

Nos. 19-72429, 19-72523

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

**NOB HILL GENERAL STORES, INC.
Petitioner/Cross-Respondent**

v.

**NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner**

and

**UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 5
Intervenors**

**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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TABLE OF CONTENTS

Headings	Page(s)
Statement of jurisdiction	1
Issues presented.....	2
Relevant statutory provisions.....	3
Statement of the case.....	3
I. The Board’s findings of fact.....	4
A. Background; Nob Hill and the Union’s relationship	4
B. Nob Hill announces a new store in Santa Clara; the CBA provision regarding new stores	6
C. The Union’s information request	7
D. Nob Hill replies to the Union’s repeated requests, refusing to provide the information.....	8
E. Nob Hill opens the Santa Clara store with mostly new hires.....	12
II. Procedural history.....	13
III. The Board’s decision and order	14
Summary of argument.....	15
Standard of review	17
Argument.....	18
I. Substantial evidence supports the Board’s finding that Nob Hill violated Section 8(a)(5) and (1) of the Act by refusing to provide the Union with relevant information.....	18

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
A. An employer's duty to bargain in good faith includes providing the union with information that has some probability of relevance to the union's representational duties	18
B. Substantial evidence supports the Board's finding that the requested information related to the Union's administration of the CBA	21
C. The Board did not interpret the CBA when it determined the relevancy of the Union's request.....	26
D. Nob Hill has failed to rebut the Union's relevancy claim	33
II. The Board is entitled to summary enforcement of the uncontested portions of its Order regarding Nob Hill's delay in providing information.....	37
Conclusion	39

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Alpha Beta Company,</i> 294 NLRB 228 (1989)	31
<i>Am. Distributing Co. v. NLRB,</i> 715 F. 2d 446 (9th Cir. 1982)	25
<i>Bentley-Jost Elec. Corp.,</i> 283 NLRB 564 (1987)	29
<i>Connecticut Yankee Atomic Power Company,</i> 317 NLRB 1266 (1995)	32
<i>Country Ford Trucks, Inc. v. NLRB,</i> 229 F.3d 1184 (D.C. Cir. 2000).....	35
<i>DaimlerChrysler Corp. v. NLRB,</i> 288 F.3d 434 (D.C. Cir. 2002).....	24
<i>Dana Corporation,</i> 356 NLRB 256 (2010), <i>enforced,</i> 698 F.3d 307 (6th Cir. 2012)	34
<i>Disneyland Park,</i> 350 NLRB 1256 (2007)	32
<i>Dodger Theatricals Holdings,</i> 347 NLRB 953 (2006)	28, 29
<i>Endo Painting Service, Inc.,</i> 360 NLRB 485, 486 (2014), <i>enforced mem.,</i> 679 F.App’x 614 (9th Cir. 2017)	37
<i>Island Creek Coal Co.,</i> 292 NLRB at 489	35

<i>Leland Stanford Junior Univ.</i> , 307 NLRB 75 (1992)	21
<i>Metro. Edison Co. v. NLRB</i> , 460 U.S. 693 (1983).....	19, 25
<i>Monmouth Care Ctr.</i> , 354 NLRB 11, 41 (2009), <i>incorporated by reference</i> , 356 NLRB 152 (2010), <i>enforced</i> , 672 F.2d 1085 (D.C. Cir. 2012)	37
<i>NLRB v. Acme Indus. Co.</i> , 385 U.S. 432 (1967).....	18, 19, 27, 28, 30, 35, 37
<i>NLRB v. Associated Gen. Contractors of Cal., Inc.</i> , 633 F.2d 766 (9th Cir. 1980)	19, 20
<i>NLRB v. Safeway Stores, Inc.</i> , 622 F.2d 425 (9th Cir. 1980)	18-20, 29, 32
<i>NLRB v. Southern Cal. Edison Co.</i> , 646 F.2d 1352 (9th Cir. 1981)	25
<i>NLRB v. Swedish Hosp. Med. Ctr.</i> , 619 F.2d 33 (9th Cir. 1980)	19
<i>NLRB v. Truitt Mfg. Co.</i> , 351 U.S. 149 (1956).....	18
<i>NLRB v. Yawman & Erbe Mfg. Co.</i> , 187 F.2d 947 (2d Cir. 1951).....	20
<i>Oil, Chemical & Atomic Workers Local Union No. 6-418 v. NLRB</i> , 711 F.2d 348 (D.C. Cir. 1983).....	20
<i>Press Democrat Publishing Company v. NLRB</i> , 629 F.2d 1320 (9th Cir. 1980)	29
<i>Raley's</i> , 336 NLRB 374 (2001)	4, 31
<i>Retlaw Broad. Co. v. NLRB</i> , 53 F.3d 1002 (9th Cir. 1995)	17

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>Safeway Stores, Inc. v. NLRB</i> , 691 F. 2d 953 (10th Cir. 1982)	25, 35
<i>San Diego Newspaper Guild, Local No. 95 v. NLRB</i> , 548 F.2d 863 (9th Cir. 1977)	18, 19, 32
<i>Shoppers Food Warehouse Corp.</i> , 315 NLRB 258 (1994)	36
<i>Spark Nugget, Inc. v. NLRB</i> , 968 F.2d 991 (9th Cir. 1992)	38
<i>Timken Roller Bearing Co. v. NLRB</i> , 325 F.2d 746 (6th Cir. 1963)	25
<i>U.S. Postal Serv.</i> , 332 NLRB 635 (2000)	20
<i>U.S. Postal Serv.</i> , 337 NLRB 820 (2002)	22
<i>U.S. Testing Co. v. NLRB</i> , 160 F.3d 14 (D.C. Cir. 1998)	26
<i>Union Builders, Inc. v. NLRB</i> , 68 F.3d 520 (1st Cir. 1995).....	30
<i>United-Carr Tennessee</i> , 202 NLRB 729 (1973)	29
<i>United Technologies Corp.</i> , 274 NLRB 504 (1985)	24, 36
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	17

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>W. Penn Power Co.</i> , 339 NLRB 585 (2003), <i>enforced in relevant part</i> , 394 F.3d 233 (4th Cir. 2005)	37

Statutes:	Page(s)
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 7 (29 U.S.C. § 157)	3
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	2-4, 13-15, 17-19, 26, 37
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	2-4, 13-15, 17-19, 26, 37
Section 9(a) (29 U.S.C. § 159(a))	3
Section 10(a) (29 U.S.C. §160(a))	2
Section 10(e) (29 U.S.C. §160(e))	2, 17
Section 10(f) (29 U.S.C. §160(f))	2
Fed. R. App. P. 28(a)(9)(A)	38

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on Nob Hill General Stores, Inc.'s petition for review, and the National Labor Relations Board's cross-application for enforcement, of an August 29, 2019 Board Order against Nob Hill, reported at 368

NLRB No. 63. (ER 1-10.)¹ The United Food and Commercial Workers Union, Local 5 (the Union) has intervened on behalf of the Board.

