

**Nos. 17-1151, 17-1184**

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**TEACHERS COLLEGE, COLUMBIA UNIVERSITY**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**LOCAL 2110, TECHNICAL, OFFICE AND PROFESSIONAL  
UNION, UNITED AUTO WORKERS, AFL-CIO**

**Intervenor**

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Local Rule 28(a)(1) of the Rules of this Court, counsel for the National Labor Relations Board (the Board) certifies the following:

### **A. Parties and Amici**

Teachers College, Columbia University, was the Respondent before the Board and is Petitioner/Cross-Respondent before the Court. Local 2110, Technical, Office and Professional Union, United Auto Workers, AFL-CIO (the Union) was the charging party before the Board and has intervened on behalf of the Board. The Board is the Respondent/Cross-Petitioner before the Court; its General Counsel was a party before the Board. There were no intervenors or amici before the Board.

### **B. Ruling Under Review**

The ruling under review is a Decision and Order of the Board in *Teachers College, Columbia University*, 365 NLRB No. 86 (May 31, 2017).

### **C. Related Cases**

This case has not previously been before this or any other court. Board counsel is not aware of any related cases.

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## **GLOSSARY**

Act	National Labor Relations Act, 29 U.S.C. § 151 et seq.
Board	National Labor Relations Board
Br.	The College's opening brief
College	Teacher's College, Columbia University
JA	The parties' joint deferred appendix
SJA	The parties' supplemental joint deferred appendix
Union	Local 2110, Technical, Office and Professional Union, United Auto Workers, AFL-CIO

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**BRIEF FOR  
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**JURISDICTIONAL STATEMENT**

This case is before the Court on the petition of Teachers College, Columbia University (the College) for review, and the cross-application of the National

Labor Relations Board (the Board) for enforcement, of a Board Order issued against the College on May 31, 2017, and reported at 365 NLRB No. 86. (JA 462-68.)<sup>1</sup> Local 2110, Technical, Office and Professional Union, United Auto Workers, AFL-CIO (the Union) has intervened on the Board's behalf.

The Board had subject-matter jurisdiction under Section 10(a) of the National Labor Relations Act (the Act) (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction over this appeal because the Board's Order is final under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). Venue is proper under Section 10(f), which provides that petitions for review may be filed in this Court and that the Court may enforce the Board's Order in that circumstance. The College's petition and the Board's cross-application were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders.

### **ISSUE PRESENTED**

Whether substantial evidence supports the Board's finding that the College violated Section 8(a)(5) and (1) of the Act by refusing to provide the Union with the information relevant to its duties as collective-bargaining representative that it requested on October 22, 2015.

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<sup>1</sup> In this final brief, references preceding a semicolon are to the Board's findings; those following are to supporting evidence. "JA" refers to the parties' joint deferred appendix and "SJA" refers to the parties' supplemental joint deferred appendix.

## **RELEVANT STATUTORY PROVISIONS**

Relevant statutory provisions are set forth in the College's brief.

### **STATEMENT OF THE CASE**

On May 31, 2016, after investigating a charge filed by the Union, the Board's General Counsel issued a complaint alleging that the College violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with information it requested on October 22, 2015. (JA 462; 140-47.) After a hearing, an administrative law judge found that the College violated the Act as alleged. (JA 462-68.)

On January 27, 2017, the College filed exceptions to the judge's decision. (JA 415-21.) On May 31, 2017, the Board issued a Decision and Order adopting the judge's decision in full. (JA 462.)

#### **I. THE BOARD'S FINDINGS OF FACT**

##### **A. The College's Operations and the Bargaining Unit**

The College is a nonprofit higher-education institution that serves as Columbia University's graduate school of education, although the two schools are separate legal entities. (JA 462; 94.) As of the 2015-16 school year, 5,090 students were enrolled at the College. (JA 462; 14-15.) The Union or its predecessors have represented the College's secretarial and clerical employees since at least the early 1990s. (JA 462; 95.) In 2007, the College and the Union

negotiated a successor collective-bargaining agreement covering “all campus full-time and part-time . . . secretarial and clerical employees . . . excluding part-timers who work less than twenty hours,” with part-timers defined as excluding current students of the College, Columbia, or Barnard College. (JA 462-63, 463 n.3; 157.) The parties have executed successive memoranda of agreement extending the agreement from its February 2012 expiration through February 2018. (JA 463; 159-69.)

**B. 2012 Grievance and Information Request**

In 2012, the Union, during a collective-bargaining session, the Union told the College that it believed that some professional staff were being paid hourly, and therefore should be represented by the Union. (JA 463; 99-100.) On April 2, the Union filed a grievance alleging that the College was improperly excluding certain positions from the unit. The grievance notice included an information request seeking a list of, and job descriptions for, all nonunit part-time, casual, hourly, temporary, and internship positions at the College. (JA 463, 463 n.5; 399.)

