UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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| NATIONAL NURSES ORGANIZING COMMITTEE-TEXAS/NATIONAL NURSES UNITED (BAY AREA HEALTHCARE GROUP, LTD. D/B/A CORPUS CHRISTI MEDICAL CENTER AN INDIRECT SUBSIDIARY OF HCA HOLDINGS, INC. | ) | |
| RESPONDENT, | ) | |
| and | ) | Case No. 16-CB-225123 |
| ESTHER MARISSA ZAMORA, | ) | |
| INDIVIDUAL-CHARGING PARTY. | ) | |

**BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE***

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**BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE***

The American Federation of Labor & Congress of Industrial Organizations (AFL-CIO) files this brief as amicus curiae because of the importance of the issues that the General Counsel and Charging Party have attempted to raise in this case for employers, employees and unions. While we do not believe the Board should reach the novel and sweeping arguments advanced by the General Counsel and the Charging Party for the reasons described below, we nevertheless address them here so that the Board can understand their baseless nature and radically destabilizing implications.

1. **The Board Cannot Use This Case as a Vehicle to Promulgate a Broad Rule Applying to All Employer-Union Agreements or All "Neutrality Agreements"[1]**

The Board should affirm the Administrative Law Judge's dismissal of the complaint for the simple reason that the General Counsel did not prove that a neutrality agreement, even if one existed, in any way governed the Charging Party's terms and conditions of employment or even her ability to post notices on the Employer's bulletin boards. The Administrative Law Judge (ALJ) found that there was no admissible evidence that any form of agreement governed the Charging Party's access to the bulletin boards:

> [Charging Party] Zamora's testimony about what [Employer agent] Lamond said [about a neutrality agreement] constitutes hearsay which cannot be used to establish the truth of the matters Lamond asserted. But even apart from being hearsay, Zamora's nebulous testimony would fall short of establishing either that the Employer had entered into a neutrality agreement with the Respondent or that such agreement was the reason why the Employer would not allow her to use the locked bulletin boards.

[1] We use the term "neutrality agreement" here because the term was used in the litigation of the case below and because it is used by both the General Counsel and the Charging Party even though, as explained below, the term is not defined by those parties and has no precise definition.

ALJD at 11. Thus, there was no admissible evidence suggesting a neutrality agreement governed the Charging Party's terms of employment[2] and, even if the hearsay testimony was admissible, the ALJ found that it did not support a finding that such an agreement governed the Charging Party's access to the bulletin boards. Under settled law, the Board cannot reverse the ALJ's finding of fact based on a credibility determination when there is utterly no evidence suggesting it was incorrect. *See Greyhound Lines, Inc.*, 367 NLRB No. 123, slip op. at 1 n. 2 (2019) ("The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect").[3] The Board must affirm on this ground.[4]

The Board cannot, in adjudicating this specific case, promulgate a broad rule relating to all agreements between unions and employers or even all neutrality agreements between union

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[2] The Charging Party had no personal knowledge of any agreement or basis for asserting its existence and the Judge properly excluded her hearsay testimony concerning statements allegedly made by an employer agent. Moreover, we concur with the Union's cross-exceptions demonstrating that the Employer's position statement from a separate case also provided no basis for the ALJ to find that a neutrality agreement existed.

[3] The same is true for the ALJ's conclusion that the testimony concerning the statements of the management agent was inadmissible hearsay in relation to the terms of the alleged agreement as the Board has held that hearsay evidence cannot be admitted unless "corroborated by something more than the slightest amount of other evidence." *Dauman Pallet*, 314 NLRB 185, 186 (1994).

[4] And even if the Board were to overturn both the credibility finding and the hearsay ruling of the ALJ and find that (1) a neutrality agreement existed, (2) the agreement governed employees' access to bulletin boards, and (3) such access is a term and condition of employment, the only conceivable conclusion from those unwarranted findings would be that the Union breached it duty of fair representation by not disclosing the portion of the agreement governing unit employees' access to bulletin boards. *See Millwrights & Machine Erectors Union Local 102 (Millwright Employers Association)*, 317 NLRB 1099, 1099 (1995) (affirming ALJ's decision that union's limitation of access to hiring hall dispatch records violated the union's duty of fair representation but reversing judge on portions of records [registrants' social security numbers] because Charging Party had "no apparent need" for them "to ascertain whether he has been fairly treated with respect to obtaining job referrals.").

and employers. Such a broad statement would be dicta, ill-advised and a violation of the Administrative Procedures Act (APA).