The Board had jurisdiction over the unfair-labor-practice proceeding below under Section 10(a) of the National Labor Relations Act (the Act), 29 U.S.C. §160(a), which authorizes the Board to remedy unfair labor practices affecting commerce. This Court has jurisdiction over this appeal because the Board's Order is final under Section 10(e) and (f) of the Act. Venue is proper under Section 10(f), because the unfair labor practice occurred in California.

ISSUES PRESENTED

(1) Whether substantial evidence supports the Board's finding that Nob Hill violated Section 8(a)(5) and (1) of the Act by refusing to provide the Union with relevant requested information.

(2) Whether the Board is entitled to summary enforcement of the portions of its Order based on the uncontested finding that Nob Hill violated Section 8(a)(5) and (1) by its unreasonable delay in providing the Union with relevant requested information.

¹ Citations are to the Excerpt of Record (ER) filed with Nob Hill's brief. References preceding a semicolon are to Board findings, and references following it are to supporting evidence. "Br." cites are to Nob Hill's opening brief.

RELEVANT STATUTORY PROVISIONS

Section 8(a) of the Act, 29 U.S.C. § 158(a), states: “It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . . [and] (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).”

STATEMENT OF THE CASE

This case involves the Union’s request for information relevant to its duty as collective-bargaining representative to administer the collective-bargaining agreement (the CBA) between Nob Hill and the Union. The CBA contains provisions protecting current unit employees when Nob Hill opens a new store, including those who wish to transfer to new jobs at that store. When Nob Hill announced that it intended to open a new store in Santa Clara, California, the Union requested information to ensure that Nob Hill was adhering to those provisions. Instead of fully answering the Union’s request, Nob Hill, months after the initial request, provided minimal information and repeatedly refused to provide the rest. It defended its refusal by insisting that, per the CBA, the Union was not entitled to any information about the jobs available at the new store until, at a minimum, 15 days after the opening of the new store.

After Nob Hill refused to provide the requested information, the Union filed unfair-labor-practice charges, and the General Counsel issued a complaint, alleging that Nob Hill's delay and refusal to provide information violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1). On a stipulated record, an administrative law judge found that Nob Hill violated the Act as alleged. On review, the Board largely adopted the judge's findings and recommended order.

I. THE BOARD'S FINDINGS OF FACT

A. Background; Nob Hill and the Union's Relationship

Nob Hill is part of a corporate family that operates supermarkets and other types of food stores in northern California and northern Nevada. (ER 2; 15.) In addition to "Nob Hill," the stores operate under the name banners "Raley's," "Bel Air," and "Food Source." Regardless of how the store is bannered, Raley's provides support services such as labor and human resources services, and its managers serve as Nob Hill's agents for labor relations. (ER 2, 2 n.5; 16, 140-41.)

Nearly all nonsupervisory employees working at Nob Hill's stores are categorized as either retail clerks or meat cutters. (ER 2; 15-16.) The Union and its sister locals represent units of either retail-department employees, meat cutters, or both at several of the stores. (ER 2; 16, 140-41.) Nob Hill and the Union have been parties to successive collective-bargaining agreements since 2000, the most recent of which (the CBA) was in effect from October 12, 2014 through February

8, 2018. (ER 3; 17, 32-103.) All of Nob Hill's stores within the Union's jurisdiction (except for the newly opened Santa Clara store) are covered by the CBA. (ER 3; 22.)

Several provisions of the CBA govern the staffing of new stores. Section 1.13, captioned "New Stores," provides in relevant part:

Notwithstanding any language to the contrary contained in this Agreement between the parties, it is agreed this Agreement shall have no application whatsoever to any new food market or discount center until fifteen (15) days following the opening to the public of any new establishment. [. . .]

The Employer shall staff such new or reopened food market with a combination of both current employees and new hires, in accordance with current industry practices of staffing such stores with a cadre of current employees possessing the necessary skills, ability and experience, plus sufficient new hires to meet staffing requirements. Employees, who are thus transferred, upon whom contributions are made to the various trust funds, shall continue to have contributions to the several trust funds made on their behalf in the same manner and in the same amount per hour as such contributions were made prior to their transfer. (ER 3; 41.)

Other relevant provisions include Section 1.11, which requires the Union's consent for any employee to enter into an individual agreement with Nob Hill that decreases pay or benefits, and Section 4.9, which addresses transfers and requires that "[r]equests for transfers, within the Union's geographical jurisdiction, so an employee may work nearer his home will be given proper consideration and will not be refused arbitrarily." (ER 3; 49.) That section also provides that "an employee will not be arbitrarily or capriciously transferred. Management will give proper consideration to transfer requests." (ER 3, 49.)

In addition to the CBA's language, the parties had an established practice regarding how Nob Hill would staff a new store that opened in the Union's jurisdiction. Per that practice, Nob Hill would staff the new store with voluntary transfer employees from other stores. (ER 2; 21.) In doing so, Nob Hill notified all unit employees that it was opening a new store and gave them the opportunity to transfer to the new store. (ER 2; 21.) It considered every employee who requested a transfer but did not grant a transfer to every employee who requested one. Each time, Nob Hill staffed the new store with some employees who had been represented by the Union at a previous store and some employees who had not. (ER 2; 21.) Before the dispute at issue, the Union and Nob Hill negotiated separate representation agreements that covered whether and how Nob Hill would recognize the Union at newly opened stores in the Union's jurisdiction. (ER 3; 22.)

B. Nob Hill Announces a New Store in Santa Clara; the CBA Provision Regarding New Stores

In August 2017, Nob Hill posted a notice on its intranet site advising employees that it was opening a new store in Santa Clara and soliciting employees to apply to transfer to that store. Through November, it continued to post job openings at the Santa Clara store on an internal website available to all employees who worked for a store in the corporate family. (ER 3; 14, 17, 130-31.) In September, Nob Hill posted notices at six stores advertising open positions at the

upcoming Santa Clara store and soliciting transfer applications. (ER 3; 14, 17, 129.) All positions listed as “open positions” on the intranet and on notices posted at the stores were non-supervisory positions normally included in the bargaining unit. (ER 7.) With a few minor exceptions, the Union represents all nonsupervisory employees at each of those six locations.² (ER 3; 14, 140-41.)

