Nos. 18-2108, 18-2225

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARATHON PETROLEUM CO., LP
d/b/a CATLETTSBURG REFINING, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF ORAL ARGUMENT

This case involves the application of settled principles to straightforward facts established on credited testimony, and therefore does not require oral argument. However, because Petitioner/Cross-Respondent, Marathon Petroleum Co., LP, has requested oral argument, the Board also requests the opportunity to argue. The Board believes that 15 minutes per side will be sufficient for the parties to present their views.

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Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Marathon Petroleum Co., d/b/a Catlettsburg Refining, LLC's ("the Company") to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, a Board Order issued against the Company on July 18, 2018, reported at 366 NLRB No. 125. The Board had subject matter jurisdiction under Section 10(a) of the

The 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 pursuant to Section 10(e) and (f) of the Act because the unfair labor practices took place in Kentucky. The Company's petition and the Board's cross-application were timely because the Act imposes no time limit on such filings.

STATEMENT OF THE ISSUE

Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with requested information relevant to the Union's duties as collective-bargaining representative.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

The Company, a nationwide refiner and retailer of transportation fuels, operates a crude-oil refinery in Catlettsburg, Kentucky. (A 6-7; SA 93.)[1] The Company has recognized the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union,

[1] "A" references are to the appendix. "SA" references are to the supplemental appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to the Company's brief. "A-Br." references are to the Amici's brief.

AFL-CIO ("the International Union") and its Local 8-719 (collectively, the "Union") as the exclusive bargaining representative for a unit of maintenance and operations employees. (A 7; SA 66.) The parties' bargaining relationship dates back to the 1940s and has been governed by a series of collective-bargaining agreements. (A 7; SA 15.)

The Company is a member of a multiemployer bargaining association that, with the International Union, negotiates the "National Oil Bargaining Policy"—also known as the "pattern agreement"—which sets the basic parameters of member-employers' collective-bargaining agreements with the local unions representing their employees. (A 7; SA 16, 18, 94.) During bargaining for the 2015 pattern agreement, the International Union proposed to return routine maintenance work to members of the bargaining unit. (A 7; SA 101.) It did so in response to the erosion of the bargaining unit due to employers' use of outside contractors to perform maintenance work. (A 7; SA 16, 64-65, 101.)

Following expiration of the parties' 2012-2015 collective-bargaining agreement on January 31, 2015,[2] the Union went on strike as part of a coordinated action against the Company and other selected employers nationwide, motivated in part by the maintenance-subcontracting issue. (A 7; SA 15-16, 64-65.) On March

[2] All dates hereinafter are 2015 unless otherwise noted.

12, the multiemployer association and the International Union reached a new pattern agreement. (A 7; A 53-57, SA 16-18, 101.) In early April, the Company and the Union agreed to a collective-bargaining agreement for the Catlettsburg location that incorporated the terms of the 2015 pattern agreement, thus ending the strike. (A 7; A 53-81, SA 18-19.)

That collective-bargaining agreement includes a letter agreement, from the pattern agreement, "regarding maintenance training and development and maintenance craft needs" ("the Letter Agreement"). (A 7; A 54-55.) The Letter Agreement was reached in response to the International Union's proposals during negotiations to convert contractor-held maintenance jobs to bargaining-unit jobs. (A 7; SA 101.) It recites the parties' commitment "to meet upon request by the local union or management to discuss ongoing opportunities in the area of maintenance recruitment, development and day-to-day routine maintenance craft needs," and specifies that such "initial discussions shall be concluded within one hundred and eighty (180) days of the date of ratification." (A 7; A 54.) The Letter Agreement goes on to list the subjects that "the Parties will meet . . . to discuss," including "[w]ays in which day-to-day routine maintenance work currently performed by contractors could be efficiently performed by bargaining unit employees." (A 7; A 54, SA 18.)

The Letter Agreement provides that "[a]t the conclusion of such discussions, the Company will develop and share the projected maintenance hiring plans and timelines for implementing such plans with the Local Union . . . ." (A 7; A 54.) It further specifies that "opportunities will be based on business needs as determined by the Company," and that "any hiring of maintenance employees will be based on business and facility maintenance needs as determined by the Company." (A 7; A 54-55.) In addition, the Letter Agreement states that "[t]he information relevant to this discussion may be considered confidential and proprietary, and may require the signing of a Confidentiality Agreement." (A 7; A 55.) Finally, it creates a dispute-resolution procedure that either party may invoke "[i]n the event either party fails to discuss and share the data identified above, or if the Company fails to develop and execute the projected maintenance hiring plan . . . ." (A 7; A 55.)

On April 8, the Union requested, pursuant to the Letter Agreement, that the Company meet to discuss the ways that routine maintenance work then performed by outside contractors might be performed by bargaining-unit employees. (A 7-8; SA 19-21, 143.) The Company responded on April 20, agreeing to meet. (A 8; SA 144.) On May 21, the Union gave the Company a written information request divided into 9 items, most of which pertained to the upcoming bargaining over maintenance subcontracting. (A 8; A 82-83.) Item #2 requested "the wage/roll up/overhead costs of these [maintenance-]contractor employees. Include any

premiums and margins paid to the contractor firms and any bonus/completion milestones paid to them." (A 8; A 83.)

"Roll-up" costs refer to all the components of a contractor's billable rate, such as base wages, fringe benefits, workers' compensation, social security, unemployment insurance, overhead, and profits. (A 8; SA 124.) Some of the Company's contracts with subcontractors for the performance of routine maintenance work at the Catlettsburg facility contain the roll-up cost information, as in the Union's request, while others show only "all-in" or "lump sum" costs. (A 8; SA 124-25.) The Union requested the cost information to assist it in determining, as contemplated in the Letter Agreement, the ways in which day-to-day routine maintenance work performed by contractors could be more efficiently performed by bargaining-unit employees. (A 8; A 54-55, SA 24-26, 70-73.)

On August 6, the Company and Union executed a confidentiality agreement to protect any information the Company provided in response to the Union's May 21 request, as provided for in the Letter Agreement. (A 8; A 84-87.) That three-page agreement requires that all information provided must be kept confidential, not to be disclosed without the Company's written consent, and only be transmitted on a "need to know" basis. (A 84-86.) The confidentiality agreement further provides that the Union: will be responsible for any breach of the agreement by its representatives; must notify the Company if required to disclose information via

subpoena so that the Company may seek a protective order; must keep a record of persons who are permitted to access the information; and must, if required to disclose information by a court order, move the court to file it under seal or through some comparable protective mechanism. (A 84-86.) Finally, the agreement specifies that the Company will not have liability to the Union as a result of the use of the information and will be entitled to specific performance and injunctive relief upon breach of the agreement. (A 8; A 84-86.)