The General Counsel's theory of the case before the ALJ rested on the contentions that a neutrality agreement existed, the agreement applied to the unit in which the Charging Party was employed, and the agreement governed the Charging Party's terms and conditions of employment. The ALJ found that, even if an agreement existed, it did not govern the Charging Party's terms or conditions of employment and, on that basis, the ALJ dismissed the amended complaint. On exceptions, both the General Counsel and the Charging Party urge the Board to go beyond the narrow issue presented in this case and thereby improperly transform this adjudicatory proceeding into a rulemaking proceeding.

This is, of course, a proceeding under Section 10 of the Act, which governs the adjudication of charges that a covered entity has engaged in an unfair labor practice ("ulp"). Separately, Section 6 of the Act provides that the "Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act." 29 U.S.C. § 156. Because the APA "prescribes radically different procedures for rule making and adjudication . . . the proper classification of agency proceedings as rule making or adjudication is of fundamental importance." *Attorney General's Manual on the Administrative Procedure Act* 12 (1947).

In *NLRB v. Wyman-Gordon Co*., 394 U.S. 759, 763-764 (1969) (plurality opinion of Fortas, J.), the Court explained that the Board may not avoid the rulemaking provisions of the APA "by the process of making rules in the course of adjudicatory proceedings." *Id*. at 764. While "the Board is not precluded from announcing new principles in an adjudicative proceeding

and . . . the choice between rulemaking and adjudication lies in the first instance within the Board's discretion," it may not engage in rulemaking under the guise of adjudication. When the Board chooses to "develop[] its standards in a case-by-case manner" through adjudication, it must do so "with attention to the specific [circumstances] . . . in each [case]." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); *See also Wyman-Gordon*, 394 U.S. at 764 ("There is no warrant in law for the Board to replace the statutory scheme with a rule-making procedure of its own invention.").

A ulp proceeding under Section 10 is an "adjudication" for purposes of the APA. Unfair labor practice proceedings, like other adjudicatory proceedings, are "concerned with the determination of past and present rights and liabilities" and "involve the determination of . . . right[s] to benefits under existing law[.]" *Attorney General's Manual*, at 14-15.[5]

The positions now advanced by the General Counsel and the Charging Party have no bearing whatsoever on "the determination of . . . right[s] to benefits under existing law" in this case. The Board need not address them in order to discharge its duties under Section 10 of the Act. The positions the General Counsel and Charging Party advance are entirely unrelated to "adjudicat[ing] disputed facts in [the] particular case[]" before the Board. *United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 245 (1973).

If the Board wished to undertake a general review of neutrality agreements or of unions' duty to provide information to represented employees, it was obligated to adhere to the APA's rulemaking requirements. Accordingly, the Board should limit its decision to the narrow issue

[5] Under the APA, a "rule" is "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy[.]" 5 U.S.C. § 551(4). By contrast, the APA defines "adjudication" to include "agency process for the formulation of an order," and it defines an "order" to include "the whole or a part of a final disposition . . . of an agency in a matter other than rulemaking." *Id.* §§ 551(6) & (7).

presented at trial and not address the sweeping theories presented by the General Counsel and Charging Party.

### 2. The Board Should Not Use This Case as a Vehicle to Promulgate a Broad Rule Applying to All Employer-Union Agreements or All "Neutrality Agreements"

Even if the Board had the authority to adopt a broad rule that was not part of the General Counsel's theory of the case at trial, it should not do so because of the many unpredictable and undesirable consequences of doing so in the absence of input from the labor-management community.

Both the General Counsel and the Charging Party urge the Board to adopt a novel and sweeping rule. The Charging Party argues that the Board "must . . . rule broadly that employees . . . are presumptively entitled to see *any and every contract* their union makes or has made with their employer." Charging Party Brief at 13. The Charging Party's proposed rule would encompass agreements having no application whatsoever to the requesting employee or his or her bargaining unit. The Charging Party argues that "all such agreements necessarily affect employees' working lives, and the union has no countervailing reason for [keeping them confidential]." *Id*. Both assertions are erroneous.

