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Diamond Trucking, Inc. *and* Teamsters Joint Council No. 69 a/w International Brotherhood of Teamsters. Case 25–CA–144424

April 25, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On November 24, 2015, Administrative Law Judge Susan A. Flynn issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a response.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide information requested by Teamsters Joint Council No. 69 (the Union) during a strike. The judge found that the Union had not established the relevance of the requested information, which concerned asserted alter-ego relationships of the Respondent and whether certain third-party entities owned the Respondent's trucks. For the reasons stated below, we find, contrary to the judge and our dissenting colleague, that the General Counsel met his burden of showing the relevance of the requested information: (1) the Union had an objective, factual basis for believing that an alter-ego relationship existed among the Respondent and other entities, and (2) the requested information would have assisted the Union in determining appropriate locations for picketing the Respondent's trucks during the strike. The Union was therefore entitled to the requested information.

I.

The Respondent hauls stone and asphalt for highway construction projects with its fleet of 50 trucks. It employs approximately 50 drivers, who are represented by the Union. The Respondent is wholly owned by Teresa Pendleton, who is also the sole board member. Pendleton's brother, Mike Bowyer, operates Kokomo Gravel, a nonunionized trucking company that performs trucking operations similar to those of the Respondent. Bowyer also acted as an agent of the Respondent during its contract negotiations with the Union. The Respondent occasionally subcontracted work it could not perform on its own to Kokomo Gravel. The Respondent and Kokomo Gravel maintained their primary offices in the same building in Peru, Indiana, at which location the Respondent kept most of its trucks.

In August 2014, the Union commenced a strike against the Respondent amidst unsuccessful negotiations for a successor collective-bargaining agreement, and began picketing at the Respondent's Peru location. In response, the Respondent advised the Union that it had vacated its Peru office and moved its trucks to an unspecified location in Kokomo, Indiana. The Respondent asserted that because it was no longer located at the Peru facility, any continued picketing there would constitute unlawful secondary conduct. After the Union ascertained the location of the trucks in Kokomo, it began picketing at their Kokomo location. When the Union subsequently observed that the Respondent had returned approximately 44 of its trucks to the Peru facility it notified the Respondent that the Union would resume picketing there. In response, the Respondent acknowledged that the trucks had been returned to that location but stated that it did not own the trucks, and that the signage was removed so that the trucks could be leased or sold; the Respondent reiterated that picketing at Peru would be unlawful.[1]

The Union thereafter requested that the Respondent furnish it with information in response to eight questions regarding the ownership of the Respondent, the ownership of the Respondent's trucks, and the locations where the Respondent had conducted work in the previous approximately 11 months.[2] The Respondent furnished the

[1] The six remaining trucks were moved by the Respondent to space it leased at Grissom Air Force Base, located between Peru and Kokomo. The Union picketed at that location without protest by the Respondent.

[2] The request stated that its purpose was to "determine the scope of the Company's business operations and its various locations." It asked for the following information:

1. Identify the owners of Diamond Trucking including any individual or entity which has a minority ownership share from January 1, 2014 to present.
2. Identify the entity/individual which owns the trucks which have been used by Diamond Trucking, Inc. in its operations from January 1, 2014 to present.
3. For the trucks referenced in Request No. 2, provide the following information for each truck:
    a. Model and year of each truck
    b. Owner of each truck
    c. Vehicle identification number of each truck
    d. Indiana license plate number for each truck.
4. For the trucks referenced in Request No. 2, provide the following information for each truck:
    a. The entity/individual in whose name the trucks are registered with the Indiana Bureau of Motor Vehicles from January 1, 2014, to present
    b. The entity/individual who purchased and/or obtained license plates used for the trucks from January 1, 2014 to present.

Union only with information responding to the eighth question, concerning the location(s) where it conducted business, and disputed the relevance of the other requests. The Respondent further asserted that it had returned the 44 trucks—which remained parked at the Peru headquarters of the Respondent and Kokomo Gravel—to the lessor of the trucks, whom the Respondent did not identify.[3] In response, the Union clarified its request by stating that it sought to "confirm the accuracy" of the Respondent's "representations" concerning the ownership of the trucks, and that it believed an alter-ego relationship existed between the Respondent and a "group of entities under common control." The Respondent refused to furnish the remaining information.

II.

An employer has an obligation to furnish a union, on request, with information that is relevant and necessary to performing its role as the exclusive bargaining representative of unit employees. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967). Information related to terms and conditions of employment of bargaining unit employees is presumptively relevant. See *Southern California Gas Co.*, 344 NLRB 231, 235 (2005). When the requested information does not involve the bargaining unit, the Union bears the burden of establishing the relevancy of the information. However, "[t]his burden is not an exceptionally heavy one." See *Trim Corp. of America*, 349 NLRB 608, 613 (2007). "[W]here . . . a union requests information pertaining to a suspected alter-ego relationship, it must establish the relevance of the requested information and have an objective, factual basis for believing that the relationship exists." *Piggly Wiggly Midwest*, 357 NLRB 2344, 2344 (2012). An alter-ego relationship can be established if there are "substantially identical ownership, business purpose, operations, management, supervision, premises, equipment, and customers." *Island Architectural Woodwork, Inc.*, 364 NLRB No. 73, slip op. at 4 (2016); *Crawford Door Sales Co.*, 226 NLRB 1144, 1144 (1976). Not all factors are required to be present. See *Fugazy Continental Corp.*, 265 NLRB 1301, 1301 (1982). The facts establishing such a belief that an alter-ego relationship exists need not be communicated to the employer at the time of the request; it is sufficient that the "'General Counsel demonstrate at the hearing that the union had, at the relevant time, a reasonable belief.'" *Piggly Wiggly Midwest*, above, at 2344 (quoting *Cannelton Industries*, 339 NLRB 996, 997 (2003)). The "reasonable belief" standard does not require the union to show "that the requested information would [have] established the existence of an alter ego operation." *Trim Corp. of America*, above at 613 (citing *Pence Construction Corp.*, 281 NLRB 322, 324–325 (1986); *Bentley-Jost Electric Corp.*, 283 NLRB 564, 567–568 (1987); *Reiss Viking*, 312 NLRB 622, 625–626 (1993)). Moreover, "[t]he Board uses a broad, discovery-type standard in determining relevance in information requests, including those for which a special demonstration of relevance is needed, and potential or probable relevance is sufficient to give rise to an employer's obligation to provide information." *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994)). We find that the General Counsel has shown the relevance of the information requested.

We find that the General Counsel established that the Union had a reasonable, objective basis for believing that an alter-ego relationship existed between the Respondent, Diamond Trucking, and a third party or parties, Kokomo Gravel or the alleged owner of the trucks, the suggestively named DT Trucking. Diamond Trucking and Kokomo Gravel shared similar business purposes of hauling stone. As in *Cannelton Industries*, above, Diamond Trucking and Kokomo Gravel shared a common address. The Respondent conceded that the owner of Kokomo Gravel, Bowyer,—who is the brother of the Respondent's owner—acted as an agent of the Respondent during its contract negotiations with the Union, which immediately preceded the strike.[4] Further, the

5. Provide a copy of all contracts, memoranda of understanding, purchase agreements or other documents which reflect the leasing of trucks by Diamond Trucking, Inc.
6. Provide the names, business addresses and business phone numbers of all Diamond Trucking's directors, stockholders, owners, corporate officers and management personnel.
7. Provide the names, business addresses and phone numbers of all directors, stockholders, owners, corporate officers and management personnel of any individuals/entities which have leased vehicles to Diamond Trucking, Inc. from January 1, 2014 to present.
8. Identify each location (street address, city and state) where Diamond Trucking has conducted business and/or where the trucks used in its operations were and/or dispatched from January 1, 2014 to present.