On August 7, one day after the parties executed the confidentiality agreement, the Company provided the Union with information responsive to the Union's May 21 request, with the exception of the subcontracting-cost information described in Item #2. (A 8; SA 148-54.) The Company challenged the Union to explain the relevance of that information, stating:

> Contracting supplemental workers is a means to expand and contract our workforce to meet the cyclical nature of our business, and the costs do not alter the Company's need to maintain that operational flexibility. In addition, this request involves highly sensitive, confidential information involving the Company's business relationships with third parties. Disclosing such information could damage the Company's ability to reach agreements with these third parties.

(A 8; SA 148.)

On August 13, representatives of the Company and the Union met to discuss maintenance subcontracting. (A 8; SA 98, 102.) At the meeting, the Company asked the Union to start looking for ways that bargaining-unit employees could

efficiently perform routine maintenance work, and the Union asked the Company to do the same. (A 8; SA 102-03.) The Company responded that it believed that outside contractors were already performing the work efficiently. (A 8; SA 102-03.)

Representatives of the Company and Union met again on September 14 regarding the possible return of routine maintenance jobs to the bargaining unit. (A 8-9; SA 28.) At the meeting, the Union presented a proposal listing 25 routine maintenance jobs it wanted returned to the bargaining unit, asserting that bargaining-unit employees could do the work more efficiently and were more familiar with the plant and the type of work than contractors. (A 9; SA 30.) The Company asked the Union to prove its efficiency claim. (A 9; SA 31-32, 110-11, 145.) The Union retorted, "we have no information on the contractors and what they cost" (A 9; SA 118, 146), asserting that it "need[ed] those contractor rates to prove that we [the bargaining-unit employees] can do the work more efficiently" (A 9; SA 31). In response, the Company claimed that it could not provide that information because it was confidential. (A 9; SA 31-32.) The Union reiterated its need for the information to answer the Company's "efficiency demand," and reminded the Company's officials that the confidentiality agreement would protect any information produced. (A 9; SA 110-11, 145-47.) The Company replied that the contractors allowed the Company to expand and contract its workforce and

were "necessary for [the Company's] flexibility, and the cost was only part of that." (A 9; SA 110-11.)

On September 18, the Union emailed the Company again requesting the subcontracting costs as described in Item #2. (A 9; A 91, SA 35, 112.) On October 5, the Company responded, acknowledging that the Union had "stated that [the subcontracting-cost] information was needed to be able to prove that the Union [could] do things more efficiently," and asserting again that "contracting supplemental workers is a means to expand and contract our workforce to meet the cyclical nature of the business, and the costs do not alter the Company's need to maintain that operational flexibility." (A 9; A 93.) The Company then stated that, since the Union had failed "to demonstrate a legitimate purpose for the requested subcontracting costs, and because cost is not the primary determinative factor for the Company contracting this work, we do not believe the Union has met its obligation to establish the relevance of this information." (A 9; A 94.)

Two months later, on January 8, 2016, the parties met concerning the Union's information request. (A 9; SA 38.) At the meeting, the Company provided the Union with a list it described as a summary, comparing the average billable rates paid to contractors and bargaining-unit employees for certain maintenance jobs. (A 9; A 92, SA 39-40, 77-78.) That summary was not accompanied by, and the Company did not offer to provide, any supporting

documentation or records. (A 9; SA 78.) The Company told the Union that the summary had been created to satisfy the Union's information request; the Union responded that the summary was insufficient and unhelpful because, for instance, it did not indicate which contractors were being paid what amount, did not state which costs were included or excluded (what "rolls into this number"), omitted the core maintenance-job classification of "instrument tech," and failed to break down the information on electricians by sub-classification. (A 9; SA 39-42, 77, 128.) The Company did not offer to bargain further over the matter, and never provided the subcontracting costs requested in Item #2. (A 10; SA 78-79.)

II. PROCEDURAL HISTORY

On February 25, 2016, after investigating a charge filed by the Union and International Union, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide to the Union requested information relevant to the Union's collective-bargaining duties. (SA 139-142.) On April 26, 2016, following a hearing, the administrative law judge issued a recommended decision finding that the Company had violated the Act as alleged. (A 5.) The Company filed exceptions, and the General Counsel filed limited cross-exceptions with the Board. (A 5.)

III. BOARD'S CONCLUSIONS AND ORDER

On July 18, 2018, the Board (Chairman Ring and Members Pearce and McFerran) affirmed the judge's rulings, findings, and conclusions. It found, in agreement with the judge, that the Company violated Section 8(a)(5) and (1) of the Act by refusing to provide the requested subcontracting-cost information to the Union. In doing so, the Board found that the requested cost information was relevant to the Union's bargaining duties and that the Company had failed to establish its asserted confidentiality defense. The Board also expressly declined to address the Company's belated argument that it had no duty to bargain about subcontracting for failure to preserve that argument before the judge.

The Board's Order requires that the Company cease and desist from the unfair labor practices found, and from, 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 (29 U.S.C. § 157). The Order further requires that the Company provide the Union the information requested on May 21, and September 18, 2015, as specified in Item #2 and to post a remedial notice.

SUMMARY OF THE ARGUMENT

Substantial evidence supports the Board's finding that the Company violated the Act by refusing to provide subcontracting costs requested by the Union. As the Board found, the Company was on notice of the relevance of the requested

information because the Letter Agreement obligated the Company to bargain over the ways in which unit employees could efficiently perform subcontracted maintenance work, and because maintenance subcontracting was a focal point of prior union bargaining efforts that culminated in a nationwide strike in 2015. The Union, moreover, demonstrated the relevance of subcontracting costs by repeatedly explaining to the Company that it needed the cost information to respond to the Company's demand, during negotiations, for proof that bargaining-unit employees could perform maintenance work more efficiently than subcontractors.

Substantial evidence also supports the Board's finding that the Company failed to establish a confidentiality defense. The Company did not prove its assertion that providing the requested information to the Union for bargaining purposes would hinder its relations with contractors, much less that its asserted confidentiality interest would outweigh the Union's interest in obtaining the information. The Company also failed to demonstrate why the comprehensive confidentiality agreement it had the Union sign was inadequate to satisfy its confidentiality concerns. That failure renders irrelevant its purported offer of an alternative accommodation, an issue which is not properly before the Court in any case.

Finally, the Company and its amici belatedly argue that the Company had no duty to bargain over, and therefore no duty to provide information concerning,

maintenance subcontracting. The Court is jurisdictionally barred from reviewing the Board's unanimous decision that the Company waived that argument for failure to raise it to the judge. In any event, the Board was well within its discretion in finding the argument waived.

STANDARD OF REVIEW

On review, the Board's findings of fact will be upheld if they are supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e). *Accord Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Squier Distrib. Co. v. Local 7, Int'l Bhd. of Teamsters*, 801 F.2d 238, 241 (6th Cir. 1986). The Board's application of the law to particular facts is also reviewed under the substantial-evidence standard. *Exum v. NLRB*, 546 F.3d 719, 724 (6th Cir. 2008). Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera Corp*, 340 U.S. at 477. *Accord Caterpillar Logistics, Inc. v. NLRB*, 835 F.3d 536, 542 (6th Cir. 2018). Accordingly, a reviewing court may not displace the Board's choice between two fairly conflicting views, even if the court "would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp.*, 340 U.S. at 488. *Accord NLRB v. Gen. Fabrications Corp.*, 222 F.3d 218, 225 (6th Cir. 2000).

