request may be based on hearsay.” *Shoppers Food Warehouse*, 315 NLRB at 259 (citing *Magnet Coal*, 307 NLRB 444, 444 n.3 (1992), *enforced*, 8 F.3d 71

(D.C. Cir. 1993). *Accord Dodger Theatricals Holdings, Inc.*, 347 NLRB 953, 968 (2006). This is because, as this Court has recognized, the “discovery-type standard decides nothing about the merits of the union’s contractual claims.” *NLRB v. Leonard B. Herbert, Jr. & Co.*, 696 F.2d at 1125 (quoting *Acme Indus. Co.*, 385 U.S. at 437). Therefore, the union may prevail without showing that the requested information, if provided, would prove either the existence of the relationship or the merits of any possible action against the employer. *Dodger Theatricals*, 347 NLRB 953, 970; *Pence Construction Corp.*, 281 NLRB 322, 324 (1986). However, the Board requires the union to disclose its relevant reason for requesting information to the employer at the time of its request. *Schrock Cabinet Co.*, 339 NLRB 182, 182 n.6 (2003).

This Court reviews Board decisions under the deferential and well-established substantial evidence standard. The Board’s factual findings are conclusive so long as they are supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). “Substantial evidence,” for purposes of this Court’s review of factual findings, consists of “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. at 477. This Court may not “displace the Board’s choice between two fairly conflicting views, even though the court [may] justifiably have made a different

choice had the matter been before it *de novo*.” *Universal Camera*, 340 U.S. at 488.

The Board’s determination that information is relevant “must be given great weight by the courts, if only because it is a finding on a mixed question of law and fact ‘which is within the particular expertise of the Board.’” *NLRB v. Brazos Elec. Power Coop.*, 615 F.2d 1100, 1101 (5th Cir. 1980) (quoting *San Diego Newspaper Guild, Local 96 v. NLRB*, 598 F.2d 683, 687 (9th Cir. 1977). *See also Crowley Marine Serv., Inc. v. NLRB*, 234 F.3d 1295, 1297 (D.C. Cir. 2000) (per curiam) (conclusion that a union met its burden is entitled to “great deference”).

B. The Board Reasonably Found That PDK Violated the Act by Withholding Requested Information Relevant to Enforcement of its Collective-Bargaining Agreement

Substantial evidence supports the Board’s finding (D&O 1, 9-10) that PDK has unlawfully failed and refused, since June 24, to provide information to the Union in response to its requests for information. The Union’s clear and lawful purpose, which it explained in its April 4 letter, was to police its agreement with PDK, it having “become aware that [PDK] has been operating Guild Commercial and Tenant Services as a Non-Union company.” (GCX5.) As the Board noted, this information was relevant to the Union and “necessary for it to evaluate whether there was a contract violation or the possibility for a grievance if, in fact there turned out to be an alter ego or a single employer.” (D&O 9.) Moreover, there is ample evidence that the Union had a reasonable belief, based on objective

facts, that there was a relationship between PDK and the nonunion entity when it sought the information from PDK.

The Union's initial suspicions that PDK might be operating a nonunion entity were reasonably piqued by McAfee's conversation with former employee Ayala. McAfee testified that Ayala told him about an offer from PDK to work on the "nonunion side" of the company. (D&O 5; Tr. 22.) Ayala also told McAfee that PDK was operating nonunion GCATS out of the same location and with the same officers as PDK. Reasonably concerned that PDK was using GCATS to evade the parties' contract, McAfee sent his April 4 letter and questionnaire requesting relevant information about the relationship between PDK and the nonunion company.

Thereafter, McAfee continued to seek information about the nonunion company, conducting an investigation that yielded information from several mutually corroborating sources, all supporting Ayala's information. PDK was also known to the Union as "Guild Electric." (Tr. 29-30, 38, GCX2.) McAfee browsed a website that listed a number of companies operating under the name "Guild," at the same address and with common officers. This supported Ayala's claim that nonunion GCATS and PDK were operating out of the same location. Union Officer Williams, whom McAfee assigned to watch materials deliveries at jobsites, reported that he saw GCATS, a nonunion company, working at buildings where

union PDK had formerly worked. This raised the specter that PDK was transferring bargaining unit work to GCATS. Williams also watched a truck with “Guild” written on the side delivering materials to both union and nonunion jobs, suggesting that PDK and a nonunion Guild company were sharing trucks and/or materials.⁴

Importantly, on April 10, right after the Union’s first request, employee Terrell reported to the Union that PDK’s part-owner Paul Prachyl had announced several “operational changes” at PDK: stating that the company would be “splitting up,” that the union side would get the “new” name PDK, move to a new office space, and subcontract work from the nonunion shop “as needed.” Prachyl told Terrell that the “Guild” name would stay with the “open shop,” and remain on the company’s trucks. (GCX6.) Accordingly, Prachyl instructed union employees to begin painting over the “Guild” name on the tools they used and mark them with “PDK.” (GCX6.) As the Board found (D&O 8), this “attempt to physically separate the two companies would also lend support to the reasonableness of the belief that, in fact, the companies were somehow related.”

