

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD REGION 32

SAFEWAY, INC. (TRACY DISTRIBUTION
CENTER)

and

Case No. 32-CA-222546

TEAMSTERS LOCAL 439,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS

**RESPONDENT SAFEWAY, INC.'S REPLY
IN SUPPORT OF MOTION FOR
TRANSFER AND SUMMARY JUDGMENT,
OR IN THE ALTERNATIVE, PARTIAL
SUMMARY JUDGMENT**

Respondent Safeway, Inc. (“Safeway”) files this Reply to the General Counsel’s Opposition to Safeway’s Motion for Summary Judgment, or in the alternative Partial Summary Judgment. A thorough review of the motion papers will demonstrate, as a matter of law, that Safeway did not engage in an unfair labor practice. It is undisputed that Safeway negotiated the right to use lumpers when unloading is part of its purchase price (confirmed in three collective bargaining agreements stretching over at least 12 years and affirmed in three binding arbitrations). Therefore, the relevance of Safeway’s contracts with third parties is neither presumptively or apparently relevant. Instead, the burden is on the Union to establish relevance of third party contracts with objective evidence, which the General Counsel concedes the Union failed to do. Summary judgment is thus appropriate and necessary to preclude further unnecessary proceedings.

It is well established that the General Counsel cannot defeat a motion for summary judgment by simply asserting that Respondent's denial of allegations, in its Answer, is proof of a dispute or that evidence will be adduced at trial. *See Lhoist N. Am. of Tennessee, Inc.*, 362 N.L.R.B. No. 110,

at *2-3. Yet, the Opposition seeks to do just that – it merely promises to introduce unstated evidence in the future and claims that unidentified factual issues exist. No opposing affidavits, declarations or documentary evidence were submitted. Furthermore, the Opposition offers *no substantive argument* or explanation as to *why* the information requested by the Union is relevant. Rather, the brief relies on conclusion and circular reasoning (restating the argument that the Union is entitled to third party contracts because the Union is entitled to third party contracts.) But the General Counsel never actually addresses Safeway’s factual or legal arguments. As such, Safeway’s motion for summary judgment should be granted, or at a minimum a stay must be issued given the imminent February 13, 2019 hearing.

I. THE OPPOSITION FAILS TO RAISE GENUINE ISSUES OF MATERIAL FACTS.

As a matter of law, Safeway is entitled to summary judgment based on the uncontested facts. To support its factual assertions, Safeway submitted two sworn and detailed declarations. Each was made on personal knowledge and set forth admissible evidence. The declarations and exhibits support Safeway’s position that it cannot be, as a matter of law, an unfair labor practice to withhold third party contracts (and other related documents) already ruled immaterial and which have no relevance to the bargaining relationship between the parties. Since the Opposition controverts none of the factual assertions, the declarations or accompanying exhibits, they should be deemed conceded for purposes of this motion. *See, e.g., U.S. Postal Service*, 300 NLRB 196, fn. 1 (1990) (the facts in respondent’s summary judgment declarations were uncontested because the General Counsel failed to state disagreement with the facts in the declarations).

Crucially, the General Counsel has not identified even one material fact in dispute. Not one. Rather, it concluded that facts “must” be in dispute because Safeway filed an Answer denying parts of the Complaint. Safeway’s denial that it engaged in an unfair labor practice does not create a factual issue requiring an evidentiary hearing. Absent any factual disputes, whether Safeway engaged in an

unfair labor practice is the *question of law* before the Board. “If the simple denial of unlawful conduct in a respondent's answer to a complaint raises a material question that defeats summary judgment, the Board would never grant a motion for summary judgment because every disputed case involves one or more such denials.” *Lhoist*, 362 N.L.R.B. No. 110, at *1. Therefore, the General Counsel cannot defeat Safeway’s motion by relying on Safeway’s denial that it engaged in unlawful conduct.

