

Nos. 20-71006, 20-71230

**In the United States Court of Appeals
for the Ninth Circuit**

SAFEWAY INC.,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

and

UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 5,
Intervenor.

On Petition for Review of a Decision and Order
of the National Labor Relations Board
N.L.R.B. Case No. 20-CA-221482

**REPLY BRIEF OF PETITIONER
SAFEWAY INC.**

Jonathan Allan Klein, SBN 162071

jaklein@khiplaw.com

Sweta H. Patel, SBN 247115

spatel@khiplaw.com

1981 North Broadway, Suite 220

Walnut Creek, California 94596

Telephone: (415) 951-0535

Facsimile: (415) 391-7808

Attorneys for Petitioner/Cross-Respondent

SAFEWAY INC.

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INTRODUCTION

Two fallacies underlie the National Labor Relations Board’s (“NLRB” or “Board”) defense of its erroneous holding that the United Food and Commercial Workers Union Local 5 (“Union”) established the relevance of its request for Safeway Inc.’s (“Safeway”) vendor contracts, including the Instacart contract. Because it cannot demonstrate that substantial evidence supports this relevancy determination as set forth in its Decision and Order, the Board engages in circular reasoning and repeats unfounded assertions to create the impression that substantial evidence exists when it plainly does not. The Board may obfuscate this lack of evidence by repeatedly citing its own findings and making the groundless claim that they constitute substantial evidence, but it cannot change the record. The Union did not establish relevance, and therefore failed to satisfy the applicable legal standard, because it based its request for the Instacart contract on conjecture instead of objective evidence. Thus, no matter how the Board and the Union characterize the record, the Board’s Decision and Order cannot stand because it is contrary to law and lacks the support of substantial evidence. *See Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (“substantial evidence” is “more than a mere scintilla” and means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion”).

ARGUMENT

I. The Board’s Decision and Order Is Legally Unsustainable and Should Be Set Aside.

A. Neither Applicable Law Nor Substantial Evidence Support the Board’s Decision and Order.

From the outset, the Board erroneously contends that substantial evidence supports its Decision and Order merely based on its finding that the Union “explained” that it “needed” Safeway’s vendor contracts in order to investigate its grievance. (Brief for the National Labor Relations Board (“NLRB Brief”), at 19.) In advancing this notion, the Board ignores the Supreme Court's clear directive that “[a] union’s bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested.” *Detroit Edison Co. v. N.L.R.B.*, 440 U.S. 301, 314 (1979). Rather, an employer must disclose information “only if it is relevant to a legitimate union need.” *Press Democrat Publishing Co. v. N.L.R.B.*, 629 F.2d 1320, 1324 (9th Cir. 1980). The Union, however, failed to make this necessary showing of a need for the vendor contracts.

Despite the Board’s suggestion to the contrary, the Union’s reference to Section 1.2 of the parties' collective bargaining agreements, which defines covered work, does not establish the relevance of its request for Safeway’s vendor contracts, such as the Instacart contract. (NLRB Brief, at 19-20; 2 ER p. 119; 3 ER p. 232.)

The Board needs to look no further than its own precedent to ascertain that the Union's citation to Section 1.2 does not amount to evidence that supports a relevancy determination. (NLRB Brief, at 19-20.) For example, in *Disneyland Park*, the Board held that “[i]n order to show the relevance of an information request, a union must do more than cite a provision of the collective-bargaining agreement.” *Disneyland Park*, 350 N.L.R.B. 1256, 1258 (2007). The Board decreed that the pertinent inquiry is whether the union demonstrated “a reasonable belief supported by objective evidence that the information sought was relevant.” *Id.* This standard requires the union to set forth facts to support its claim that the employer breached a specific provision of their collective bargaining agreement. *Id.* at 1259. The Union failed to make this required showing in this case, offering nothing more than mere speculation that Safeway's vendor contracts *might* support its grievance. (Opening Brief of Petitioner Safeway Inc. (“Safeway Opening Brief”), at 24-29.)