C. The Union’s Information Request

In late September, the Union wrote to Nob Hill to request information regarding job openings at the Santa Clara store, including, as relevant here:

- 1) a list of classifications and numbers of employees to be hired;
- 2) a list of current unit employees who have been asked to work in the store;
- 3) a list of employees who have agreed to work there;
- 4) a copy of any employee handbook that Nob Hill intended to use;
- 5) the intended pay ranges for each classification of employee;
- 6) the intended benefits to be offered; and
- 7) the projected start date for employment and store opening date.

(ER 4; 18, 106-07.)

In the same letter, the Union explained that it had members who were working short hours or not working who would be able to transfer to the new store.

² The Union does not represent the retail employees at Store 315 and 316; those employees are unrepresented. One of the Union’s sister locals represents the meat department employees at Store 316. (ER 140-41.)

It therefore asked how to “make arrangements for them to be hired.” (ER 4; 107.) The Union also asked under what circumstances unit employees would be able to transfer to the Santa Clara store. (ER 4; 107.) Due to its expectation that the store would open soon, the Union stated that it wanted the information “within the next week.” (ER 4; 106.)

The Union explained that the requested information was necessary for it “to administer the contract,” and listed several provisions of the CBA as applying to the opening of the Santa Clara store, including provisions covering transfers, recalls, new stores, new jobs, part-time employees, and “various other” provisions. (ER 4; 107.) For example, in addition to pointing to Section 1.13 as relevant, the Union explained that the information was necessary under Section 1.11, which covers individual employment agreements, and Section 4.9, which addresses transfers. (ER 3; 107.)³

D. Nob Hill Replies to the Union’s Repeated Requests, Refusing to Provide the Information

Nob Hill replied to the Union’s information request by letter dated October 18. Citing Section 1.13 of the CBA, Nob Hill stated that the CBA did not apply to the new store until 15 days after the store publicly opened. (ER 4; 18, 109.) Nob

³ Although the Union initially mistakenly cited Section 1.14, both parties later acknowledged that the Union had intended to cite Section 1.13. (ER 3 n.7; 109, 119.)

Hill further stated that it therefore saw “no legal basis” for the information request and declined to provide the requested information. (ER 4; 109.) It told the Union it would consider information requests only “[w]hen, and if, the store has been open to the public for fifteen days[.]” (ER 4; 109.)

The Union wrote back later that month, stating that the CBA’s provisions “govern now and will govern throughout the process of staffing the store.” (ER 4; 18, 111.) The Union further noted that the contract provides for the continuation of trust-fund contributions for transferring employees. (ER 4; 111.) Noting that “according to reports,” the store would open sometime in December, the Union stated that the information was “urgently needed.” (ER 4; 111.) The Union therefore threatened to file an unfair-labor-practice charge if Nob Hill did not provide the information within 48 hours. (ER 4; 111.)

On December 5, the Union again wrote to Nob Hill, which had “refused to provide any information that has been requested.” (ER 4; 18, 113.) The Union repeated that it needed the information “to administer the contract” and highlighted the CBA’s recognition, individual-agreements, new-stores, and extra-work provisions. (ER 4; 113.) The Union stated that staffing “is a critical issue,” and that Section 1.13 of the CBA “protects the bargaining unit by allowing them to staff a new store,” elaborating that “[w]hen a new store opens, it often compete[s] with existing stores and the right to transfer and the staffing obligation [in the

CBA] protects current employees and the bargaining unit.” (ER 4, 113.) The Union noted that many part-time employees could gain full-time employment by transferring to the Santa Clara store, and that “many such members . . . wish to transfer.” (ER 4; 113.) The Union asserted that Nob Hill’s failure to provide the information evidenced “an effort . . . to discriminate against [u]nion members who want to transfer to the new store.” (ER 4; 113.) Finally, the Union stated that such employees would be entitled to a remedy for Nob Hill’s failure to consider them for transfer, as would employees who would have taken transferring employees’ hours at their old stores but for Nob Hill’s failure to consider transfer requests. (ER 4; 113.)

On December 13, Nob Hill wrote to the Union, again refusing to provide any information. (ER 4-5, 18-19, 115.) Nob Hill reiterated its position that it had no duty to provide the requested information because Section 1.13 allowed it to “operate the store with whatever personnel it wishes” until the fifteenth day after the store opens to the public. (ER 4-5; 115.) Nob Hill did, however, answer the Union’s request for information as to how the Union could make arrangements for employees to transfer and under what circumstances employees would be allowed to transfer. (ER 5; 19.) Specifically, Nob Hill explained that it had given all represented employees an opportunity to transfer to the Santa Clara store, that it had solicited unit employees to apply, and that it had not discriminated against any

who had applied. (ER 5; 116-17.) Nob Hill stated that it was providing “this limited information” with the “hope that this will end [the Union’s] attempt to circumvent the contractual language.” (ER 5; 116 n.4.)

On December 19, the Union again wrote to Nob Hill. (ER 5; 19, 119.) It noted that Nob Hill’s limited response to its request was belated and “incomplete because it does not provide any information that was sought[.]” (ER 5; 119.) It noted that the CBA’s staffing requirement was similar to the requirements in the Union’s contracts with Nob Hill’s competitors, that standard industry practice for both Nob Hill and its competitors was to staff stores with a cadre of current employees, and that it was seeking the information to ensure that Nob Hill was complying with those established staffing requirements. (ER 5; 119.)

Nob Hill wrote back in late December, stating only that it reviewed the Union’s letter and its “position remains the same.” (ER 5; 122.) The Union responded in writing within days, stating that it had made a “valid and routine” information request that was “nonburdensome.” (ER 5; 124.) It questioned whether Nob Hill was trying to discourage union members from applying, claiming that “employment recruiters for the Santa Clara store” had informed its members “that the new store will be operated ‘non-union.’” (ER 124.) Trying yet again to get Nob Hill to understand why the requested information was necessary, the Union explained that “when new stores open there are many additional

opportunities afforded current employees,” that the CBA afforded union members with a process to attain those opportunities, and that those opportunities included “job transfers so employees may work nearer to their homes, promotions, additional full-time positions and more work hours for part-time workers[.]” (ER 5; 19, 124.) For the fourth time, the Union mentioned that it needed the information to perform its duties under the contract, including its duty to “monitor these matters and make sure they are performed in a fair and equitable manner[.]” (ER 5; 124.) Nob Hill did not provide any additional information in response. (ER 5; 19.)

D. Nob Hill Opens the Santa Clara Store with Mostly New Hires

Nob Hill initially scheduled the Santa Clara store to open in October but successively pushed the date back to January 10, 2018. (ER 3; 17.) As of that date, 13 current employees had requested transfers, and 10 of them accepted transfer offers. (ER 3-4; 19-20.) Most of the employees who sought and received transfers were previously represented by the Union or its sister locals. (ER 3-4; 20.) Nob Hill also hired 47 new non-supervisory employees by the store’s opening date. (ER 4; 20.) Employees at the Santa Clara store are not represented by any labor organization, and Nob Hill has informed the Union that it will not recognize the Union without a Board-conducted election. (ER 4; 21-22.)