The Opposition makes blanket statements that are conclusory and unsupported by the evidence, much like the Union’s information requests and subsequent correspondence. For example, the General Counsel argues factual disputes exist because it will introduce evidence of the Union’s “interpretation” of the prior arbitration orders. This argument is an intentional effort to mislead the Board regarding the binding awards. The General Counsel tacks onto the Union’s claim that Safeway “fundamental[ly] misunderstand[s] the arbitration awards when Safeway asserts it was “not prohibited from contracting with lumpers as long as the lumpers are used when the inbound freight loads include unloading as part of the purchase agreement.” (Klein Decl. Ex. J.) As previously noted, however, Safeway’s assertion is a *word-for-word* quote of the Arbitration Decision and Award issued February 20, 2006, and a *word-for-word* quote from the CBA, Article II(a)(1.) Quite frankly, the Union’s (or anyone’s) “interpretation” of an arbitration decision is wholly irrelevant, and no such “interpretation” creates a factual dispute. The binding arbitration orders unequivocally and plainly stand on their own. Evidence to be proffered at a hearing about how a party “interprets” the language of arbitrators’ decisions is both improper and demonstrative of the appropriateness of summary judgment.

The General Counsel similarly makes a conclusory statement that there is a factual dispute as to whether the sought-after Safeway contracts with transportation brokers are contemplated by the CBA, but completely fails to explain the relevance of contracts that arrange for trucking companies to transport goods to Safeway’s California Distribution Center from all around the country. The

General Counsel does not even bother to try to argue how such contracts are related to the dispute here -- Safeway's use of lumpers to off-load trucks. Safeway's moving brief asked how Safeway's contracts with transportation brokers pertain to the dispute regarding lumpers? This question remains unanswered -- and that is fatal to the Region 32's claim that Safeway engaged in an unfair labor practice. At a minimum, there is no factual dispute as to transportation broker contracts.

II. SUMMARY JUDGMENT IS PROPER BASED ON UNDISPUTED FACTS.

The Union made thirteen information requests, of which three are for third party contracts -- vendor agreements (Complaint ¶7(a)(2)), lumper service agreements (Complaint ¶7(a)(7)), and transportation broker contracts (Complaint ¶7(a)(9)). The Union further requested purchase orders and the remaining nine requests are for various other documents related to third parties, including the names of third parties, policies and procedures pertaining to third parties, and communications with third parties. The undeniably relevant documents, 30-days of purchase orders, have already been provided to the Union as required by arbitration orders and the clear and unambiguous language of the CBA. Safeway has established, as a matter of law, that the third party contracts are not relevant to the bargaining relationship. Consequently, the other documents related to third parties are also not relevant to the bargaining relationship. Regardless of how the Board rules on the related documents, summary judgment or partial summary judgment on the Union's request for third party contracts is appropriate and necessary.

The Board must reject the General Counsel's claim that it will offer evidence at a hearing, but not in opposition to Safeway's motion for summary judgment. Summary judgment is proper based on these **undisputed material facts**:

- The Union sought thirteen categories of documents and/or information from Safeway regarding Safeway's use of lumpers at the Tracy Distribution Center. General Counsel's Opp. to MSJ, p. 2; Mixey Decl. Exhs. Q, NLRB Complaint ¶7 & F (March 12, 2018); Klein Decl., Exhs. H (March 22, 2018) & N (June 7, 2018).
- For at least the last twelve years, the CBA has provided that "[i]nbound freight loads that include unloading as part of the purchasing agreement" may be unloaded by lumpers.

(Mixey Decl. ¶12; Exhs. A, B & C (Decision and Award dated February 20, 2006), p. 3.; General Counsel's Opp. to MSJ, p. 2.)