[3] At the hearing, the Respondent identified the lessor as "DT Trucking."

[4] Our dissenting colleague acknowledges that "Bowyer has participated in contract negotiations with the Union and advised" Diamond Trucking, but argues that this "does not constitute evidence that Bowyer was part owner of, or played any managerial or supervisory role in, Diamond Trucking." This overlooks the key role of Kokomo's owner Bowyer as an admitted agent of the Respondent in those negotiations. Plainly, by playing a key role in those negotiations, Bowyer was involved in the supervision or management of the Respondent's labor relations. Furthermore, Bowyer's role in the Respondent's affairs was one of the facts underlying the Union's reasonable belief that Kokomo Gravel had an alter-ego relationship to the Respondent. Bowyer's lack of an official managerial or supervisory role at the Respondent does not lessen the significance of that fact.

Union had reason to believe that the Respondent, Kokomo Gravel, and/or DT Trucking shared the use and ownership of the Respondent's critical equipment: its fleet of trucks.[5] When the Respondent assertedly returned its trucks to the lessor—DT Trucking—it returned the trucks to the common place of business of the Respondent and Kokomo Gravel in Peru. Although there were several other businesses located at that address, only Diamond Trucking and Kokomo Gravel used the type of trucks at issue here. Moreover, the record does not show and the Respondent does not identify any independent truck leasing company, named DT Trucking or otherwise, housed at that address. The Union was thus faced with the Respondent's assertion that it did not own the trucks while the trucks nevertheless remained parked at what, up until the start of the strike at least, was the Respondent's (and Kokomo Gravel's) headquarters. These circumstances validated the Union's stated aim of confirming the accuracy of the Respondent's representations concerning the ownership of the trucks,[6] and gave rise to a reasonable belief by the Union that the Respondent and a third party or parties, whether Kokomo Gravel or DT Trucking, shared key equipment. In sum, considering the ties between the owners of the Respondent and Kokomo Gravel, the status of Kokomo Gravel's owner as the Respondent's agent for collective bargaining, the similar business purposes and the shared address of the Respondent and Kokomo Gravel, the likely shared use of trucks, and the utter lack of evidence that DT Trucking—the entity the Respondent asserted to be the trucks' owner—actually existed, we find that the Union had an objective, factual basis for believing that an alter-ego relationship existed between the Respondent and Kokomo Gravel and/or DT Trucking.[7]

We further find that the Union, in light of that reasonable belief, established that the information was relevant to determining appropriate picketing locations. A union is entitled to engage in picketing at locations where an employer or its related single employer or alter-ego entities conduct business. See, e.g., *Mine Workers (Boich Mining Co.)*, 301 NLRB 872, 873 (1991). The Union sought to determine such lawful picketing sites here, and crafted its information request for that purpose in light of the Respondent's asserted movement of its business location and trucks. Through the parties' communications, the Union made that purpose manifestly clear to the Respondent.[8]

Our dissenting colleague asserts that, for the requested information to be relevant, the Union must have had a reasonable belief that Kokomo Gravel was a "disguised continuance" of Diamond Trucking. This mischaracterizes the Union's information request and the argument advanced by the General Counsel and the Union, neither of whom argued that the trucks at issue were used by Kokomo Gravel as a disguised continuance after the strike began. Rather, as stated above, the trucks, with one known exception, remained parked at the common office location of the Respondent and Kokomo Gravel,

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[5] Our dissenting colleague quotes heavily from the testimony of the Union's vice president, Jim Wilkinson, that he never saw the Respondent's trucks used on former Diamond Trucking jobs once the strike began. As discussed infra, even if that testimony may be relevant to our colleague's more narrow disguised-continuance theory of this case, it is not relevant to the Board's established, broader alter-ego test, upon which we rely. As indicated, the Board's alter-ego test asks whether two ostensibly independent businesses may be treated as one in a particular case because they share "substantially identical ownership, business purpose, operations, management, supervision, premises, equipment, and customers." *Island Architectural Woodwork, Inc.*, above, slip op. at 4; *Crawford Door Sales Co.*, above at 1144. Whether Wilkinson ever saw the Respondent's trucks used on former Diamond Trucking jobs has little relevance to those factors. But Wilkinson actually did give testimony that bears on those factors: specifically, whether the Respondent and Kokomo were sharing equipment. Thus, Wilkinson testified that at least one of the Respondent's trucks was operating for Kokomo Gravel during the strike:

Q. Now, during the period you were on the picket line did you ever see any of the Diamond trucks in operation?

A. On U.S. 31 we seen (*sic*) - - it was an old Diamond truck with a new name of the side of it.

Q. And what was the name on the side of it?

A. And it was Kokomo Sand and Gravel is what it said on the side.

Q. And when did you see that?

A. That was sometime during the strike in maybe October or something.

Q. How did you know it was an old truck?

A. It's got a - - they have a number on the side of their trucks that's in a yellowish gold, and it was on that truck and matched all the other Diamond truck numbers, the color.

(Tr. 64.)

The shared use of trucks was one of the facts that led to the reasonable belief that an alter-ego relationship existed between the Respondent and Kokomo Gravel.

[6] Indeed, the Respondent in its response brief enigmatically states that the Respondent returned the trucks "to the owner" and makes no mention of DT Trucking.

[7] Contrary to the dissent's implication, the Union is not required to establish the actual existence of factors establishing an alter-ego relationship in order to meet its burden of showing the relevance of the requested information.

[8] The Union stated to the Respondent, when it sought the information, that "Diamond Trucking is part of a group of entities under common control," and that the information was being sought to establish "possible alter ego/double breasted relationships" between Diamond Trucking, Kokomo Gravel, or other "entities." Other correspondence between the parties shows that the Respondent was well aware that the Union was seeking to verify the Respondent's business locations in order to determine lawful picketing locations. The Respondent nevertheless asserts that the Union's information request was defective because it failed to disclose to the Respondent all underlying facts supporting its request. But as stated above, it is sufficient that the General Counsel demonstrate at the hearing that the Union had, at the relevant time, a reasonable belief that an alter-ego relationship existed. See *Piggly Wiggly Midwest*, above, at 2344–2345.

even after the Respondent told the Union that the trucks had been returned to alleged lessor DT Trucking. The Union, in its request for information, characterized the alleged relationship as a "group of entities under common control," including multiple "alter ego/double breasted relationships.[9] The dissent's attempt to limit the scope of the inquiry to searching only for a disguised continuance fails to reflect the Union's concerns plainly expressed to the Respondent.[10]

Accordingly, we find that the Respondent's refusal to provide the requested information violated Section 8(a)(5) and(1) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Diamond Trucking, Inc., Peru, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Teamsters Joint Council No. 69, affiliated with International Brotherhood of Teamsters, by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's employees in the following appropriate unit:

> The employees described in Article 1 of the most recent Highway, Heavy, Railroad and Underground Utility Contracting collective-bargaining agreement between Highway, Heavy and Utility Division - ICA, Inc. and the Union which was effective from April 1, 2008 to May 31, 2014, and of which Respondent is signatory.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish to the Union in a timely manner the information requested by the Union in numbered items 1 through 7 in its letter dated November 20, 2014.

