UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8

INTERNATIONAL UNION OPERATING ENGINEERS, LOCAL 18 (WELDED CONSTRUCTION, L.P.) Respondent, and GARY LANOUX, AN INDIVIDUAL and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18 (PETE GOULD & SONS, INC.) and GARY LANOUX, AN INDIVIDUAL	Case No. 08-CB-138850 Case No. 08-CB-138909

POST-HEARING BRIEF OF WELDED CONSTRUCTION, L.P.

Pursuant to Section 102.42 of the Rules and Regulations of the National Labor Relations Board ("NLRB" or the "Board"), Employer Welded Construction, L.P. ("Welded") submits this Post-Hearing Brief in the above-captioned matter.

I. PRELIMINARY STATEMENT & SUMMARY OF ARGUMENT

This case relates to certain information requests made by Gary Lanoux, a member of the International Union of Operating Engineers Local 18 ("Local 18" or the "Union"). The information that Lanoux is seeking from the Union is much more likely to harm the interests of the parties involved – Welded, the Union, and Union workers – than to provide him with any legitimate benefit. Although Lanoux's specific requests remain unclear, he appears to be seeking various information from the Union concerning certain Welded employees, known as Key Men,

who were neither referred by nor hired through the Union hiring hall. Lanoux claims the information is relevant to determine whether he was treated fairly for job referrals by the Union hiring hall. Lanoux and Counsel for the General Counsel allege that the Union violated its duty of fair representation by refusing to provide the requested documents to Lanoux.

The disclosure of Welded's confidential Key Men information to Lanoux would subject Welded to significant and material competitive harm. More importantly, disclosure of this information will not provide any benefit to Lanoux or assist in any way the resolution of his claim of unfair treatment by the Union hiring hall. Rather, if the Union is required to disclose Welded's confidential Key Men information, this proprietary information could easily fall into the hands of a competitor – creating a significant competitive disadvantage for Welded (or any other unionized employer performing work in Local 18's jurisdiction that is subjected to a similar disclosure). Considering the significant demand for Key Men in the highly competitive pipeline construction industry, Key Men information gives competitors a virtual blueprint to undercut Welded on project bids and poach Welded's Key Men. Particularly where the competitors are non-union contractors, the Union and its membership, including Lanoux, share the harm faced by Welded due to the potential risk of diminished work opportunities for Welded. The Board substantiated these same concerns in *Operating Engineers, Local 18 (Precision Pipeline, LLC)*, 362 NLRB No. 176 (Aug. 20, 2015) (hereinafter "*Precision*"), a case involving substantially the same parties and issues, by holding that there were significant confidentiality and competitive reasons for not disclosing information contained in pre-job forms to Union members, which included Key Men information. As such, Lanoux is collaterally estopped from seeking the same information. Moreover, the Key Men materials Lanoux seeks infringe on employee privacy interests because it discloses their sensitive information.

Finally, Lanoux has shown no legitimate countervailing reason supporting his request for the disclosure of the Key Men information. The Key Men information sought by Lanoux is not relevant or related to determining whether he was treated fairly by the Union hiring hall because, under the relevant collective bargaining agreement, Key Men are not referred or hired through the Union hiring hall and the Union plays no role in the hiring of Key Men. In addition, Lanoux already has access to the necessary and relevant hiring hall information that allows him to police the Union referral practices, including referral lists from the Union hiring hall. Lanoux has offered no legitimate reason why he could not use the information readily available to him to police the Union's administration of the hiring hall.

For these reasons, the ALJ should maintain the confidentiality of Welded's Key Men information.

II. STATEMENT OF FACTS

a. The Pipeline Industry and the National Pipe Line Agreement.

Welded is a pipeline contractor that performs construction and maintenance on natural gas, oil, and other types of pipeline. Tr. 49.[1] Welded is a long-standing member of the Pipe Line Contractors Association ("PLCA"), which is a trade association of over 70 pipeline contractors. Tr. 373-74. The PLCA negotiates and administers collective bargaining agreements ("CBAs") on behalf of its member employers. Tr. 373-74. The PLCA negotiates with the various craft unions in the industry, including the International Union of Operating Engineers ("IUOE"). The PLCA has an industry-wide agreement with the IUOE called the National Pipe Line Agreement ("NPLA"). *See* G.C. Ex. 5, the NPLA. The NPLA supersedes all local agreements for covered

[1] Citations to the record are formatted as follows: Cites to the transcript are indicated by the notation "Tr. __." Citations to Respondent's exhibits are indicated by the notation "R. Ex. __." Finally, citations to the General Counsel's exhibits are indicated by the notation "G.C. Ex. __."

work, and all PLCA members are bound by the terms of the NPLA. *See* G.C. Ex. 5, Art. I, Sec. (L); *Precision* at 2. Welded is a signatory to the NPLA. Tr. 374.