Employers and unions enter into countless types of agreements that do not affect all or even any employees in a represented unit or in general. Such agreements include collective bargaining agreements in separate units, grievance settlement agreements, unfair labor practice settlement agreements, labor-management cooperation agreements, and many other types of agreements. Those agreements may relate to a single employee, employees in a single bargaining unit, employees who are unrepresented, or to matters unrelated to any employees, and may be agreements that relate to one location, more than one location, or no location. The Board does not have before it the facts concerning any such agreements. The Board does not have

before it any arguments from employers and has arguments from only one union concerning the application of the broad rule urged by the Charging Party. It would thus be imprudent in the extreme to adopt a rule such as that proposed by the Charging Party in this case.

To provide just one example of the wholly unexamined implications of adopting such a rule, accepting the Charging Party's theory (and the logical implications of the General Counsel's position before the Board) would prevent employers and unions from entering into confidential settlement agreements resolving grievances or unfair labor practices. Of course, all such agreements are agreements between a union and an employer and thus fall within the duty of disclosure proposed by the Charging Party. Moreover, such agreements almost always involve securing benefits for some employees but not others, which is not and does not suggest a breach of the duty of fair representation. *See Humphrey v. Moore*, 375 U.S. 335, 349 (1964) ("[W] are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against another.") For that reason and others, employers often wish to keep some settlements confidential in order to prevent dissatisfaction and discord among employees. Mere speculation that a confidential settlement agreement may somehow evidence a breach of the duty of fair representation – the very most that exists here – certainly is not enough to mandate disclosure of all such agreements to any represented employee who requests them. Yet that would be the direct consequence of accepting the Charging Party's theory and the logical consequence of accepting the General Counsel's theory.

"The Board favors 'private, amicable resolution of labor disputes, whenever possible.'" *S. Freedman & Sons, Inc.*, 364 NLRB No. 82, slip op. at 2 (2016). Thus, the Board has upheld

provisions in grievance settlements barring the grievant from discussing the terms of the settlement with other employees. *Id*. And several of the current Members of the Board have urged even greater respect for the confidentiality of agreements settling employment disputes. *See* Order Denying Summary Judgment, *Baylor University Medical Center*, Case No. 16-CA-195335, at 1 n. 2 (Dec. 27, 2017) (Members Kaplan and Emanuel expressing belief "that, to the extent not already permitted under Board precedent, the legality of confidential severance agreements for former employees should be reconsidered"). A broad holding here of the type urged by the Charging Party would disrupt this jurisprudence as it applies to settlements to which a union is party because any represented employee working for the employer in any unit at any location could request the agreement and the union would be obligated to provide it.

Even a ruling limited to "neutrality agreements" would be ill advised. The General Counsel asks for a broad ruling applying to all "neutrality agreements," arguing that it does not matter whether or not the agreement governs the requesting employee's terms of employment because "it concerns her Union's relationship with her employer." General Counsel Brief at 16. But while the General Counsel uses the term "neutrality agreement," his counsel never defines the term and the term is not clearly defined elsewhere. The General Counsel's brief acknowledges, "Neutrality agreement have no strict definition." General Counsel's Brief at 19. Thus, the General Counsel urges the Board to adopt a broad rule applying to all "neutrality agreements" while acknowledging that it has not and cannot define that term and thus the scope of the duty it would have the Board impose on unions.

The provisions of agreements that have been denominated neutrality agreements vary greatly. Scholars have "found considerable variation in the substantive aspects of these agreements." James J. Brudney, Neutrality Agreements and Card Check Recognition: Prospects

for Changing Paradigms, 90 Iowa L. Rev. 819, 826 (2004) (citing Adrienne E. Eaton & Jill Kiesky, Union Organizing Under Neutrality and Card Check Agreements, 55 Indus. & Lab. Rel. Rev. 42, 46 (2001)). The duties of both employers and unions under such agreement vary considerably. Agreements may require that the employer remain neutral in relation to its employees' choice of whether to be represented or they may not.[6] They may impose other types of mutual limits on speech such as agreements not to disparage the other side. They may apply to a single unit of employees or all employees of the employer, to a single location or multiple locations. They may involve no more than an agreement on the part of the employer to recognize the union upon a showing of majority support other than a Board-supervised election, such as signed authorization cards. They may involve multiple forms of consideration from the union, including an agreement not to strike or picket for recognition, an agreement to settle outstanding ulp charges, and agreements to assist or cooperate with the employer in other respects having no direct impact on employees' terms and condition of employment at all. It would be highly irregular and highly imprudent for the Board to issue a decision that governs all such agreements in the context of this case.

A broad ruling in this case would be particularly ill-advised when the Board does not have any information before it concerning the broad range of agreements such a ruling would cover. In fact, the Board does not even know the terms of the alleged agreement at issue in this case itself.