On June 8, the College by email requested clarification of the Union’s information request and questioned whether some of the requested information related to the grievance that the Union had filed. (JA 463; 398.) On June 13, by reply email, the Union clarified its request, and asserted that the College had been improperly excluding positions from the bargaining unit and unlawfully

transferring unit work to nonunit employees. (JA 463; 397.) On September 7, the College informed the Union by email that it had not identified any issues regarding the improper transfer of unit work, and asked the Union again to clarify its request. (JA 463; 400-01, 106-07.) The College also expressed its belief that the Union, through the information request, was seeking evidence to support filing NLRB charges, and that the College “had no obligation to provide information.” (JA 463; 400-01.)

**C. The Union Requests Arbitration; the Arbitrator Finds the Grievance Timely and Arbitrable**

On December 4, 2012, the College formally denied the Union’s grievance. (JA 463; 402-04.) The Union notified the College on December 13 that it intended to arbitrate the dispute. (JA 463; 171.) The College challenged whether the grievance was arbitrable, and the parties exchanged correspondence discussing the issue. (JA 463; 402-04, 174.) Unable to come to agreement on the issue, on June 13, 2014, the parties instead agreed to submit the question to an arbitrator. (JA 463; 174-85.) The arbitrator requested pre-hearing briefs from the parties on the issue of whether the grievance was arbitrable. (JA 463 n.7; 178.) The College argued that the Union’s arbitration request was untimely, and that the grievance involved solely unit-placement issues, which were not arbitrable. (JA 463; 175.)

In November 2014, the Union informed the College by email that it needed the information it previously requested in April 2012 in order to prepare for

arbitration. In doing so, the Union explained the relevance of the requested information at some length. (JA 463; 368-69.) Specifically, the Union stated that the parties' collective-bargaining agreement included a provision that defined the scope of the bargaining unit, as well as a provision stating that "any work connected with a job performed by a full-time or part-time employee . . . shall be performed by an employee within the bargaining unit only." (JA 463; 157-58, 368-69.) The Union explained that information about nonunit employees, including "hourly professional" employees, is relevant to determining whether those employees are doing bargaining-unit work. (JA 463; 54, 368-69.) At the request of the arbitrator, the parties attempted to discuss settlement, but those efforts stalled. (JA 463; 370.)

On January 21, 2015, the arbitrator issued an Opinion and Award finding that the Union had timely requested arbitration, that the question of whether non-bargaining unit employees were performing unit work was arbitrable, and ordered the grievance to proceed to arbitration. (JA 463; 174-85.)

On February 20, the Union renewed its information request, stating that in order to prepare for arbitration, it needed the College to provide records of all hourly professional, temporary, interim, casual, and internship positions since July 1, 2012, in order to determine if those employees were doing bargaining-unit work.

The Union also asked the arbitrator to set a schedule for the College to provide the requested information and to set a hearing date. (JA 463-64; 372-74, SJA 1-5.)

**D. The Arbitrator Directs the Parties To Discuss the Information Request; the Union Narrows Its Request; the College Continues To Raise Objections to the Union's Request**

On March 25, 2015, the arbitrator directed the parties to reach an agreement within 30 days regarding what information the College would provide to the Union. (JA 464; SJA 1-5.) In doing so, the arbitrator noted that the information request “is designed to acquire information so as to determine if the College is using non-unit employees to perform unit work.” (SJA 3.) The arbitrator further stated that the College had acknowledged in 2012 that it knew what information the Union sought, and that “the information the Union was seeking was relevant to the instant grievance.” (SJA 3.) However, the arbitrator was “not able to determine exactly what information the College must provide to the Union,” and indicated that the Union was “not entitled to information going back as far as the date of the grievance.” (SJA 4.) If the College refused to provide any information after 30 days, the arbitrator stated that a hearing would be set as soon as practicable and that he would determine whether the College's failure to provide the information warrants drawing an adverse inference in the arbitration against the College. (SJA 5.) The arbitrator also indicated that the Union could “file charges

with the [Board], or issue a subpoena to the College for the information it seeks.”  
(SJA 4.)

On April 13, the Union sent the College a letter with a streamlined request, seeking the names, titles, position types, departments, rates of pay, work schedules, and job descriptions for four categories of employees. (JA 464; 69-70, 194-96.)

On April 17, the College responded by stating that the information request was burdensome and requesting that the Union identify the work allegedly transferred to nonunit employees, provide the basis for the Union’s belief that work had been so transferred, and state the connection between unit work and the information requested. The College also stated that, if the Union did not provide that information, it would be precluded from responding to the Union’s April 13 request in a meaningful fashion. (JA 464; 198-202.)