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY FAILING AND REFUSING TO FURNISH THE UNION WITH RELEVANT, REQUESTED INFORMATION

A. An Employer Must Provide Its Employees' Union with Requested Information Relevant to the Union's Representational Duties

Section 8(d) of the Act creates a mutual obligation for an employer and the collective-bargaining representative of its employees "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder . . . ." 29 U.S.C. § 158(d). Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees" as required by Section 8(d). 29 U.S.C. § 158(a)(5).

An employer's duty to bargain in good faith includes the 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, 435-37 (1967). That includes information relevant to bargaining. *Gen. Motors Corp. v. NLRB*, 700 F.2d 1083, 1088 (6th Cir. 1983). Accordingly, "an employer's refusal to provide the Union with information which is relevant and necessary to the

bargaining function violates Sections 8(a)(1) and (5) of the Act." *Id.* (citing *Acme*, 385 U.S. 432; *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 151-54 (1956)).[3] The duty to bargain, and therefore the duty to furnish relevant, requested information "extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement." *Acme*, 385 U.S. at 436.

Where a union requests information pertaining to employees in the bargaining unit, that information is presumptively relevant. *Gen. Motors*, 700 F.2d at 1088 (citing *Teleprompter Corp. v. NLRB*, 570 F.2d 4, 8 (1st Cir. 1977)); *Disneyland Park*, 350 NLRB 1256, 1257-58 (2007). Where, however, the requested information involves matters outside the bargaining unit, the information is not presumptively relevant, and the union must demonstrate its relevance. *Disneyland Park*, 350 NLRB at 1257-58. The Board has held that information regarding subcontracting is not presumptively relevant, even if it relates to the bargaining unit's terms and conditions of employment. *Id.* at 1258; *Richmond Health Care*, 332 NLRB 1304, 1305 n.1 (2000). An employer must provide such information only if the union demonstrates the relevance of the requested

[3] Conduct that violates Section 8(a)(5) also derivatively violates Section 8(a)(1), *NLRB v. Galicks*, 671 F.3d 602, 608 n.2 (6th Cir. 2012), which prohibits employer actions that "interfere with, restrain, or coerce employees in the exercise of the[ir] rights" under the Act, 29 U.S.C. § 158(a)(1).

information, *or* if the relevance of the requested information should have been apparent to the employer under the circumstances. *Disneyland Park*, 350 NLRB at 1258. *Accord Public Serv. Co. of New Mexico*, 360 NLRB 573, 598 (2014), *enforced*, 843 F.3d 999 (D.C. Cir. 2016).

As this Court has stated, to require an employer to provide requested information, "the Board need only find that the desired information is relevant and useful to the [u]nion in carrying out its statutory duties and responsibilities." *Id.* (citing *Acme*, 385 U.S at 437; *Truitt*, 351 U.S. at 153; *NLRB v. Rockwell-Standard Corp.*, 410 F.2d 953, 957 (6th Cir.1969)). Whether information is relevant depends on the circumstances of each case. *Gen. Motors*, 700 F.2d at 1088. The Court and the Board apply a liberal discovery-type standard that looks at whether there is a "probability that the desired information [is] relevant, and that it [will] be of use to the union in carrying out its statutory duties and responsibilities." *Id.* (quoting *Acme*, 385 U.S. at 437). *Accord Disneyland Park*, 350 NLRB at 1258. Therefore, even "potential or probable relevance is sufficient to give rise to an employer's obligation to provide information." *Disneyland Park*, 350 NLRB at 1258. Indeed, the "[requested] information must have some bearing on the issue between the parties but *does not have to be dispositive*." *Kaleida Health, Inc.*, 356 NLRB 1373, 1377 (2011) (emphasis added).

B. The Company Unlawfully Refused To Provide the Union with Relevant Requested Subcontracting-Cost Information

Here, the Company does not dispute that the Union requested the Company's subcontracting costs. Nor does the Company dispute that it refused to provide the requested information in full. Rather, the Company argues that its subcontracting costs were not relevant to the Union's bargaining duties, that it had a confidentiality interest that justified withholding the information, and that it had no duty to bargain about subcontracting at all, much less produce information relevant to such bargaining. As demonstrated below, however, substantial evidence supports the Board's findings that: (1) the requested information was relevant to bargaining; (2) the Company failed to establish a confidentiality interest in the information that outweighed the need of the Union to obtain the information; and (3) the Company waived any argument that it has no applicable duty to bargain.

1. The subcontracting-cost information was relevant to the Union's bargaining duties

Substantial evidence supports the Board's finding that the requested information regarding maintenance-subcontracting costs was relevant to the Union's representational duties. (A 10-11.) As the Board found, the Company should, under the circumstances, have been aware of the relevance of the information to ongoing bargaining regarding subcontracting of maintenance work

and, specifically, to the relative efficiency of assigning such work to bargaining-unit employees vs. contractors. (A 10.) As the Board further found, in any event, the Union demonstrated relevance. (A 11.)

First, the events leading up to the Union's request, and the context of the request, should have made the cost information's relevance clear to the Company. (A 10.) As the Board found, it is undisputed that the nationwide strike, in which bargaining-unit employees participated, was motivated in part by erosion of the bargaining unit over time due to maintenance work being awarded to outside contractors. (A 7, 10; SA 16, 64-65.) As a result, the Company was on notice at least as early as January 2015, when the strike began, that its subcontracting of maintenance work was a major concern of its employees and their Union. (A 10; SA 16, 64-65.) Moreover, the strike-concluding labor agreement included the terms of the Letter Agreement—negotiated in response to the International Union's proposals to reduce subcontracting—which required the Company to bargain over that issue upon the Union's request. (A 10-11; A 53-55, SA 16, 101.)

More specifically, the Letter Agreement required the Company to "meet . . . to discuss [with the Union]" the "[w]ays in which day-to-day routine maintenance work currently performed by contractors could be efficiently performed by bargaining unit employees." (A 11; A 54, SA 18.) And, to facilitate those discussions, the Letter Agreement contemplated the production of information—

some potentially sensitive—relevant to the efficiency of assigning maintenance work to contractors vs. bargaining-unit employees. (A 54-55.) The Letter Agreement itself thus confirms the parties' ongoing dispute over the subcontracting of maintenance work and attests both to their ongoing negotiations over that issue and to the key role in those discussions of the efficiency of bargaining-unit employees and contractors. (A 10; A 54-55.)

In light of that Letter Agreement, it is disingenuous of the Company to claim ignorance of the purpose and relevance of the Union's request for subcontracting costs. Rather, as the Board found, the relevance of the information requested should have been apparent to the Company based on the surrounding circumstances. (A 10.) *See, e.g.*, *Brazos Elec. Power Co-Op., Inc.*, 231 NLRB 1016, 1018-19 (1979), *enforced in relevant part*, 615 F.2d 1100 (8th Cir. 1980) (finding that employer was on notice of the relevant bargaining purpose of the union's request for non-unit employee wage data where that the request was made during the second year of a two-year agreement that called for submission of contract proposals three months before contract expiration).