[6] The only evidence concerning the contents of the alleged agreement admitted in this case suggested it did not require neutrality. *See* ALJD at 18, 21-22.

### 3. **The Negotiation of a Neutrality Agreement Falls Outside the Duty of Fair Representation**

Parties negotiate and enter into a neutrality agreement prior to recognition of the union as the exclusive representative of the employees in the unit covered by the agreement.[7] Thus, at the time a union enters into such an agreement, it owes *no* duty of fair representation to employees in the unit. The union cannot possibly have a duty to disclose an agreement that derives from its duty of fair representation when the duty of fair representation had not attached at the time the agreement was entered into. A duty to disclose cannot possibly be derived from mere speculation that the agreement will contain evidence of a breach of the duty when no duty existed at the time the agreement was entered into.

It is a bedrock principle of labor law that the duty of fair representation attaches only to the union's activities within its role as the exclusive representative of a unit of employees under the Act. The foundational precedent, *Steele v. Louisville & N.R. Co*., makes clear that Congress implicitly imposed a duty of fair representation only "on the bargaining representative." 323 U.S. 192, 203-04 (1944). The duty does not extend beyond the actions of the union as the exclusive representative. The duty extends only to the "functions of the bargaining representative." *Branch 529, Nat'l Ass'n of Letter Carriers*, 319 NLRB 879, 881 (1995). "Without the exclusive bargaining representative status, the statutory justification for the imposition of a duty of fair representation does not exist." *Teamsters Local 460 (Superior Asphalt)*, 300 NLRB 441, 441 (1990). *See also Simo v. UNITE*, 316 F.3d 974, 984 (9th Cir.

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[7] In this case, as is typical, the Charging Party and General Counsel appear to allege that a neutrality or recognition agreement was entered into by the union and the employer prior to recognition of the union as the exclusive representative of the employees in the Charging Party's unit. The Union was certified in the unit on June 7, 2010. The Charging Party was not employed in the unit until July of 2017 and the exchange between the Charging Party and the Union at issue here did not occur until late July of 2018.

2003) ("Definitionally, however, the duty of fair representation does not apply where the union is not representing the workers in question."); *Felice v. Sever*, 985 F.2d 1221, 1228 (3d Cir.1993) ("the duty of fair representation is inextricably linked to the union's status as exclusive bargaining representative in the collective bargaining process or in the administration of rights under a collective bargaining agreement"); *Richardson v. United Steelworkers of Am.,* 864 F.2d 1162, 1166 (5th Cir.1989) (holding that the "duty of fair representation generally governs a union's conduct vis-a-vis the bargaining unit members *when the union is representing them*" (emphasis added)); *Freeman v. Local Union No. 135,* 746 F.2d 1316, 1321 (7th Cir.1984) ("If a union does not serve as the exclusive agent for the members of the bargaining unit with respect to a particular matter, there is no corresponding duty of fair representation."); *Kolinske v. Lubbers,* 712 F.2d 471, 481 (D.C. Cir. 1983) ("'[A] union . . . can be held to represent employees *unfairly* only in regard to those matters as to which it represents them *at all.*'") (emphasis in original).

Yet neutrality agreements are negotiated before a union becomes the exclusive representative and their terms almost never continue in effect once the union becomes the exclusive representative. Thus, there simply is no basis in the duty of fair representation for a categorical duty to disclose neutrality agreements.

The Board has made clear that a union's duty to disclose agreements extends only to agreements reached *after* the union because the exclusive representative. Those agreements, unlike the typical neutrality agreement, may be relevant to the union's carrying out of its duty. Thus, in *Law Enf't & Sec. Officers Local 40B (S. Jersey Detective Agency)*, the Board reasoned:

> when a union denies the employees it represents the opportunity to examine its agreement with their employer, it severely limits the employees' ability to determine whether they have been afforded the fair representation that is their due. In the instant case, Respondent's failure to make available to Charging Party

> Richards copies of its collective-bargaining agreement and its health and welfare plan impeded his ability to understand his rights under those documents and hampered his ability to determine the quality of his representation under them.