On April 29, the College sent a letter to the arbitrator accusing the Union of dilatory tactics and asking that the grievance be dismissed. (JA 464; 204-07.) On September 10, the Union sent the College and the arbitrator a letter that, among other things, explained the relevance of the requested information. (JA 464; 335-40.) The Union stated that it believed the College had transferred bargaining-unit work, and that the contract forbids such transfers, “regardless of the destination.” (JA 337-38.) The Union then explained that names are relevant because they assist it in “identifying non-unit employees” and “evaluating whether workers in these

non-unit positions perform bargaining unit work.” (JA 338.) Titles and position types help the Union evaluate “the actual job responsibilities,” identify comparators, and indicate what role the College intends those individuals to fill. (JA 338.) The Union contended that the individual’s department is relevant because an individual’s responsibilities depend in part on the work circumstances, and gave the example of an individual who works in a department with no support staff being unlikely to have supervisory responsibilities. (JA 338.) The Union further explained that work schedules relate to how much work nonunit employees perform and whether they are replacing unit jobs; rates of pay tend to indicate whether a position is supervisory or comparable to a unit position; and job descriptions are “self-evidently relevant to the question of whether a non-unit employee” is performing unit work. (JA 338.)

On September 28, the arbitrator issued an Opinion and Award denying the College’s motion to dismiss the grievance. (JA 464; 346-50.) The Award stated that “[t]he parties have 30 days to agree to what information the Union needs that the College is willing to provide,” and “[i]f no agreement is reached, the Union has an additional 30 days to file unfair labor practice charges . . . or to issue a subpoena to the College for the information it seeks.” (JA 350.)

In response to the arbitrator’s order, the College resent its April 17, 2015 responsive letter to the Union. (JA 464; JA 356.) After further correspondence,

the Union proposed providing a list of specific nonunit positions that it believed were performing unit work. (JA 464; 355.) In turn, the College asked the Union to instead provide a list of the specific “tasks” that such employees were performing that the Union alleged constituted bargaining-unit work. (JA 464; 353-54.)

**E. The Union Goes Door-to-Door To Collect Information Supporting Its October 22, 2015 Final Information Request; the College Still Refuses To Provide Information**

As the parties’ correspondence continued, the Union asked its members to canvass the College and review any documents in their possession to determine the specific positions that were possibly performing unit work. The Union then relayed that information to its attorney and compiled a list of 34 positions, going building-by-building and floor-by-floor. (JA 464; 33-35.)

On October 22, the Union sent the College an email again requesting information and providing a chart including, as best it could determine, the titles, departments, and position histories for all 34 positions. (JA 464; 359-61.) The chart also included a “comments” section explaining the basis for the Union’s belief that the person at issue was performing unit work. Some comments included notes that the nonunit employees at issue were staffing a front desk or working alongside unit members in a department. Other comments explicitly noted that unit employees had been replaced, such as in the Accounts Payable department, which had converted from three full-time unit positions to just one; former unit

employee Tamara Stancheski had been promoted out of the unit but was still doing the same work, and a nonunit bookkeeping clerk had been hired. (JA 464; 360-61.)

The Union sent the College a cover letter with the chart reiterating its belief that the connection between the requested information and the grievance was self-explanatory, and that it had already fully explained the relevance of the information requested. (JA 464; 359.) The Union also explained that it did not know the exact titles of the positions at issue, but had done the best it could to describe the listed positions. The Union indicated that it was open to discussing ways to streamline the information further, either temporally or by consolidating and summarizing the information. (JA 464; 47-49, 359.)

The College did not provide any information in response to the Union's October 22 request. (JA 465; 39-40, 363-67.)

## **II. THE BOARD'S CONCLUSIONS AND ORDER**

On May 31, 2017, the Board (Chairman Miscimarra and Members Pearce and McFerran) issued a Decision and Order, adopting the administrative law judge's decision in full which found that the College's refusal to provide the information requested on October 22, 2015, violated Section 8(a)(5) and (1) of the Act. (JA 462.) To remedy that violation, the Board adopted the judge's recommended order that requires the College to cease-and-desist from refusing to

provide the Union with relevant and necessary information, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act, 29 U.S.C. § 157. (JA 462, 467.) Affirmatively, the Board’s Order requires the College to post a remedial notice and to “[p]romptly provide the Union with: all relevant information requested by the Union in its email dated October 22, 2015, and related attachment.” (JA 467-68.)

### **SUMMARY OF ARGUMENT**

An employer’s duty to bargain under Section 8(a)(5) of the Act includes producing requested information to a union that is relevant to the union’s duties as collective bargaining representative, including information about nonunit employees that bears on the subject matter of a contractual grievance. Here, the Union filed a grievance in order to protect unit work, which is one of its most basic duties as bargaining representative. Despite two arbitration decisions finding that the Union had requested relevant information, and extensive efforts by the Union to demonstrate facts in support of its belief that the information is relevant to the grievance, the College refused to provide the Union with any information responsive to its October 22, 2015 request.