(b) Within 14 days after service by the Region, post at its Peru, Indiana, facility copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 20, 2014.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 25, 2017

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[9] As noted above, the dissent's focus only on whether Kokomo Gravel is a disguised continuance of the Respondent ignores other situations in which an alter ego relationship may exist. "Absent a disguised continuance," an alter ego relationship may still be found when the businesses "have 'substantially identical' ownership, business purpose, management, supervision, customers, operation, and equipment." *T.E. Elevator Corp.*, 268 NLRB 1461, 1461 (1984) (quoting *Chippewa Motor Freight*, 261 NLRB 455, 458 (1982)). Unlawful motivation is not necessary to establish an alter ego relationship. See e.g., *Island Architectural Woodwork, Inc*., above, slip op. at 4.

[10] Our dissenting colleague further argues that the Union and the General Counsel failed to timely raise facts and argument, prior to the exceptions to the judge's decision, to support a belief that an alter-ego relationship existed. The Union, however, expressly communicated to the Respondent, when the information was sought, that "Diamond Trucking is part of a group of entities under common control," and that the information was being sought to establish "possible alter ego/double breasted relationships" between Diamond Trucking, Kokomo Gravel and/or other "entities." The Union and the General Counsel have continued to assert that justification for the information request throughout the proceedings. All of the facts upon which we have relied were established at the hearing.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

CHAIRMAN MISCIMARRA, dissenting.

The sole issue in this case is whether the Respondent, Diamond Trucking, violated Section 8(a)(5) of the National Labor Relations Act (NLRA or Act) when it declined to furnish information the Union requested after the Respondent had ceased operations when its employees went out on strike. The information the Union asked for did not concern employees the Union represents, and it is undisputed that the information was not presumptively relevant to the Union's representational duties. Therefore, Diamond Trucking had no duty to furnish the information unless the Union demonstrated its relevance. As explained below, relevance was never demonstrated.

Very simply, the Union tendered the information request at issue here because it was looking for trucks to picket. When the strike began, the Respondent ceased operating, closed its office, and parked its trucks on a rented lot away from its former office; and the Union picketed the trucks at that lot. The Respondent leased its trucks. As the strike dragged on, the Respondent decided it made no sense to continue paying to lease trucks it was not using. So the Respondent removed the "Diamond Trucking" signs from the trucks, terminated the leases, and returned the trucks to the company that owned them. This created a picketing quandary for the Union. Its labor dispute was with Diamond Trucking, not with the company that owned the trucks. Therefore, after Diamond Trucking relinquished the trucks to their owner, picketing the trucks would have been unlawful secondary activity—*unless* the entity that owned the trucks was an alter ego of Diamond Trucking. That was the reason for the information request: the Union wanted to find out whether the Respondent, even though it had ceased operating when its employees went on strike, was continuing to operate through an alter ego or disguised continuance—because if it was, the Union could lawfully picket that alter-ego entity.

These facts clarify the nature of the Union's relevancy burden. When a union requests information concerning a suspected alter-ego relationship, it must show—or rather the General Counsel, at the unfair labor practice hearing, must show on the union's behalf—that the union reasonably believed, based on objective facts, that an alter-ego relationship existed.[1] Here, this means the General Counsel had to show that the Union reasonably believed, based on objective facts, that the entity that owned the trucks was an alter ego of Diamond Trucking.

The administrative law judge dismissed the complaint, concluding that the General Counsel had failed to make the required demonstration of relevance. After carefully reviewing the evidence, the judge found that the Union's alter-ego suspicions were "merely speculation, at best" and that there was "*not one iota of support for an alter-ego theory*" (emphasis added). Indeed, at the unfair labor practice hearing and in his posthearing brief to the judge, the General Counsel's attorney did not even *attempt* to establish a basis in objective fact for the Union's suspicions. It was not until he filed exceptions to the judge's decision that the General Counsel articulated any factual basis whatsoever—and by then it was too late because arguments raised for the first time on exceptions are untimely and thus waived.[2] But even if this waiver were set aside, it would make no difference to the conclusion I would reach. The General Counsel's relevancy showing is too little as well as too late. It does not support a reasonable, objective, fact-based belief that the Respondent was continuing to operate through an alter ego. My colleagues attempt to bolster the meager facts cited by the General Counsel, but in my view unsuccessfully. Accordingly, I respectfully dissent.

Facts

Before it ceased operating in 2014 after its drivers went on strike, the Respondent hauled stone and asphalt for highway construction projects in the State of Indiana. Its drivers are represented by Teamsters Joint Council No. 69 (the Union). The Respondent's owner and president is Teresa Pendleton. Pendleton's brother, Mike Bowyer, operates Kokomo Gravel, a nonunion company that hauls stone and gravel for individuals. Diamond Trucking and Kokomo Gravel have a common street address—2653 South 400 West, Peru, Indiana—but they maintained separate offices. Other businesses also share

[1] See, e.g., *Cannelton Industries*, 339 NLRB 996, 997 (2003). I disagree with current Board law that permits the General Counsel to demonstrate the relevance of requested information at the unfair labor practice hearing, instead of requiring the union to demonstrate relevance to the employer at the time of the request. I would apply *Hertz Corp. v. NLRB*, 105 F.3d 868 (3d Cir. 1997), in which the court held that an employer's duty to furnish information that is not presumptively relevant is conditioned on the union's disclosure to the employer—at the time it requests the information—of facts sufficient to demonstrate relevance, unless the factual basis of the request is readily apparent from the surrounding circumstances. See, e.g., *Postal Service*, 364 NLRB No. 27, slip op. at 1 fn. 3 (2016). As explained below, however, the complaint in the instant case must be dismissed even under the extant standard, since (i) at the unfair labor practice hearing, the General Counsel did not even *attempt* to demonstrate that the Union had an objective, factual basis for believing that an alter-ego relationship existed between the Respondent and any other entity; and (ii) the facts cited by the General Counsel—not to the judge, but for the first time in his exceptions brief to the Board—fail to establish the required objective basis.

[2] See, e.g., *Smoke House Restaurant*, 347 NLRB 192, 195 (2006), enfd. mem. sub nom. *NLRB v. JLL Restaurant, Inc.*, 325 Fed. Appx. 577 (9th Cir. 2009); *Yorkaire, Inc.*, 297 NLRB 401, 401 (1989), enfd. 922 F.2d 832 (3d Cir. 1990).

that address, including a recycling business and an excavating company.

The Respondent operated approximately 50 trucks. When it won a construction contract that required more trucks than it could supply, the Respondent subcontracted the overflow work to other unionized employers, drawing from a list of 15 to 20 companies. When no union subcontractor was available, the Respondent subcontracted work to Kokomo Gravel. Diamond Trucking and Kokomo Gravel operated separate truck fleets, clearly differentiated by distinctive signage, colors, and truck identification numbers.

In 2014, the Respondent and the Union engaged in negotiations for a successor collective-bargaining agreement.[3] Pendleton had never engaged in collective bargaining, and at her request, Bowyer participated in an advisory capacity. The parties were unable to reach an agreement. On August 20, the Respondent's drivers went on strike, and as stated above, the Respondent ceased operating. The projects the Respondent had been working on when the strike commenced were completed by other unionized trucking companies. Jim Wilkinson, the Union's vice president, testified that (i) he knew Diamond Trucking's trucks on sight from their identifying numbers; (ii) after the strike commenced, he never saw a Diamond Trucking truck doing work that Diamond Trucking had previously performed; (iii) after the strike commenced, he never saw a Kokomo Gravel truck doing work that Diamond Trucking had previously performed; and (iv) he had no reason to believe that after the strike commenced, Diamond Trucking performed work through Kokomo Gravel or any other company.[4]

During the first week of the strike, the Respondent's idled trucks were parked at 2653 South 400 West, and the Union picketed the Respondent's trucks at that location. Approximately 1 week later, the Respondent closed its office at 2653 South 400 West and moved the trucks to a rented parking lot on Grissom Air Force Base. Its attorney, Hanson, notified the Union of these facts. The Union ceased picketing at 2653 South 400 West and began picketing the Respondent's trucks at the rented lot.

