CASE NOS. 19-72429 AND 19-72523

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NOB HILL GENERAL STORES, INC.

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 5

Intervenor

ON REVIEW FROM THE NATIONAL LABOR RELATIONS BOARD

PETITIONER'S REPLY BRIEF

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I. PRELIMINARY STATEMENT

The Brief filed by the National Labor Relations Board ("NLRB" or "Board") misstates the applicable standard of review, mischaracterizes its own Decision, and disregards both federal law and Board precedent.[1] The Board's Brief does not dispute the unanimous federal jurisprudence holding that a "notwithstanding" clause precludes the application of *any other contractual provision*. *E.g., Cisneros v. Alpine Ridge Group*, 508 U.S. 10 (1993). Of equal significance, the Board's Brief does not cite, much less distinguish, most of the NLRB and federal cases relied upon by Nob Hill.[2] The few times the Board does reference one of those cited cases, it mischaracterizes its holding to evade its application. Rather than respond to Nob Hill's arguments, the Board (1) chooses to cite "boilerplate" law having no applicability to this case, 2) seeks to re-write its Decision to change the

[1] References to the Board's Brief are cited as "Br. while "ER" refers to the Excerpt of Record. Nob Hill's Opening Brief is cited as "NH Br." Intervenor Union filed a 4-page Brief which is cited as "U Br.", and the substance of which is addressed in the final section of this Brief.

[2] Of the 40 cases cited by Nob Hill, the Board's Brief references 7. By failing to distinguish Nob Hill's cited authorities, the Board implicitly concedes many of Nob Hill's arguments including, for example: (1) that relevance is judged as of the date of the Union's request (*Kraft Food North America, Inc*., 355 NLRB 753 (2010)); (2) that an employer is not required to respond to a premature information request (*Tri-State Generation*, 332 NLRB 910 (2000)); and (3) that the Union was required to demonstrate that the information it sought was relevant to its need to administer the contract. (*Delaware County Memorial Hospital*, 366 NLRB No. 28 (2018).

facts, and (3) argues for a relevancy test that has no support in Board law.

II. THE BOARD APPLIES THE WRONG STANDARD OF REVIEW

The issue presented for review concerns the interpretation of a collective bargaining agreement. This Court reviews that issue *de novo* *E.g.*, *Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.3d 1072, 1078 (9th Cir. 2008). No other standard of review is possible given that it is the province of the federal courts, not the Board, to interpret collective bargaining agreements. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 451 (1957).

This matter was decided on a stipulated factual record, so the Board's glib, unsupported pronouncement that the deferential "substantial evidence test" should be applied is nonsense. (ER 2.) (Br. pp. 17-18.) This is not a case where the Board or the ALJ resolved conflicting facts or drew factual inferences, and the Board fails to identify any "conflicting facts" or "drawn" factual inferences. The only issue presented is whether the Board interpreted the CBA correctly.

In a further attempt to avoid *de novo* review, the Board falsely claims (see discussion *infra*, pp. 3-4) that it never interpreted Section 1.13, and therefore, there is no contract interpretation issue for this Court to address. (Br. 26-29.) Not only is the Board's claim refuted by its Decision, but, by statute, this Court is required to address any defense proffered to the Board. 29 U.S.C. §160(e).

III. ARGUMENT

A. THE BOARD'S BRIEF CONCEDES THE LEGAL AS WELL AS THE FACTUAL PREDICATES UNDERLYING NOB HILL'S DEFENSE.

1. The Board Interpreted Section 1.13 And Its Interpretation Is Contrary To Established Federal Common Law Which Holds That A "Notwithstanding" Clause Trumps All Other Contractual Provisions.

The Board's outlandish suggestion that it never interpreted Section 1.13 is more than a gambit to evade *de novo* review; it is the means by which it seeks to preclude the Court from fairly addressing the CBA or Nob Hill's defense. (Br. 26-28.) The Board's suggestion is plainly dishonest.