In these circumstances, substantial evidence supports the Board’s finding that the Union established both the relevance and an objective basis for the information it requested regarding nonunit employees whom it believed were

performing unit work. The Union stated that each piece of requested information was relevant because the information would allow the Union to identify and determine job responsibilities of nonunit employees, as well as to find out to what extent those employees have replaced unit employees. Further, the Union established an objective basis for its request. Specifically, as part of its October 22, 2015 information request, it provided the College with a chart and explanatory comments summarizing what it had found from its extensive, door-to-door canvass of the College and document review in which it gathered the specifics available from those sources about employees in nonunit positions that appeared to be performing unit work. In these circumstances, the Board reasonably determined that the College had a duty to provide the requested information.

The Board reasonably rejected the College's proffered defenses. Contrary to the College's contentions, the Union was not obliged to establish that it knew all of the facts supporting relevance a year before the time of the request, or to identify particular "tasks" that nonunit employees had performed. Further, the Board properly found that the record did not support the College's claim that the Union requested the information for an improper purpose. And there is no merit to the College's claim that it had no duty to provide information that the Union could have used to organize nonunit employees or file a Board charge.

Finally, this Court lacks jurisdiction to consider the College's arguments attacking the relevance of specific pieces of the requested information. Under Section 10(e) of the Act, no objection that was not urged before the Board shall be considered by the Court, absent extraordinary circumstances. All of the College's arguments to the Board were all-or-nothing, and at no time did it bring to the Board's attention any argument that specific pieces of the requested information were not relevant to the Union's grievance. The College does not allege that any extraordinary circumstances excused its failure.

### **STANDARD OF REVIEW**

Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, where the plain terms of the statute do not specifically address the precise issue, the courts must defer to the Board's reasonable interpretation of the Act. 467 U.S. 837, 843 (1984); accord *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 307 (D.C. Cir. 2003). And courts "must respect the judgment of the agency empowered to apply the law 'to varying fact patterns,' even if the issue 'with nearly equal reason [might] be resolved one way rather than another.'" *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996).

Moreover, as the Supreme Court has observed, "Congress made a conscious decision" to delegate to the Board "the primary responsibility of marking out the scope of the statutory language and of the statutory duty to bargain." *Ford Motor*

*Co. v. NLRB*, 441 U.S. 488, 496 (1979). In particular, “Congress assigned to the Board the primary task of construing [Section 8(a)(5) and 8(d)] in the course of adjudicating charges of unfair refusals to bargain[.]” *Id.* at 495.

The duty to bargain in good faith under Section 8(a)(5) includes the employer’s obligation “to provide information that is needed by the bargaining representative for the proper performance of its duties.” *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967); accord *Brewers & Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 45 (D.C. Cir. 2005). As such, “great deference” is owed to Board determinations of the scope of an employer’s obligation to provide relevant information. *Crowley Marine Servs., Inc. v. NLRB*, 234 F.3d 1295, 1297 (D.C. Cir. 2000) (quoting *Local 13, Detroit Newspaper Printing & Graphic Commc’ns Union v. NLRB*, 598 F.2d 267, 272 (D.C. Cir. 1979). Whether information is relevant “is, in the first instance, a matter for the NLRB, and the Board’s conclusions are given great weight by the courts.” *Oil, Chem. & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348, 360 (D.C. Cir. 1983).

The Board’s factual findings “shall be conclusive” if they are “supported by substantial evidence on the record considered as a whole.” 29 U.S.C. § 160(e); *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2012). Evidence is substantial when “a reasonable mind might accept [it] as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). A

reviewing court may not displace the Board's choice between two fairly conflicting views of the facts, even if the court "would justifiably have made a different choice had the matter been before it de novo." *Id.* at 488. *Accord UFCW, Local 204 v. NLRB*, 506 F.3d 1078, 1080 (D.C. Cir. 2007).

## **ARGUMENT**

### **SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COLLEGE VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO PROVIDE THE UNION WITH THE INFORMATION RELEVANT TO ITS DUTIES AS COLLECTIVE-BARGAINING REPRESENTATIVE IT REQUESTED ON OCTOBER 22, 2015**

One of a union's central duties is to protect the work of its bargaining-unit members. There would be little value to employees exercising their Section 7 right to collectively bargain if an employer could simply assign all unit work to employees whom it designates as outside the bargaining unit. When the Union here had a reasonable belief that it faced such a situation, it filed a grievance and requested information about the nonunit employees whom it believed were performing unit work. Despite two arbitration decisions stating that the Union was entitled to relevant information about nonunit employees, the College balked, and ultimately refused to provide the Union with any information at all.