Second, and in any event, the Union's contemporaneous communications to the Company prior to and during initial bargaining over maintenance subcontracting made clear to the Company the relevance of the subcontracting costs. (A 10-11.) As the Board noted, the Union specifically requested the

information for bargaining pursuant to the Letter Agreement. (A 10-11; SA 22, 143.) The Union also repeatedly conveyed to the Company, throughout those negotiations, that it could not reliably measure and compare cost efficiencies without the cost information. (A 9, 11; SA 24-26, 30-32, 70-73, 110-12, 145-47.)

For instance, after the Union proposed that the Company return several job classifications to the unit at their September 15 bargaining session, the Company's Human Resources Manager, Greg Jackson, challenged the Union to prove that bargaining-unit employees could do the work more efficiently than subcontractors. (A 9; SA 30-31, 34, 111.) In response, Union Secretary Roy Claar explained to Jackson that the Union "need[ed] those [requested] contractor rates to prove that [the unit employees] can do the work more efficiently." (A 9; SA 30-31.) After the Company raised confidentiality concerns, Claar reiterated that the Union needed the information to be able to adequately respond to the Company's "efficiency demand," reminding the Company that the Union had signed a confidentiality agreement. (A 9; SA 31-32; 145-47.) Thus, the Union explicitly told the Company that it sought subcontracting-cost information to satisfy the Company's demand in bargaining that the Union support its proposals for the return of maintenance work to the unit with comparative evidence of efficiency. Accordingly, substantial evidence supports the Board's finding that the Union adequately explained to the Company the relevance of the information to the

parties' bargaining regarding the return of maintenance work to the bargaining unit, to the extent that relevance was not readily apparent. (A 10-11.)

The Company's challenges to the Board's relevancy finding (Br. 23-27) fail because they disregard Jackson's admissions, misconstrue Board precedent, presume—illogically—that costs and flexibility are completely independent, and apply an overly stringent standard of relevance. As an initial matter, although the Company maintains that it subcontracts maintenance work "primarily" (Br. 25) to achieve the workforce flexibility required in a cyclical industry, it has not shown that it does so to the exclusion of cost considerations. The record in fact makes clear that the Company does consider cost in subcontracting. The Board reasonably inferred that cost was at least a secondary factor in subcontracting because, for instance, in an October 5 letter to the Union, the Company wrote that "cost is not the primary determinative factor." (A 11; A 94, SA 110-11.) Contrary to the Company's (Br. 27, n.5) and amici's (A-Br. 23-24) mischaracterizations of the Board's decision, however, the Board's determination that the Company took costs into consideration was not based on that inference alone. (A 11.) Rather, as the Board noted, Jackson candidly admitted more than once at the hearing that cost was indeed a factor—"a part" of the equation—in determining whether to subcontract maintenance work. (A 9, 11; SA 110-11, 115.) Thus, the Company's

own admissions show that cost factored into its subcontracting decisions.[4]

The Company does not advance its position by citing (Br. 23-26; *see also* A-Br. 24) cases where the Board found subcontracting-cost information irrelevant to unions' processing of grievances based on contractual provisions that restricted subcontracting on factors other than cost. In *Disneyland Park*, the Board found that detailed information about particular subcontractors and their contracts was not relevant to substantiate the union's contractual grievance under a provision that barred subcontracting in certain circumstances (e.g., if it resulted in layoffs of unit employees). 350 NLRB at 1262-63. Because the union had not claimed that the subcontracting at issue had caused layoffs, or identified any other circumstance reasonably suggesting a violation of the collective-bargaining agreement, the Board concluded that the details of the subcontracts were not relevant to the union's grievance. *Id.* at 1258-59. Similarly, in *Ethicon, a Johnson & Johnson Co.*, the Board found that the requested subcontracting-cost information was not

[4] The amici also argue (A-Br. 25) that the language of the Letter Agreement did not anticipate a *comparison* of the efficiency between unit employees and subcontractors. That argument disregards the plain language of the Letter Agreement itself, which compelled the parties to discuss efficiency, of which comparative efficiency is an inherent part. It also ignores Jackson's explicit demand during negotiations that the Union prove how unit employees could more efficiently perform subcontracted maintenance work. (A 9; SA 31-32, 110-11, 145-47.)

relevant to the union's grievance alleging violation of the labor agreement where there was nothing suggesting that the employer's subcontracting violated the relevant provision of the labor agreement, under which cost was not a consideration. 360 NLRB 827, 832 (2014). *See also Sara Lee Bakery Grp., Inc. v. NLRB*, 514 F.3d 422, 432 (5th Cir. 2008) (court found subcontracting-cost information irrelevant to grievance regarding whether particular type of work was subject to subcontracting under the parties' contract).

By contrast, the Union here does not seek the requested information to support a grievance challenging the employer's subcontracting as a violation of a particular contractual provision. The Union seeks subcontractor cost information—and the Board found it relevant—for an entirely different purpose: bargaining for the return of subcontracted work to the unit, as contemplated in the parties' Letter Agreement. And crucially, as discussed above, pp. 18-21, the parties' initial discussions pursuant to the Letter Agreement explicitly identified comparative efficiency of bargaining-unit employees and contractors—of which cost is a factor—as an issue relevant to those negotiations.

Those facts also distinguish this case from *Detroit Edison Co.*, highlighted by the amici (A-Br. 19-21). 314 NLRB 1273, 1273-75 (1994). In that case, a union sought subcontracting-cost information based on its fear that bargaining-unit work might be contracted out in the future after the employer asserted, during

contractually mandated semiannual meetings to "review" ongoing subcontracting, that contractors were cheaper than bargaining-unit employees. *Id.* at 1273-74. The Board found the requested information irrelevant to the union's representational duties based on the union's own admissions that, among other things, it had no grievance *or bargaining* planned regarding subcontracting, nor any reason to believe that the employer was in violation of contractual provisions guaranteeing a set amount of work to the bargaining unit. *Id*. at 1274-75. Here, however, unlike *Detroit Edison*, there was planned bargaining taking place, pursuant to the Letter Agreement, over the subject of returning maintenance jobs to the unit, and the initial focus of that bargaining was the comparative efficiency of subcontracting and having bargaining-unit employees perform the work.

The Company's insistence (Br. 25) that flexibility, not cost, is the primary determinative factor in subcontracting decisions does not make cost irrelevant; as described above, pp. 21-22, Company officials admitted that cost is a consideration. The Company's contention that cost is nonetheless irrelevant because cost savings cannot eliminate its need for flexibility requires one to accept the dubious premise that "cost" and "flexibility" are completely distinct, non-interrelated concepts. The Company does not explain how this can be so when cost is admittedly a consideration. Rather, it is logical to assume that lower costs create more flexibility in operational decision-making and thus represent an

important component of the flexibility the Company seeks through subcontracting. And to the extent the Company is focused only on scheduling flexibility, even that is not necessarily an all-or-nothing proposition; it is not inconceivable that the Union could convince the Company to exchange not all, but some measure, of scheduling flexibility for substantial cost savings. Those are precisely the sorts of issues about which the parties could negotiate—and solutions the Union might be able to devise and propose—if armed with the relevant (cost) information during bargaining.