Both the ALJ and the Board interpreted section 1.13. Indeed, the ALJ disposed of Nob Hill's "notwithstanding" defense by *interpreting* Section 1.13 to constitute an "after acquired stores" clause:

> "Respondent [Nob Hill] argues that the CBA, *specifically at Section 1.13*, does not apply to the Santa Clara Store, and thus the information requested was not relevant and necessary to the Union's representational duties. ... The language in Section 1.13 mirrors the language analyzed by the Board in *Raley's*, 336 NLRB 374 (2001). In *Raley's* the Board found that the provision such *as in the parties' CBA at Section 1.13* is known as an 'after acquired stores clause,' 'additional stores clause,' or 'after acquired'. [citations omitted] The Board determined that these types of clauses affected an employer's obligation to recognize a union at a new store 15 days after a store opens. However, I do not find that *this after acquired provision* affects the Union's information request..."
>
> (ER 7) (emphasis added.).[3]

[3] As the *italicized* words in this quotation prove, relying upon *Raley's*, the ALJ

This Board interpretation is contrary to federal common law which holds that a "notwithstanding" clause overrides *all* other contractual provisions. *E.g.*, *Cisneros v. Alpine Ridge Group*, *supra,* 508 U.S. at 18; and *F.B.T. Productions, LLC v. Aftermath Records*, 621 F.3d 958, 964 (9th Cir. 2010). This is the one, *and only*, *meaning* such clauses have. The Board's Brief does not challenge or even reference the holdings of *Cisneros* or *F.B.T. Productions*. Given that the Board *erroneously interpreted* Section 1.13, this Court is bound by *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 202 (1991) which holds that the Board's interpretation is not entitled to judicial deference and must be reversed as contrary to federal common law. This Court is required to give the "notwithstanding" proviso its intended effect.

2. The Board Admits That The Union's Information Request Is Premised On Contractual Provisions Which, As A Matter Of Federal Law, Are Precluded From Being Applicable.

The Board's Brief points to numerous contractual provisions that the Union sought to enforce and then argues that the information requested was relevant to

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interpreted Section 1.13 to be an "after acquired stores" clause. As a result, Nob Hill devoted a significant portion of the brief it submitted *to the Board* arguing that the ALJ's interpretation was wrong. (Brief to the Board, filed March 22, 2019, pp. 20-23 (ER 147).) In its Decision, the Board could have disavowed the ALJ's interpretation of Section 1.13, or it could have held that the interpretation was irrelevant to its analysis (as it now claims). *It did neither*. The Board *adopted* the ALJ's interpretation and cannot now be heard to argue otherwise.

administration of *those* contractual provisions. (Br. pp. 21-24.) Its Brief devotes pages to delineating the applicable contractual provisions and describing why the requested information is relevant to the administration of those provisions (Br. pp. 22-25).

This detailed discussion misses the critical point. The Board's *entire legal analysis* is premised on its factual claim that the cited contractual provisions were arguably applicable to the Santa Clara Store, and therefore, subject to enforcement or administration. The Board's Brief candidly acknowledges this factual premise:

> "In asking for that information, the Union stated it was needed 'to administer the contract,' noting that the CBA had several provisions *that apply to the opening of the new store*. The initial request listed the provisions that the Union was seeking to enforce."
>
> (Br. 21.) (emphasis added.)[4]

As the Board concedes, relevancy exists *only* because, *at the time of the Union's request*, there were contractual provisions that were applicable to the new

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[4] The Board's Brief repeatedly acknowledges this underpinning because the Board is constrained by the parties' factual stipulation. The Union *never asserted* that it was seeking to administer contractual provisions *unrelated* to the Santa Clara Store. The Union repeatedly asserted that these contractual provisions were *applicable to the Santa Clara Store*. (ER 106-107, 111, 113, 119-120.) The first such communication, *written by the Union's attorney*, stated:

> "Finally, this is a reminder that there are various provisions of the collective bargaining agreement *which apply to the opening of this store*. See, in part, Sections 1.14 [sic], 2.4, 2.5, 4.3.4, 4.9, 4.10, 5,9 and various other provisions. Nob Hill must comply with the provisions." (ER 107) (emphasis added.)

Santa Clara Store. (Br. pp. 21-23.) Yet, if these contractual clauses did not apply to the Santa Clara store because of the "trumping" effect of the "notwithstanding" proviso, then the factual underpinning for the Board's relevancy conclusion disappears. That is precisely the result of giving the "notwithstanding" proviso its acknowledged federal common law meaning.

Having premised relevancy on non-enforceable contractual clauses (essentially non-existent for purposes of contract administration), the Board has conceded the factual infirmity of its Decision. This matter should be at an end, and the Petition for Review should be granted. To avoid this result, the Board "doubles down" on its false claim that it never interpreted Section 1.13 by asserting that not only did it not interpret Section 1.13, but it was not required to do so, or indeed, to interpret any part of the CBA.

B. THE BOARD CANNOT AVOID ADDRESSING THE EFFECT OF THE "NOTWITHSTANDING" PROVISO BY CLAIMING THAT IT DID NOT EVALUATE THE MERITS OF THE UNION'S REQUEST.