The Union went to great lengths to address the College's concerns, by attempting on multiple occasions to narrow the scope of information it sought, by corresponding and negotiating with the College on the subject, and by canvassing

the entire campus, surveying job postings, and describing positions in detail. After all of that, the College still refused to provide the Union with any information. The College's position that the Union must provide it with a list of specific tasks that each employee performed in order to render basic information about nonunit employees relevant essentially requires the Union to prove its grievance in full before receiving any information. As shown below, the Board reasonably rejected the College's position as inconsistent with the longstanding requirement that employers provide unions with information related to a grievance so long as the union shows a minimal, discovery-type standard of relevance.

**A. An Employer's Duty To Bargain in Good Faith Includes Providing the Union with Information Relevant to the Union's Duties as Bargaining Representative, Including Information that Bears on a Grievance's Subject Matter**

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of its employees. An employer's duty to bargain in good faith includes the "general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties." *Acme Indus.*, 385 U.S. at 435-36; *accord NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Brewers & Maltsters*, 414 F.3d at 45. It is well-established that an employer's failure to provide the union with such relevant information thus violates the employer's duty to bargain under Section 8(a)(5) of the Act. *Acme Indus.*, 385 U.S. at 435-36;

*Truitt Mfg.*, 351 U.S. at 152; *Brewers & Maltsters*, 414 F.3d at 45-46; *see also N.Y. & Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 729 (D.C. Cir. 2011).<sup>2</sup>

In order to facilitate the exchange of relevant information, “[i]nformation related to the wages, benefits, hours, [and] working conditions . . . of represented employees” are viewed as “presumptively relevant” to the union’s duty to represent the unit employees. *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1191 (D.C. Cir. 2000); *accord Brewers & Maltsters*, 414 F.3d at 46. Such information enjoys a presumption of relevance because it is “central to the core of the employer-employee relationship.” *Oil, Chem. & Atomic Workers Local Union No. 6-418*, 711 F.2d at 359 (internal citation omitted); *accord Columbia Coll. Chicago*, 360 NLRB 1116, 1126 (2014).

The critical question in determining whether information must be produced is that of relevance. Information pertaining to employees in the bargaining unit is presumptively relevant. *See United States Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998). When requesting information that is not presumptively relevant, such as “information about employees outside the bargaining unit, the union must explain to the employer why the information is relevant.” *N.Y. & Presbyterian*

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<sup>2</sup> Section 8(a)(1) of the Act makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7” of the Act. 29 U.S.C. § 158(a)(1). A violation of Section 8(a)(5) of the Act therefore produces a derivative violation of Section 8(a)(1). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

*Hosp.*, 649 F.3d at 730. To show relevance in such situations, the union need only meet a “discovery-type standard,” under which “[t]he fact that the information is of probable or potential relevance is sufficient to give rise to an obligation . . . to provide it.” *Crowley Marine*, 234 F.3d at 1297 (citation and quotation marks omitted). Under that standard, requested information must be produced “whether or not the theory of the complaint [or grievance] is sound or the facts, if proved, would support the relief sought.” *Acme*, 385 U.S. at 437 (citation omitted). See also *Detroit Newspaper Printing & Graphic Comm’ns Union*, 598 F.2d at 271 (information is relevant if it is germane and “has any bearing” on the subject matter of the case). The Union need not prove that its grievance is meritorious in order to support an information request. Rather, a union satisfies its burden of proving relevance by demonstrating “a reasonable belief supported by objective evidence for requesting the information.” *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994); see also *Union Builders, Inc. v. NLRB*, 68 F.3d 520, 524-25 (1st Cir. 1995) (determining relevance of information request requires determining whether the union “could supply objective evidence supporting a reasonable belief that made [its] information request relevant to [its] collective bargaining duties”); accord *NLRB v. George Koch Sons, Inc.*, 950 F.2d 1324, 1332 (7th Cir. 1991) (union must “demonstrate a reasonable basis based on objective facts for

suspecting that the information sought will aid the union in its representational duties”) (internal quotation marks omitted).

**B. The Board Reasonably Found that the Requested Information Is Relevant to the Grievance**

The record evidence amply supports the Board’s conclusion that “the Union had established and demonstrated to the College both the relevance of the requested information and the existence of evidence that gave rise to the Union’s reasonable belief in the relevance of that information.” (JA 465.) It is undisputed that “the Union ha[s] not received the information it requested.” (JA 465.) Because an employer’s duty to provide information includes the duty to provide information that has any bearing on a grievance’s subject matter, this Court has held that unions grieving work transfers are entitled to basic information about the nonunit employees who are allegedly performing the work in question. *See* pp.21-23, *infra*. And the record further establishes that the Union believed, based on objective facts, that the nonunit employees were performing bargaining-unit work. As shown below, the College’s contentions otherwise would turn the Union’s minimal burden on its head, requiring it to prove the merit of its grievance before receiving basic information about nonunit employees.