The Company also argues (Br. 26-27, 31) that even assuming cost is a factor in its subcontracting decisions, the Union did not establish why the "roll-up," or itemized breakdown, of subcontracting costs was relevant. It also asserts that the Union failed to illustrate how it would use the information once provided and, specifically, did not explain what it meant by "more efficient." Of course, to argue that the Union does not know exactly what it will do with the information or how it will prove comparative efficiency, while withholding the very information that defines the object of comparison, is disingenuous. As the Board noted, for example, union officials testified that the average billing rates the Company provided did not indicate differences in the costs of different contractors and did not break down the information on electricians' work by subcategory of electrician. (A 14; SA 42.) Those details could be relevant to determining whether

bargaining-unit employees could compete with some contractors even if they could not compete with others or could perform some types of electrical work more efficiently but not others. Such information could, in turn, facilitate bargaining over the return to the bargaining unit of some, but not all, routine maintenance work, depending on which work employees could perform more efficiently—and that was precisely the issue in the context of bargaining to return some, but likely not all, routine maintenance work to the bargaining unit.[5]

Moreover, at bottom, the Company's objection to the relevance of *itemized* costs boils down to an argument that it satisfied its statutory obligation by providing a purported summary of average billing rates of some contractors that the Company had calculated and compiled *in lieu of* actual subcontracting-cost documentation. As the Board noted, however, the Company did not even offer to let the Union review or inspect the documentation substantiating that list.[6] (A 9, 13-14; SA 78.) A requesting party is not required to accept, at face value, the other party's unsupported assertions and representations about requested information.

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[5] Essentially the same rationale applies to the other deficiencies the Board noted in the purported summary, i.e., that it omitted one maintenance job classification and did not make clear which costs were included in the listed averages. (A 13-14.)

[6] Under those circumstances, moreover, the Board had no occasion to decide whether the Company would have satisfied its obligation by producing documents with non-itemized subcontracting costs.

See Providence Hosp. v. NLRB, 93 F.3d 1012, 1021 (1st Cir. 1996) (in finding employer's "naked assertion" about staffing levels insufficient to meet its statutory obligation to provide the requested information, the Court noted that "a union is not bound to accept management's *ipse dixit*"); *Merchant Fast Motor Line*, 324 NLRB 562, 563 (1997) (union not required to accept a respondent's declaration as to profitability or its unsupported financial summary); *McQuire Steel Erection*, 324 NLRB 221 (1997) (payroll record summaries provided to union were insufficient to meet respondent's statutory duty to supply the information). Given the proven availability of the requested itemized roll-up costs (SA 125), the lack of any claim—much less evidence—that providing the requested information would be overly burdensome, and the Company's failure to substantiate its list with any original documentation, itemized or not, the Company's proffered list of average rates was insufficient to satisfy its statutory obligation.[7]

Finally, in making its arguments, the Company misconstrues the applicable relevance standard. The Board holds that "potential or probable relevance is

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[7] The Company contends (Br. 31), wrongly, that the Board found that summaries can *never* satisfy an employer's bargaining obligation. To the contrary, the Board made no such sweeping holding. Rather, the Board explained why, in this case, the Company's purported summary was insufficient to satisfy its bargaining obligation, both because it was incomplete and because it lacked any substantiation. (A 14.)

sufficient to give rise to an employer's obligation to provide information." (A 10.) *Disneyland Park*, 350 NLRB at 1258 (citing *Richmond Health Care*, 332 NLRB at 1305 n.1). *Accord Leland Stanford Junior Univ.*, 262 NLRB 136, 139 (1982), *enforced*, 715 F.2d 473 (9th Cir. 1983). As the Board reasonably found, the requested subcontracting costs were, at the very least, of potential or probable relevance to the parties' bargaining over subcontracting—particularly in light of the Company's demand that, to pursue negotiations over the Union's proposal to return certain work to the bargaining unit, the Union must first prove the comparative efficiency of bargaining-unit employees vs. contractors. (A 10-11; SA 31, 111.) The Company's insistence that the Union demonstrate the precise ways the requested information will be useful and exact comparisons or proposals it will support go beyond the "discovery-type" relevance standard, which the Union satisfied. Accordingly, substantial evidence supports the Board's finding that the subcontracting costs requested by the Union were relevant to its representational duties and thus that the Company had a statutory obligation to provide that information unless it could establish its confidentiality defense. (A 10-11.)

2. The Company failed to establish a confidentiality defense justifying its failure to provide the requested information

Board law provides that, in certain instances, a party may justify its otherwise unlawful refusal to furnish relevant, requested information by proving a confidentiality defense. *See Detroit Newspaper Agency*, 317 NLRB 1071 (1995)). To do so, the refusing party must establish a legitimate and substantial confidentiality interest that outweighs the requesting party's interest in obtaining the information and must seek a reasonable accommodation that would facilitate provision of information while protecting confidentiality. *Pennsylvania Power Co.*, 301 NLRB 1104, 1105-06 (1991).

Here, substantial evidence supports the Board's rejection of the Company's confidentiality defense. (A 11-13.) The Company claimed in its August 7 written response to the Union that the requested wage, roll-up, and overhead costs "involve[] highly sensitive, confidential information involving the Company's business relationships with third parties. . . . [and] that disclosing such information could damage the Company's ability to reach agreements with these third parties." (A 11; A 88-90.) The Company failed, however, to substantiate its asserted confidentiality interest, much less prove that it outweighed the Union's need for the information. In any event, the Company failed to show that the confidentiality agreement it had the Union sign in anticipation of an information exchange was an

inadequate accommodation of any confidentiality interests it might have. (A 11-13.)

a. The Company did not prove a legitimate and substantial confidentiality interest that outweighed the Union's interest in obtaining the requested information

A party refusing to provide relevant, requested information based on asserted confidentiality concerns has the burden of proving that it has a "legitimate and substantial" confidentiality interest in the information sought. *Island Creek Coal Co. v. NLRB*, 899 F.2d 1222, 1990 WL 41848, at *4 (6th Cir. 1990) (citing *Detroit Edison v. NLRB*, 440 U.S. 301, 314-15 (1979)); *Howard Indus., Inc.*, 360 NLRB 891, 892 (2014); *N. Indiana Pub. Serv. Co.*; 347 NLRB 210, 211 (2006). If the refusing party is unable to establish such an interest, it must disclose the information in full. *Howard Indus.*, 360 NLRB at 892. If it establishes a legitimate and substantial confidentiality interest, it then has the burden of proving that its interest outweighs the interests of its bargaining partner in receiving the information. *Id.*

The Board has designated certain categories of information as confidential, including information that: is "highly personal . . . , such as individual medical records or psychological test results"; "would reveal substantial proprietary information, such as trade secrets"; "could reasonably be expected to lead to harassment or retaliation, such as the identity of witnesses"; and "is traditionally

privileged, such as memoranda prepared for pending lawsuits." *Detroit Newspaper*, 317 NLRB at 1073. However, that list is not exclusive; whether information is sensitive and confidential must be considered within the factual context of each case.[8]

Here, as the Board found, the Company failed to establish a legitimate and substantial confidentiality interest in the requested information. (A 12-13.) Subcontracting-cost information does not fall into any of the Board's generally recognized categories of confidential information. (A 12.) It does not implicate traditionally sensitive subjects such as medical records, trade secrets, or attorney-client discussions, and its disclosure could not reasonably be expected to result in harassment or retaliation. (A 12.) Nor has the Company proven its contention that the information is otherwise especially sensitive or that disclosure is likely to have serious consequences. (A 12-13.)