- The Union sent Safeway five communications regarding its request for information and documents related to lumpers. (Mixey Decl. Ex. F; Klein Decl. Exhs. H, J, L, & N.)
- The Union did NOT demonstrate relevance of the non-unit information by offering objective evidence in any of its five communications to Safeway. (Mixey Decl. Ex. G; Klein Decl. Exhs. I, K, M, & O.)
- The Union never responded to Safeway's suggestion of a face-to-face meeting to discuss the requests. (Mixey Decl. ¶9, Ex. G.)
- Safeway sent the Union five communications in response to the Union's request for information and documents related to lumpers. (Mixey Decl. Ex. G; Klein Decl. Exhs. I, K, M, & O.)
- There have been three final and binding arbitrations between the parties with respect to Safeway's use of lumpers. (Mixey Decl. Exhs. C, D, E.)
- Arbitrator Angelo's decision set forth a documentary framework by which the Union can evaluate whether Safeway is complying with the CBA regarding lumpers. Pursuant to the arbitrator's order, the Union may request and review up to 30 days of purchase orders to determine whether unloading freight was part of the purchase agreement. (Mixey Decl. Ex. D.)
- Safeway provided the Union with a list of all purchase orders, for the 30-days prior to the Union's initial request as contemplated by Arbitrator Angelo's decision. (Mixey Decl. ¶14, Ex. B; Klein Decl. Ex. K.)
- The Union's communications to Safeway did not explain how Safeway's contracts with transportation brokers, much less any of the remaining sought-after documents relate to Safeway's right to use lumpers when unloading is part of the purchase agreement. The General Counsel also fails to provide an explanation in the Opposition. (Mixey Decl. Ex. G; Klein Decl. Exhs. I, K, M, & O.)¹
- Transportation brokers do not contract with or negotiate with lumper services. (Mixey Decl. ¶15.)

Whether Safeway engaged in an unfair labor practice can be determined based on these undisputed material facts. The Opposition does not refute that the questions for the Board are simple:

1. When the Union seeks third party documents not presumptively relevant to the bargaining relationship and outside an arbitrators' documentary framework for confirming a potential breach of the collective bargaining agreement, is it an unfair labor practice for the employer to refuse to produce such third party documents where the Union has provided no objective evidence of relevance?
2. What is the continuing effect of arbitration decisions that establish a documentary framework for parties to evaluate compliance with the CBA?

¹ Mr. Rosenfeld explained that the Union sought the documents "to determine whatever [sic] Safeway is fully and completely complying with the contract including the arbitrator's decision regarding the use of lumpers." (*Id.*) Rather than offering any rationale for that request, he said, "*that's a sufficient explanation and the information is relevant to the Union's inquiry.*" (Klein Decl., Exh. H.) The General Counsel agrees – the documents are relevant because the documents are relevant. This circular response does not create a question of fact.

It cannot be an unfair labor practice for Safeway to refuse to provide third party documents (like lumber and transportation broker contracts), where (i) the CBA permits Safeway to utilize lumpers, (ii) where the arbitrator set forth a detailed documentation scheme to evaluate compliance with the CBA and (iii) where neither the Union or General Counsel has offered objective evidence, much less argument, as to why the documents are relevant.

A. Third Party Documents Are Not Presumptively Relevant.

The General Counsel argues that Safeway's third-party contracts are presumptively relevant, yet it fails to cite to a single case in support of its position. To the contrary, even the cases cited in the Opposition affirm that subcontracting agreements are not presumptively relevant. See *United States Postal Serv.*, 364 NLRB No. 27 (2016) ("Information about subcontracting agreements, even those relating to bargaining unit employees' terms and conditions of employment, is not presumptively relevant."); *Allison Corp.*, 330 NLRB 1363, 1367 (2000); Safeway's MSJ, (III)(B)(1). The Opposition ignores well-established law because it is detrimental to the Union and Region 32's position that the Union get unrestricted access to Safeway's subcontracts merely because it is a party to a collective bargaining agreement that explicitly permitted Safeway to use lumpers.

Unlike *Boeing Co.*, which the General Counsel relies on heavily, the Union is not requesting documents related to the relocation of unit work. *Boeing Co.*, 363 NLRB No. 63 (Dec. 17, 2015) The decision in *Boeing* was based on a logical precedent that "relocation of work directly impacts the terms and conditions of employment of affected employees." *Id.* However, the work performed by lumpers in this case is explicitly not unit work because the CBA indisputably permits the use of lumpers when unloading is part of the purchase price paid by Safeway. This has been extensively litigated in three separate arbitrations brought by the Union. The *only question is whether* unloading is part of the purchase price for a particular item(s). If so, the work cannot as a matter of law constitute relocating work from Union employees to lumpers. The General Counsel seeks to ignore relevant

caselaw and effectively sanctions Unions to obtain any and all third party contracts on a “presumptively relevant” standard. That is unsupported by the law.