⁴ As the Board found (D&O 9), the fact that it may have been unclear which “Guild” was operating the trucks, for example, does not excuse PDK from complying with the Union’s information request. Over the years, PDK used many similar “Guild” names in its business, which, as the judge observed, tended to create the very type of confusion that would concern a union. PDK cannot, then, rely on that confusion to avoid its obligation to supply information necessary to clear the air.

All of the objective evidence he obtained during his investigation substantiated McAfee's belief that PDK was operating a nonunion entity that would have an impact on the collective bargaining relationship. *See NLRB v. Leonard B. Herbert Jr. & Co.*, 696 F.2d 1120, 1124 (5th Cir. 1983) (union relied on employee and third party reports of double-breasting and its own sightings of former union members and equipment bearing employer's name at nonunion worksites); *Dodger Theatricals Holdings, Inc.*, 347 NLRB 953, 968-69 (2006) (union relied on, among other things, union members' reports that the two entities were actually one company, nonunion entity seen at union worksites, and shared office space) (citing cases); *Herbert Indus. Insulation Corp.*, 312 NLRB 602, 608 (1993) (union relied on second-hand reports of employer using nonunion company's trucks, physical proximity of the two companies' offices, and unit work being done by nonunion company's employees). Notably, the mutually corroborative nature of the Union's information spoke to its reliability.

In the face of this evidence, the Board reasonably found (D&O 6, 9) that the particular information sought by the Union was germane to an investigation of a suspected related nonunion entity. The Union was not certain of the precise nature or depth of the relationship between PDK and the nonunion Guild company, so the scope of its information request was necessarily broad. However, the multi-part questionnaire (GCX5) closely tracks questionnaires that the Board has repeatedly

found relevant in union investigations of a variety of corporate relationships. *See Public Serv. Elec.*, 323 NLRB 1182, 1186-88 (1997) (approving a similar questionnaire where union suspected subcontracting and diversion of unit work), *enforced*, 157 F.3d 222 (3d Cir. 1998); *Brisco Sheet Metal*, 307 NLRB 361, 361 (1992) (union suspected employer of diverting unit work or operating an alter ego); *George Koch & Sons, Inc.*, 295 NLRB 695, 697 (1989) (suspected double-breasting), *enforced*, 950 F.2d 1324 (7th Cir. 1991). The Union's June 9 question regarding the retagging of tools was similarly warranted, since such activity could show a change in operations, common management and control, or shared resources.

Since June 24, PDK has flatly refused to provide the requested information. In its June 9 letter, the Union provided the clarification that PDK requested and, although the Union lawfully was required only to disclose the relevant reason for its request (that PDK was operating a nonunion company), it shared many specific facts concerning PDK's conduct that substantiated the basis for its request (tool retagging, offices moved, and reassigned supervisors). (GCX 8.) Yet, even in the face of this courtesy by the Union, PDK continues, undisputedly (Br. 26-28), to refuse to provide the requested information. The Board reasonably found that PDK's refusal constituted a violation of Sections 8(a)(5) and (1) of the Act.

C. The Board's Finding that the Union Met Its Burden of Proof is Fully Supported by the Evidence and Applicable Law and PDK's Arguments to the Contrary Are Devoid of Merit

PDK launches a three-pronged attack on the Board's finding of a violation. First, PDK claims that the information on which the Union relied was either biased or unreliable hearsay. Second, it asserts that it is entitled to an adverse inference because of the General Counsel's failure to call one witness. Third, it claims that there is no contractual provision that would be violated by its operation of a nonunion entity. None of these arguments need delay the Court long, as each is at odds with well-established precedent and the facts of this case.