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[8] *See, e.g.*, *N. Indiana Pub. Serv. Co.*, 347 NLRB at 211. For instance, the Board has found legitimate and substantial confidentiality interests in investigative interview notes of alleged supervisor harassment where the employee was expressly promised confidentiality (*id.*); in an investigative report concerning an altercation between two employees (*West Penn Power Co.*, 339 NLRB 585 (2003), *enforced on other grounds*, 394 F.3d 233 (4th Cir. 2005)); in the names and unlisted phone numbers of customers whose complaints led to an employee's discharge, the confidentiality of which was ensured by state law (*GTE California, Inc.*, 324 NLRB 424 (1997)); and in the identity of informants who assisted the employer in its employee drug-monitoring schemes (*Pennsylvania Power Co.*, 301 NLRB at 1106-08).

As the Board described, the only evidence the Company offered as to the legitimacy and substantiality of its alleged confidentiality interest was the vague and conclusory testimony of its Director of Global Procurement, James Nelson, that confidentiality was necessary to protect its ongoing business relationships with third-party contractors, and purely internal company policies. (A 9-10, 12; A 141-146, SA 129-31, 155-59.) Nelson merely testified that he himself deemed the requested information confidential based on his own sense that disclosure could "compromise the trust that we have with our contractors." (A 12-13; SA 129-131.) And the internal policies demonstrate, at most, the Company's subjective intent to keep the information confidential.

The record is devoid of any suggestion that the Company ever expressly promised the contractors, orally or in writing, that cost information would be kept confidential. (A 12-13.) Notably, there is no evidence that the Company's internal confidentiality policies were ever publicized to contractors. (A 12; SA 130-35.) The subcontracting agreements did not require confidentiality, no contractor testified that it relied on confidentiality in contracting with the Company, and Nelson did not say that he based his fear that disclosure could damage contracting relationships on any statement by a contractor. (A 12; SA 130-35.) In other words, as the Board found, the Company failed to present any evidence that disclosure of the requested information would prevent the Company from reaching

agreements with contractors in the future. (A 12.) Thus, contrary to the Company's contention (Br. 34), the Board did not "overlook" the record evidence but, rather, reasonably found the evidence lacking. (A 12-13.)

Accordingly, the Board reasonably found the circumstances of this case distinguishable from other cases where the burden to prove substantial and legitimate confidentiality interests had been met. (A 12.) For instance, in *Northern Indiana Public Service Co.*, 347 NLRB 210, *Pennsylvania Power Co.*, 301 NLRB 1104, and *GTE California Inc.*, 324 NLRB 424, cases the Company cites as support (Br. 33-34), the Board found that parties could lawfully withhold certain information where disclosure might lead to harassment or retaliation against individuals or expose the employer to liability under state law. Unlike the employers in those cases, the Company has made no argument and provided no evidence that the release of subcontracting costs to the Union could foreseeably lead to harassment or retaliation against individuals or put the Company in violation of some other law. Nor, as shown above, has it substantiated its vague assertion that disclosure would damage its ability to enter into future third-party contracts. *Compare N. Ind. Pub. Serv. Co.*, 347 NLRB at 211-12 (in finding confidentiality interest, Board relied in part on employer's promise that information would remain confidential and on testimony that third party relied on that promise in providing the information). Because the Company failed to show

that the withheld information implicates the same concerns as those identified in the above cases, or prove disclosure posed a comparable risk, the Board reasonably concluded that the Company did not meet its burden to establish a legitimate and substantial confidentiality interest. (A 11-13.)

Substantial evidence also supports the Board's further finding that, even if the Company's vague confidentiality concerns did qualify as legitimate and substantial, that alleged interest does not outweigh the Union's demonstrated need for the information. (A 13.) As discussed above, pp. 18-22, the Union needed the subcontracting-cost information to ascertain how bargaining-unit employees could do maintenance work more efficiently than contractors. Without it, the Union cannot reasonably be expected to adequately respond to the Company's efficiency demand, thus depriving the Union the opportunity, afforded by the Letter Agreement, to meaningfully discuss with the Company the return of maintenance jobs to the unit.

b. In any event, the Company did not satisfy its obligation to seek a reasonable accommodation

Even if the party asserting confidentiality can establish a legitimate and substantial confidentiality interest in requested information that outweighs the needs of the requesting party, it may not simply refuse to provide the information. *Howard Indus.*, 360 NLRB at 892; *Borgess Med. Ctr.*, 342 NLRB 1105, 1106

(2004). Rather, the refusing party must seek a reasonable accommodation that would allow the requesting party an opportunity to obtain the information it needs while protecting the confidentiality interest. *Howard Indus., Inc.*, 360 NLRB at 892.

Here, as the Board found and as detailed below, the Company refused to disclose the requested subcontracting-cost information even though the Union had signed a confidentiality agreement, a mutually agreed-upon accommodation for the Company's confidentiality concerns. (A 13.) Because the Company has not shown that accommodation to be inadequate to protect its interests, its confidentiality defense fails. (A 13.) The Company's argument, which it makes for the first time on appeal, that it offered an acceptable alternative accommodation in the form of an unsupported summary of subcontractor billing rates to the Union, is jurisdictionally barred and, in any event, lacks merit.

As the Board described, the parties established an accommodation in advance to address any confidentiality interests implicated by information requests relating to their bargaining over returning maintenance work to the bargaining unit. (A 13.) Specifically, their Letter Agreement provided for, and they signed, a confidentiality agreement that comprehensively protects from disclosure any information the Company provides in connection with that bargaining. (A 8, 13; A 84-87.) Among other terms, the confidentiality agreement makes the Union

responsible for any breaches of confidentiality and requires, should disclosure be ordered by a court, that the Union both notify the Company and seek to make any such disclosure under seal. (A 8, 13; A 84-87.)