The opening and operation of the Santa Clara store has not caused any layoffs in stores with unit employees or resulted in the reduction of any unit employees' work hours. (ER 4; 20.) Nob Hill has staffed all positions and work hours vacated by transferring unit employees with other unit employees.⁴ (ER 4; 20.)

II. PROCEDURAL HISTORY

On a stipulated record, the judge found that Nob Hill violated Section 8(a)(5) and (1) by its refusal to provide, and its unreasonable delay in providing, the Union's requested relevant information. (ER 2-10.) Specifically, the judge found that the Union established that the information was relevant to the Union's duties to administer the CBA, advise employees, and bargain over the effects of the Santa Clara store's opening. (ER 6-8.) The judge rejected Nob Hill's claimed defense that the Union waived its right to the information. (ER 8.) As to the limited information Nob Hill provided on December 13, the judge found that the requested information was "not difficult to obtain, complex or voluminous," and Nob Hill did not claim otherwise, rendering its delay of over 2 months in providing that information unlawful. (ER 8.) Nob Hill filed exceptions to the judge's decision. The General Counsel and the Union each filed cross-exceptions, seeking

⁴ As the judge explained, although some of the stipulated facts include information responsive to the Union's request, Nob Hill did not provide any of that information before the unfair-labor-practice proceedings. (ER 2 n.1.)

to have the Board's remedial notice posted at each store where unit employees work instead of solely at the Santa Clara store. (ER 1.)

III. THE BOARD'S DECISION AND ORDER

The Board (Chairman Ring and Members Kaplan and Emanuel) issued its decision on August 29, 2019. The Board agreed with the judge that the requested information was relevant and that Nob Hill's unreasonable delay in providing some of it and refusal to provide the rest violated Section 8(a)(5) and (1) of the Act. In determining that the Union met its relevancy burden, the Board relied only on the judge's finding that the requested information was relevant to the Union's administration of the CBA. (ER 1.)

To remedy the violations found, the Board ordered Nob Hill to cease and desist from failing and refusing to provide the Union with the requested information, from unreasonably delaying providing responses to relevant requested information, and from violating the Act in any like or related manner. (ER 1, 9.) The Board also ordered Nob Hill to furnish the Union with the requested information and to post a remedial notice at the Santa Clara store and at all stores where unit employees work. (ER 1, 9-10.) In ordering the broader posting requirement, the Board reasoned that "all bargaining unit employees could have requested transfers to the Santa Clara store, and therefore all unit employees were potentially affected by [Nob Hill's] unfair labor practices." (ER 1 n.2.)

SUMMARY OF ARGUMENT

The facts here are undisputed. After learning that Nob Hill intended to open the Santa Clara store, the Union requested information about that store's job openings, working conditions, and expected opening date. As the Board found, the requested information related to the CBA's requirements that Nob Hill fairly consider transfers, refrain from reducing any unit employee's compensation without the Union's agreement, and staff new stores with a cadre of current employees. As the Board further found, the Union explained the relevance of the information to Nob Hill and made clear that it was seeking to ensure that Nob Hill was following the CBA's staffing provisions, including the transfer provisions. Specifically, the Union explicitly and repeatedly told Nob Hill that the information was necessary to administer the CBA, specifically, to protect the job prospects of the bargaining unit employees and to monitor whether current employees were being fairly considered for those opportunities. Given the broad, discovery-type standard for relevance, substantial evidence supports the Board's finding that the Union demonstrated that the requested information was relevant to its duty to administer the contract, and that Nob Hill's failure to produce the information violated Section 8(a)(5) and (1) of the Act.

Nob Hill misreads the Board's decision by claiming that the Board's relevancy determination wrongly interprets the CBA and ignores Section 1.13.

Under Nob Hill’s proffered contract interpretation, the requested information is irrelevant because Section 1.13’s “notwithstanding” clause renders the CBA inapplicable to the Santa Clara store until 15 days after opening. But the Board did not interpret the contract in determining relevancy and explaining that Section 1.13—and Nob Hill’s proffered interpretation of it—did not affect the Union’s information request. Rather, the Board simply determined that the Union was attempting to administer the CBA at other stores where the CBA covered unit employees. In doing so, the Board never interpreted the CBA as applying at the Santa Clara store. The Board, which properly eschewed Nob Hill’s proffered contract interpretation and did not offer one of its own, adhered to settled precedent establishing that the Board does not make binding contract interpretations in determining the relevancy of information requests. In keeping with that principle, Nob Hill’s citation to federal common law and the meaning of the word “notwithstanding” is irrelevant to this case.

Nob Hill is also wrong when it claims that, regardless of the CBA’s applicability to the Santa Clara store, the Union’s failed to demonstrate the relevancy of the requested information. Nob Hill’s claim that there is “no scenario” under which the Union could assert a contract breach wrongly holds the Union to a higher standard than applicable caselaw requires; the Union is not required to prove an actual contract breach or meritorious grievance in order to

obtain information. And Nob Hill's proffered relevancy test is also contrary to what the law demands the Union must show, which is only that the information has a probable relevance to the Union's representational duty of contract administration, which the Union plainly demonstrated.

Nob Hill has made no argument challenging the Board's finding that it unduly delayed in providing information. Therefore, if this Court agrees with the Board that Nob Hill had a duty to provide the requested information, the Board is entitled to summary enforcement of its finding that Nob Hill's delay in providing some limited information violated Section 8(a)(5) and (1).

STANDARD OF REVIEW

The Board's factual findings are "conclusive" if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e). Evidence is substantial when a "reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). A reviewing court "may [not] displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *Universal Camera*, 340 U.S. at 488; *accord Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1005 (9th Cir. 1995).

In information-request cases, the Court's "task is to determine whether there was substantial evidence on the record to support the Board's finding[.]" *NLRB v.*

Safeway Stores, Inc., 622 F.2d 425, 430 (9th Cir. 1980). This Court gives “great weight” to the Board’s relevancy determination, deeming it a matter “within the particular expertise of the Board.” *San Diego Newspaper Guild, Local No. 95 v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977) (footnote omitted); *see also Safeway*, 622 F.2d at 429 (relevance “depends on the factual circumstances of each case” so Board is entitled to deference).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT NOB HILL VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO PROVIDE THE UNION WITH RELEVANT INFORMATION

A. An Employer’s Duty To Bargain in Good Faith Includes Providing the Union with Information that Has Some Probability of Relevance to the Union’s Representational Duties

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of its employees. 29 U.S.C. § 158(a)(5). An employer’s duty to bargain in good faith includes the “general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties.” *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967); *accord NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). It is well-established that an employer’s failure to provide such relevant information violates the employer’s duty to bargain under Section 8(a)(5) of the Act. *Acme Indus.*, 385 U.S. at 435-36; *Truitt Mfg.*, 351 U.S. at 152.