Like the subcontracts requested by the unions in *Disneyland Park* and *Ethicon, supra*, subcontracting agreements between Safeway and lumpers and transportation brokers are not presumptively relevant. *Ethicon, a Johnson & Johnson Co.*, 360 NLRB 827 (2014); *Disneyland Park et al.*, 350 NLRB 1256 (2007). The documents at issue are unlike other “presumptively relevant” documents such as seniority, wage or hours worked records for unit members. *Disneyland Park*, at 1257. The documents requested here are third-party contracts and related communications.

The General Counsel’s unsubstantiated claim that third party contracts will inform the Union if lumpers are unloading freight where unloading is not part of the purchase order is both puzzling and erroneous, as a matter of law. Lumper service contracts themselves (much less other third party contracts) do not indicate whether unloading is part of the purchase price *of a particular item* shipped to Safeway. Based on the clear and unambiguous language of the CBA and the reasoning of three prior binding arbitration decisions, only the purchase order would inform the Union if lumpers are moving freight as contemplated by the CBA (when unloading is part of the purchase price.) Once the Union narrowed its request for purchase orders to 30 days, Safeway provided the Union with a list of 1,766 purchase orders where unloading was part of the purchase agreement. (Mixey Decl. ¶13.) All relevant information has already been provided to the Union. The General Counsel’s reliance on this evidentiary standard does not, in this case, create a triable issue of fact.

B. The General Counsel’s “Trust Us to Prove Apparent Relevance at the Hearing” Argument Must be Rejected.

The General Counsel also asserts that the relevance of third-party contracts to the bargaining relationship is “apparent” from the surrounding circumstances, but refuses to explain why until the hearing. This improperly seeks to render summary judgment impossible. The General Counsel cannot defeat Safeway’s motion by simply saying “trust us.” *Lhoist*, 362 N.L.R.B. No. 110.

“Otherwise, the Board would never have occasion to grant a respondent's motion for summary judgment because in every case in which the General Counsel has decided to issue a complaint, he believes he ought to prevail.” *Id.* In fact, the Board Rules provide for summary judgment to permit a decision without a hearing when, as here, Respondent establishes that there was no unfair labor practice as a matter of law and the General Counsel fails to raise a triable issue of material fact.

In refusing to explain why the relevance of third-party documents is apparent, the Opposition rests heavily on inapplicable decisions with materially distinguishable CBAs. The Opposition purposefully excludes a critical fact from its analysis of *U.S. Postal Serv.*, in which the Board held that the relevance of the subcontracting information was apparent. *U.S. Postal Serv.*, 364 NLRB No. 27; Opp., p. 7. Unlike here, the CBA in *U.S. Postal Serv.* required the employer to give the union advance notice of potential subcontracting that would have a significant impact on the bargaining unit. *Id.* at *5. Similarly, the Board in *Ormet* held that “[g]iven the contractual language on subcontracting, and the reference to a recently filed grievance, the relevance of the requested information should have been readily apparent to Respondent.” *Ormet Aluminum Mill Products*, 335 NLRB 788, 801 (2001). The Opposition intentionally excludes the fact that the CBA in *Ormet* severely limited the employer’s ability to use subcontractors because the parties had to mutually agree to subcontract jobs that would normally be performed by the bargaining unit. *Id.* at 794; Opp. p. 7.

The CBA here, however, is materially and critically different because it gives Safeway the unfettered right to have lumpers unload “[i]nbound freight loads that include unloading as part of the purchase agreement” (Mixey Decl. Ex. B.) As such, *Disneyland Park* and *Ethicon* are instructive since the CBAs in those cases also specifically provided for an unencumbered right to subcontract. *Disneyland Park* at 1258; *Ethicon*, 360 NLRB at 832. In accordance with the Board’s ruling in those cases, since the CBA here specifically provides for the right to subcontract to lumpers, the relevance

of subcontracts is not apparent from the surrounding circumstances. *Id.* The only restriction on Safeway's use of lumpers is whether unloading is part of the purchase price of a particular item. Therefore, the "apparent" evidentiary standard is irrelevant here.