**i. The Union Sufficiently Demonstrated the Relevance of the Requested Information**

As the Board reasonably found, the Union “met its burden of establishing the relevance of its October 22, 2015 information request.” (JA 467.) The Union requested seven pieces of basic information about nonunit employees: their names, titles, position types, departments, work schedules, rates of pay, and job descriptions. The Union tied its request directly to a grievance concerning whether those exact employees were performing bargaining-unit work. As the Union repeatedly told the College, it is self-explanatory that information such as employee names or job descriptions “would be of use to the Union in carrying out its statutory duties and responsibilities,” *Acme*, 385 U.S. at 437, for both processing the grievance and preparing for arbitration on the issue. Indeed, it is difficult to see how a union could ever prove that an employer transferred unit work without knowing the names and job duties of the transferees.

This Court’s decision in *New York & Presbyterian Hospital* is instructive. There, the union and the hospital executed a side letter to their contract establishing that nurses who were not in the bargaining unit would not regularly perform clinical duties normally performed by unit members. *N.Y. & Presbyterian Hosp.*, 649 F.3d at 727. After some unit-member nurse practitioners observed nonunit nurse practitioners who worked for Columbia University on the hospital’s premises, the union filed a grievance alleging that the hospital had violated the side

letter. The union then filed an information request seeking credentialing documentation that the hospital kept, which would show “the nurse practitioners’ names, (including those on Columbia University’s payroll); the departments or units where the nurse practitioners are assigned to work; their job duties and their start dates at the hospital.” *Id.* at 727 (internal quotation marks omitted). This Court held that “[t]here can be little dispute that [the union]’s information request is relevant to the question whether non-bargaining unit [nurse practitioners] are performing bargaining unit work,” so “the [h]ospital was obligated to provide [the information].” *Id.* at 730.

Here, as in *New York & Presbyterian Hospital*, the Union’s unit members witnessed nonunit employees working at traditionally secretarial or clerical work stations, such as the front desk. As the Board stated (JA 465), the parties’ contract describes the unit as all secretarial and clerical employees, and the arbitrator specifically decided that he had the authority under that provision “to determine whether non-bargaining unit employees are performing unit work, and/or whether the College has transferred unit work to non-unit employees, and to fashion an appropriate remedy.” (JA 185.) The Union requested exactly the same type of information that was at issue in *New York & Presbyterian*—names, departments, and job duties—for exactly the same reason—determining whether nonunit

employees were performing unit work. The College, therefore, “was obligated to provide it.” *Id.* at 730.

Moreover, the Union easily had “a reasonable belief supported by objective evidence for requesting the information.” *Shoppers Food Warehouse*, 315 NLRB at 259. It initially filed the grievance based on a belief that employees with the title of “hourly professionals” would be likely to be doing clerical and secretarial work. Given that “[e]ven rumors may be pursued, providing that there is at least some demonstration that the request for information is more than pure fantasy,” such a suspicion was likely enough to trigger the College’s duty to provide information. *Cannelton Indus., Inc.*, 339 NLRB 996, 1005 (2003). But on the facts of this case, the Union went far beyond that minimal showing by the time it submitted its final request on October 22, 2015. As the Board explained, that information request “describe[ed] the specific position in question, or identif[ied] the basis of the Union’s belief that the position was performing unit work.” (JA 465.) Moreover, the Union had exhaustively canvassed the campus and reviewed all available documentation, and “explain[ed] that the information request was based upon job postings, as well as information gathered from members about changes in the unit and job functions they had observed nonunit employees performing.” (JA 465.) Such observations easily establish a reasonable basis for requesting the information. Substantial evidence thus supports the Board’s finding

that the Union had a reasonable belief, supported by objective facts, for its information request.<sup>3</sup>

**ii. The College's Objections to the Board's Finding of Relevance Are Insufficient To Overcome the Union's Minimal Burden**

The College's contention (Br. 27-29) that the Union demonstrated no objective basis for its information request misrepresents the record here. Contrary to the College's claim (Br. 27-28), the Union's attorney did not testify that the Union had no knowledge or belief that any work had been transferred outside the unit at the time of the October 2015 information request. The transcript pages the College cites reveal that the Union's attorney merely testified on cross-examination that he could not "speak to the Union's knowledge as of November 20, 2014," nearly a year before the information request at issue here, and that he did not "frame[d] any communication with the college in terms of what job duties were claimed to be exclusively unit work." (JA 45, 87.) The College points to no requirement in Board or this Court's case law that union agents must know the