Pipeline construction is a highly competitive industry. Tr. 377-78. Pipeline projects are typically awarded following a competitive bid process conducted by the energy or utility company commissioning the work. *Precision* at 2. The bid process is highly competitive and is kept confidential in order to ensure fairness. *Id.* Contractors prepare bids by compiling information about costs, equipment used, wage rates, and manpower needed. *Id.* This information, in the aggregate, is the basis for the contractor's labor cost calculations for the project. *Precision* at 2-3. A small change in a bid calculation, *e.g.*, slightly different equipment distribution or slightly lower staffing projections, can be the difference between a successful bid and an unsuccessful one. *See* Tr. 377-78. Thus, seemingly minor details can be the difference between winning a project valued at several hundred million dollars and losing it. *See id.* As such, unionized pipeline contractors are highly vulnerable to competition from non-union competitors which do not typically experience the same project labor costs. Tr. 252-58, 378-79, 383-84. For this reason, the IUOE and PLCA are highly sensitive to the release of sensitive proprietary information, which would give a competitive advantage to a non-union contractor. Tr. 252-58; *Precision* at 8.

b. Hiring of Key Men.

The NPLA authorizes employers to hire workers directly without going through the Union hiring hall process. Specifically, an employer performing work under the NPLA is permitted to staff its projects with a combination of: (1) individuals dispatched from the local union hiring hall – referred to as "Locals"; and (2) individuals directly hired by the employer –

referred to as "Key Men," "Travelers," "Non-Locals," or "Regular Employees."[2] *See* G.C. Ex. 5, Art. II, Secs. (I), (J); Tr. 49-50.

The NPLA defines Key Men as "those who are regularly and customarily employed by the individual Employer ... because of their special knowledge and experience in pipe line construction." *See* G.C. Ex. 5, Art. II, Sec. (J). There is no limitation on an employer's designation of Key Men, except that they must be "distributed as evenly as possible" among different job classifications. *See id.* The NPLA requires that there be fifty percent Locals and fifty percent Key Men staffed on any particular project unless the local union is unable to dispatch the requisite number of qualified individuals. *See* G.C. Ex. 5, Art. II, Sec. (I); Tr. 280-81, 380.

The Union has no right to refer Key Men, place restrictions on Key Men hiring processes, or have Key Men go through the referral hall system. Tr. 244-45, 280-82, 363-64. The employer has an "inherent right" to hire and fire Key Men, and it retains sole discretion and authority on whether to provide any information to the Union on Key Men. *See* G.C. Ex. 5, Art. II, Secs. (I), (M)(1)(a); Tr. 280-82.

Before working on a project, the NPLA requires the Union and employer to hold a pre-job conference to discuss, among other things, the length of the job and the estimated staffing needs. *See* G.C. Ex. 5, Art. II, Sec. (D); *Precision* at 3. The information discussed at the pre-job conference is memorialized in a pre-job form. *Precision* at 3. As part of the pre-job form, a Key Man agreement is usually completed, which lists the names, social security numbers and classifications of the Key Men the employer is bringing onto a project. Tr. 240-41.

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[2] Employees hired directly by Welded and not through the union hiring hall will hereinafter be referred to as "Key Men." *See* Tr. 49-50 (Richard Dalton, President of Local 18, testified that the terms "Regular Employees" and "Key Men" are used interchangeably).

c. Lanoux's Request for Confidential Information Regarding Welded's Key Men.