Because Section 8(a)(1) of the Act makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise” of their rights under the Act, a violation of Section 8(a)(5) of the Act produces a derivative violation of Section 8(a)(1). 29 U.S.C. § 158(a)(1); *see Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *NLRB v. Swedish Hosp. Med. Ctr.*, 619 F.2d 33, 35 (9th Cir. 1980).

The critical question in determining whether information must be produced is that of relevance. Information pertaining to employees in the bargaining unit is presumptively relevant. *San Diego Newspaper*, 548 F.2d at 867. When a union seeks information that is not presumptively relevant, the union must establish the relevance of that information. *Id.*

The duty to furnish information “is based upon the belief that without such information the union would be unable to properly perform its duties specified in the collective bargaining agreement and no meaningful bargaining could take place.” *San Diego Newspaper*, 548 F.2d at 866-67. Accordingly, the Board and the courts have employed a liberal, “discovery-type standard” of what constitutes relevant information. *Acme*, 385 U.S. at 437; *accord NLRB v. Associated Gen. Contractors of Cal., Inc.*, 633 F.2d 766, 770 (9th Cir. 1980). In meeting that standard, the union’s burden is not high; it need only show “some probability” that the requested information is relevant to its duties. *Safeway*, 622 F.2d at 430.

“Any less lenient rule. . . would greatly hamper the bargaining process, for it is virtually impossible to tell in advance whether the requested data will be relevant[.]” *NLRB v. Yawman & Erbe Mfg. Co.*, 187 F.2d 947, 949 (2d Cir. 1951).

The duty to provide information extends to information that is “relevant to the union’s negotiation or administration of a collective bargaining agreement.” *Assoc. Gen. Contractors*, 633 F.2d at 770. That includes information that allows the union “to evaluate grievances and sift out unmeritorious claims,” *Safeway*, 622 F.2d at 430, and that enables it to “intelligently represent [its] members.” *Oil, Chemical & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348, 358-59 (D.C. Cir. 1983). A union need not show that the contract has been violated to establish its need for the requested information; the “discovery-type standard decide[s] nothing about the merit of the union’s contractual claims.” *Acme*, 385 U.S. at 437.

If an employer refuses to provide relevant information, the employer must demonstrate a legitimate basis for that refusal. *See U.S. Postal Serv.*, 332 NLRB 635, 636 (2000). In such circumstances, the employer bears the burden of bringing its concern to the union’s attention and offering an accommodation. *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 20-21 (D.C. Cir. 1998). Similarly, an employer asserting that a union has waived its right to receive information bears the burden

of proving that the union clearly and unmistakably waived its statutory rights. *See Leland Stanford Junior Univ.*, 307 NLRB 75, 80 (1992).

B. Substantial Evidence Supports the Board’s Finding that the Requested Information Related to the Union’s Administration of the CBA

When the Union learned about the opening of the Santa Clara store, it requested basic information about the jobs that would be available for transferring unit employees, including the number of employees to be hired and the classifications of those jobs, the rates of pay and benefits offered, the names of unit employees who had applied, and the store’s opening date. (ER 6.) In asking for that information, the Union stated it was needed “to administer the contract,” noting that the CBA had several provisions that would apply to the opening of the new store. (ER 106.) The initial request listed the provisions of the CBA that the Union was seeking to enforce. Specifically, it identified Section 1.13, which provides that new stores would be staffed with “a mix of new hires and current employees, some of whom could have been unit employees.” (ER 7.) Two other provisions identified by the Union protect employees from some involuntary transfers—Section 1.11 and Section 4.9. Section 1.11 specifies that unit employees may not “be compelled or allowed to enter into an employment agreement” reducing their wages or benefits. (ER 7.) Section 4.9 bars arbitrary or capricious transfers and provides that management will give “proper

consideration” to transfer requests and that employees who wish to transfer closer to home “will not be refused arbitrarily[.]” (ER 3, 49.)

Given the Union’s explanation to Nob Hill—an explanation that pointed to the CBA provisions it sought to enforce—the Board properly found that the Union met its burden of showing relevancy. As the Board explained, the information requested—the list of employees who requested and received transfers, the working conditions at the Santa Clara store, and the available positions there—“appears relevant to the Union’s duties” to administer the CBA’s requirements that new stores be staffed with at least some unit employees and that unit employees’ transfer requests are treated fairly. (ER 7.) *See U.S. Postal Serv.*, 337 NLRB 820, 822 (2002) (finding that all transfer applications were relevant to union’s duty to determine if employer’s denial of employee’s requested transfer “was for legitimate reasons”). The Board further explained that the same information would bear on whether employees were “compelled or allowed to enter into an employment agreement . . . which reduces wages and benefits” within the meaning of Section 1.11. (ER 7.) And the date of the store’s opening “directly relates to Section 1.13[,] which states that the CBA shall apply no sooner than 15 days after a new store is open to the public[.]” (ER 7.) As the Board explained, “how would the Union know when to be prepared [for] any bargaining or recognition if the date of the Santa Clara [s]tore’s opening is not known.” (ER 7.) Thus, contrary to Nob

Hill's claim that the Board's decision "provides no guidance" as to the information's relevancy to the CBA (Br. 35), the Board discussed the provisions that the Union was seeking to administer and why the information was relevant to those provisions. (ER 7.)

In addition, substantial evidence supports the Board's finding that the requested information was "necessary to determine whether [Nob Hill] was following the CBA concerning staffing at the new location[.]" (ER 7.) As the Board noted, "the Union repeatedly explained that it sought to administer the CBA regarding the staffing of the Santa Clara [s]tore." (ER 6.) Indeed, the Union responded to Nob Hill's repeated recalcitrance by explaining that there were "additional opportunities afforded current employees when a new store opens." (ER 124.) The Union then listed those specific opportunities—"job transfers so employees may work nearer to their homes, promotions, additional full-time positions and more work hours for part-time workers." (ER 124.) Because the CBA "provided the processes by which the unit employees could obtain those opportunities," the Union, whose duty is to "monitor these matters," explained that it was requesting information regarding the staffing of the new store, to "make sure they are performed in a fair and equitable manner consistent with the terms of the CBA." (ER 124.) The Union further explained that if employees transferred from unit stores, the Union would need to monitor the CBA at those unit stores to ensure

that work available due to those employees' absences was awarded in accordance with the CBA's provisions. (ER 7.)