The Board claims that it only decided that the requested information might be relevant to the Union's "stated position" and did not judge the merits of the Union's claim or interpret any part of the CBA. (Br. 28-29.) According to the Board, having found that the requested information was relevant to the Union's *stated position*, it was not required to go any further in determining relevancy. The Board was free to ignore Section 1.13 because Nob Hill "may not rely on its own

arguable interpretation of a contract to totally foreclose a union's right to information..." (Br. x 30.) The Board is arguing for a "facial" relevancy test that no Board decision has ever adopted and which is contrary to its own precedent as well as federal law.

First, in denying it interpreted the CBA, the Board ignores the fact that it had to make a "threshold" determination (1) that the CBA's provisions were arguably applicable to the Santa Clara Store and (2) that the "notwithstanding" proviso did not bar the Union's requests. These threshold determinations require *some level of contract interpretation*.

For instance, the Board reviewed and determined that the "staffing" requirements of Section 1.13 required Nob Hill to tell the Union what job positions would exist at the Santa Clara Store.[5] The Board further reviewed the CBA and found that sections 1.11 and 4.9 supported the Union's request. (ER 7.) Indeed, the Board's Brief devotes pages to *interpreting* the applicable contractual provisions and then explaining why the requested information is relevant. (Br. pp.

[5] The Board's precise finding was: "Per Section 1.13 of the CBA, the staffing of a new store would be a mix of new hires and current employees, some of whom could have been unit employees. As such, it appears relevant to the Union's duties to determine which positions would be filled at the Santa Clara Store as well as the work hours of such positions. In the same vein, it appears relevant and necessary for the Union to need the list of employees who have been asked to work in the Santa Clara Store along with a list of employees (and their classifications and wage rates) who were willing to work in the store." (ER 7.)

22-25). To be sure, the Board's claimed quick dismissal of the "notwithstanding" provision shows little concern for *that specific provision* of the CBA. *But, by giving credence to some parts of the CBA, but not others, the Board made a merits decision*, *albeit an incorrect one*.[6]

Second, the Board's argument that it was not required to interpret Section 1.13 is contrary to settled federal law. The Board is asserting that it had a right to review one part of the CBA while simultaneously ignoring another part of the *same* CBA. The Board asks this Court to adopt a contract interpretation rule unique to it, contrary to the common law, and which conflicts with decades old Supreme Court precedent holding that a CBA must be interpreted "as a whole". *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 279 (1956); and *see generally Restatement of the Law (2nd) of Contracts*, §202(2) ("A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.")[7]

A simple hypothetical demonstrates the absurdity of the Board's position.

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[6] Moreover, the Board had no difficulty in interpreting Section 1.13 when the contractual language was helpful to its "relevancy" conclusion. The Board concluded that the "staffing" requirements of Section 1.13 required Nob Hill to tell the Union what job positions would exist at the Santa Clara Store. (See language quoted in footnote 5, *supra*.) The Board proposes a "heads I win, tails you lose" scenario. It gets to interpret Section 1.13 to find relevancy but declines to interpret the language when it comes to ascertaining Nob Hill's defense.

[7] In its Brief, the Union acknowledges this established common law rule citing *O'Brien v. Miller*, 168 US 287 (1897). (U. Br. 2.) The Union is correct that the Board is not free to ignore any part of a CBA.

- Suppose a CBA provided that all employees would be paid $15 per hour but said nothing else about the applicable wage rate.
- Further suppose that the CBA provided that "Notwithstanding any language to the contrary contained in this Agreement, it is agreed that this Agreement shall have no application prior to January 1, 2021".
- Under the Board's theory, a union demand for information in 2020 to ascertain whether the employer was paying the $15 rate would be seeking relevant information because the Board is free to ignore the "notwithstanding" language and focus exclusively on the wage rate language to conclude that the union's information request is relevant to its *stated* position.

That is precisely the argument that the Board is now making to this Court. The Board was free to determine that the Union's information requests concerning the Santa Clara Store were relevant by focusing solely on contractual provisions that "arguably" were applicable to the Santa Clara Store while simultaneously declining to interpret or give effect to the one contractual provision that affirmatively states that those contractual provisions do *not* apply.

Third, the simple truth is that the Board has never used a "stated position" test to determine relevancy, and the Board's Brief cites no such precedent. Quite to the contrary, Board precedent holds that where language in the CBA

affirmatively precludes the Union's grievance, requested information cannot be relevant.