The Respondent leased 44 of its 50 trucks from another company, identified in the record as DT Trucking. In November, with the strike ongoing,[5] the Respondent decided it could not afford to continue leasing the trucks. It removed the "Diamond Trucking" signs from the trucks, returned the trucks to 2653 South 400 West, and handed them over to DT Trucking.[6]

The Union informed Hanson that since the trucks had been returned to 2653 South 400 West, it intended to resume picketing at that location. Hanson replied that the Respondent did not own those trucks and the "Diamond Trucking" signs had been removed from them so they could be sold or leased to someone else. The Union then tendered the information request at issue here, which for the most part sought information concerning the entity that owned the trucks.[7] Hanson provided in-

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[3] All dates are 2014 unless otherwise indicated.

[4] Wilkinson's admissions were elicited under cross-examination by the Respondent's attorney, James Hanson. Here are the relevant exchanges:

> Q. So you could always tell an old Diamond truck because it had the same identifying truck number on it?
>
> A. Yes.
>
> . . . .
>
> Q. And Diamond Trucking never operated again after you went out on strike, correct?
>
> A. I will say no, as far as I know.
>
> . . . .
>
> Q. And you had no evidence—you had no evidence that any company—well, let me just make it specific. That Kokomo Gravel was doing any of Diamond Trucking's work that it had been doing before the strike, correct?
>
> A. No.
>
> Q. No evidence of that, correct? I just want to make sure that we're clear on the record.
>
> A. I don't understand what you're trying—what you're trying to say.
>
> Q. You had no evidence that Kokomo Gravel, which had been at the same location as Diamond Trucking, correct? They have two different offices there at that 2653 South 400 West location, correct?
>
> A. Yeah.
>
> Q. And you have—you never saw Kokomo Gravel doing work that Diamond Trucking had previously been doing, correct?
>
> A. No.
>
> . . . .
>
> Q. The Diamond Trucking trucks that were being used on the projects, the construction projects, the highway construction projects before the strike began, you never saw any of those trucks being used doing any type of work on those same projects after the strike, correct?
>
> A. No.
>
> . . . .
>
> Q. And you had no reason to believe that Diamond Trucking was doing the work that the strikers had previously been doing either through Kokomo Gravel or any other company, correct?
>
> A. Do what now?
>
> Q. You had no reason to believe that Diamond Trucking was doing an[y] of the work that the picketers—the people who were on strike, your drivers—were doing any of the work with other companies or other people.
>
> Mr. Williams [counsel for the GC]: Objection, Your Honor, calls for a conclusion.
>
> Mr. Hanson: I asked him if he had reason to believe.
>
> Judge Flynn: Overruled. You can answer.
>
> Oh, I reckon not.
>
> (Tr. 65–71.)

[5] As of the date of the hearing—August 25, 2015—the Respondent's drivers remained on strike, and the Respondent had not resumed operations.

[6] The other six trucks were moved to another location on Grissom Air Force Base.

[7] The Union requested the following information:

formation in response to one item of the request, but he otherwise declined to furnish the requested information on the basis that the Union had not established its relevance. The Union answered that it had "reason to suspect" that the Respondent was "part of a group of entities under common control" and that "related third parties are the owners of these trucks." Hanson replied that if the Union was requesting the information because it was alleging the existence of an alter-ego relationship, the Union had not demonstrated "a reasonable objective basis" for its suspicion that such a relationship existed.

Discussion

"The duty to bargain collectively, imposed upon an employer by § 8(a)(5) of the National Labor Relations Act, includes a duty to provide relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative." *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979). Information concerning unit employees' terms and conditions of employment is presumptively relevant. See, e.g., *United Parcel Service of America*, 362 NLRB No. 22, slip op. at 3 (2015). But when, as here, a union requests information that is not presumptively relevant to the union's performance of its duties as bargaining representative, the union bears the burden of demonstrating relevance. See, e.g., *Disneyland Park*, 350 NLRB 1256, 1257 (2007). It is undisputed that the information the Union requested in this case was not presumptively relevant, and the Union had to demonstrate its relevance. It is also undisputed that the Union wanted to determine where it could lawfully picket in support of its strike against the Respondent—and if the owner of the trucks was the Respondent's alter ego, the Union could lawfully picket that entity.[8] Thus, the Union asked for information that it hoped might reveal an alter-ego relationship. However, as the Union itself acknowledged, it merely *suspected* that "related third parties are the owners of these trucks"—and the law is clear that mere suspicion of an alter-ego relationship does not satisfy the burden to demonstrate relevance. See *Cannelton Industries*, 339 NLRB 996, 997 (2003). Rather, the Union had to have "an objective, factual basis for believing" that an alter-ego relationship existed between the Respondent and one or more allegedly related third parties. Id. Under extant Board law, the Union was not obligated to disclose those facts to the Respondent at the time it requested the information. "Rather, it is sufficient that the General Counsel demonstrate at the [unfair labor practice] hearing that the [U]nion had, at the relevant time, a reasonable belief" that an alter-ego relationship existed. Id.[9]

"To determine whether two employers are alter egos, the Board considers several factors, including whether they have substantially identical ownership, business purpose, operations, management, supervision, premises, equipment, and customers." *Island Architectural Woodwork, Inc.*, 364 NLRB No. 73, slip op. at 4 (2016). These factors are similar to those the Board applies in deciding single-employer allegations; but in the alter-ego context, the focus is on whether the suspected alter ego is a disguised continuance of the respondent employer. See *Hotel & Restaurant Employees Local 274 (Warwick Caterers)*, 282 NLRB 939, 943 (1987) (citing *Carpenters Local 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 507 (5th Cir. 1982)). Thus, in making an alter-ego determination, the Board also considers "whether the purpose behind the creation of the suspected alter ego was to evade another employer's responsibilities under the Act." *Island Architectural Woodwork*, 364 NLRB No. 73, slip

1. Identify the owners of Diamond Trucking including any individual or entity which has a minority ownership share from January 1, 2014 to present.
2. Identify the entity/individual which owns the trucks which have been used by Diamond Trucking, Inc. in its operations from January 1, 2014 to present.
3. For the trucks referenced in Request No. 2, provide the following information for each truck:
   a. Model and year of each truck
   b. Owner of each truck
   c. Vehicle identification number of each truck
   d. Indiana license plate number for each truck.
4. For the trucks referenced in Request No. 2, provide the following information for each truck:
   a. The entity/individual in whose name the trucks are registered with the Indiana Bureau of Motor Vehicles from January 1, 2014, to present
   b. The entity/individual who purchased and/or obtained license plates used for the trucks from January 1, 2014 to present.
5. Provide a copy of all contracts, memoranda of understanding, purchase agreements or other documents which reflect the leasing of trucks by Diamond Trucking, Inc.
6. Provide the names, business addresses and business phone numbers of all Diamond Trucking's directors, stockholders, owners, corporate officers and management personnel.
7. Provide the names, business addresses and phone numbers of all directors, stockholders, owners, corporate officers and management personnel of any individuals/entities which have leased vehicles to Diamond Trucking, Inc. from January 1, 2014 to present.
8. Identify each location (street address, city and state) where Diamond Trucking has conducted business and/or where the trucks used in its operations were and/or dispatched from January 1, 2014 to present.