The Union also voiced concern that Nob Hill's failure to provide the information evidenced "an effort . . . to discriminate against [u]nion members who want to transfer to the new store." (ER 4, 113.) The Union explained that such employees would be entitled to a remedy for Nob Hill's failure to consider them for transfer, as would employees who would have taken transferring employees' hours at their old stores but for Nob Hill's failure to consider transfer requests. (ER 4; 113.) Consistent with Board precedent, the Board noted that "it is sufficient if the requested information is potentially relevant to a determination as to whether a grievance should be pursued." (ER 7, citing *United Technologies Corp.*, 274 NLRB 504 (1985)). See *DaimlerChrysler Corp. v. NLRB*, 288 F.3d 434, 444 (D.C. Cir. 2002) (finding information relevant due to potential as "helpful barometer as [the union] decides whether to pursue a grievance").

Given the Union's minimal burden to "show a probability that the desired information is relevant," the Board properly determined that the Union's communications adequately demonstrated its need for the information. (ER 7.) As the Board explained, "the relevance for the information requested is clear—the Union sought to ensure that the parties' agreement regarding the staffing for the Santa Clara [s]tore was being followed along with other provisions of the CBA

including the transfer provisions.” (ER 8.) A union “is entitled to receive any information which is relevant to its obligation to administer a collective bargaining agreement,” and the Union plainly showed its request related to that duty. *Safeway Stores, Inc. v. NLRB*, 691 F. 2d 953, 956 (10th Cir. 1982); *see also Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746, 753 (6th Cir. 1963) (union’s statement that it needed information “to properly administer the contract” sufficiently demonstrated relevance).

Pointing to Union’s conduct with respect to previous store openings, Nob Hill contends that the Union waived its right to the requested information. Specifically, Nob Hill claims (Br. 32 n.16) that the Union, by making no information requests before other new stores opened, “acknowledged it had no right to administer the CBA prior to the opening of a new store or to require Nob Hill to respond to any information requests.” That bald assertion falls far short of proving waiver. As the Board explained, citing *Metropolitan Edison*, 460 U.S. at 708, waivers of rights under the Act must be “clear and unmistakable.” (ER 8.) *See NLRB v. Southern Cal. Edison Co.*, 646 F.2d 1352, 1364 (9th Cir. 1981) (same). Waivers can be established either through contractual language, bargaining history showing that the union “consciously yielded its interest in the matter,” or a combination of the two. *Am. Distributing Co. v. NLRB*, 715 F.2d 446, 453 (9th Cir. 1982) (internal citations and quotation marks omitted). Nob Hill has

cited no case supporting the proposition that by simply declining to request information in the past, a union waives the right to ever receive information in the future. Nob Hill thus “presented no evidence to support its burden of proof that the Union waived its right to enforce the contractual provisions” underlying its information request. (ER 8.)

Because substantial evidence supports the Board’s finding that the requested information is relevant and that the Union did not waive its right to receive such information, Nob Hill’s failure to provide the information violated Section 8(a)(5) and (1). As discussed below, Nob Hill relies primarily on two arguments for its refusal—that the Board wrongfully interpreted the CBA as applying to the Santa Clara store and, even assuming the CBA’s applicability, the Union was not entitled to information about the Santa Clara employees. Both claims lack merit.

C. The Board Did Not Interpret the CBA when It Determined the Relevancy of the Union’s Request

Nob Hill contends (Br. 22-32) that the Board erroneously interpreted the CBA as applying to the Santa Clara store prior to its opening. That argument, however, misinterprets the Board’s decision; the Board did not adopt any particular interpretation of the CBA in determining the information’s relevance. (ER 7.) Nor did the Board need to do so; when evaluating an information request, the Board

rules only on “the probability of relevance,” not on “the merits of the union’s contractual claims.”⁵ *Acme*, 385 U.S. at 437.

In contending that the CBA forecloses the Union’s right to the requested information, Nob Hill relies exclusively on the first paragraph of Section 1.13 of the CBA. That paragraph states that, “[n]otwithstanding any language to the contrary,” the CBA does not apply to new stores “until fifteen (15) days following the opening to the public[.]” (ER 41.) Pointing to “federal common law” interpreting “notwithstanding” clauses (Br. 22-26), Nob Hill argues that this clause has a broad reach and renders the entire CBA inapplicable to the Santa Clara store until at least fifteen days after it has opened. According to Nob Hill (Br. 17-22), because the CBA was inapplicable at the time the Union requested the information, there were no contractual provisions for the Union to administer or enforce, rendering its request premature and irrelevant.

Nob Hill’s claim that the Board misinterpreted Section 1.13 to find that the CBA applied to the Santa Clara store prior to its opening misreads the Board’s decision. The Board did not interpret the contract in determining relevancy, and notably missing from Nob Hill’s discussion is a reference to any language in the Board’s decision that adopts the interpretation of Section 1.13 that Nob Hill

⁵ Because the Board’s relevancy determination did not rely on any contract interpretation, Nob Hill is wrong when it claims (Br. 1-2) that this Court owes no deference to the Board’s decision and instead must review this case “de novo.”

attributes to it. Rather, the Board’s relevancy determination was founded on the Union’s duty to administer the CBA provisions that apply to current employees “as they seek to transfer” to the Santa Clara store. (ER 7.) The Union explained as much, telling Nob Hill that “the [CBA] protects the current bargaining unit by allowing them to staff a new store.” (ER 113.) In other words, the Board relied on the CBA’s applicability at the stores from which its current unit employees sought to transfer, not the store to which those employees sought transfers. Thus, the Board’s analysis does not rely on any particular interpretation of Section 1.13, and Nob Hill’s entire argument is based on a strawman.

Declining to adopt any particular reading of the CBA is fully consistent with Board and court precedent. Disagreement over contract interpretation and whether the Union can establish a contract violation based on its interpretation has no role in the Board’s relevancy determination; “it is not the province of the Board to resolve such disputes in information request cases.” *Dodger Theatricals Holdings*, 347 NLRB 953, 970 (2006). As the Supreme Court has explained, when evaluating an information request, the Board does not “mak[e] a binding construction of the labor contract” but simply determines whether the information “would be of use to the union in carrying out its statutory duties and responsibilities.” *Acme*, 385 U.S. at 437. This Court has likewise asserted that “in information-request cases, “[t]he issue before the Board [is] not primarily one of

contract interpretation.” *Safeway*, 622 F.2d at 428; *see also Dodger Theatrical Holdings*, 347 NLRB at 970 (rejecting employer’s contract interpretation-based defense for its refusal to provide information, explaining that in an information request case, the Board does not determine whether there is contract violation but instead “need only decide whether the information sought has some bearing” on the Union’s representational duties).