260 NLRB 419, 420 (1982). Here the agreement is alleged to have been reached prior to the union having any duty to the Charging Party. Its terms can in no way enable the Charging Party "to determine the quality of h[er] representation."[8]

The Board's decisions holding that represented employees do not have a right to obtain documents concerning the operation of a non-exclusive hiring hall are directly on point. For example, in *Carpenters Local 370 (Eastern Contractors Assn.)*, 332 NLRB 174 (2000), the Board held, "We . . . find that the Respondent [Union] did not owe a duty of fair representation to Charging Party . . . regarding its operation of a nonexclusive hiring hall. Accordingly, we cannot conclude that the Respondent's failure to provide Charging Party . . . with the requested information [concerning the operation of the hiring hall] violated Section 8(b)(1)(A) of the Act." *Id*. at 175. In these cases, the Board held that the mere fact that obtaining the information might establish retaliatory treatment was not enough. The mere fact that such unlawful conduct may exist and may be evidenced by requested documents is insufficient to create a duty to provide information about conduct outside of the union's representational role.

The Ninth Circuit reached a similar conclusion in *Simo v. UNITE*, 322 F.3d 602 (9th Cir. 2003). In that case, employees represented by a union alleged the union breached its duty of fair representation by not providing them a copy of a collective bargaining agreement between the union and an employer that was not the employees' employer. The employees argued that the

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[8] Moreover, in this case, there is no allegation or evidence of any kind that the union took any steps to enforce any portion of the agreement after it became the exclusive representative. Thus, the Board cases involving unions' duty to disclose documents related to a grievance or the operation of a hiring hall maintained under a collective bargaining agreement, *see infra* § 5, are also inapplicable.

union relied on the agreement to induce the second employer to withdraw work from their employer in retaliation against the employees and thus in violation of the duty of fair representation. "The workers argue that the duty of fair representation requires a union to give its members access to any documents necessary for the members to assess the union's conformance with its duty." *Id*. at 615. The Court rejected this claim, reasoning, "union members [do not] have a right to any information from their union that may affect them, such as a CBA with a different employer, when the union is not acting as the exclusive bargaining representative of the workers." *Ibid*.

Because unions have no duty of fair representation at the time they enter into neutrality agreements, they cannot have a duty to disclose such agreement that rests on the duty of fair representation.

4. **There Can Be No Breach of the Duty of Fair Representation in Every Refusal to Disclose Any Neutrality Agreement Given the "Wide Range of Reasonableness" Permitted a Union in the Negotiation of Agreements**

Even if the duty of fair representation applied to the negotiation of neutrality agreements, a union's refusal to disclose such an agreement cannot violate the duty given the wide range of reasonableness accorded unions in the negotiation of agreements, including the inclusion and honoring of confidentiality requirements. Even more obviously, *every* refusal to disclose such an agreement cannot possibly violate the duty as both the General Counsel and Charging Party propose.

The Supreme Court has made clear that unions must be accorded a wide degree of latitude in negotiating with employers. "Any substantive examination of a union's performance . . . must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities." *Air Line Pilots Assn. v. O'Neill*, 499 U.S. 65,

78 (1991). A union's "authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-38 (1953). The "wide range of reasonableness" permitted a union derived from the recognition that "complete satisfaction of all who are represented is hardly to be expected." *Id*. at 338. Thus, a union's conduct in negotiations breaches the duty "only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." *Air Line* Pilots, 499 U.S. at 67. Any administrative or judicial examination of a union's agreement must be "highly deferential." *Id*. at 78.[9]

A union's agreement to keep a neutrality agreement confidential and its subsequent honoring of that agreement is certainly not irrational in every instance. Unions rationally believe that employees will be better off if they have representation and that employees are more likely to achieve that objective if their employer does not oppose representation. The employer may condition such an agreement on confidentiality for many reasons, for example, to prevent its competitors from obtaining information concerning its labor relations strategy. A union certainly may act rationally by acceding to such a confidentiality demand and by subsequently honoring the confidentiality agreement. Thus, the categorical positions advanced by the General Counsel and Charging Party are incompatible with the Supreme Court's construction of the duty of fair representation.

[9] The General Counsel is thus simply wrong in his counsel's description of the duty that exists in this context and the analogy to the lawyer-client relationship.

5. **All Existing Precedent Concerning Unions' Duty to Provide Information to Represented Employees is Inapposite**

None of the cases cited by the General Counsel or the Charging Party requiring that unions provide information to represented employees apply here. That is because neutrality agreements clearly fall outside the scope of the duty to provide information the Board has derived from the duty of fair representation.