As the Board noted, the Union specifically reminded the Company of the signed confidentiality agreement when the Company asserted confidentiality as a reason for non-disclosure of the requested subcontracting costs. (A 9; SA 31.) The Company never explained why it considered the agreement inadequate to protect any confidentiality interests it had. (A 13 & n.9.) Given the lack of evidence of any defect or inadequacies in the signed confidentiality agreement, or of any effort to bargain over adjusting that agreed-upon accommodation, the Board reasonably found the Company's confidentiality defense meritless. (A 13.)

The Company's contention (Br. 32) that the confidentiality agreement was inadequate because disclosure of subcontracting costs to the Union would result in damage to its relationship with contractors, is entirely unsupported by the record. The Company offered no statements from contractors in support of that assertion. Nor has it explained how it believes confidential disclosure to the Union for purposes of bargaining would affect the Company's relationship with contractors—or how they would even learn of any such confidential disclosure. Amici in support of the Company posit that contractors may refuse to deal with unionized companies for fear that "their confidential business information will be

disseminated to unions *which may leak the information elsewhere*." (A-Br. 25 (emphasis added).) This argument, however, disregards the confidentiality agreement and the extensive restrictions it imposes on the Union's disclosure to third parties. Neither the Company or its amici purport to identify any problem with the Union and Company discussing subcontracting costs in the context of bargaining.

Finally, the Company argues (Br. 27-32), for the first time on appeal, that the purported summary of subcontracting costs it provided to the Union, after first refusing to provide any costs at all, constituted an offer of compromise satisfying its legal obligation to seek an accommodation. Although the Company argued to the Board that its purported summary fulfilled the Union's information request, the Company made no argument, until now, that the document also satisfied its separate burden to seek accommodation with the Union upon establishing confidentiality interests that would outweigh the Union's interest in the requested information.

Because the Company did not raise that alternative accommodation argument before the Board, or justify its failure to do so, this Court is jurisdictionally barred from considering it. Under Section 10(e) of the Act, "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure to neglect to urge such objection shall be excused because

of extraordinary circumstances." 29 U.S.C. 160(e). *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (stating that Section 10(e) bars courts from considering issues not raised before Board); *Wal-Mart Stores, Inc. v. NLRB*, 136 F. App'x 752, 755 (6th Cir. 2005) (same). *See generally United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-38 (1952) (noting that "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order raise issues reviewable by the courts").

In any event, there is no merit to the Company's claim that its summary satisfied its duty to seek an accommodation with the Union. In making its case, the Company misplaces reliance on *E.W. Buschman Co. v. NLRB*, 820 F.2d 206 (6th Cir. 1987), and *E. Tennessee Baptist Hosp. v. NLRB*, 6 F.3d 1139 (6th Cir. 1993). (Br. 27-30). Both cases are fundamentally distinguishable. In *Buschman*, the employer agreed to provide its complete financial statements in response to a grievance-related information request, subject only to the union signing a confidentiality agreement. 820 F.2d at 207-08. The union refused to sign the agreement. *Id.* at 208. This Court vacated the Board's order that the employer provide the information without the confidentiality agreement, finding the asserted confidentiality agreement and proposed accommodation facially reasonable. *Id.* at 209. Similarly, in *East Tennessee Baptist*, the union sought non-unit employees'

attendance and payroll records to investigate a grievance, and the employer offered to provide attendance records for any non-unit employee allegedly treated more favorably than bargaining-unit employees and to allow an independent accountant to review all payroll records on behalf of the union. 6 F.3d at 1141-43. The union refused those proposed accommodations. *Id.* at 1142-43. This Court denied enforcement of the Board's order against the employer because the Board had not addressed the proposed accommodations. *Id.* at 1145.

The circumstances of the instant case are clearly different: the Union and Company *both* agreed to an accommodation that the Company has not shown to be inadequate, much less unreasonable. And the Board analyzed that accommodation and found it sufficient. More specifically, whereas in *Buschman* the employer offered to provide the information but the union refused to sign a confidentiality agreement, the Company here refused to provide the information despite the Union's execution of a strict confidentiality agreement. Also, unlike the employer in *East Tennessee Baptist*, the Company here made no offer either to provide documentation of its subcontracting costs or to allow the Union, or even an independent third party, to review its subcontracting records and verify the accuracy of its purported summary. Moreover, as already established, the requested information here was relevant to an overall comparative analysis in preparation for bargaining, not to prove specific instances of disparate treatment in

support of a grievance. Also, as discussed above, p. 25, the Company's purported summary—unlike the information the employers in *Buschman* and *East Tennessee Baptist* proposed to provide with their accommodations—was incomplete and inadequate to meet the needs of the Union.[9] For that reason, it would not constitute a reasonable accommodation of the two parties' interests. As such, the Company's analogy to those cases is inapposite.

In sum, given the executed confidentiality agreement, which was itself the accommodation, and the lack of evidence offered by the Company as to why that accommodation was inadequate to protect confidentiality, the Board reasonably found that the Company's asserted confidentiality defense fails even if the Company were to establish a substantial and legitimate interests sufficient to outweigh the Union's interest in the subcontracting-cost information. (A 13.)

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[9] In addition to the arguments addressed above, the Company argues that it was justified in omitting one maintenance job classification from the summary because including it would have revealed the wages of the sole contractor performing that job. (Br. 30-31.) The Company has not even argued, however, that the confidentiality agreement the Union signed would not adequately protect the employee's wage information.

3. The Company's belated argument that it had no duty to bargain is not properly before the Court

The Court does not have jurisdiction to review the Board's determination that the Company had failed to preserve its contention that it had no statutory duty to bargain over the return of maintenance work. The Company's no-duty-to-bargain argument is procedurally defective, primarily because the Company failed to object before the Board to the Board's finding that the Company had waived that argument. As detailed above, pp. 37-38, Section 10(e) of the Act bars the Court from considering arguments not first presented to the Board, barring "extraordinary circumstances." 29 U.S.C. § 160(e).

The Board here unanimously found that the Company had failed to raise its no-duty-to-bargain argument to the judge, and therefore the Board did not address that argument on review. (A 5 n.1.) After the Board's decision issued, the Company did not file a petition for reconsideration or rehearing to challenge the Board's finding that the no-duty-to-bargain argument was not preserved. 29 C.F.R. § 102.48(d)(1) (permitting post-decisional motions for reconsideration and rehearing). And it has not even suggested that extraordinary circumstances within the meaning of Section 10(e) excuse its failure to do so.

Instead, the Company now argues for the first time on appeal that it did raise the no-duty-to-bargain issue to the administrative law judge. (Br. 21-22.) As the

Supreme Court has recognized, the Section 10(e) jurisdictional bar extends to just such circumstances. *See Woelke*, 456 U.S. at 665-66 (holding that the Court was barred from considering employer's challenge to issue the Board had decided *sua sponte*, because employer had not raised it in a motion for reconsideration); *see also Tucker Truck Lines*, 344 U.S. at 37 ("[s]imple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice"). Section 10(e) thus bars the Court from considering the Company's belated contention that it preserved its no-duty-bargain argument.