Under established Board law, the Board reviews a contract *in its entirety* to determine if a union has a viable contractual claim such that the information requested is relevant. Where language in a CBA affirmatively precludes the union's grievance the requested information is not relevant. *E.g.*, *Connecticut Yankee Atomic Power Co.*, 317 NLRB 1266, 1268 (1995) (Board found that union's requested information irrelevant due to the "specific conditions placed on [its] ability to unilaterally subcontract work..."); and *Disneyland Park*, 350 NLRB 1256 (2007) (where CBA affirmatively granted the employer the right to subcontract union's information request irrelevant inasmuch as the union could not demonstrate "with objective evidence" a possible contractual breach).

The Board seeks to distinguish *Connecticut Yankee Atomic Power Co*. and *Disneyland Park* by blithely asserting that in both cases the CBA "waived the Union's right to bargain over that issue and allowed the employer to act unilaterally". (Br. 32.) *But, neither case involved a bargaining waiver*, and the Board misrepresents their holdings. Both cases involved contractual language that precluded the union's contractual claims. *See also Oncor Electric Delivery, LLC*, 369 NLRB No. 40 (2020) (the union's request to know why the employer did not use bargaining unit employees to perform work was irrelevant where the CBA

provided that non-unit employees could perform the work as long there was no "reduction of the regular work hours of an employee covered by this Agreement".)

This Court essentially reached the same result in *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863, 868-869 (9th Cir. 1977) when it concluded that a union is not entitled to information unless it demonstrates that a contractual violation *is or has occurred – precisely the holding of Disneyland Park*. Both this Court *and the Board* require that the union make *some showing of a viable contractual breach*. *See also Hertz Corp. v. NLRB*, 105 F.3d 868, 874 (3rd Cir. 1997) ("The Union is required to apprise Hertz of facts tending to support its suspicion that Hertz might be discriminating.")

The Board's Brief makes no reference to *Hertz Corp*. and misstates the holding of *San Diego Newspaper Guild* by claiming the dispute there was "hypothetical" while here the dispute is real because "Nob Hill was opening a store to which unit employees could transfer..." (Br. 32.) Yet, again, the Board misstates precedent. *The Board's Brief contains no quote (or page) referencing such a holding*. What this Court said, consistent with *Disneyland Park*, was that the union was required to make an "initial, but not overwhelming demonstration...that some [contractual] violation is or has been taking place." *Id*.

at 869.[8]

Relevance is not judged in the abstract but only in relation to the CBA. In *Disneyland Park*, *Connecticut Yankee*, and *Oncor Electric*, language in the CBA precluded the union's substantive claim and therefore made the union's information request irrelevant. In all three cases, *the Board considered the merits of the union's claim in the context of the language of the entire CBA*. The cases that the Board cites from which it seeks to draw the contrary rule are far different from *Disneyland Park*, *Connecticut Yankee, Oncor Electric,* and *San Diego Newspaper Guild* and easily distinguishable.

For example, the Board relies upon *Dodger Theatrical Holdings*, 347 NLRB 953, 970 (2006). But in *Dodger Theatrical*, the parties disputed the meaning of the *same* contractual language and it was concluded that because the evidence was "murky and uncertain" as to the meaning of the language, the language was susceptible to more than one meaning. Therefore, the ALJ concluded that it could not be determined as a "matter of law" that the employer's position was correct.

[8] In passing, the Board cites this Court's decision in *NLRB v. Associated General Contractors*, 633 F. 2d 766 (1980) as supportive of its argument, when it is not. (Br. 19-20.) That case, which cited *San Diego Newspaper Guild* with approval, adopted the same relevancy test. This Court held: "It is sufficient that the information is relevant to possible violations where the union has established a *reasonable basis to suspect such violations have occurred*." *Id*. at 771 (emphasis added.) Logically, of course, if no contractual violation is legally possible, relevancy cannot exist.

The exact same analysis is applicable with respect to the Board's reliance on *United Carr Tennessee*, 202 NLRB 729, 731 (1973) where there was a dispute between the parties over the meaning of the *same* contractual provision.