The cited cases all involve controversies between represented employees and their unions over the disclosure of documents that either set terms and conditions of employment (*e.g.*, collective bargaining agreements and health and welfare plan documents) or relate to the union's enforcement or administration of those agreements and plans setting terms and conditions of employment (*e.g.,* contractual grievance and hiring hall referral documents). *See, e.g., IATSE, Local 720 (Tropicana Las Vegas, Inc.)*, 363 NLRB No. 148, slip op. at 1 n. 1 (2016) (employee requested list of referrals from his union's hiring hall); *Yellow Freight Sys.,* 327 NLRB 996 (1999) (employee requested a copy of the collective bargaining agreement); *Local 909, United Automobile Workers (General Motors)*, 325 NLRB 859, 862 (1998) (refusal to account for the disparity in amounts of money allotted pursuant to grievance settlement); *Branch 529, Nat'l Ass'n of Letter Carriers*, 319 NLRB 879 (1995) (employee requested forms pertaining to a grievance the union had filed on her behalf); *Vanguard Tours, Inc.*, 300 NLRB 250 (1990) (shop steward refused to show copies of the collective bargaining agreement to bargaining unit members); *Teamsters Local 282 (General Contractors)*, 280 NLRB 733, 734-35 (1986) (job referral information related to the operation of an exclusive hiring hall); *Law Enf't & Sec. Officers Local 40B (S. Jersey Detective Agency)*, 260 NLRB at 420 (employee requested collective bargaining agreement and health and welfare plan); *Local No. 324, Operating Engineers (Associated General Contractors)*, 226 NLRB 587, 587 (1976) (request for job

referral information concerning an exclusive hiring hall). Thus, in *IATSE Local 720*, for example, the Board explained, "we note that the requested information is relevant because it would help ascertain the validity of the Charging Party's reasonable belief that the Respondent was operating the hiring hall improperly, including with respect to the general reliability of the Respondent's automated dispatch system." 363 NLRB No. 148, slip op. at 1 n. 1.

Even the Charging Party acknowledges that unions breach their duty only if they decline to provide represented employees with "copies of requested contracts and similar documents that touch on their employment." Charging Party Brief at 11. But neutrality agreements do not govern or touch on employees' employment.

Moreover, employees certainly have no "reasonable belief" that they are being treated unfairly in respect to their terms and conditions of employment based solely on the mere existence of a neutrality agreement. *Compare IATSE, Local*, 363 NLRB No. 148, slip op. at 1 n. 1. The existing precedent thus provides no basis whatsoever for accepting the theories of either the General Counsel or the Charging Party.

In fact, existing precedent directly supports the ALJ's decision. In *Int'l Union of Operating Engineers Local 18 (Precision Pipeline, LLC)*, 362 NLRB 1438 (2015), the Board held that a union had no duty to disclose pre-job reports provided to the union by signatory employers. Like the General Counsel and Charging Party here, the Charging Party in that case sought "the pre-job reports purely on principle, believing that if it concerns the job, he should be able to see it." *Id.* at 1445. But the Board affirmed the ALJ's conclusion, decisively rejecting such a categorical approach:

> The General Counsel's arguments for finding a violation effectively ignore the Supreme Court-mandated standards, which require deference to a union's rational, good-faith, nondiscriminatory decision-making. At bottom, and at odds with the controlling standard, the General Counsel presumes a violation and the right of

> employees to receive the pre-job forms, and challenges the union to prove why it cannot honor this "right." The government's approach turns the law on its head.

*Id.* at 1446.

Existing precedent requires affirmance of the ALJ here.

6. **No Case Requires a Union to Provide Information About Extra-unit Matters to a Represented Employee**

If accepted by the Board, the theories advanced by both the General Counsel and Charging Party would require a union to disclose any neutrality agreements between a union and an employer to an employee of the employer represented by the union, even if the agreement applies only to employees outside the represented employee's unit at the time it is requested or at all times. The General Counsel argues specifically that "employees requesting neutrality agreements should not be required to provide specific evidence as to how the agreement might affect them." General Counsel's Brief at 17. Such a holding would be contrary to settled law governing the broader duty to disclose information under § 8(a)(5).

Even under the *much broader* duty to disclose information that may be relevant to bargaining under § 8(a)(5),[10] the Board has long held that unions do not have a right to information about employees outside the unit they represent absent a specific showing of relevance. *See, e.g., Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994). It is settled

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[10] The ALJ in *Precision Pipeline*, in a decision affirmed by the Board in its entirety, accurately explained the significantly more limited obligations that exist under the duty of fair representation compared to those under § 8(a)(5):

> [T]his is not an 8(a)(5) case. It is an 8(b)(1)(A) case. Unlike an employer faced with a union's request for information, here there is no statutory duty for a union to collectively bargain with its members. Here, there is no general affirmative duty to provide relevant requested documents upon request.