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<sup>3</sup> The College is incorrect when it states (Br. 27 n.4) that this Court's law requires the Union to disclose the objective basis for its grievance to the College in order to trigger the College's duty to provide relevant information. The cited case states only that "the union must explain to the employer why the information is relevant," and says nothing about disclosing objective facts. *N.Y. & Presbyterian Hosp.*, 649 F.3d at 730. Indeed, there is no indication in *New York & Presbyterian Hospital* that the union there ever disclosed how it knew or why it thought that nonunit nurse practitioners were performing unit work. Here, the Union exhaustively explained the relevance of each piece of information in its October 2015 request, and that explanation is all that is required.

objective basis for its information requests a year in advance or that unions frame their information requests in any particular way. Indeed, the opposite is true; as the Board has repeatedly stated, union agents' personal knowledge of contract violations is not required, and "[information] requests may reasonably be based on hearsay reports." *Pub. Serv. Elec. & Gas Co.*, 323 NLRB 1182, 1187 (1997); *Shoppers Food Warehouse*, 315 NLRB at 259; *Magnet Coal*, 307 NLRB 444, 444 n.3 (1992).

The College further claims that the information request did not "identify any type of unit work or duties that it believed were improperly transferred to non-unit employees." (Br. 28.) But the Union's burden was only to show a reasonable belief that the contract was being violated, not to list every specific job duty that each employee performed. As the Board found, the Union based its request on "job postings, as well as information gathered from members about changes in the unit and job functions they had observed nonunit employees performing." (JA 465.) Far from having "no conceivable relationship" to the contract violation alleged in the grievance (Br. 29), such job postings and observations of staff working at typically unit-member locations clearly relate to whether nonunit employees were performing unit work.

None of the cases the College cites undermines the Board's conclusion here. In *Postal Service*, 310 NLRB 701, 703 (1993), the union requested supervisors'

timecards in order to use those supervisors as comparators in a grievance, but it could not name particular supervisors whom employees had observed being late to work at any particular time. Here, the Union did much more. It provided a specific list of positions that had been observed at unit work stations, and buttressed this list by referring to a category of employees, hourly professionals, who were not specifically excluded from the unit. Equally inapposite is *Disneyland Park*, 350 NLRB 1256, 1259 (2007), where the union requested information about nonunit employees, but the contract expressly allowed the employer to subcontract work to such employees. Here, the contract contains a broad unit-scope clause that covers all administrative and clerical employees, and an arbitrator determined that the Union's grievance adequately alleged a violation of the unit-scope clause. Although the clause specifically excludes students and certain part-time employees, the College has never contended that all 34 nonunit positions were held by such employees. Indeed, the existence of the hourly professional classification indicates that at least some of the nonunit employees in question were not specifically excluded from the unit-scope clause.

A closer analogue to this case is *Somerville Mills*, 308 NLRB 425, 435-36 (1992). In that case, the union established an objective basis for its belief that unit work was being subcontracted by observing that unit members had been laid off, that the plant started shipping large orders overseas, and that some unnamed unit

members told the union that work was being subcontracted. Similarly, here, the Union observed job postings for nonunit positions that list unit job duties, the College started using a new category of nonunit employee called “hourly professional,” and unit employees observed nonunit members sitting at unit places or staffing new positions in departments that had cut unit jobs. (JA 360-61.) In such circumstances, as the Board found, the Union adequately “identif[ied] the basis of the Union’s belief that the position was performing unit work.” (JA 465.)

**C. The Arbitrator’s Decision Does Not Determine the Relevance of the Information and, in any Event, Supports the Board’s Finding**

The College’s contention (Br. 31-32) that the arbitrator did not determine any information to be relevant is both irrelevant and incorrect. An employer’s duty to provide information does not depend on “the precise wording of the grievance.” *N.Y. & Presbyterian Hosp.*, 649 F.3d at 740-41. Thus, because the October 25, 2015 request sought information relevant to an alleged breach of the contract, it makes no difference whether that information would be relevant to the particular arbitration at issue. The Union’s duty here is only to show objective facts underlying its claim that the contract was breached. As discussed above, pp.23-24, the Union pointed to objective facts showing that the College might be violating the contract clause requiring the College to include all clerical and secretarial employees in the bargaining unit.

Moreover, even if the arbitrator's rulings were relevant, those rulings support the Board's finding that the requested information was relevant. The arbitrator specifically stated so, twice. (JA 346-50, SJA 1-5.) Indeed, the arbitrator seemed to indicate that it was the Board's job, not his, to determine exactly what information was owed, and it was on that basis that he declined to order the production of specific documents. (SJA 3-4.) Thus, the requested information was relevant not only to the Union's duty to administer and police the contract, but also to the specific grievance the Union was pursuing at the time it made the request.