The Board therefore properly rejected Nob Hill’s contract-interpretation argument, finding that Section 1.13 does not “affect[] the Union’s information request.” (ER 7.) That finding is fully consistent with the purpose of an information request—and the “liberal” discovery-type standard” applied to it, *see Press Democrat Publishing Company v. NLRB*, 629 F.2d 1320, 1325 (9th Cir. 1980)—which is to allow a union to gather information necessary for an “informed” administration of the contract and for an intelligent evaluation of whether or not to file or process a grievance. *Bentley-Jost Elec. Corp.*, 283 NLRB 564, 568 (1987). *See Safeway*, 622 F.2d at 430 (“A union cannot be put to the expense of arbitration only to learn later that its complaint had no merit.”); *United-Carr Tennessee*, 202 NLRB 729, 731-32 (1973) (rejecting employer’s attempt to rely on a contract interpretation to defend its withholding of requested information which is potentially relevant in assisting a union “intelligently to evaluate or process a grievance”). Thus, requested information, if it meets the “discovery-type

standard,” must be produced regardless of whether the union’s theory is sound or “the facts, if proved, would support the relief sought.” *Acme*, 385 U.S. at 437 n.6 (citation and quotation marks removed).

Because an employer may not rely on its own arguable interpretation of a contract to totally foreclose a union’s right to information, the Board properly declined to engage with Nob Hill’s lengthy discussion of how various courts have interpreted the meaning of “notwithstanding.” *See Union Builders, Inc. v. NLRB*, 68 F.3d 520, 525 (1st Cir. 1995) (finding that Board “correctly avoided turning the hearing into an inquiry into the agreement’s ultimate meaning, since such a decision was beyond the scope of the only issue before [it]: whether or not to compel information disclosure”). And, as the Board explained, Nob Hill “may continue to argue that the CBA does not apply to the Santa Clara [s]tore until 15 days after the store opens, but such an argument on any potential grievance or bargaining issue would only arise in those proceedings, not where the Union seeks information to determine whether in its view the CBA is being followed appropriately.” (ER 7.) *See Acme*, 385 U.S. at 537 (arbitrator’s post-information determination of contract breach “would clearly not be precluded by the Board’s threshold determination concerning the potential relevance of the requested information”).

Pointing to *Raley's*, 336 NLRB 374 (2001) and *Alpha Beta Company*, 294 NLRB 228 (1989), Nob Hill contends (Br. 29-32) that the Board's relevancy finding conflicts with that prior precedent, which discussed the effect of clauses identical or similar to Section 1.13. Nob Hill's argument, however, misreads the Board's discussion of that precedent. In both cases, the Board determined that the employers were required to honor agreements providing that newly acquired stores be covered by existing contracts where, 15 days after the stores' openings, the unions presented the employers with proof of majority status. *See Raley's*, 336 NLRB at 376-77; *Alpha Beta*, 294 NLRB at 229. Here, the Board, in agreement with those decisions, stated that Section 1.13 addressed Nob Hill's obligation to recognize the Union at its Santa Clara store 15 days after it opened. (ER 7.) Neither *Raley's* nor *Alpha-Beta* involved the employer's reliance on that clause to defend a refusal to provide a union with relevant requested information, and the Board properly determined that Section 1.13 had no effect on the entirely separate matter of the Union's information request.⁶

⁶ Nob Hill gains no ground with its claim that the Board "misread" *Raley's* by incorrectly referring to Section 1.13 instead of Section 1.11 as an "after-acquired clause." The Board's characterization of the clause is consistent with both *Raley's*, 336 NLRB at 376 (noting that Section 1.13 "incorporates" the "after-acquired clause" in Section 1.11) and *Alpha Beta*, 294 NLRB at 228-29 (agreeing with union contention that Section 1.13 is an "after-acquired stores clause"). In any event, the terminology applied to Section 1.13 does not change the Board's finding that Nob Hill's interpretation of Section 1.13 does not affect the Union's information request.

Nob Hill misplaces its reliance (Br. 20-21) on *Connecticut Yankee Atomic Power Company*, 317 NLRB 1266, 1268 (1995) and *Disneyland Park*, 350 NLRB 1256, 1259 (2007). In both cases, the Board found that a union was not entitled to information about an employer's unilateral action because the relevant contract waived the Union's right to bargain over that issue and allowed the employer to act unilaterally. Neither case states that a union is only entitled to information for contract-administration purposes if it can immediately file a grievance on receipt of that information, and this court has rebuffed that argument. *See Safeway*, 622 F.2d at 430 (rejecting employer's argument that it was required to provide only information relevant to grievable disputes; "[t]he requirement of grievability is not now a part of federal labor law, and we decline to add it").

San Diego Newspaper is similarly inapposite. There, the union requested information about non-unit employees who were not presently performing unit work on the grounds that those employees might perform unit work at some point in the future. *San Diego Newspaper*, 548 F.2d at 868. The Court found that the union's mere suspicion that the employer could be violating the contract did not make its requested information relevant. *Id.* at 868-69. Here, the circumstances that the Union relied on to establish relevance—namely, that Nob Hill was opening a store to which unit employees could transfer—are not hypothetical.

D. Nob Hill Has Failed To Rebut the Union’s Relevancy Claim

Nob Hill next claims (Br. 33) that even if the Court “adopts” the Board’s interpretation of the “notwithstanding” clause, it must then determine what “contractual provisions prevail over” that clause and are applicable to the Santa Clara store and its employees, and whether the Union sought information relevant to those provisions. That argument suffers from the same shortcoming discussed above. The Board did not interpret the “notwithstanding” clause or any other provision; it simply made a relevancy determination. There is no need, therefore, for the Court to determine which CBA provisions applied to the Santa Clara store and its employees.

Nob Hill further argues (Br. 33-34) that because the Board disavowed the judge’s determination that the information was relevant for effects bargaining and for counseling employees, instead finding the request relevant solely for contract administration, the Union cannot show relevancy because “how Nob Hill intended to treat its Santa Clara [s]tore employees” should not be of any “contractual concern to the Union.” But the Union was not seeking information about “how Nob Hill intended to treat its Santa Clara [s]tore employees[.]” (Br. 34.) Rather, the Union consistently stated that its information request was to help protect *current* unit employees, both those who sought to transfer and those who remained in their current stores. Indeed, as the Board noted, the Union “explained that it

needed to monitor the transfers of employees to ensure that staffing was conducted” fairly and equitably and consistent with the CBA. (ER 7.) And as the Board observed, the Union also justified its request by explaining that “with the opening of a new store, the unit employees remaining in their current stores also creates the need for the Union to monitor the CBA to ensure that all provisions are being met.” (ER 7.) Thus, contrary to Nob Hill’s claim (Br. 34), the Union has not asserted that the CBA controls the working conditions of *Santa Clara* employees; it asserted only that it sought to administer the contract with regard to current unit employees.