Lanoux worked briefly for Welded on a project as a Local around March 2014. Tr. 73-74, 158-59. Local 18 was the local union with jurisdiction for the project. Tr. 59. Lanoux was laid off in the normal course along with other Welded employees due to lack of work. Tr. 158-59. Soon thereafter, Welded started another project in Noble County referred to as the Blue Racer project. Tr. 66-67, 159-60; R. Ex. 37, at Ex. C at 3. On or about July 12, 2014, Lanoux visited the Welded warehouse and asked Welded project superintendent Kevin Eckelberry whether there were any openings on the Blue Racer project. Tr. 70-75. Lanoux was not considered a Key Man for Welded and, as such, could only work on the job if dispatched as a Local by the Union. Tr. 295-96, 299-301, 360.

Roderick Groesser was a Key Man who had worked on various projects for Welded in the past. Tr. 293-96. On or about July 16, 2014, Welded hired Mr. Groesser for the Blue Racer project as a Key Man, *i.e.* a direct hire that was not referred to Welded from the Union hiring hall. Tr. 293-96; R. Ex. 37, at Ex. C at 3. At the time of Mr. Groesser's hiring, the Noble County project was staffed by 34 Key Men and 36 Locals. *See* R. Ex. 37, at Ex. C at 3. Because the number of Key Men on the project was below fifty percent, the only positions available were for Key Men. Tr. 295-96.

Counsel for the General Counsel has brought this claim alleging that Local 18 has violated Section 8(b)(1)(A) of the Act by breaching its duty of fair representation when it, among other things, refused to disclose certain information concerning the hiring of employees by Welded. *See* G.C. Ex. 1(n), at ¶ 20. It is unclear precisely what Welded information Lanoux is requesting from Local 18. At the hearing, Lanoux could not articulate whether he was seeking information on all Welded Key Men or only Mr. Groesser:

> Q: All right. You said employment information. Employment information for who?
>
> A: Well, for all the -- the employees of Welded at that time. Or maybe I just specifically said -- no. For Welded employees. Excuse me. Just -- I believe I just said it for Groesser, because that would have established his -- his time that he was hired.

Tr. 102.

Whatever Welded Key Men information Lanoux is requesting from the Union, the only basis for the information that Counsel for the General Counsel has provided is that it is relevant to determining whether he was treated fairly regarding referrals from the Union hiring hall, but she offered no explanation as to why this information is necessary to determining whether Lanoux was treated fairly. *See* G.C. Ex. 1(n), at ¶ 18(c); G.C. Ex. 5 at 4-5; Tr. 15-16. Among the documents Lanoux appears to be seeking are "certified payroll documents; signed dues check off card; stewards' report; Business Agent report; date of urinalysis test; and verification of Welded's contribution to Respondent's Health & Welfare, Pension, Apprenticeship, Safety & Education, Pipeline Training, LMCT and EPEC Funds. *See* G.C. Ex. 2 at 2. Although Lanoux testified that he requested the information to determine if the dates of employment for Mr. Groesser were accurate and whether the fifty percent rule was correctly followed (Tr. 101-02) there is no evidence disputing that Key Men comprised less than fifty percent of workers on the Welded project at the time Mr. Groesser was hired. Mr. Dalton, President of Local 18, also testified that, even if an employer violates the fifty percent rule by having more than fifty percent Key Men on a project, it does not automatically mean that the Union will refer additional Locals through the hiring hall to work on the project. Tr. 365-66. Instead, the employer will typically choose to lay off Key Men rather than increase the number of Locals on the project. *Id.* Mr. Dalton also testified how many of the documents Lanoux appears to be requesting are not in the possession

of Local 18 and would have no bearing on whether Lanoux was treated fairly by the Union hiring hall. Tr. 323-40.

d. Risk of Harm Caused by Disclosure of Welded's Key Men Information.

To the extent Lanoux is requesting any information about Welded's Key Men, disclosure of such information would seriously harm Welded's competitive interests, and set a precedent that could harm the interests of all other PLCA members and the Union. Both Mack Bennett, the Pipeline Director for IUOE, and Don Thorn, President of Welded and a member of PLCA's Board of Directors, testified that that the pipeline industry is highly competitive with both union and nonunion competitors. Tr. 252-53, 377-78, 384. Mr. Bennett and Mr. Thorn further testified that, due to the competitive nature of the industry, an employer's Key Men information is confidential because it could effectively be used by a competitor to create a competitive disadvantage for an employer such as Welded. Tr. 252-53, 377-78.