**D. The College Failed To Prove that the Union Sought Information in Bad Faith or for an Improper Purpose**

Although information requests must be made in good faith, “the ‘good faith’ requirement is met so long as ‘at least one reason for the demand can be justified.’” *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1192 (D.C. Cir. 2000) (quoting *Island Creek Coal Co.*, 292 NLRB 480, 489 (1989)). *See also Cent. Manor Home for Adults*, 320 NLRB 1009, 1011 (1996) (citing cases). Thus, as the Board observed, “the issue here is not whether the information itself may be of value for some other purpose, but whether under the applicable liberal discovery standard of relevance the General Counsel and the Union have shown the relevance of the requested information.” (JA 466, internal quotation marks omitted.) As discussed above, pp.21-24, the Union demonstrated that the

requested information was relevant to its grievance regarding nonunit employees doing unit work. Therefore, regardless of whether the information could also be used for another purpose, the Union met the good-faith requirement.

The record belies the College's contention (Br. 38-40) that the Union made the information request in order to obtain discovery in a Board proceeding. As the Board pointed out, there was no such proceeding pending at the time of the request, and "a potential charge or petition is 'not a valid reason for depriving the Union of relevant information.'" (JA 466, quoting *Fallbrook Hosp. Corp.*, 360 NLRB 644, 644 n.3 (2014).) The College's only evidence that the Union made the request in order to aid a Board proceeding is correspondence from 3 years before the request, where the Union stated that the College had improperly excluded positions from the unit. In the same correspondence, however, the Union stated that it intended to pursue a grievance over the improper work transfer. (JA 397-99.) It strains credulity to believe that grounds for an unfair-labor-practice charge that the Union mentioned but never pursued for at least 3 years were its sole reason for requesting information, when, in fact, the information was relevant to a grievance it had actually filed and pursued to arbitration.

The College's reliance on *Sahara Las Vegas Corp.*, 284 NLRB 337 (1987), is misplaced. In that case, the union had filed "numerous other unfair labor practice charges" following the discharge of some employees, and the Board found

that the employer reasonably refused to provide the union with information regarding those discharges even though no unfair-labor-practice charge was pending at the moment of the request. *Id.* at 344. Notably, the union in *Sahara* did not establish any legitimate purpose for requesting the information. Here, the Union has done so. Moreover, here, the Union never filed an unfair-labor-practice charge regarding the nonunit employees. *Sahara* is thus inapposite.

The College finally contends that the grievance itself was not made in good faith. (Br. 41.) But as discussed above, pp.18-20, the College's duty to provide information is independent of the merit of the Union's grievance. All the Union need show is that it had an objective belief that the contract may have been violated. It easily did so here, by pointing to the College's new category of nonunit "hourly professional" employee, job postings listing unit duties, and unit members' personal observations of nonunit employees directly replacing unit employees or working at job stations that were typically staffed with unit members. The Board therefore reasonably found that the Union requested the information in good faith for the proper purpose of policing the contract.

**E. The Court Lacks Jurisdiction To Consider the College's Alternative Argument that the Board Should Only Have Ordered Production of Some Documents**

The College contends that, even if the Court finds that the Union requested some relevant information, the Court should modify the Board's Order to apply

only to some of the 34 listed positions or only some of the requested categories of information. (Br. 42-44.) But because the College never raised this alternative contention to the Board, the Court cannot consider it. Section 10(e) of the Act bars from review any claim that has not been presented to the Board, absent extraordinary circumstances. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure . . . to urge such objection shall be excused because of extraordinary circumstances.”); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (stating Section 10(e) precludes court of appeals from reviewing claim not raised to the Board). *See also Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 143-44 (D.C. Cir. 1999) (holding that Section 10(e) barred employer’s objection to Board-ordered remedy where exceptions did not mention remedy).

Neither the College’s exceptions to the judge’s decision, nor its brief in support of those exceptions, contain an argument that the Board should exclude some information even if it determined that the College violated Section 8(a)(5) of the Act. (JA 415-21.) Before the Board, the College solely argued that it had no duty to produce any of the information. Therefore, the College’s belated argument is jurisdictionally barred from review.

## CONCLUSION

The Board respectfully requests that the Court deny the College's petition for review and enforce the Board's Order in full.

Respectfully submitted,

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National Labor Relations Board  
December 2017

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

TEACHERS COLLEGE, COLUMBIA	)	
UNIVERSITY	)	
	)	
Petitioner/Cross-Respondent	)	
	)	
v.	)	
	)	Nos. 17-1151, 17-1184
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	Board Case No.
	)	02-CA-164870
and	)	
	)	
LOCAL 2110, TECHNICAL, OFFICE AND	)	
PROFESSIONAL UNION, UNITED AUTO	)	
WORKERS, AFL-CIO	)	
	)	
Intervenor	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 7,327 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC  
this 6th day of December, 2017

**UNITED STATES COURT OF APPEALS  
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LOCAL 2110, TECHNICAL, OFFICE AND	)	
PROFESSIONAL UNION, UNITED AUTO	)	
WORKERS, AFL-CIO	)	
	)	
Intervenor	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on December 6, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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