First, PDK claims (Br. 15-18) that it was unreasonable for McAfee to rely on Ayala and Terrell because they were biased sources with an "ax to grind." As discussed above at pp. 14-15, under the Board's broad discovery standard, the Union was not obligated to prove that its evidence was accurate or its sources unbiased. *See Public Serv. Elec. and Gas Co.*, 323 NLRB 1182, 1186 (1997) (union does not need to prove reports are "accurate or reliable"); *Herbert Indus. Insulation Corp.*, 312 NLRB 602, 608 (1993) (union reasonably relied on reports from the employer's business competitors). As the Board has made clear, the issue is not "whether the [evidence] is or is not accurate, but whether the Union acted reasonably in relying on [the evidence]." *Dodger Theatricals*, 347 NLRB at 969.

Here, as fully described above, McAfee reasonably relied on the evidence presented by the two employees, which was corroborated during his investigation, and PDK's alleged controversies with Terrell and Ayala did not render their reports inherently unbelievable. As a factual matter, the Board found McAfee was unaware of any criminal complaint PDK may have had against Ayala, so he had no reason to distrust Ayala's information. (D&O 8; Tr. 34-37, 112.) Likewise, Terrell's demotion for alleged project overruns did not provide a basis for disregarding his information, particularly when that information was partially corroborated by PDK's actions. (D&O 8.) Indeed, PDK's subsequent admission in its June 24 letter that PDK moved offices demonstrates the accuracy of Terrell's information. Moreover, contrary to the cases cited by PDK,⁵ the employee reports were not speculative but were based on specific offers to work on the "nonunion side" of the company and detailed information from PDK's owner about operational changes incident to PDK "splitting" into a union and a nonunion shop. Thus, it was eminently reasonable for the Union to rely on the information the employees provided.

⁵ *Uniontown County Market*, 326 NLRB 1069, 1071 (1998) (union was not entitled to information when it offered no more than "naked suspicion" of an alter ego), and *Bohemia, Inc.*, 272 NLRB 1128, 1129 (1984) (employees' suspicion of work diversion based solely on reported pay cuts at another facility was insufficient to allow access to information about other facilities' operations). These cases, cited by PDK (Br. 18), serve only to highlight that the Board dismisses information requests where the union relies solely on speculative claims rather than those supported by a reasonable belief based on objective evidence.

PDK misrepresents the Board's holding (Br. 19-20) by asserting that it applied a "new standard" under which a union may establish an objective basis for a reasonable belief with "unreliable and inaccurate information." The Board did no such thing. Here, the Board applied, as it has for decades, the well-established standard for determining the relevancy of information requests. The Union's burden was merely to show that the objective facts, as it knew them, supported a reasonable belief that PDK was operating nonunion GCATS. *Public Serv. Elec.*, 323 NLRB 1182, 1188 (1997) (citing *Island Creek Coal Co.*, 292 NLRB 480 (1989)). The Board found (D&O 8) that the Union met its burden. In meeting this test, the Union was not required to show that the facts it relied on were accurate, reliable, or non-hearsay. *Public Service Elec.*, 323 NLRB at 1186; accord *Dodger Theatricals*, 347 NLRB 953, 968 (2006); *Leonard B. Herbert Jr.*, 259 NLRB 881, 885 (1981), *enforced*, 696 F.2d 1120 (5th Cir. 1983). It is not necessary for the Board to determine whether the Union can prove its suspicions; such questions of ultimate liability are left for any subsequent charge or grievance proceedings after the Union has had the benefit of informed deliberation. As this Court has recognized, the "discovery-type standard decides nothing about the merits of the union's contractual claims." *NLRB v. Leonard B. Herbert, Jr. & Co.*, 696 F.2d at 1125 (quoting *Acme Indus. Co.*, 385 U.S. at 437).

The generous “discovery-type” standard for information requests facilitates bargaining and contract administration by providing broad access to information. *Acme Indus.*, 385 U.S. at 437-38. This access allows the parties to police their agreements and encourages informed bargaining. It is irrelevant whether any grievance or contractual claim would ultimately be meritorious. The Union must only “establish[] a non-frivolous position” that the alleged relationship between GCATS and PDK, if found, would violate the contract. *Dodger Theatricals*, 347 NLRB at 972.