Maintaining a pool of reliable, highly-skilled Key Men is critical to maintaining a competitive pipeline business – particularly in a unionized operation. According to Mr. Bennett, because employers do not know the quality of workers they will receive from the Union hiring hall, it is critical for employers to have Key Men, who they consider "solid" and reliable, available for half their workforce on a given project. Tr. 243. Because the pipeline industry requires such specialized skill, Key Men are the "money makers" for the employer. Tr. 234, 243. As such, Mr. Thorn testified that Welded and other employers are always concerned about Key Men being poached by competitors because the Key Men play such an important role on the jobsite. Tr. 379-80.

Mr. Bennett confirmed that stealing of Key Men is common in the pipeline industry, so employers have to be careful with their Key Men information. Tr. 251. Disclosure of

information about an employer's Key Men, including their date of hire and location of work, literally gives a competitor a direct path to the employees they are most interested in poaching. Tr. 378, 389-90. According to Mr. Thorn, once a non-union competitor identifies a Key Man and retains him, the competitor will put the Key Man on paid "stand-by" so that the Key Man is available for future projects. Tr. 384-85. This process essentially puts Welded and other unionized employers at a disadvantage because the NPLA does not allow union contractors to keep Key Men on paid standby when there is no work. *See id.* Mr. Thorn testified that increasing the risk of poaching for employers like Welded would have a "very dramatic impact" on the employer's operation. Tr. 378.

Disclosure of Key Men information can also negatively impact Welded's future project bidding and, ultimately, the company's profitability. Tr. 380. Mr. Bennett stated that non-union contractors do everything they can to beat union contractors out of jobs. Tr. 253. If a competitor obtained an employer's Key Men information or the Key Man agreement, the competitor could use it to determine the employer's staffing levels, how many crews the employer used, and what type of equipment the employer is using. Tr. 256-57; *see also Precision* at 5 (Mr. Thorn testified that information contained on the pre-job form, including Key Men information, is "quite similar" to that used to prepare a bid for new work and could be used to calculate the contractor's labor and job costs). Mr. Bennett explained that a competitor armed with this information could undercut the employer's bid because, for instance, it could submit a lower cost bid with less workers or equipment. Tr. 258; *Precision* at 2 (Mr. Thorn testified that contractors armed with the labor and job costs "would have a very good idea of how I estimate my work. And subsequently a very good idea of what they would need to do to underprice another job somewhere."). Particularly where labor costs make up a significant portion of the bid, Mr.

Bennett indicated that any advantage a competitor has in lowering those costs could result in them being selected by the energy or utility company commissioning the work. *See* Tr. 252-53. Mr. Thorn testified that a successful project bid could be determined by less than five percent in costs. Tr. 377-78. For example, he recalled an instance where two contractors submitted bids that were around $13 million where the successor contractor was selected for having a bid that was only $12,045 less than the other contractor. *Id.*

Because of these concerns, employers keep information on their Key Men confidential. Tr. 253. Although employers sometimes provide the IUOE with a list of their Key Men during the pre-job process, employers typically do not provide IUOE or Local 18 with any information on their Key Men after that. Tr. 242-43.

III. ARGUMENT

a. Lanoux Should Not Be Provided Information on Welded's Key Men Because It Is Confidential and Proprietary and Subjects Welded and the Union to Competitive Harm.

To the extent Lanoux is requesting documents that disclose information on Welded's Key Men, the ALJ should reject his request because Welded's Key Men information is proprietary and confidential and, if disclosed, would subject Welded, as well as other PLCA members, and the Union to unfair competition.

It is well settled that an employer has an interest in protecting confidential information that may countervail a union or employee's interest in acquiring that information. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 314-315 (1979) (an employer's duty to supply information to a union depends on the facts of the case and may be mitigated by reasonable concerns for confidentiality). An employer's interests may outweigh other legitimate interests in confidential information. *Penn. Power & Light Co.*, 301 NLRB 1104, 1105 (1991) ("a union's interest in information . . . will not always predominate over other legitimate interests"). Among the types