For that reason, Nob Hill’s misplaces its reliance on *Dana Corporation*, 356 NLRB 256 (2010), *enforced*, 698 F.3d 307 (6th Cir. 2012). The Board’s decision does not run afoul of the principle that a union and an employer may not pre-negotiate contracts to apply to unrepresented employees. That principle has nothing to do with this case, because the Union was not trying to apply the CBA to Santa Clara employees. It simply wanted to know the effect of the new store on its represented employees, the employment terms available to those employees who requested transfers, and whether Nob Hill was following the CBA and its staffing requirements in considering their requests.

Moreover, the Board found it unnecessary to rely on the judge’s other grounds because the contract-administration rationale is sufficient on its own. *See*

Safeway Stores, Inc. v. NLRB, 691 F.2d at 956 (“A union, as a bargaining representative, is entitled to receive any information which is relevant to its obligation to administer a collective bargaining agreement.”) That reasoning comports with Board precedent; information must be provided “so long as ‘at least one reason for the request can be justified.’” *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1192 (D.C. Cir. 2000) (quoting *Island Creek Coal Co.*, 292 NLRB at 489). And nothing in the judge’s opinion indicates that the contract-administration rationale applied to only some of the Union’s information request. That stands to reason; information that would help the Union inform unit members about what jobs are available for transfers would also aid the Union in knowing whether union members were being fairly selected for such jobs. Nob Hill also claims that “there is no scenario under which the Union could assert a contractual breach” based on conditions at the Santa Clara store (Br. 35), and that the Union could not seek information about whether Nob Hill fulfilled the “cadre” requirement because that could not be determined until after the store opened (Br. 27). Those arguments apply the wrong relevancy standard. The Board does not decide the merits of the underlying dispute for which the information is being sought. *See Acme Indus. Co.*, 385 U.S. at 437-39. As the Board stated, “[a]n actual grievance need not be pending” so long as the requested information would be relevant to the question of whether a grievance should be pursued. (ER 7, citing

United Tech., 274 NLRB at 504.) The CBA’s requirement that transfers be fairly considered, and that staffing include current employees, gives rise to scenarios relevant to the Union’s duty to administer the contract. For instance, the information could indicate that Nob Hill selected unit employees for transfers to the Santa Clara store but only to the lowest-paid positions with the most onerous working conditions. That information would be relevant to the Union’s enforcement of the CBA’s transfers requirements. Indeed, in that circumstance, each requested item would be potentially relevant, as it is difficult to know whether Nob Hill has fairly considered an employee’s transfer request when the Union does not know what jobs were available, what wages are paid, the working conditions, who applied and was accepted, and the employees’ start dates. Thus, the Union is entitled to obtain information “to conduct its own investigation and to reach its own conclusions”—which is what the Union was seeking to do here. *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994).

Finally, Nob Hill requests (Br. 35-37) that this Court apply a three-part relevancy test that it has devised to determine each requested item’s relevance. Nob Hill asserts that “[w]hen analyzed, each item of requested information fails one or more parts” of its test but does not elaborate further or apply its putative test to any of the requested items of information. In any event, Nob Hill’s “test” does not reflect the applicable precedent regarding relevancy, which requires the Union

to demonstrate a “probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities,” a standard that the Board properly found the Union met. *Acme*, 385 U.S. at 437.

II. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE UNCONTESTED PORTIONS OF ITS ORDER REGARDING NOB HILL’S DELAY IN PROVIDING INFORMATION

“[A]n unreasonable delay in furnishing [relevant] information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all.” *Monmouth Care Ctr.*, 354 NLRB 11, 41 (2009), *incorporated by reference*, 356 NLRB 152 (2010), *enforced*, 672 F.2d 1085 (D.C. Cir. 2012). Employers must make a good-faith effort to comply with requests as promptly as circumstances allow, taking into account “the complexity and extent of information sought, its availability, and the difficulty in retrieving the information.” *W. Penn Power Co.*, 339 NLRB 585, 587 (2003) (internal quotation marks and citation removed), *enforced in relevant part*, 394 F.3d 233 (4th Cir. 2005); *see also Endo Painting Service, Inc.*, 360 NLRB 485, 486 (2014), *enforced mem.*, 679 F.App’x 614 (9th Cir. 2017).

The Board found that Nob Hill “violated Section 8(a)(5) and (1) by failing and delaying from September 25 to December 13 to provide the following requested information: whether employees who are currently working in the

bargaining unit may transfer into the store and under what circumstances, and advise the Union on how to make arrangements for those members who are working short hours, not working or who are otherwise available to work in the new store.” (ER 8.) Nob Hill’s only challenge to that finding on appeal is its argument that it had no duty to provide information at all (Br. 10-11 n.4). Should the Court agree that Nob Hill had a duty to provide information, the Board is entitled to summary enforcement of the portions of its Order addressing Nob Hill’s unlawful delay. *See Spark Nugget, Inc. v. NLRB*, 968 F.2d 991, 998 (9th Cir. 1992) (enforcing the Board’s order with respect to findings unchallenged in petitioner’s opening brief); *see also* Fed. R. App. P. 28(a)(9)(A) (party must raise all claims in opening brief).

CONCLUSION

The Union requested basic information about positions that would be available to its members at a new store and explained that it needed the information to determine if Nob Hill was fairly filling those positions. Nob Hill's repeated refusal to provide most of the information and unreasonable delay in providing the rest violated the Act despite its insistence that the CBA foreclosed the Union's request. The Board respectfully requests that the Court enforce the Board's Order in full.

Respectfully submitted,

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March 2020

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

NOB HILL GENERAL STORES, INC.)	
Petitioner/Cross-Respondent)	
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	Nos. 19-72429, 19-72523
Respondent/Cross-Petitioner)	
)	
and)	
)	
UNITED FOOD AND COMMERCIAL)	
WORKERS UNION, LOCAL 5)	
Intervenors)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 9,081 words of proportionally spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

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Dated at Washington, DC
this 6th day of March 2020

**UNITED STATES COURT OF APPEALS
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Respondent/Cross-Petitioner)	
)	
and)	
)	
UNITED FOOD AND COMMERCIAL)	
WORKERS UNION, LOCAL 5)	
Intervenors)	

CERTIFICATE OF SERVICE

I certify that on March 6, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. The foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

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Dated at Washington, DC
this 6th day of March 2020