In such cases, where the parties disagree about the meaning of the *same contractual provision*, the Board is correct that it does not resolve the merits of that dispute when determining relevancy. But, that factual scenario is not present here, and the Board erroneously broadens those cases to assert that it "always" uses a "stated position" test when its own cases are to the contrary. As *Disneyland Park*, *Connecticut Yankee, Oncor Electric* demonstrate the Board does not unquestionably accept a union's stated position where *contractual provisions* disprove the union's claim.[9]

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[9] To force fit Nob Hill into its artificial "stated position" test, the Board makes it appear that there is a *possible* dispute concerning the meaning of the "notwithstanding" proviso, when such a dispute is legally impossible. The Board claims that Nob Hill's "notwithstanding" defense is based on Nob Hill's "own arguable interpretation" of this language (Br. p. 30.) The Board implicitly argues that the "notwithstanding" proviso is ambiguous and subject to conflicting interpretation. In truth, under federal law, *binding upon the Board*, the clause is not ambiguous and is subject to *one, and only one*, interpretation. *E.g. F.B.T. Productions, LLC v. Aftermath Records, supra*, 621 F.3d at 964 ("This provision is admittedly broad but it is not unclear or ambiguous."). The Board is not free to create an ambiguity where none exists. A CBA is ambiguous only if "after applying established rules of interpretation, it remains susceptible to at least two reasonable but conflicting meanings". *CNH Industries NV v. Reese*, 583 U.S. __, 138 S. Ct. 761 (2018). The Board fails to point to single federal case holding that a "notwithstanding" clause is ambiguous or susceptible to two meanings. There is nothing "arguable" when it comes to the meaning of a "notwithstanding" clause.

C. THE BOARD IS BOUND BY ITS OWN PRECEDENT TO INTERPRET SECTION 1.13 AS PRECLUDING THE APPLICATION OF ANY OTHER CONTRACTUAL PROVISION TO THE SANTA CLARA STORE UNTIL IT OPENED TO THE PUBLIC.

Without explanation or justification, the Board chose to disregard its own precedent interpreting the language of Section 1.13. As noted in detail in Nob Hill's Opening Brief (pp. 30-33), in *Raley's*, 336 NLRB 374 (2001) the Board held that Section 1.13 was a *timing limitation* on the another provision of the CBA – specifically that Section 1.13 precluded the "after acquired stores" clause, contained in Section 1.1 of the CBA, from being applicable to a new store until the store was open to the public for fifteen days. *Id*. at 377 ("...the Board...found that section 1.13 incorporated section 1.1 and applied it to new stores only after they had been opened for 15 days.") Applying that *same interpretation here* to the *same contractual language* would result in the Board concluding that no provision of Nob Hill's CBA was applicable to the Santa Clara Store until it had been opened to the public for 15 days. That, too, should end this matter. Absent explanation, the Board is required to apply its precedent. *Abm Onsite Servs. W., Inc. v. NLRB*, 849 F.3d 1137, 1142 (D.C. Cir. 2017).

Instead, the Board twists its own precedent. Although it avoids saying so directly, it argues that the *Raley's* Board found that Section 1.13 timing restriction applied to *one, and only one, particular contractual provision*, the separate "after

acquired stores" clause (contained in Section 1 of the CBA). (Br. 31.) Specifically the Board asserts that based on *Raley's* (and *Alpha Beta*, 294 NLRB 228 (1989)) "...the Board, *in agreement with those decisions*, stated that Section 1.13 addressed Nob Hill's obligations *to recognize the Union* at its Santa Clara store 15 days after it opened." (Br. 31.) (emphasis added.)

To be sure, the *Raley's* Board found that the after acquired stores clause (§1 of the CBA) was governed by the time limitation of the "notwithstanding" proviso of Section 1.13, but *nothing in Raley's limited the reach or scope of Section 1.13*. In other words, had the *Raley's* Board been tasked with deciding whether a different clause in the CBA (such as a "transfer" provision) applied to a store that had not yet opened, it presumably would have found that the "notwithstanding" proviso limited the application of all other contractual provision until the new store opened. The Board cannot avoid its own precedent by rewriting it.

In the alternative, the Board argues that, because the *Raley's* and *Alpha Beta* decisions did not address the issue of an employer's refusal to provide information, "Section 1.13 [has] no effect on the entirely separate matter of the Union's information request." (Br. 31.) In effect, the Board is claiming that Section 1.13 can have one meaning when determining whether an employer is obligated to recognize a union and an entirely different meaning when an information request is involved. *But, the meaning of a contract is not dependent on the issue to be*

resolved, and the Board cites no authority for this astounding proposition.