Not only did speculation become the cornerstone of the Board's Decision and Order, but it is also now the primary ground on which the Board relies to oppose Safeway's petition and support enforcement of its Decision and Order. Specifically, the Board reiterates its finding that the Union “explained” it was seeking Safeway's vendor contracts, including the Instacart contract, “to corroborate anecdotal, witness observations” that these vendors were performing bargaining unit work and “to establish” that the alleged violations resulted from a “deliberate business plan”

adopted by Safeway, which “could affect any remedy sought in arbitration.” (NLRB Brief, at 20, internal quotation marks omitted.) The Union set forth this rationale in an April 26, 2018 email to Safeway, which actually asserted that the vendor contracts were relevant because they “may” serve these various purposes. (3 ER p. 380.) According to the Board’s Decision and Order, this email alone established the relevance of the Union’s request for Safeway’s vendor contracts, including the Instacart contract. (1 ER p. 1 n.2.)

The Board overlooked then and disregards now that the Union proffered no evidence to support its assertions in the April 26, 2018 email. (3 ER p. 380.) Instead, the Union proceeded solely on the basis of an unsubstantiated belief that was and remains insufficient to establish relevance. *See Disneyland Park, supra*, 350 N.L.R.B. at 1258 (union’s assertion that it “believed” a collective bargaining violation had occurred was insufficient to explain the relevance of requested subcontracting information). Like the Union, the Board ignores that whether the requested contracts *might* corroborate “anecdotal, witness observations” that Safeway’s vendors were performing bargaining unit work, *might* demonstrate that the alleged violations of the collective-bargaining agreements resulted from a “deliberate business plan” adopted by Safeway, or *might* have a bearing on “an appropriate remedy” is insufficient to establish relevance. (3 ER p. 380.)

Although the Union was not required to make an “overwhelming” showing that Safeway breached the collective bargaining agreements, it had to “offer more than mere ‘suspicion or surmise’ for it to be entitled to the information.” *See San Diego Newspaper Guild v. N.L.R.B.*, 548 F.2d 863, 869 (9th Cir. 1977). To make this required showing, the Union had to provide Safeway with “a sufficient factual basis to establish relevance at the time the information request was made.” *See Disneyland Park, supra*, 350 N.L.R.B. at 1259 (footnote omitted). The Union’s failure to satisfy this burden confirms that the Board’s Decision and Order is legally unsustainable because “[s]peculation cannot constitute substantial evidence.” *See United States v. Navarrette-Aguilar*, 813 F.3d 785, 796 (9th Cir. 2015).

Given that the Board concluded without any evidentiary basis that the Union’s April 26, 2018 email established relevance, the Court should end its inquiry here. To assess whether Safeway engaged in an unfair labor practice, “the Union’s proffered reasons for demanding the information, as well as [the employer’s] motives for refusing that demand, must be examined as of the time of the demand and refusal.” *See General Elec. Co. v. N.L.R.B.*, 916 F.2d 1163, 1169 (7th Cir. 1990). The Union’s failure to assert legally sufficient grounds for requesting Safeway’s vendor contracts in its April 26, 2018 email negates any claim it may have to such information. *See Disneyland Park, supra*, 350 N.L.R.B. at 1259.

For this reason, the Board’s attempt to salvage its Decision and Order through evidence unrelated to its determination that the Union’s April 26, 2018 email established the relevance of Safeway’s vendor contracts is unavailing. One such example is the Board’s reliance on its findings relating to three photographs of Safeway and Instacart advertisements. (NLRB Brief, at 20; 3 ER pp. 369-72.) Contrary to the Board’s suggestion otherwise, the Union did not provide Safeway with these photographs to show the relevance of its request for the Instacart contract. Rather, the Union enclosed these photographs with its March 5, 2018 letter that accused Safeway of violating their collective bargaining agreement covering Safeway’s North Coast stores. (3 ER p. 369.) The Union did not request any information from Safeway or mention any vendor contract at that time. (*Id.*) These photographs therefore are immaterial. (1 ER p. 1 n.2.)