of information deemed confidential and worthy of protection is information that "would reveal substantial proprietary information." *Detroit Newspaper Agency*, 317 NLRB 1071, 1073 (1995). Thus, it is well settled that when a union or member requests an employer's information, the Board must balance the need "for the relevant information against any legitimate and substantial confidentiality interests established by the employer." *Am. Baptist Homes of the W.*, 359 NLRB No. 46, at *3 (2012); *N. Ind. Pub. Serv. Co.*, 347 NLRB 210, 211 (2006) ("the Board must weigh the party's interest in confidentiality against the requester's need for the information, and the balance must favor the party asserting confidentiality"). Similarly, a union may protect information in its possession from disclosure to a member where it may show a countervailing interest in maintaining confidentiality. *See In re Local 307*, 339 NLRB 93, 94 (2003) (union is not required to disclose witness statements from employee's grievance file to employee where union has a countervailing interest in its confidentiality policy).

As described more fully below, Welded (and employers generally) have a clear and substantial interest in protecting proprietary information – the disclosure of which could drastically impair their operations. In contrast, Counsel for the General Counsel has failed to demonstrate that Lanoux has a countervailing interest. For these reasons, the disclosure of the employers' proprietary and confidential information regarding Key Men is not required.

i. Disclosure of Welded's Key Men Information Raises the Same Issues and Substantial Interests the Board Protected in *Precision* and, Therefore, Is Barred By Collateral Estoppel Principles.

The Board in *Precision* already found that information similar to Welded's Key Men information is protected from disclosure. *Precision* involved substantially the same parties and issues, with Lanoux arguing, similar to here, that the Union violated its duty of fair representation by failing to provide him with the pre-job forms. *Precision* at 7. In *Precision*, the

Board held that the Union had "rational" and "substantial" reasons for not disclosing information on the pre-job form, including information about Key Men, to Lanoux and another Union member because it could subject employers to a competitive disadvantage, thereby harming the Union as well. *Precision* at 8-9. Specifically, the Board found there was a credible risk that competitors could use such information to underbid PLCA members thereby causing them to lose work on future jobs. *Id.*

In this case, Lanoux is collaterally estopped from asking for the same type of confidential and proprietary information that the Board in *Precision* found the Union had a substantial reason for protecting. Under collateral estoppel principles, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Big D Serv. Co.*, 293 NLRB 322, 323 (1989). Although Lanoux claims he is not specifically requesting the pre-job form here, he admits that Key Men information is included as part of the pre-job form the Board refused to disclose. *See* Tr. 134. In essence, Lanoux is relabeling his requests in this matter in an effort to obtain the same information the Board rejected in *Precision*. As a result, Lanoux is collaterally estopped from relitigating the same issue. *See, e.g., A.W. Farrell & Son, Inc.*, 362 NLRB No. 142, at *1 (July 1, 2015) (union was collaterally estopped from asserting 8(a)(5) allegation where the issue had already been decided in a prior suit involving the same parties); *Sabine Towing & Transp. Co.*, 263 NLRB 114, 122 (1982) (union was collaterally estopped from seeking information from the employer, as well as other claims, where the claims involved substantially the same issues as the prior litigation).

The same substantial interest the Board found for protecting the pre-job form in *Precision* applies equally to the Key Men information Lanoux is seeking in this case. Disclosure of

Welded's Key Men information would severely harm the competitive interest of Welded and set bad precedent for other PLCA members seeking to protect their Key Men information. Indeed, Mr. Bennett and Mr. Thorn credibly testified about the enormous demand for skilled workers in the highly competitive pipeline industry due to the need for contractors to increase production while lowering costs. Tr. 252-53, 377-78, 384. Given the premium placed on skilled workers, union and non-union contractors routinely attempt to poach Key Men to improve their position in the bid process. Tr. 251, 380.

Providing any information on Welded's Key Men could negatively impact Welded. Tr. 378. Even knowing the date a Key Man was hired and his work location could result in a competitor locating that Key Man in order to try to pirate him from Welded. Tr. 389. If a competitor successfully poaches Welded's Key Men, it not only reduces the number of skilled workers available to Welded, but it also can undercut Welded in bidding for work because the efficient Key Men will allow competitors to cut production costs. *See* Tr. 252-53, 258-59, 377-80. Requiring disclosure of Key Men information harms other union contractors , IUOE, and Local 18 because non-union competitors would have a distinct advantage in retaining Key Men. Unlike union employers, non-union pipeline contractors can place Key Men on paid stand-by even if there is no work, which prevents union contractors from retaining those Key Men on future projects. Tr. 384-85.