The relevance of third-party contracts and other related documents is certainly not apparent from the evidence before the Board. To the contrary, the CBA explicitly authorizes Safeway's use of lumpers and the Arbitrator held that third party contracts are "immaterial" to the issue of whether Safeway's use of lumpers is in compliance with the CBA. As explained above, the contracts with lumpers do not address the question of whether the purchase price includes offloading². Only the purchase orders, which have been produced to the Union, speak to that question. Therefore, third party contracts and documents are not "apparently" relevant. Indeed, Arbitrator Angelo's decisions, and his documentary framework, establish the "relevant" evidence for evaluation of the Union's claims related to compliance (or lack thereof) with the CBA. Nothing else is "apparently" relevant.

C. The General Counsel Concedes That The Union Did Not Offer Objective Evidence That the Information Sought Is Relevant.

Since third party contracts are not presumptively relevant and their relevance is not apparent, it was the Union's burden to establish the relevance of third-party agreements with objective evidence. Crucially, the General Counsel is understandably silent on this key issue, because the Union's five letters to Safeway indisputably fail to do so. None of the five letters offer any objective evidence of relevance nor point to any specific contractual language which Safeway allegedly violated. The General Counsel offers no opposition to Safeway's argument that the Union failed to meet its burden. (Safeway's MSJ, p. 21 & 24-26.) The General Counsel cannot point to a single sentence in five letters that could arguably be evidence of the Union meeting its burden. Like the

² The relevance of Safeway's contracts with "vendors" or "transportation brokers" is certainly not "apparently" much less "presumptively" relevant to the question of Safeway's use of lumper services. Quite frankly, neither the Union (in its correspondence) nor the General Counsel here make any substantive argument about the relevance of such documents. If it is an unfair labor practice to refuse to produce contracts of "vendors", and "brokers", then it is also an unfair labor practice to refuse any Information Requests made by a Union. This cannot be the law. These are questions of law, not fact, suitable for disposition in a summary proceeding.

employers in *Disneyland Park* and *Ethicon*, Safeway was not required to provide the Union with documents which the Union had failed, with objective evidence, to establish as relevant. *Disneyland Park* at 1258; *Ethicon*, 360 NLRB at 832. Therefore, as a matter of law, Safeway did not engage in an unfair labor practice and no triable issue of material fact exists.

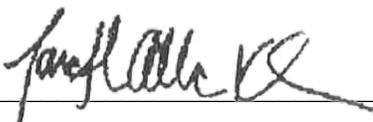
III. CONCLUSION

The General Counsel does not dispute the material facts presented by Safeway nor offer any of its own material facts. The Opposition offers no factual argument as to why third-party documents requested by the Union are relevant. Instead, the General Counsel expects a free pass to an unnecessary hearing. Summary judgment is appropriate because the third-party contracts and related documents are not presumptively relevant to the bargaining relationship between the parties, and have even been established to be immaterial by prior binding arbitrations. Moreover, since the Union failed to provide any objective evidence of its entitlement to documents beyond the documentary framework established in binding arbitration, no triable issue of material fact remains.

A simple question can be posed – if the CBA permits Safeway’s unfettered use of lumpers services where unloading is part of the purchase price, why would contracts with lumpers services, much less transportation brokers or other unknown “vendors” be relevant to the bargaining relationship between the parties? The General Counsel offers no answers, and it is that silence that leads Safeway to respectfully request its motion for summary judgment, or for partial summary judgment, be granted.

DATED: January 30, 2019

KLEIN, HOCKEL, IEZZA & PATEL P.C.



Jonathan Allan Klein, Esq.
Attorney for Respondent Safeway, Inc.

STATEMENT OF SERVICE

I hereby certify that I served the foregoing **RESPONDENT SAFEWAY, INC.’S REPLY IN SUPPORT OF MOTION FOR TRANSFER AND SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT** as indicated below.

X **(BY ELECTRONIC FILING)** I served the document(s) by transmitting an electronic version through the NLRB E-Filing portal to the eService recipients listed below:

National Labor Relations Board
Office of the Executive Secretary
1015 Half Street SE
Washington, D.C. 20570-0001

X **(BY ELECTRONIC SERVICE)** By electronically mailing a true and correct copy through Klein, Hockel, Iezza & Patel P.C.’s electronic mail system from edenman@khiplaw.com to the email addresses set forth below:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on this 30th day of January 2019 at San Francisco, California.



Ezra M. Denman, Paralegal