The Respondent furnished the information requested in Item #8.

[8] Picketing of an alter ego of an employer with whom a union has a labor dispute is lawful primary activity. *Electrical Workers IBEW Local 3 (Kidder Peabody)*, 270 NLRB 1025, 1029 (1984).

[9] As stated above, I disagree with extant Board law in this respect. See supra fn. 1.

op. at 4 (citing *Fugazy Continental Corp.*, 265 NLRB 1301, 1301–1302 (1982), enfd. per curiam 725 F.2d 1416 (D.C. Cir. 1984)). Summarizing, to establish that the information at issue here was relevant to the Union's representational duties, the General Counsel had to demonstrate that when the Union requested the information, it reasonably believed, based on objective facts, that Diamond Trucking and one or more other entities met at least some of the factors relevant to alter-ego status.[10]

For several reasons, the General Counsel failed to make the required showing.

First, at the unfair labor practice hearing, the General Counsel's attorney did not even attempt to show that the Union had a basis in objective fact for believing that an alter-ego relationship existed between the Respondent and any other entity. Under questioning by the General Counsel's attorney, Union Vice President Wilkinson testified as to the reasons why the Union wanted each item of information it requested—not as to any facts that led him to believe an alter-ego relationship existed. The judge summarized Wilkinson's testimony in this regard as follows:

> [Wilkinson] said he wanted the information in Request No. 1 to determine who actually owned Diamond Trucking. Request No. 2 was to learn who owned the trucks, because the Union had the right to picket the old office [2653 South 400 West] if Diamond Trucking still owned them. The same basis was given for Request No. 3, to determine ownership of each truck. Request No. 4 was intended to find out who the trucks were registered to, which would also explain who owned them. Request No. 5 would show whether they were, in fact, leased. Request No. 6 was to learn where Diamond Trucking was conducting its day-to-day business. The Union sought this, since the lots at Grissom [Air Force Base] where the trucks were parked had no offices, no telephones, no staff. Request No. 7 was to determine the identity of the purported lessor. Request No. 8 was to determine where Diamond Trucking was operating from, since they weren't dispatching any trucks, and the old office was empty. *Ultimately, [Wilkinson's] stated reasons for the requests are simply a restatement of the requests themselves.*

Judge's decision, infra, slip op. at XX (emphasis added).

Second, in his posthearing brief to the judge, the General Counsel's attorney failed to cite any facts allegedly furnishing an objective basis for believing that an alter-ego relationship existed between the Respondent and any other entity. Readers of the judge's decision may question why the judge did not mention *any* of the facts my colleagues rely on to find that the relevancy of the requested information was adequately established. The reason is that the General Counsel did not cite *any* of those facts in his posthearing brief to the judge. Instead, like his principal witness Wilkinson, the General Counsel's attorney merely reiterated the reasons *why* the Union wanted the information—primarily, to determine whether an alter-ego relationship existed. He wrote:

> Item 1 is relevant and necessary for the Union to determine whether an alter-ego relationship existed. Item 2 is also relevant and necessary for the Union to determine whether an alter-ego relationship existed. Item 3 is relevant and necessary for the Union to determine and confirm appropriate picketing locations. Item 4 is relevant and necessary for the Union to determine whether an alter-ego relationship existed. Item 5 is relevant and necessary for the Union to confirm that the Respondent was leasing its trucks . . . . Item 6 is relevant and necessary for the Union to determine whether an alter-ego relationship existed. Item 7 is relevant and necessary for the Union to determine whether an alter-ego relationship existed. Item 8 is relevant and necessary for the Union to determine and confirm appropriate picketing locations.

Posthearing Brief of Counsel for the General Counsel, at 14.

The General Counsel recited the applicable legal standard, but his application of the standard was limited to the vague and general statement that the Union had an objective factual basis for its belief that a "possible" alter-ego relationship existed "based upon the Respondent's assertions about picketing locations and ownership and leasing of trucks." Id. at 15.

Third, in his exceptions brief to the Board, the General Counsel's attorney finally cited specific facts and argued that they furnished an objective basis for the Union to believe an alter-ego relationship existed. Setting aside the merits of the General Counsel's argument in this regard, it is well established that "'[a] contention raised for the first time in exceptions to the Board is ordinarily untimely raised and, thus, deemed waived.'" *EZ Park, Inc.*, 360 NLRB 672, 672 fn. 1 (2014) (quoting *Yorkaire, Inc.*, 297 NLRB at 401); see also, e.g., *Strategic Resources, Inc.*, 364 NLRB No. 42, slip op. at 1 fn. 2 (2016); *Smoke House Restaurant*, 347 NLRB at 195. Accordingly, the General Counsel's untimely contention should be disregarded.

[10] I say "at least some" of the factors because "[n]o single factor is determinative, and not all are necessary to establish alter ego status." *T.E. Elevator Corp.*, 268 NLRB 1461, 1461 (1984).

Fourth, even reaching the merits of the General Counsel's contention, the facts the General Counsel cites do not support a reasonable belief that an alter-ego relationship existed between Diamond Trucking and any other entity. In his exceptions brief, the General Counsel cites the following.

- Mike Bowyer is Teresa Pendleton's brother.
- Bowyer has participated in contract negotiations with the Union and advised Pendleton regarding those negotiations.
- Bowyer is affiliated with Kokomo Gravel, a non-union company that hauls stone and gravel, and Kokomo Gravel has an office and place of business at the same address as Diamond Trucking's office and place of business.
- Diamond Trucking has used Kokomo Gravel as a subcontractor.

These facts do not support a reasonable belief that *any* of the factors relevant to an alter-ego determination existed here.[11] Again, those factors are whether two employers "have substantially identical ownership, business purpose, operations, management, supervision, premises, equipment, and customers." *Island Architectural Woodwork, Inc.*, supra, slip op. at 4.

- There is no evidence that Bowyer is part owner of Diamond Trucking or that Pendleton is part owner of Kokomo Gravel. There is no evidence that Bowyer has ever played a managerial or supervisory role in Diamond Trucking or that Pendleton has ever played a managerial or supervisory role in Kokomo Gravel. The mere fact that two different companies are owned by siblings is irrelevant to an alter-ego determination.
- That Bowyer attended Diamond Trucking's collective-bargaining sessions with the Union to advise his sister is also irrelevant to alter-ego status. It certainly does not constitute evidence that Bowyer was part owner of, or played any managerial or supervisory role in, Diamond Trucking.[12]
- Kokomo Gravel and Diamond Trucking do not have substantially identical operations. Although both companies haul stone, Diamond Trucking hauls asphalt, and Kokomo Gravel does not.
- Kokomo Gravel and Diamond Trucking do not have substantially identical customers. Diamond Trucking delivers to highway construction projects, while Kokomo Gravel delivers to individuals.
- Kokomo Gravel and Diamond Trucking do not share the same premises. Before Diamond Trucking ceased operations, they shared the same street address—2653 South 400 West—but they maintained separate offices (as the Union was well aware), and other companies also shared the same street address, including a recycling business and an excavating company. Everyday experience shows that multiple businesses routinely share the same street address—occupying separate offices—and nobody would reasonably believe that such businesses are alter egos of one another merely on that account.
- Finally, that one business subcontracts work to another business does not evidence an alter-ego relationship between the two entities. Moreover, Diamond Trucking only subcontracted with Kokomo Gravel as a last resort when none of the 15 to 20 unionized companies with which it typically subcontracted was available.

The facts the General Counsel cites do not support the requisite reasonable belief.