Equally misplaced is the Board’s reliance on the stipulated testimony of John Frahm (“Frahm”), the Union’s North Coast director, that supposedly provided further support for the Union’s request for Safeway’s vendor contracts as well as Frahm’s July 31, 2018 complaint to Safeway that Instacart workers were asking bargaining unit employees to verify that customers could legally purchase alcohol.¹

¹ Safeway never conceded the relevance of Frahm’s stipulated testimony and reserved the right to object to its consideration. (2 ER p. 89.) Moreover, Frahm’s stipulated testimony relates to his unsubstantiated belief regarding the contents of the Instacart contract. (NLRB Brief, at 21; 2 ER p. 93.) The Board’s own precedent

(NLRB Brief, at 20-21; 1 ER pp. 5, 6.) Because the Board held that the Union established relevance through its April 26, 2018 email, the Union’s submission of this additional evidence, which did not even exist at the time of the email, has no bearing on the propriety of the Board’s relevancy determination as a matter of law. *See Sara Lee Bakery Group, Inc. v. N.L.R.B.*, 514 F.3d 422, 431 (5th Cir. 2008) (“a union cannot rely on a reason proffered for the first time at the administrative hearing”); *Disneyland Park, supra*, 350 N.L.R.B. at 1259 (testimony at the hearing “cannot serve to establish that the Union provided to the Respondent a sufficient factual basis to establish relevance at the time the information request was made”). It is axiomatic that evidence arising after April 26, 2018 cannot cure the lack of evidence on which the Board premised its erroneous conclusion that the Union established the relevance of the vendor contracts on that date.

Because conjecture provides the sole foundation for the Board’s holding that the Union’s April 26, 2018 email established the relevance of Safeway’s vendor contracts, the Board’s notion that its Decision and Order is “fully consistent with decisions of this Court and others” is untenable. (NLRB Brief, at 22.) An examination of the “string cited” decisions relied on by the Board reveals that they lend no support to its Decision and Order. For example, unlike here, in *N.L.R.B. v.*

holds that a union’s belief does not establish relevance. *See Disneyland Park, supra*, 350 N.L.R.B. at 1258.

Associated General Contractors of California, Inc., 633 F.2d 766, 771 n.6 (9th Cir. 1980), the unions established the relevance of the requested information because they “show[ed] an objective basis for their suspicions,” “provided concrete examples,” and took “other steps to investigate possible violations.” Similarly, unlike here, in *DirectSat USA LLC v. N.L.R.B.*, 925 F.3d 1272, 1278 (D.C. Cir. 2019), the unions demonstrated that the subject contract was relevant because the employer “itself incorporated the full agreement by reference” into the parties’ collective bargaining agreement. Finally, unlike here, in *Murray American Energy, Inc. v. N.L.R.B.*, 765 F. App’x 443, 449 (D.C. Cir. 2019), the union established the relevance of information regarding the employer’s use of contractors based on the record of an ongoing disagreement between the parties that included multiple grievances and arbitrations. Thus, unlike here, the unions in these cases necessarily established the relevance of the information they requested because, as this Court has long recognized, “[t]o hold otherwise would be to give the union unlimited access to any and all data which the employer has.”² See *San Diego Newspaper Guild, supra*, 548 F.2d at 868.

² The Union also cites this Court’s unpublished disposition in *N.L.R.B. v. ATC, LLC*, 309 F. App’x 98, 99 (9th Cir. 3009). In that case, the Court concluded without explanation that the union established the relevance of contract terms of certain non-unit employees. This decision therefore is not informative.

By contrast, the Union's request for Safeway's vendor contracts, including the Instacart contract, ran afoul of the well-settled principles set forth in *San Diego Newspaper Guild, supra*, 548 F.2d at 867-69; *Sara Lee Bakery Group, Inc., supra*, 514 F.3d at 425-428, 431-433; *Disneyland Park, supra*, 350 N.L.R.B. at 1256-59; and *G4S Secure Solutions (USA), Inc.*, 369 N.L.R.B. No. 7, at 1-2 (2020). The Board goes to great lengths, but fails, in an attempt to distinguish these cases because they found that the information requests at issue were based on speculation and therefore irrelevant. (NLRB Brief, at 28-32.) As discussed in Safeway's opening brief, it is precisely for this reason that these cases are on point and instructive here. (Safeway Opening Brief, at 7, 20-24, 27, 29, 31-34, 36-37.) Each of these cases compels the conclusion that the Board erred in ordering Safeway to produce the Instacart contract because the Union based its request for such information on mere speculation, which was legally insufficient to establish the contract's relevance. (*Id.*)

In sum, no legal or evidentiary basis exists for the Board's holding that the Union established in its April 26, 2018 email that Safeway's vendor contracts, including the Instacart contract, were relevant to its grievance that Safeway violated the collective bargaining agreements by allowing third parties to perform work reserved for the bargaining unit. Try as it might, the Board cannot create relevance simply by repeating its own unsupported findings and the Union's unsubstantiated assertions. Any impartial review of the record reveals that the Board's claims that

the Union reinforced its request with “repeated” explanations, “ample” substance and evidence, “specific, objective detail,” and “objective evidence” are baseless. (NLRB Brief, at 20, 24, 27, 29, 32.) Because the Union has failed to establish relevance as a matter of law, the Court should grant this petition, deny enforcement of the Board’s Decision and Order, and order the dismissal of the complaint against Safeway in its entirety.

