

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

Nos. 15-2031, 15-2183

KELLOGG CO.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**BAKERY, CONFECTIONARY, TOBACCO WORKERS, AND GRAIN
MILLERS INTERNATIONAL UNION, AFL-CIO, CFC;
BAKERY, CONFECTIONARY, TOBACCO WORKERS, AND GRAIN
MILLERS LOCAL UNION 252-G**

Intervenors

**PETITION FOR PARTIAL PANEL REHEARING
BY THE NATIONAL LABOR RELATIONS BOARD**

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, the National Labor Relations Board (“the Board”) respectfully petitions for partial panel rehearing of the Court’s decision in this case. The Board requests rehearing for the limited purpose of enforcing the portion of its Order regarding an uncontested violation of the National Labor Relations Act (“the Act”) that was discussed in the Board’s brief but not addressed in the panel’s opinion.

BACKGROUND

1. In an opinion in this case that issued August 19, 2016, the Court (Judges Siler, Batchelder, and Gibbons) granted Kellogg's petition for review, denied the Board's cross-application for enforcement, and vacated the Board's decision. The Court rejected the Board's finding that Kellogg's proposals during contract negotiations constituted midterm modifications of an unexpired collective-bargaining agreement, and held that Kellogg's insistence upon those proposals and its lockout of employees to compel acceptance of them were not unlawful.

2. The Court's opinion did not address, and made no findings regarding, the Board's holding that Kellogg violated Section 8(a)(5) and (1) of the Act by refusing to provide its employees' union with requested information related to job bidding. As to that violation, the Board found that Kellogg did not respond to a request for information regarding the total number of jobs bid in the last three years, the total number of employees who were awarded a job in the past year, the total number of employees who were awarded more than one new job in the past three years, and the identity of the Kellogg officials who would make the final decision as to which employee was awarded a job. (JA 1 n.2, 20-21, 24; JA 441-43, 483-84.)¹

¹ "JA" refers to the Joint Appendix filed on November 30, 2015. References preceding a semicolon are to the Board's findings; cites following a semicolon are to supporting evidence.

Kellogg did not address the information-request violation in its brief to the Court, and the Board sought summary enforcement on the grounds that the violation was uncontested (NLRB Br. 36-37).

ARGUMENT

Rehearing is warranted because the panel opinion overlooked the Board's argument that it was entitled to enforcement of its uncontested finding that Kellogg violated Section 8(a)(5) and (1) of the Act by failing to provide requested information regarding job bidding. *See* FRAP 40(a)(2) ("point of law or fact that the petitioner believes the court has overlooked" may provide basis for panel rehearing).

When a party "fails to challenge a portion of the Board's findings on appeal," the Board "is entitled to summary enforcement as to the uncontested portions of its Decision and Order." *Vanguard Fire & Supply Co. v. NLRB*, 468 F.3d 952, 956 (6th Cir. 2006); *see also FiveCAP, Inc. v. NLRB*, 294 F.3d 768, 791 (6th Cir. 2002) (same); *NLRB v. Autodie Int'l, Inc.*, 169 F.3d 378, 381 (6th Cir. 1999) (same). In such circumstances, "the employer effectively admits the truth of those findings and loses the right to object to them." *Vanguard Fire*, 468 F.3d at 956. Moreover, it is well-settled that an employer's refusal to provide information requested by its employees' union that is necessary and relevant to the union's performance of its functions as bargaining representative is an unfair labor

practice. *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967); *Gen. Motors Corp. v. NLRB*, 700 F.2d 1083, 1088 (6th Cir. 1983). The information-request violation did not depend, factually or legally, on the Board's findings of other violations, and thus is not affected by the Court's conclusions regarding those findings.

The Board has both a strong interest in remedying unfair labor practices and a statutory obligation to do so. 29 U.S.C. § 160(a), (c). Panel rehearing for the limited purpose of enforcing the uncontested portion of the Board's Order will permit it to do so in this case.

CONCLUSION

The Board respectfully requests that the panel rehear this case and enforce the portion of the Board's Order related to the uncontested violation.

Respectfully submitted,

/s/ Kira Dellinger Vol
KIRA DELLINGER VOL
Supervisory Attorney

/s/ Joel A. Heller
JOEL A. HELLER
Attorney
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-0656
(202) 273-1042

RICHARD F. GRIFFIN, JR.

General Counsel

JENNIFER ABRUZZO

Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

National Labor Relations Board

September 2016