In addition, if a competitor obtains Welded's Key Men information, it would essentially have a blueprint of the labor staffing needs of Welded to use in the bidding process. As Mr. Bennett explained, Key Men information can be used to calculate Welded's staffing levels, how many crews it uses, and the type of equipment employed. Tr. 256-57. Such details on Welded's

labor and job costs could effectively be used by a competitor to underbid Welded on pipeline jobs. *Precision* at 3.

As a result, Welded has a substantial interest in maintaining the confidentiality of its Key Men information and the Union's refusal to disclose this information to Lanoux was neither arbitrary nor discriminatory.

ii. Welded Has a Clear Expectation of Confidentiality in Its Key Men Information.

Welded, the PLCA, the IUOE, and Local 18 all believe Key Men information is confidential. Mr. Bennett testified that, because of the competitive risks discussed above, Welded and other PLCA members keep information on their Key Men confidential. Tr. 253; *see also Precision* at 3. Moreover, Local 18 has also behaved in a manner consistent with the expectation of privacy. The Union has refused to disclose Key Men information to Lanoux because it is confidential and proprietary to Welded and cannot be disclosed to members. The Union even elected to litigate this matter, presumably at its considerable expense, rather than simply disclose the documents because the documents are confidential.

iii. Welded's Interest in Protecting Its Proprietary Key Men Information Outweighs Lanoux's Interest.

Welded's substantial interest in protecting its Key Men information outweighs Lanoux's interest, if any, in obtaining it. The record is void of evidence showing that any Key Men materials that Lanoux is requesting are relevant to determining whether he has been fairly treated by the Union's hiring hall practices. For the requested information to be relevant, Lanoux must prove that: (1) his request is "reasonably related to the question of whether [he] was being properly treated in the matter of referrals" under the CBA; and (2) the union acted arbitrarily by refusing to provide the information. *See Carpenters Local Union No. 1080*, 255 NLRB 80, 87

(1981). Counsel for the General Counsel has failed to demonstrate that Lanoux meets either of those requirements.

First, Lanoux cannot show that Welded's Key Men information is reasonably related to the question of whether he was fairly treated in the Union hiring hall process. Counsel for the General Counsel has not articulated any specific basis for the Key Men information beyond that it is needed to determine whether he was treated fairly by the Union hiring hall. The Key Men information Lanoux appears to be requesting is not relevant to that question because Key Men are not referred to work for Welded or any other PLCA member through the Union hiring hall. Tr. 363. Instead, employers have the inherent right to hire or fire Key Men without Union involvement. Tr. 363. Although Lanoux testified that he requested the information to determine if the dates of employment for Mr. Groesser were accurate and whether the fifty percent rule was correctly followed (Tr. 101-02), there is no evidence disputing that Welded was entitled to hire Mr. Groesser as a Key Man without utilizing the Union hiring hall given that less than fifty percent of the workers on the project were Key Men. Tr. 295-96. Even if there were a violation of the fifty percent rule, it would only mean that Welded would have to lay off a Key Man – not that the Union would automatically have a right to refer additional Locals to the project through the hiring hall. Tr. 365-66. Moreover, as Mr. Dalton testified, the materials Lanoux appears to be requesting concerning Welded's Key Men have no bearing on whether he was treated fairly by the Union hiring hall. Tr. 323-40. Consequently, any Key Men information Lanoux is seeking is not related to or relevant to the Union's hiring hall practices.

Moreover, Lanoux does not need Welded's Key Men information to determine if the Union violated its duty of fair representation because he already has access to the relevant hiring hall information through the Union. For example, Lanoux can access information concerning

employees and applicants referred by the Union hiring hall, including their names, who they worked for, the date they were requested to work, and the type of equipment used as well as information about any referral requests submitted by the employer. Tr. 290-91, 149. Lanoux could use this information to police the hiring hall system by, for instance, using it to see if other members were sent for work after his registration date. Tr. 290-91. Moreover, Counsel for the General Counsel did not present any evidence that the fifty-fifty ratio of Key Men to Locals as required by the NPLA was not followed on the Welded project. In short, Lanoux has shown no reason why he cannot use the information already available to him to determine whether he was treated fairly by the Union.