Raley's holds that Section 1.13 is timing provision – determining when other provisions of the CBA take effect, *all other provisions of the CBA*. The exact same language (without even a deviation in punctuation) is present here, and yet according to the Board, it is irrelevant in judging the validity of the Union's information request. The Board is wrong and is required, absent explanation and justification, to apply its precedent. If *Raley's* timing limitation is applied here, then the Union's information is clearly premature and irrelevant.[10]

D. UNDER ESTABLISHED PRECEDENT, THE PARTIES' PAST PRACTICE IS A PERTINENT FACTOR IN EVALUATING THE RELEVANCY OF THE UNION'S INFORMATION REQUEST.

In its Opening Brief (p. 33, n. 16), Nob Hill cited both Board cases and Ninth Circuit cases holding that "past practice" is a relevant factor when evaluating a union information request. *E.g.*, *Anaconda American Brass Company*, 148 NLRB 474, 479 (1963). Past practice is relevant to the extent it sheds light on the parties' understanding concerning what a clause in the CBA means. Here, the

[10] *Tri-State Generation*, *supra*, where the Board held that a union's information request was premature, is yet another example where the Board ignores its own precedent. The Board's Brief does not cite *Tri-State Generation*, does not distinguish it, and does not cite any authority for the proposition that an employer must respond to a "premature" information request. Similarly, the Board's Brief makes no mention of *General Electric Co. v. NLRB*, 916 F.2d 1163, 1171 (1990) where the Seventh Circuit also concluded that a union was not entitled to information where the request was prematurely made.

undisputed factual record is that the Union never previously contended that any contractual provision was applicable to a new Nob Hill store and the Union never made a request for information prior to the opening of a new store. (ER 11-12.)

Unable to distinguish its precedent, the Board misreads Nob Hill's argument when it claims that Nob Hill is relying upon this "past practice" to assert that the Union waived its right to the requested information. (Br. p. 25.).[11] In truth, Nob Hill argued: "By its past actions, the Union acknowledged that it had no right to administer the CBA prior to the opening of the new store or to require Nob Hill to respond to any information requests." (NH Br. p. 33, n 16.)

Nob Hill simply argued that the Board, consistent with its own precedent, should have used this conceded past practice in evaluating the Union's assertion that various contractual provisions were applicable to the Santa Clara Store prior to its opening. *Id*.; and *see also Emeryville Center v. NLRB*, 441 F.2d 880, 884 (9th Cir. 1971). This is the common and well-established use of "past practice". *See generally*, Elkouri and Elkouri, *How Arbitration Works* (8th Ed. 2016), Chapter 12.

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[11] The Board's Brief fails to discuss the case authority cited by Nob Hill in support of its argument. (NH Br. p. 33 n. 16.) Instead, the Board cites cases concerning the Board's test for establishing a statutory waiver – cases having nothing to do with Nob Hill's argument. (Br. p. 25.)

E. IN THE ALTERNATIVE, THE BOARD HAS FAILED TO DEMONSTRATE THE RELEVANCE OF THE INFORMATION REQUESTED BY THE UNION.

If this Court declines to give effect to the accepted meaning of Section 1.13, it still must determine if the Board properly concluded that the Union was entitled to *all* of the information it requested. (NH Br. 34-37.) In adopting the ALJ's Decision, the Board did *not* address the relevancy of the Union's *specific* information requests for purposes of "contract administration". This failure is problematic in light of the Board's simultaneous disavowal of two of the ALJ's reasons for finding the requested information to be relevant (specifically to allow the Union to engage in "effects bargaining" and to allow the Union to "counsel" its members). (ER 1 n. 1.) When analyzed, many of the Union's information requests are only relevant to the two purposes *disavowed by the Board*.

The items of information requested by the Union focused on the terms and conditions of employment at the future Santa Clara Store. The Union requested (1) a copy of the Santa Clara Store employee handbook; (2) the wage rates to be paid the Santa Clara Store employees; (3) copies of any benefit plans applicable to the Santa Clara employees; and (4) a breakdown of the job classifications in the Santa Clara Store. (ER 106-107.) Because this was non-bargaining unit information, the Union was required to demonstrate that the information was needed to administer its CBA. *E.g., Frito-Lay, Inc.*, 333 NLRB 1296 (2001).

Confronted with these facts and this law, the Board denies the obvious stating: "*But the Union was not seeking information about 'how Nob Hill intended to treat its Santa Clara store employees*.' " (Br. p. 33.) Really! The Union is asking for the terms and conditions of employment *at the Santa Clara Store* and yet it is not asking for information concerning how Nob Hill intended to treat its Santa Clara employees. The Board's denial is absurd on its face.