B. The Instacart Contract Is Irrelevant to the Union’s Grievance.

The Board cannot show that its Decision and Order is supported by applicable law or substantial evidence for the simple reason that Safeway’s contract with Instacart is irrelevant to the Union’s grievance that Safeway violated the collective bargaining agreements by allowing Instacart to perform bargaining unit work. Although the Board disputes Safeway’s position that the Instacart contract lacks relevance because it has no bearing on the resolution of the Union’s grievance, this proposition is self-evident. (NLRB Brief, at 25.) The collective bargaining agreements alone dispose of the Union’s grievance because their provisions either permit Instacart to perform the work complained about or they do not. *See Sara Lee Bakery Group, Inc., supra*, 514 F.3d at 431-32.

The Board’s error lies in its disregard of the Union’s stated reason for requesting the Instacart contract. The Union did not make this request, as the Board incorrectly asserts, because it sought “a full understanding of the work performed by

InstaCart [sic] to evaluate whether and to what extent Safeway was breaching its obligation under the CBAs to assign unit work to Safeway employees.” (NLRB Brief, at 25.) Rather, the Union requested the Instacart contract for the stated purpose of corroborating its anecdotal witness observations. (3 ER p. 380.) The terms of the Instacart contract, however, cannot confirm or deny such observations. It is inexplicable how any contract provision could corroborate a witness account. In this case, only an investigation of Instacart’s activities could accomplish that goal and thereby address the Board’s concern that the Union obtain the information needed “to evaluate the merits of its claims.” (NLRB Brief, at 26.) Because the Instacart contract cannot assist the Union in accomplishing the purpose for which it was sought, it lacks relevance as a matter of law.

Under these circumstances, the Board’s relevancy determination lacks legal and evidentiary support. *See Washington State Nurses Ass’n v. N.L.R.B.*, 526 F.3d 577, 580 (9th Cir. 2006). Safeway is neither suggesting that the Union must “accept at face value” its representations regarding its relationship with Instacart nor refusing to produce the Instacart contract because it considers the Union’s legal theory “unsound,” as the Board misguidedly contends. (NLRB Brief, at 26, 27.) Instead, Safeway maintains that the Union’s right to information regarding that relationship depends on its adherence to the applicable legal and evidentiary requirements – i.e., meeting its “initial burden of proof as to the relevance of the information.” *See San*

Diego Newspaper Guild, supra, 548 F.2d at 867. The Union’s failure to satisfy this burden necessarily renders its request unenforceable and compels the conclusion that the Board erroneously held that Safeway must produce the Instacart contract. *Id.* at 869; *Disneyland Park, supra*, 350 N.L.R.B. at 1258.

C. Safeway Had No Duty to Bargain Toward an Accommodation Regarding Confidentiality.

The absence of legal or evidentiary support for the notion that Safeway’s vendor contracts, including the Instacart contract, were relevant to the Union’s grievance negated any obligation by Safeway to reach an accommodation with the Union regarding confidentiality. This obligation only arises when “the initial showing of relevance has been made.” *See A-Plus Roofing*, 295 N.L.R.B. 967, 971 (1989); *see also Emeryville Research Ctr., Shell Dev. Co. v. N.L.R.B.*, 441 F.2d 880, 883 (9th Cir. 1971) (when the information sought “has no relevance to any legitimate union collective bargaining need, a refusal to furnish it could not be an unfair labor practice”). As a result, the Board erred in holding that Safeway failed and refused to bargain in good faith in an attempt to reach an accommodation with the Union. (1 ER pp. 1, 6-7.) The Board’s contention otherwise, based on the misguided premise that substantial evidence supports its determination of relevance, is unjustified. (NLRB Brief, at 23.)

II. The Union Raises No Legal or Evidentiary Basis on Which the Board's Decision and Order Can Survive Judicial Review.

Each of the three arguments advanced by the Union in support of the Board's Decision and Order lacks both legal and evidentiary merit.