My colleagues attempt to bolster the General Counsel's rationale, but their effort fails. They write:

> [T]he Union had reason to believe that the Respondent, Kokomo Gravel, and/or DT Trucking shared the use and ownership of the Respondent's critical equipment: its fleet of trucks. When the Respondent assertedly returned its trucks to the lessor – DT Trucking – it returned the trucks to the common place of business of the Respondent and Kokomo Gravel in Peru. Although there were several other businesses located at that address, only Diamond Trucking and Kokomo Gravel used the type of trucks at issue here. Moreover, the record does not show and the Respondent does not identify any independent truck leasing company,

[11] Contrary to my colleagues' assertion, I do not imply that the Union must "establish the actual existence of factors establishing an alter ego relationship in order to meet its burden of showing the relevance of the requested information."

[12] My colleagues attempt to parlay Bowyer's attendance at collective-bargaining sessions in an advisory capacity to his sister into a finding that Bowyer played a managerial or supervisory role in Diamond Trucking, claiming that he "was involved in the supervision or management of the Respondent's labor relations." This strained application of the alter-ego standard stretches the terms *supervisor* and *manager* far beyond their well-established limits. Thus, NLRA Sec. 2(11) defines the term *supervisor*, in relevant part, as any individual who possesses one of 12 enumerated types of authority over "other employees." There is no evidence Bowyer supervised any Diamond Trucking employees. "Managerial employees are defined as those who formulate and effectuate management policies by expressing and making operative the decisions of their employer." *NLRB v. Yeshiva University*, 444 U.S. 672, 682 (1980) (internal quotations omitted). There is no evidence Bowyer formulated and effectuated management policies of Diamond Trucking by expressing and making operative its decisions.

named DT Trucking or otherwise, housed at that address. The Union was thus faced with the Respondent's assertion that it did not own the trucks while the trucks nevertheless remained parked at what, up until the start of the strike at least, was the Respondent's (and Kokomo Gravel's) headquarters. These circumstances validated the Union's stated aim of confirming the accuracy of the Respondent's representations concerning the ownership of the trucks, and gave rise to a reasonable belief by the Union that the Respondent and a third party or parties, whether Kokomo Gravel or DT Trucking, shared key equipment.

The problem with this rationale is that it is contradicted by record evidence. Contrary to my colleagues, the Union did *not* have reason to believe that Diamond Trucking, Kokomo Gravel and/or DT Trucking "shared key equipment" or "shared the use" of Diamond's truck fleet. We know this because Wilkinson, the Union's vice president, so testified. Again, Wilkinson testified that (i) he knew Diamond's trucks on sight from their identifying numbers;[13] (ii) after the strike commenced, he *never* saw a Diamond Trucking truck doing work that Diamond Trucking had previously performed;[14] (iii) after the strike commenced, he *never* saw a Kokomo Gravel truck doing work that Diamond Trucking had previously performed; and (iv) *he had no reason to believe* that after the strike commenced, Diamond Trucking performed work *through Kokomo Gravel or any other company*.

As for shared ownership of Diamond Trucking's fleet, even assuming the Union had reason to believe—more like reason to suspect—overlapping ownership of Diamond's trucks, mere overlapping ownership without use is not probative of alter-ego status. Again, another name for an alter ego is a *disguised continuance*. When, as here, a respondent employer has ceased operating, the purpose of an alter-ego inquiry is to determine whether it is actually *continuing* to operate, *disguised* as another entity. However, Union Vice President Wilkinson testified that he had no reason to believe that Diamond Trucking was continuing to operate through Kokomo Gravel or any other company. That admission effectively negates any possibility that the Union reasonably believed, based on objective facts, that Kokomo Gravel or DT Trucking was Diamond Trucking's alter ego. Accordingly, the record evidence fails to establish the relevance of the requested information, and the Respondent did not violate Section 8(a)(5) when it refused to furnish that information.[15]

CONCLUSION

For the reasons set forth above, I would affirm the judge's dismissal of the complaint. Accordingly, I respectfully dissent.

Dated, Washington, D.C. April 25, 2017

Philip A. Miscimarra, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

[13] In addition, Pendleton testified that Diamond's trucks were black and white and Kokomo Gravel's trucks are red.

[14] My colleagues rely on Wilkinson's testimony that, on one occasion in October, a truck formerly used by Diamond Trucking was seen operating with the name "Kokomo Sand and Gravel" on its side. This testimony does not support my colleagues' position because, as Wilkinson's testimony later makes clear, the truck was not performing any work on projects that Diamond Trucking had previously worked on. Once Diamond Trucking returned its trucks to the lessor, it stands to reason that the lessor would lease or sell them to another entity. Further, Wilkinson testified that the name on the truck was "Kokomo Sand and Gravel." My colleagues find that the testimony suggests an alter-ego relationship between the Respondent and Kokomo Gravel, but there is no indication in the record that Kokomo Gravel is the same as or in any way associated with Kokomo Sand and Gravel.

[15] My colleagues draw a distinction between "alter ego" and "disguised continuance." Typically, these terms are treated as synonymous. See, e.g., *Apex Electric Services*, 350 NLRB 40, 45 fn. 3 (2007) (Member Liebman , dissenting in part) ("An alter ego is often described as a 'disguised continuance of the old employer.' *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942)."). But even granting the distinction, the Union still lacked the necessary reasonable belief. My colleagues cite *T.E. Elevator Corp.*, supra, for the proposition that an alter-ego relationship may still be found "[a]bsent a disguised continuance." But as the Board in *T.E. Elevator Corp.* further stated, an alter-ego relationship may be found "[a]bsent a disguised continuance . . . *only* where the two enterprises have substantially identical ownership, business purpose, management, supervision, customers, operation, *and* equipment." 268 NLRB at 1461 (emphasis added; internal quotations omitted). Here, at most, the Union merely suspected one of these factors—overlapping ownership of Diamond's trucks—which is an insufficient basis for a reasonable belief that an alter-ego relationship exists absent a disguised continuance.

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with Teamsters Joint Council No. 69, affiliated with the International Brotherhood of Teamsters, by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's employees in the following appropriate unit:

> The employees described in Article 1 of the most recent Highway, Heavy, Railroad and Underground Utility Contracting collective-bargaining agreement between Highway, Heavy and Utility Division - ICA, Inc. and the Union which was effective from April 1, 2008 to May 31, 2014, and of which Respondent is signatory.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL furnish to the Union in a timely manner the information requested by the Union in numbered items 1 through 7 in its letter dated November 20, 2014.

DIAMOND TRUCKING, INC.

The Board's decision can be found at www.nlrb.gov/case/25–CA–144424 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Raifael Williams, Esq., for the General Counsel.
James H. Hanson and *Alaina C. Hobbs, Esqs. (Scopelitis, Garvin, Light, Hanson & Feary, P.C.),* for the Respondent.
Geoffrey Lohman, Esq. (Fillenwarth, Dennerline, Groth & Towe), for the Charging Party.

DECISION

STATEMENT OF THE CASE

SUSAN A. FLYNN, Administrative Law Judge. This case was tried in Indianapolis, Indiana, on August 25, 2015. The Union filed the charge on January 15, 2015, and the General Counsel issued the complaint on May 29, 2015.

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) when it refused to furnish certain information requested by the Union. The Respondent filed an answer, denying all material allegations.