In the face of this well-established standard, PDK persists, essentially arguing (Br. 19-24) that the only way a union should be able to establish a reasonable belief is to prove that the information it relied on was completely accurate. There is no basis in law, policy, or the facts of this case, to apply such a stringent standard. Nevertheless, PDK asserts (Br. 20-24) that the Board has always examined the accuracy of the information. Again, PDK is wrong. The cases cited by PDK for this proposition instead illustrate the Board’s consistent position that the accuracy or reliability of the Union’s evidence is irrelevant. In none of the cited cases does the Board make any fact finding that the union’s information was accurate and reliable—that characterization is PDK’s alone. The Board holds only that the union acted reasonably. *See, e.g., Dodger Theatricals*, 347 NLRB 953, 969 (2006) (Board rebuffed respondent’s effort to discredit and

disprove the union's sources); *Brisco Sheet Metal, Inc.*, 307 NLRB 361, 367 (1992) (no comment on the credibility of the union's sources or its own observations); *Leonard B. Herbert, Jr.*, 259 NLRB at 885-86 (holding that evidence from "several sources" raised "*bona fide* questions" without commenting on whether the sources were reliable). Indeed, PDK concedes this point (Br. 21), with regard to *W.L. Molding Co.*, 272 NLRB 1239, 1240 (1984), noting that "the Board did not comment" on the accuracy or reliability of the union's evidence.

PDK's related argument (Br. 24-25) that the Board should not allow the Union to meet its burden by presenting hearsay evidence misses the point. As PDK acknowledges, the evidence is not being offered for the truth of the matter. Rather it is offered to show its effect on Business Manager McAfee—to wit, whether he was acting reasonably in requesting information. *See Dodger Theatricals*, 347 NLRB at 968 (2006) (rejecting a similar claim that a "reasonable belief" may not be supported by "hearsay evidence"). In any event, as a factual matter, the Board made a well-supported finding that the Union was reasonable in relying on the employee reports that McAfee received. *See* above at p. 23.

Second, PDK's insistence (Br. 18-19) that it was entitled to an adverse inference because Williams was not called as a witness further demonstrates its misunderstanding of the relevant standard and evidentiary issues. When a union relies on reports from union agents, the Board does not draw an adverse inference

from the agents' failure to testify individually. *Lenox Hill Hosp.*, 327 NLRB 1065, 1068 (1999). The Union does not have to prove that Williams' reports were true because the merits of any potential claims are not yet at issue. *See id.* McAfee's testimony about the information he relied on at the time of his request was sufficient.

Third, PDK mistakenly asserts (Br. 26-27) that the contract does not prohibit its operation of a nonunion entity. The Board found (D&O 5, 9) that the information was relevant to the Union's policing of the contract recognition and jurisdiction clauses defining the Union's work. In the event that PDK has established a nonunion entity as an alter ego, this effort to avoid the contract's wages and benefits would violate the parties' collective bargaining agreement. Moreover, depending on how closely interrelated PDK and nonunion GCATS are, the GCATS entity "may be held to the terms of a collective bargaining agreement executed by its alleged union counterpart" via the single employer and alter-ego doctrines. *NLRB v. Leonard B. Herbert, Jr.*, 696 F.2d 1120, 1125 (5th Cir. 1983) (citing *Carpenters Local Union 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 504-09 (5th Cir. 1982), *Accord J. Vallery Elec., Inc. v. NLRB*, 337 F.3d 446, 450-51 (5th Cir. 2003).

Contrary to PDK's claim, information about PDK's relationship to a nonunion entity may be relevant to the parties' bargaining obligations, even in the

absence of any specific contractual limits on practices like subcontracting or double breasting. *See Meeker Coop. Light and Power Ass'n.*, 341 NLRB 616, 618 (2004) (information was relevant even though contract did not address subcontracting); *Brisco Sheet Metal, Inc.*, 307 NLRB 361, 361 (1992) (regardless of whether parties had a collective-bargaining agreement, the union was entitled to information about employer's relationship to nonunion company); *W-L Molding Co.*, 272 NLRB 1239, 1239-40 (1984) (employer ordered to produce information on subcontracting even though contract affirmatively permitted it). Thus, for myriad reasons, the Board reasonably found (D&O 9) that information regarding PDK's relationship with the nonunion entity was relevant to the Union's policing of the collective bargaining agreement.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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Petitioner	* No. 10-60705
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	*
Respondent	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 6,126 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

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Board counsel certifies that the contents of the accompanying CD-ROM, which contains a copy of the Board's brief, is identical to the hard copy of the Board's brief filed with the Court and served on the petitioner/cross-respondent. The Board counsel further certifies that the CD-ROM has been scanned for viruses using Symantec Antivirus Corporate Edition, program version 10.1.9.9000

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date electronically filed its final brief in the above-captioned case with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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