First, the Union erroneously asserts that the Board's Decision and Order is entitled to deference in this case. (Brief for United Food and Commercial Workers Local 5 ("Union Brief"), at 2-3.) This Court will only "uphold a decision by the Board if its findings of fact are supported by substantial evidence and if it correctly applied the law." *Lucas v. N.L.R.B.*, 333 F.3d 927, 931 (9th Cir. 2003). The granting of Safeway's petition is warranted because, in this case, neither applicable law nor substantial evidence support the Board's Decision and Order. (*See supra* Sections I(A) and (B); Safeway Opening Brief, at 20-38.)

Second, the Union erroneously argues that the Board properly applied a "discovery-type standard" in determining that the Union established the relevance of its request for the Instacart contract. (Union Brief, at 3-5.) Although the Board uses a broad discovery-type standard to assess relevance, it misapplies this standard where, as here, it finds relevance despite the Union's failure to demonstrate "a reasonable belief supported by objective evidence that the information sought was relevant." *Disneyland Park, supra*, 350 N.L.R.B. at 1258. Nowhere in its April 26, 2018 email did the Union mention any objective factual evidence demonstrating that the Instacart contract was relevant to its grievance. (3 ER p. 380.) Instead, the Union

offered nothing more than conjecture, which is legally insufficient to establish relevance. *See San Diego Newspaper Guild, supra*, 548 F.2d at 868-69 (“the Union’s claim of relevance and need fails as it is apparently grounded only upon the Union’s suspicion that some contract violation is or has been taking place”). Yet, according to the Board, the Union established relevance through that email. (1 ER p. 1 n.2.) Because this conclusion lacks evidentiary support, the Board’s Decision and Order is unsustainable as a matter of law. Consequently, Safeway is not asking this Court to adopt an alternative interpretation of the evidence, as the Union inaccurately asserts, but rather to grant this petition and deny enforcement of the Board’s Decision and Order because it has no legal or evidentiary basis.

Third, the Union erroneously contends that it “amply” demonstrated the relevance of the Instacart contract. (Union Brief, at 6-8.) Not only does the Union’s failure to proffer any objective factual evidence of relevance belie this claim, its notion that the Instacart contract is relevant to determine whether Safeway is engaging in a deliberate business plan likewise lacks merit. (*Id.*) Safeway’s intent is not in dispute given its prior acknowledgement that “allowing Instacart shoppers to shop for customers in its stores is obviously an intentional business decision.” (2 ER pp. 78-79.) As a result, the disclosure of the Instacart contract is unnecessary to evaluate the validity of the Union’s grievance. Safeway’s conduct in this regard either is or is not a violation of the collective bargaining agreements based solely on

what their own terms and provisions require, and not those contained in a third party commercial contract.

On these grounds, the Union has identified no legal or evidentiary basis on which the Board's Decision and Order can survive judicial scrutiny.

CONCLUSION

For the foregoing reasons, and the reasons set forth in its opening brief, Safeway Inc. respectfully requests that the Court grant this petition, deny enforcement of the Board's decision and order, and order the Board to dismiss the complaint against Safeway Inc. in its entirety.

DATED: December 8, 2020 KLEIN, HOCKEL, IEZZA & PATEL P.C.

By: /s/ Sweta H. Patel
Jonathan Allan Klein
Sweta H. Patel
Attorneys for Petitioner/Cross-Respondent
SAFeway INC.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

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**CERTIFICATE OF SERVICE
FOR CASE NUMBERS 20-71006, 20-71230**

I, Nicole J. Policastro, declare:

I work in the City of Walnut Creek in the State of California. My business address is 1981 North Broadway, Suite 220, Walnut Creek, California 94596. I am over the age of 18 years and not a party to the foregoing action.

On **December 8, 2020** I served the following Document: **REPLY BRIEF OF PETITIONER SAFEWAY INC.**, on the interested parties in said action, by electronically submitting the document through the Court's CM/ECF system. All participants in the case are registered CM/ECF users and service will be accomplished by the Notice of Electronic Filing to each party.

I declare under penalty of perjury and the laws of the United States that the foregoing is true and correct and that this declaration was executed on **December 8, 2020** at Walnut Creek, California.

/s/ Nicole J. Policastro

Nicole J. Policastro