After the trial, the General Counsel and the Respondent filed briefs, which I have read and considered. Based on the entire record in this case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent operated its business out of 2653 South 400 West, Peru, Indiana, at the relevant time period. In the 12 months before May 29, 2015, the Respondent purchased and received at that facility goods valued in excess of $50,000 from other enterprises located within the State of Indiana, each of which had received these goods directly from points outside the State of Indiana. Accordingly, I find, and Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Background

The Respondent, Diamond Trucking, Inc., hauls stone and asphalt for highway construction projects for the State of Indiana. (Tr. 12.) Teresa Pendleton is the owner and president of the Company. (GC Exh. 1(c).) There are no other Board members. (Tr. 11.) Pendleton and Ted Peters, field supervisor and dispatcher, worked at the office at 2653 South 400 West, in Peru, Indiana. The Company employed approximately 50 truckdrivers.

Pendleton's brother is Mike Bowyer. He operates Kokomo Gravel, a nonunionized trucking company that hauls stone and gravel, and that has an office at the same location as Diamond Trucking.[1] (Tr. 24, 26.) Bowyer is not an officer of Diamond Trucking, but he did participate in contract negotiations between Diamond Trucking and the Union, along with Pendleton, Peters, and the Respondent's attorney. (Tr. 17.) Pendleton had

[1] Other companies are also located at that address, including a recycling business and an excavating company. (Tr. 32.)

requested his presence to advise her, since she had never negotiated a contract before. (Tr. 25–26.)

Diamond Trucking used Kokomo as a subcontractor on certain jobs in the past. Normally, in situations where Diamond Trucking had insufficient trucks to fulfill a contract, it would subcontract with a unionized company, and it had a list of 15–20 such companies for that purpose. However, when none were available, it did subcontract with Kokomo. (Tr. 34–35.)

The Respondent's employees are unionized. The Respondent is a signatory to the Highway, Heavy, Railroad and Underground Utility Contracting Agreement between the Highway, Heavy and Utility Division of the Indiana Contracting Association, Inc., and the Union. The most recent collective-bargaining agreement was effective April 1, 2008 through March 31, 2014. (GC Exh. 2.) Danny Barton is the president and James Wilkinson is the vice president of Union Local 69.

Negotiations for a new contract began in May 2014. The parties were unsuccessful in reaching an agreement. The Respondent presented its best and final offer to the Union. Membership voted it down and authorized a strike on August 20, 2014. Picketing at the Respondent's office then began. The parties resumed negotiations thereafter, and in September the Respondent made another best and final offer. That offer was likewise rejected by the Union in October so the strike continued.

The Respondent's Actions after the Strike

Diamond Trucking kept most of its 50 trucks at the 2653 South 400 West location. Some were parked at other locations, at plants where they were performing work, or drivers might take the trucks home overnight. (Tr. 36.) The Union set up picket lines at each of the business locations where the trucks were parked, including the jobsites. (Tr. 63, 68–69, 77.) After the strike started, all trucks were returned to the office location, and the Respondent conducted no further business.[2] On or about August 25, within a week of the beginning of the strike, the Respondent closed the office and moved the trucks to leased space on Grissom Air Force Base, in a fenced-in lot owned by the County located on Hoosier Boulevard. On August 25, the Respondent's attorney notified Wilkinson by email that the Peru office had been closed and the trucks moved to Kokomo.[3] (GC Exh. 3.) He further stated that, for those reasons, picketing was no longer permitted at that location as it would be unlawful secondary picketing. The Union then picketed in front of the Hoosier Boulevard lot.

In November, the Respondent determined it could no longer afford to rent that lot or keep the trucks. The Diamond Trucking Company signage was removed from the doors of 44 of those trucks. Those trucks were then returned to 2653 South 400 West and turned back over to the leasing company, DT Trucking. (Tr. 38, 39.) The other six trucks were moved to another lot on Grissom, at 1801 Thunderbolt Avenue; a week later, those six trucks were moved approximately 50 feet, to 1701 Thunderbolt. The Union picketed each of these locations, when the trucks were parked there.

[2] The strike is ongoing, as the parties have not engaged in any further negotiations since September 2014.

[3] He did not indicate the specific location or street address.

On November 7, the union attorney sent Respondent's attorney an email stating that they had noticed that some of the trucks were returned to the Peru office, and since the Respondent had returned to its old office, the Union intended to resume picketing that location. (GC Exh. 4.)

The Respondent's attorney replied on November 10, acknowledging that some trucks had been returned to that location. He stated that the Respondent does not own those trucks, that the signage had been removed so the trucks could be leased to someone else or sold, and that the Respondent had not used the trucks in 2 months. He reiterated that picketing was therefore not permitted at that location. (GC Exh. 5.)

Union President Barton wrote Pendleton on November 13, requesting the Respondent's new business address. (GC Exh. 6.)

The Respondent's attorney responded on November 20. He stated that trucks were parked at 1701 Thunderbolt Avenue in Peru. (R. Exh. 1)

Union Request for Information

That same day, Union Vice President Wilkinson wrote Pendleton, requesting further information, in order to "determine the scope of the Company's business operations and its various locations."

1. Identify the owners of Diamond Trucking including any individual or entity which has a minority ownership share from January 1, 2014 to present.
2. Identify the entity/individual which owns the trucks which have been used by Diamond Trucking, Inc. in its operations from January 1, 2014 to present.
3. For the trucks referenced in Request No. 2, provide the following information for each truck:
   a. Model and year of each truck
   b. Owner of each truck
   c. Vehicle identification number of each truck
   d. Indiana license plate number for each truck
4. For the trucks referenced in Request No. 2, provide the following information for each truck:
   a. The entity/individual in whose name the trucks are registered with the Indiana Bureau of Motor Vehicles from January 1, 2014, to present
   b. The entity/individual who purchased and/or obtained license plates used for the trucks from January 1, 2014 to present.
5. Provide a copy of all contracts, memoranda of understanding, purchase agreements or other documents which reflect the leasing of trucks by Diamond Trucking, Inc.
6. Provide the names, business addresses and business phone numbers of all Diamond Trucking's directors, stockholders, owners, corporate officers and management personnel.
7. Provide the names, business addresses and phone numbers of all directors, stockholders, owners, corporate officers and management personnel of any individuals/entities which have leased vehicles to Diamond Trucking, Inc. from January 1, 2014 to present.
8. Identify each location (street address, city and state)

> where Diamond Trucking has conducted business and/or where the trucks used in its operations were and/or dispatched from January 1, 2014 to present.

[GC Exh. 7.]

The Respondent's attorney emailed Wilkinson on December 3, responding to Request No. 8. He stated that "until on or about August 22, 2014, Diamond Trucking conducted business and dispatched its trucks from an office located at 2653 S 400 W Peru, Indiana. After the strike began, Diamond Trucking has not conducted business or dispatched its trucks from any location, and the trucks have been parked at Grissom Air Force Base, 1701 Thunderbolt Ave, Peru, Indiana 46970." He indicated that the Respondent refused to provide the other requested information, because the Union had not established its relevance. (GC Exh. 8.)

The Union's attorney then emailed the Respondent's attorney on December 29, stating that the Union was "entitled to know the physical locations where Diamond Trucking is doing business including the storage of vehicles used in its operations." He said that, since the Respondent asserted that the trucks located at the old office location are not owned by Respondent, and that Diamond's trucks are at Grissom, the information was necessary in order to confirm the accuracy of the Respondent's assertions as to the ownership and leasing of the trucks. He further stated that

> the Union has reason to suspect that the (sic) Diamond Trucking is part of a group of entities under common control. The Board has ruled that unions are entitled to information regarding such possible alter ego/double breasted relationships. (citation omitted) To the extent that Diamond Trucking does not own certain vehicles, the Union believes that related third parties are the owners of these trucks through various leasing entities. These third parties have ownership and management roles with Diamond Trucking. The Union's November 20 request has thus sought relevant information regarding these business relationships between Diamond Trucking and third parties.