Notwithstanding the Section 10(e) jurisdictional bar, the Board reasonably concluded that the Company failed to preserve its no-duty-to-bargain challenge in the administrative proceedings. (A 5 n.1.) The Board is not required to address arguments that are procedurally defective for failure to raise them to the judge. *Local 594, Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. NLRB*, 776 F.2d 1310, 1314 (6th Cir. 1985) (finding union waived argument because it was not timely raised before judge); *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 116 (D.C. Cir. 1996) (same). Moreover, courts afford the Board discretion in making procedural determinations. *See, e.g., U.S. Mosaic Tile*

Co. v. NLRB, 935 F.2d 1249, 1254 (11th Cir. 1991) ("Generally, the Board's . . . procedural determinations [are] within its discretion."); *NLRB v. H.M. Patterson & Son*, 636 F.2d 1014, 1018 (5th Cir. 1981) (Board's alleged procedural errors reviewed for an abuse of discretion).

Here, the judge held that the requested subcontracting-cost information was related to the parties' planned bargaining under the Letter Agreement regarding the return of maintenance work to the bargaining unit. (A 11-12.) And, as the Board found, the Company did not clearly argue to the judge—as it now argues to the Court—that the Letter Agreement did not obligate the Company to bargain over maintenance work. (A 5, n.1.) Although the topic of the Letter Agreement itself was explored at length during the hearing, the Company points to just three passing references to support its post-hoc contention that it made a no-duty-to-bargain argument to the judge: (1) the general testimony of HR Manager Jackson that the Letter Agreement was limited in scope (Br. 22); (2) a portion of its attorney's opening statement at the hearing (Br. 9-10. 21-22); and (3) a one-page excerpt of its post-hearing brief to the judge (Br. 10, 22).[10] As detailed below, those three

[10] The Company's arguments reference its post-hearing brief, and the Company includes excerpts of that brief and of its memoranda in support of its exceptions in its Appendix. Those documents are not part of the administrative record as described in the Board's Rules and Regulations. 29 C.F.R. § 102.45(b).

vague references were insufficient to put the judge and other parties to the case on notice that the Company intended to challenge its duty to provide information relevant to the parties' planned bargaining pursuant to the Letter Agreement, as opposed to challenging the relevance of the requested information to those negotiations.

At the hearing, Jackson described the relevant portion of the Letter Agreement as a response to the Union's expressed desire during contract negotiations and in going on strike to return maintenance jobs to the bargaining unit. (SA 101.) He stated that the Letter Agreement represented the parties "kick[ing] the can down the road a little bit" by agreeing "to meet and discuss—not negotiate necessarily." (SA 101.) That testimony is not inconsistent with a duty to bargain, particularly in light of the language and context of the Letter Agreement, detailed above, pp. 18-19.

Even more unhelpful to the Company's position is its attorney's opening statement. Just after asserting that "nothing in the collective bargaining agreement . . . requires or imposes any limitations upon subcontracting routine maintenance work," the attorney cited the parties' agreement to discuss maintenance work. (SA 91.) Then he pivoted immediately to the Company's argument that "cost is just a factor" in those discussions, asserting that the Company would present evidence regarding the confidentiality of certain information. (SA 91-92.) The thrust of his

argument was thus geared towards establishing the Company's confidentiality defense, which of course presumes a duty to bargain. (SA 90-92.)

With regard to the Company's post-hearing brief to the judge, Board law is clear that a party may not raise an argument for the first time in its post-hearing brief. *See Anthony Motor Co., Inc.*, 314 NLRB 443, 449 (1994); *Union Electric Co.*, 196 NLRB 830, 837 n. 34 (1972). In any event, the passage the Company references was inadequate to put the judge and General Counsel on notice of any argument that the Company had no duty to bargain under the Letter Agreement, much less explicate the protracted argument the Company (Br. 16-21) and amici (A-Br. 15-23) now make on appeal. Rather, the one-page passage asserts that the information is neither relevant nor necessary to a grievance or to negotiating a new collective-bargaining agreement.[11] (SA 169.) The following section of the brief, of which only two sentences are excerpted, starts by asserting that the requested information is not relevant under the Letter Agreement because of the Company's "steadfast position that variability of maintenance demands, and not cost, was at the foundation of its subcontracting practices . . .," once again challenging the *relevance* of the requested information under the Letter Agreement, not its *duty to*

[11] This language echoes the language in the Company's Answer to the General Counsel's Complaint, which the amici cite as raising the no-duty-to-bargain argument. (A-Br. 14.)

bargain. (SA 169-170.) Indeed, the thrust of the Company's argument at hearing and throughout its post-hearing brief—epitomized by the conclusion of the post-hearing brief (SA 171)—was that the subcontracting costs requested by the Union were confidential and/or not relevant to the Union's duties, and that, as such, the Company was justified in not providing them to the Union. It was not that the Company had no duty to bargain with the Union whatsoever.[12]

Finally, in a tacit admission that any no-duty-to-bargain argument it made to the judge was cursory at best, the Company attempts (Br. 22) to excuse its failure to develop the argument by claiming it had no idea that the Letter Agreement might be read as entailing a duty to bargain until the judge's decision issued. The Company, however, was a party to the Letter Agreement, agreed to bargain pursuant to that agreement, and had the Union sign a confidentiality agreement to protect any information it might produce in the course of that bargaining. Moreover, the topic of the Letter Agreement was in fact explored at length during the hearing and discussed at length in the parties' post-hearing briefs. For whatever reason, the Company chose, throughout the litigation before the judge, to

[12] That impression was reinforced when the Company highlighted, as it does before this Court (Br. 5, 29), its full production of the other eight items of information requested by the Union, several of which also related to the bargaining over routine maintenance work under the Letter Agreement.

focus its objections to producing subcontracting-cost information on issues of relevance and confidentiality. It could not then reasonably expect the Board (or this Court) to entertain a belated challenge based on an entirely different theory.

Accordingly, the Board reasonably concluded that the Company had waived before the judge its belated argument that it had no duty to bargain with the Union over the return of maintenance work to the bargaining unit. Should this Court conclude that the Section 10(e) jurisdictional bar does not apply to its review of the Board's waiver finding, *and* should the Court find the Board's waiver finding to be an abuse of discretion, the Board respectfully requests a remand to consider the merits of the Company's no-duty-to-bargain argument in the first instance.

CONCLUSION

As demonstrated above, substantial evidence supports the Board's findings that the subcontracting costs requested by the Union were relevant to bargaining, and that the Company's confidentiality defense fails both for failure to establish an overriding confidentiality interest and because any such interest was accommodated by the parties' confidentiality agreement. The Company's belated argument that it had no obligation to bargain or provide any information relevant to maintenance subcontracting is not properly before the Court, and was waived before the Board. For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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FOR THE SIXTH CIRCUIT

MARATHON PETROLEUM COMPANY, LP	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 18-2108 & 18-2225
	)	
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	09-CA-162710
	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that this brief contains 10,676 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 13th day of February 2019

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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

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Dated at Washington, DC
this 13th day of February 2019