To deflect this Court from the obvious, the Board insists that this information was relevant "to help protect current unit employees, both those who sought to transfer and those who remained in their current stores...[and] to monitor the transfers of employees to ensure that staffing was conducted fairly and equitably and consistent with the CBA." (Br. pp. 33-34.) This justification erroneously assumes that existing bargaining unit members somehow retain their union status when they transfer to the Santa Clara Store such that their terms of employment remained a valid Union consideration. But, *that is a legal impossibility* inasmuch as the employees in any new store remain "unrepresented" until *a majority* elects union representation. *NLRB v. Retail Clerks Local 588*, 587 F.2d 984, 987 (9th Cir. 1978) ("Thus, when a new store is opened, union representation cannot be forced on the new employees; they must be allowed to

decide their own representation.”).[12]

The Board’s abstract assertion that the information was needed to “protect” current employees and “monitor” the transfer process fails to explain how the information concerning the Santa Clara Store *is relevant* to a *specific contractual provision* that the Union may administer. How does this information protect current unit employees and under what applicable contractual provision? Board law requires that relevancy be established, not simply asserted. *E.g., Delaware County Memorial Hospital*, *supra*. There is no such showing in this record, and the Board’s unsupported claim is legally insufficient.

Yet, again, a simple hypothetical proves the point. Suppose Nob Hill intended to pay minimum wage at the Santa Clara Store and provide no benefits. How does that information bear on the Union’s ability to monitor whether Nob Hill is fairly considering for transfer union employees who wish to transfer to the Santa Clara Store? Unquestionably, it has no logical bearing or relationship.

The reality is that this requested information is relevant if the Union needed

[12] Moreover, the employees in a new store cannot elect representation until the store is engaged in “normal business operations” and a substantial and representative complement of employees are working. *Hilton Inn Albany*, 270 NLRB 1364, 1365 (1984); and *Elmhurst Care Center*, 345 NLRB 1176 (2005). In the case of a retail store such as Nob Hill’s Santa Clara Store, these conditions cannot be met until the store opens to the public.

the information for the purpose of "counseling" employees about the "pros and cons" of transferring (precisely because the terms and conditions of the CBA did not apply to those union-represented employees who chose to transfer). Indeed, that is exactly what the ALJ concluded stating:

> "In addition, the need for employee handbook, ranges of rates to be paid and benefit plans is clear from the *Union's duties* to ensure that any unit members who chose transfer *would be well-informed* as to any difference between their current wages, benefits and terms and conditions of employment."
>
> (ER 7.) (emphasis added.)

However, the Board *expressly disavowed* the ALJ's conclusion that the Union's "counseling" duties supported these information requests. (ER 1, n. 1.)[13] The Board failed to make alternative findings as to how information concerning the employment terms at the Santa Clara Store would be relevant to the Union's *contract administration* need.

This Court must determine, applying extant Board law, how this requested non-unit information is relevant to any specific contractual provision that the Union *can* administer. It was incumbent *on the Union* to demonstrate *to Nob Hill* the relevance of its requests. *IGT d/b/a International Gaming Technology*, 366

[13] A union is entitled to information *only* to fulfill one of two *statutory* duties: contract administration or bargaining. *General Electric Co. v. NLRB*, *supra*, 916 F.2d at 1168 citing *NLRB v. Acme Industrial Co.*, 385 US 432, 437 (1967). Thus, the Board properly rejected the ALJ's "counseling" conclusion.

NLRB No. 170, p. 2 (2018). Moreover "[a]n actual, not theoretical or speculative, connection between the requested information and the Union's bargaining or representational responsibilities must be shown. *International Union of Operating Engineers, Local 501 (Golden Nugget)*, 366 NLRB No. 62, p. 5 (2018). A specific and concrete need for the information must be established. *F.A. Bartlett Tree Expert Co*., 316 NLRB 1312, 1313 (1995). A bare assertion that a union needs information is legally insufficient. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 314 (1979). The union must claim that a specific provision of the contract is being breached and provide some facts to support its claim. *Disneyland Park*, *supra*.

The Board's Brief (and more importantly its Decision) fails to tell this Court how the Union's information request satisfies the Board's relevancy test. Instead, the Board asserts that Nob Hill's proposed three-part test (NH Br. 37) does not reflect applicable precedent when *it is taken from Board precedent.*

In fact, less than three months ago, the Board reiterated that a union must provide objective evidence to support a request for non-bargaining unit information. *G4S Secure Solutions, Inc*., 369 NLRB No. 7, p. 2 (2020). In *G4*S the union sought a copy of a contract that the employer had executed with an outside firm on the grounds that there "might" be something in the contract that affected the unit employees' employment. The Board concluded that the union had failed to establish relevance stating:

> "For [non-bargaining unit] information that is not presumptively relevant, a union satisfies its burden of proving relevance by demonstrating 'a reasonable belief *supported by objective evidence* for requesting the information.' [citation omitted] Suspicion alone is not enough, and 'whether a union has gone beyond " mere suspicion" to show relevance is a factual question to be decided on a case-by-case basis."
>
> (emphasis added.)