362 NLRB at 1446. The ALJ stated that the General Counsel's attempt to rely on 8(a)(5) decisions to impose a duty on the union resting on the duty of fair representation was "100 percent wrong." *Id.* n. 7.

law that "when a union's request for information concerns data about employees or operations other than those represented by the Union . . . there is no presumption that the information is necessary and relevant to the Union's representation of employees." *Bohemia, Inc*., 272 NLRB 1128, 1129 (1984). In *Bohemia*,

> [T]he Union's request for information was based solely on the suspicion of some . . . employees that work had been transferred [to a location out of the unit] . . . because of the wage cut there. The Union d[id] not contend, nor d[id] the record demonstrate, that it had any objective factual basis for believing such a transfer had occurred.

*Ibid*. For that reason, the Board dismissed a charge based on the employer's refusal to provide the extra-unit information. *See also* Advice Memo., *ABM Industries*, Case No. 18-CA-136876 (April 8, 2015).

A party satisfies the burden in regard to information about employees outside a represented unit only "when it demonstrates a reasonable belief supported by objective evidence" that the information is relevant to a breach of contract or to bargaining. *Shoppers Food Warehouse*, 315 NLRB at 259. The demonstration "must be more than a mere concoction of some general theory which explains how the information would be useful to the union in determining if the employer has committed some unknown contract violation." *New York Times Co*., 270 NLRB 1267, 1275 (1984). The Board recently held:

> Regardless of what rationale is offered for an information request, it must be more than a 'hypothetical theory'' about the requested relevance of requested documents; 'mere suspicion or surmise' will not suffice. *Disneyland Park*, 350 NLRB 1256, 1258 fn. 5 (2007); *Sheraton Hartford Hotel*, 289 NLRB 463, 464 (1988); *Southern Nevada Builders Assn*., 274 NLRB 350, 351 (1985).

*International Union of Operating Engineers, Local 501 (Golden Nugget Las Vegas),* 366 NLRB No. 62, slip op. at 4 (2018).

Mere speculation that a neutrality agreement applying to employees outside a represented unit might contain evidence that a union could possibly have violated its duty of fair representation toward represented employees in some wholly unspecified manner clearly does not satisfy that standard. It is at best a "hypothetical theory" or "mere suspicion or surmise." It is certainly not a "reasonable belief supported by objective evidence." As a categorical matter, there is far more reason to believe the information concerning an employer's dealings with employees outside a represented unit (*e.g.*, their wages and benefits) is relevant to a union's bargaining with the employer than there is to believe that a neutrality agreement applying only outside the unit might somehow evidence a breach of the duty of fair representation. Thus, the Board cannot accept the positions advance by the General Counsel and Charging Party here without also loosening the standard applied to union requests for extra-unit information from employers.[11]

7. **The General Counsel's Position is Inconsistent with the *Broader* Existing Duty to Provide Information Under § 8(a)(5)**

The General Counsel's position, if accepted, would radically alter the *broader* duty to provide information under § 8(a)(5). The General Counsel argues that a union cannot be "excused" from providing an agreement "by simply stating that the agreement does not affect the requesting employee." General Counsel Brief at 21. But, of course, that is the current law governing employer's obligation to provide information.

[11] Notably, the Board, with two of the current Members joining, recently affirmed the dismissal of a charge against a union on the ground that an employer that requested information from the union "failed to establish the relevance of the requested extra-unit information." *International Union of Operating Engineers, Local 501,* 366 NLRB No. 62, slip op. at 1 n. 1.

In *Tegna, Inc.*, 367 NLRB No. 71 (2019), the Board reversed an administrative law judge's determination that the employer violated §§ 8(a)(5) and (1) of the Act by not responding to certain requests for documents pertaining to statements made during a negotiation between the parties. In response to the requests, the employer had "orally stated at a bargaining session that there was no responsive information," a position it reiterated in a supplemental written response. *Id*. at 4. Despite the administrative law judge's finding that the representative for the company "frequently hedged and qualified his verbal responses," even "fudg[ing] his answer[s]" to the union about certain documents, *id*. at 26, the Board was satisfied that "the Respondent met its obligation with regard to these requests" by merely "verbally explain[ing] to the Union that [it] did not possess (nor did there exist) documents or information responsive to [its requests]." *Id*. at 4.