[GC Exh. 9.]

The Respondent's attorney replied on January 9, 2015, reiterating his position that the Respondent would not provide the information requested in Requests No. 1–7 since it was not relevant. He stated that

> the trucks Diamond Trucking used were parked at 2653 S 400 W, Peru IN until approximately August 22, 2014. At that point, the trucks were moved to Grissom Air Reserve Base as I notified James Wilkinson in my letter of December 3, 2014. In mid-November, Diamond Trucking determined it could no longer afford to pay the lease on some of the trucks. It therefore returned the trucks to the lessors at 2653 S 400 W, Peru, IN. The trucks Diamond Trucking continued to lease were then moved to 1701 Thunderbolt Avenue, Peru, IN as Ms. Pendleton informed Danny Barton in her letter of November 20, 2014.
>
> The union is not entitled to the other information requested about Diamond Trucking's business relationships. Although you quote a decision requiring the union to request information that would be of use "in carrying out its statutory duties and responsibilities," you do not identify which statutory duty or responsibility the requested information will help the union fulfill. (citation omitted) You only allege that Diamond Trucking "is part of a group of entities under common control," but there is no control group concept in federal labor law.
>
> To the extent you instead meant to request this information because of any alleged alter ego relationship, you still have not demonstrated "a reasonable objective basis for believing that" such a relationship exists nor have you demonstrated why that would be relevant in this particular case. . . .

[GC Exh. 10.]

III. LEGAL STANDARDS AND ANALYSIS

The General Counsel contends that the information requested is relevant and necessary. He asserts that each request is necessary in order for the Union to determine where it could lawfully picket the Respondent. Specifically, he argues that Requests No. 1, 2, 4, 6, and 7 are relevant and necessary for the Union to determine whether an alter-ego relationship exists; Request No. 3 is relevant and necessary for the Union to determine and confirm appropriate picketing locations; and Request No. 5 is relevant and necessary for the Union to confirm that the Respondent was in fact leasing its trucks as represented in Respondent's attorney's November 10 email.

The Respondent agrees that the Union is entitled to the information in Request No. 8, regarding the location of Diamond Trucking, for purposes of determining the appropriate location for picketing, and it provided that information. It contends, however, that the remaining requests are irrelevant to determining where to picket, and that there is no reasonable basis for an alter-ego theory.

Pursuant to Section 8(a)(5) of the Act, it is an unfair labor practice for an employer to refuse to bargain collectively with the representative of its employees. The duty to bargain includes the duty to provide information that is necessary for the union to perform its functions as representative of the bargaining unit. Information pertaining to mandatory subjects of bargaining is presumptively relevant to the union's role. *Southern California Gas Co.*, 344 NLRB 231 (2005); *NLRB v. Item Co.*, 220 F.2d 956 (5th Cir.), cert. denied 350 U.S. 836 (1955).

Where, as here, a union requests information that does not involve the bargaining unit, there is no presumption of relevance. Rather, the union must establish the relevance and necessity of the information. *Trim Corp.*, 349 NLRB 608 (2007) (information request concerning the existence of an alleged alter-ego operation is not presumptively relevant). Further, the union must have a reasonable objective factual basis for the information requested. *Piggly Wiggly Midwest LLC*, 357 NLRB 2344 (2012). A union cannot meet its burden based on a mere suspicion that an alter-ego or single employer relationship exists; it must have an objective, factual basis for believing that the relationship exists. *Cannelton Industries*, 339 NLRB 996 (2003); see *M. Scher & Son, Inc.*, 286 NLRB 688, 691 (1987), citing *Bohemia Inc.,* 272 NLRB 1128 (1984). On the other hand, if a union has a reasonable objective basis for its belief that several companies constitute a single employer, or a com-

pany is an alter-ego, it has met its burden of showing relevance. *Blue Diamond Co.*, 295 NLRB 1007 (1989); *Shoppers Food Warehouse*, 315 NLRB 258 (1994); *Contract Flooring Systems, Inc.,* 344 NLRB 925 (2005).

A union generally has the right to picket at the site of the dispute or where the employer is engaged in normal business operations. See *Operating Engineers Local 150 (Harsco Corp.)* 313 NLRB 659 (1994), affd. 47 F.3d 218 (1995). Therefore, in the instant case, the Union is entitled to information that would assist it in determining such locations. That is precisely the information requested in Request No. 8—each location (street address, city, and state) where Diamond Trucking has conducted business and/or where the trucks used in its operations were and/or dispatched from January 1, 2014 to present. The Respondent provided that information and Request No. 8 is not at issue herein.

In addition to the assertions in the correspondence between the parties, we have Wilkinson's testimony as to the reasons for his information requests. (Tr. 55–59.) He said he wanted the information in Request No. 1 to determine who actually owned Diamond Trucking. Request No. 2 was to learn who owned the trucks, because the Union had the right to picket the old office if Diamond Trucking still owned them. The same basis was given for Request No. 3, to determine ownership of each truck. Request No. 4 was intended to find out who the trucks were registered to, which would also explain who owned them. Request No. 5 would show whether they were, in fact, leased. Request No. 6 was to learn where Diamond Trucking was conducting its day-to-day business. The Union sought this, since the lots at Grissom where the trucks were parked had no offices, no telephones, no staff. Request No. 7 was to determine the identity of the purported lessor. Request No. 8 was to determine where Diamond Trucking was operating from, since they weren't dispatching any trucks, and the old office was empty. Ultimately, his stated reasons for the requests are simply a restatement of the requests themselves.

The General Counsel has failed to meet his burden as to the seven requests at issue. The Union knew that the Respondent was not conducting any business. The Respondent engaged in no business activity once the strike began. Since it had no drivers, it could not operate and it vacated its office. No explanation was given for what business operations the Union thought could possibly be going on under the circumstances. That left the location of the trucks as the only possible picketing option, which the Union seems to have considered unsatisfactory. Nonetheless, there are trucks in the Respondent's possession at Grissom Air Force Base; the Union was notified of their location and it picketed there. The Diamond Trucking signage was removed from some other trucks that were moved back to the old office location when the leases were terminated. The Union claims to have been suspicious, apparently suspecting that Pendleton's brother had some ownership stake in Diamond Trucking or owned the trucks used by Diamond Trucking, and hoped to justify picketing at 2653 South 400 West if it could establish a connection between Diamond Trucking and Bowyer and/or Kokomo. However, the Union provided no objective or reasonable or factual basis for such suspicion; it was merely speculation, at best. In fact, at the hearing, Wilkinson testified that he had no proof that Respondent's counsel's statements were true, attempting to shift the burden to the Respondent rather than demonstrate the Union's objective factual basis for its belief. Even if Bowyer or Kokomo owns those trucks, rather than DT Trucking, that does not provide support for the Union's position. There is not one iota of support for an alter-ego theory. The trucks were not used by the Respondent after August 2014, when the strike began. Kokomo did not perform any work previously performed by the Respondent; the Union conceded that all such work was performed by union companies. The mere fact that the two companies had offices at the same location, that Pendleton and Bowyer are siblings, and that Bowyer attended contract negotiations with Pendleton is wholly insufficient to meet its burden. The General Counsel has not shown that the information requested would support an alter-ego theory, even if there were a reasonable basis for such belief, nor that it would in any way assist the Union in determining appropriate additional locations to picket.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The complaint is dismissed.

Dated, Washington, D.C., November 24, 2015

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.