Here, there is not a single word in any correspondence from the Union establishing that Nob Hill was violating the CBA. Similarly, the Board's Brief fails to identify any such breach based on *objective evidence*.

F. THE UNION'S REQUEST TO OVERRULE NINTH CIRCUIT AND SUPREME COURT PRECEDENT MUST BE REJECTED.

The Union's Brief merely rehashes arguments made by previous litigants confronted with a "notwithstanding" proviso. Like those previous litigants, the Union insists that a "notwithstanding" clause cannot negate contractual provisions that "pertain to current employees as they relate to new stores". (U. Br. 2.) This is, of course, the precise argument made to every court that has ever considered the meaning of a "notwithstanding" clause, to wit, that other contractual provisions that "arguably" apply must, or should, be given effect. The Union fails to cite a single legal authority to support its argument.

This argument has been repeatedly and universally rejected. *E.g.*, *Cisneros v. Alpine Ridge Group*, *supra (U.S. Supreme Court*); *F.B.T. Productions, LLC v. Aftermath Records*, *supra (9th Cir.); and Boghos v. Certain Underwriters at*

Lloyd's of London, *supra, (California Supreme Court*). There is no reason for this Court to overrule such uniform precedent.

Because the notwithstanding clause has a legally settled definition, the Union is forced to argue that the parties never intended such an "absurd" result. (U. Br. 2.) Yet, nowhere its Brief does the Union provide this Court with *any other interpretation* for the parties' "notwithstanding" proviso (nor does it endeavor to defend the Board's interpretation of the "notwithstanding" proviso).

Moreover, the Union's claim that employees are being deprived of contractual rights is factually incorrect. There is no denial. *There is a short delay*. Nob Hill conceded that once the Santa Clara Store opened various contractual constraints might exist and acknowledged that it would be required to respond to any relevant information requests made at that time. (ER 109, 115-116.)

The "notwithstanding" proviso should be given its settled meaning because that it is exactly what the contracting parties intended when they negotiated this language. By including this proviso, the contracting parties gave Nob Hill the operational freedom to open a new store without any contractual constraints. Once the new store was operational, various contractual constraints came into play.[14]

[14] At that point, the Union was perfectly free to assert (and arbitrate if it wished) that Nob Hill had failed to fulfill its contractual obligation to staff the Santa Clara Store with a cadre of existing employees and/or claim that Nob Hill failed to transfer union employees into the store. (ER 109, 115-116.)

There is nothing "absurd" about that result.

Moreover, it is a bedrock principle of American jurisprudence that contracting parties are presumed to "know" the law and that contracts incorporate the law in force at the time of the agreement. *E.g., Von Hoffman v. City of Quincy*, 71 U.S. 535, 550 (1866). The legal effects of "notwithstanding" clauses are (1) well known, (2) long established, and (3) universally acknowledged. Accordingly, the intended effect of such a clause was known to the Union when it negotiated the proviso.

Finally, it is significant that the Union appropriately acknowledges that a contract must "be read as a whole". (U Br. 2.) The only rational way to read the CBA "as a whole" is to give the "notwithstanding" clause its accepted legal meaning. To do otherwise deprives Nob Hill, as it continues to open new stores, of the benefit of the contractual language it negotiated.

IV. CONCLUSION

For the aforesaid reasons, Nob Hill's Petition for Review should be granted and the Board's Cross Application for Enforcement should be denied.

Dated: April 17, 2020

Respectfully Submitted,

s/ Henry F. Telfeian

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Attorney for Nob Hill General Store, Inc.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s): 19-72429 and 19-72523

I am the attorney or self-represented party.

This Reply Brief contains 6,372 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature s/ Henry F. Telfeian **Date** April 17, 2020

CERTIFICATE OF SERVICE

I am a citizen of the United States and an attorney licensed in the State of California with my principal place of business in Placer County, California. I am over the age of eighteen years and not a party to the within action and my business address is PO Box 1277, Kings Beach, CA 96143.

I hereby certify that on April 17, 2020 I electronically filed the foregoing

PETITIONER'S REPLY BRIEF

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