Second, Local 18 did not act arbitrarily because: (1) much of the information Lanoux is requesting is not in the Union's possession; and (2) to the extent the information was in its possession, it had a substantial reason for withholding it. Many of the documents Lanoux appears to be requesting, including certified payroll records and verification of the contractor's contributions to certain health and welfare and pension funds, are not in the possession of Local 18. Tr. 324-25, 328-29. Moreover, as discussed above, by refusing to provide access to Key Men information, Local 18 was protecting the legitimate confidentiality interests of Welded and, thereby, protecting Welded, other PLCA members, and the Union from competitive harm. *See supra* 11-14.

b. Lanoux Is Not Entitled to Private Information of Welded Employees.

Finally, to the extent Lanoux is seeking private information regarding Welded's employees, such as Mr. Groesser, he has no right to that information – even assuming such information is in Local 18's possession. Lanoux appears to be requesting private information of Mr. Groesser, including his "certified payroll" information and the date of his urinalysis. For

example, as Mr. Dalton testified, the only information Local 18 receives or could disclose on the urinalysis of an employer's Key Men is a positive test result, which is confidential information that is protected by HIPAA. *See* Tr. 328-29. Similarly, Mr. Groesser's "certified payroll" information would contain private information about Mr. Groesser's rate of pay, his fringe benefits, and social security number. *See* Tr. 325. Because disclosing this information would infringe on Mr. Groesser's privacy interest and Lanoux has shown no legitimate countervailing interest, the Union cannot disclose such information to Lanoux to the extent the Union even has such information in its possession. *See Detroit Edison Corp.*, 440 U.S. at 450 (employees' privacy interests trumped the need for disclosure of psychological aptitude test results); *Johns-Manville Sales Corp.*, 252 NLRB No. 56, at *2 (1980) (employer was not required to disclose the names of employees identified as having certain lung conditions because of employee privacy concerns, among other reasons).

c. If Disclosure Is Required, Welded's Interests Must Be Protected.

If it is determined that the Union has an obligation to disclose some or all of Welded's Key Men information to Lanoux, a remedy must nonetheless be fashioned that accommodates Welded's substantial interests as described above. When a union seeks confidential information to which it is entitled, an employer's confidentiality interest still must be accommodated. *See, e.g.*, *GTE Cal. Inc.*, 324 NLRB 424, 427 (1997) (complaint dismissed where the employer had disclosed information to the union which fulfilled the union's bargaining responsibility while protecting confidential information in possession of the employer). No disclosure is required if a party will not accommodate the disclosing party's confidentiality interest. *See Silver Bros. Co., Inc.*, 312 NLRB 1060, 1062 (1993) (employer did not violate act by refusing to disclose financial

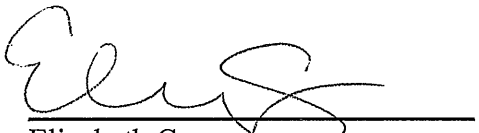
information where it had a legitimate confidentiality interest and union refused to accommodate that interest).

In this instance, the ALJ should accommodate Welded's interest consistent with Board authority. Such an accommodation could include: (1) providing summaries of the information that exclude Welded's proprietary information; (2) excluding the names, locations, date of hire, and other personal identifying information of Key Men; (3) providing redacted copies of the Key Men lists that exclude proprietary and confidential information, such as the number and types of equipment, number of employees, and similar items; (4) requiring union members to sign a confidentiality agreement with penalties for a violation before disclosure is permitted; or (5) some other remedy fashioned by the ALJ.

IV. CONCLUSION

For the foregoing reasons, the complaint should be dismissed in its entirety, or, in the alternative, a remedy fashioned that properly accommodates the clear and undisputed interests of Welded.

Respectfully Submitted,



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Dated: November 13, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of November, 2015, I caused copies of Welded Construction, L.P.'s Post-Hearing Brief to be served on the following parties:

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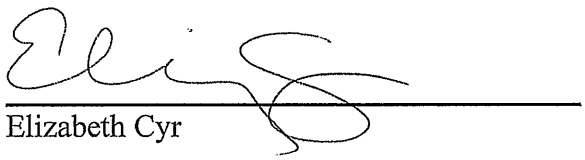

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