Similarly, a response that explains that a requested neutrality agreement does not contain any terms concerning the Charging Party's terms of employment or right to access Employer bulletin boards would be adequate. As in relation to the extra-unit implications of the General Counsel's and Charging Party's positions, rejecting the Union's response here would necessarily have implications for employer responses to union information requests under § 8(a)(5).

8. **An Information Request Cannot Be Used as a Fishing Expedition for Evidence of an Unfair Labor Practice**

In this case, both the General Counsel and the Charging Party urge the Board to adopt a broad, categorical standard that would not require any showing of relevance or any evidence that a union treated an employee unfairly in some way connected to a neutrality agreement. But the law is clear that an employee cannot use an information request to a union as a fishing expedition for evidence of an unspecified unfair labor practice the employee has no evidence was committed and cannot even describe.

While the General Counsel attempts to argue that, "in the context of bargaining relationships, the Board does not require requesting unions to establish that a requested document has a direct bearing on the employment relationship," GC at 21-2, and is rather, subject to a "broad, discovery-type standard in determining relevance", *id*., even in the collective bargaining context where the parties have a *much broader* duty to exchange information, the union has a burden to articulate "a reasonable basis [for the request] based on objective facts." *NLRB v. George Koch Sons, Inc.*, 950 F.2d 1324, 1332 (7th Cir. 1991). "Although the relevance standard applied under § 8(a)(5) is a liberal standard, the courts will not allow the union to go on unfounded fishing expeditions." *Id*.

In this case, the General Counsel and Charging Party urge the Board to adopt a broad, categorical standard that appear to be designed for no purpose other than to permit a baseless fishing expedition for evidence of an unfair labor practice. Adopting either standard would necessarily radically alter the standard applicable to both unions' and employers' duty to honor information requests.

9. **Neutrality Agreements Are In No Way Suspect or Inconsistent With a Union's Duty of Fair Representation**

Underlying both the General Counsel's and the Charging Party's arguments in this case is the unfounded suggestion that there is something suspect about neutrality agreements, *i.e*., that the mere existence of such an agreement somehow suggests a breach of the duty of fair representation. But that suggestion is contrary to the explicit terms of the Act and decades of jurisprudence.

Voluntary recognition of a union representative by employers has always been a part of U.S. labor relations. Far from displacing voluntary recognition, the NLRA created the election process only as a means of resolving questions of representation when the parties could not

resolve them privately. Section 9(c)(1)(A)(i) of the Act provides that employees can file a petition for an election alleging "that their employer declines to recognize their representative." The legislative history of both the Wagner and Taft-Hartley Acts expressly recognize the legitimacy of voluntary recognition. *See, e.g.*, H. R. Rep. No. 74-969, at 4 (1935), reprinted in 2 Legislative History of the National Labor Relations Act 1935, at 2914 (1949) (an election is appropriate "[w]hen an employee organization has built up its membership to a point where it is entitled to be recognized . . . and the employer refuses to accord such recognition"); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 598 (1969) (citing H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 41 (1947)) (discussing rejected amendment to Section 8(a)(5) that would have permitted the Board to find that an employer had unlawfully refused to bargain only with "a union 'currently recognized by the employer or certified as such [through an election] under section 9.'")

The Supreme Court has made clear that "a Board election is not the only method by which an employer may satisfy itself as to the union's majority status [under Section 9(a) of the Act]." *United Mine Workers* v. *Arkansas Flooring Co.*, 351 U.S. 62, 72 n.8 (1956). Voluntary recognition agreements based on a union's showing of majority support are undisputedly lawful. *Gissel Packing Co.*, 395 U.S. at 595–600 (1969). As the Board has recognized, "Voluntary recognition itself predates the National Labor Relations Act and is undisputedly lawful under it." *Dana Corp*., 351 NLRB 434, 436 (2007), *overturned on other grounds*, *Lamons Gasket Co.*, 357 NLRB 739 (2011). Voluntary recognition and agreements to voluntarily recognize are in no way legally suspect and the mere existence of such an agreement in no way suggests a breach of the duty of fair representation.

Nor can the fact that a recognition agreement contains a provision evidencing the employer's voluntary agreement not to campaign against the union render such agreements suspect in any way. Section 8(c) of the Act provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice . . ., if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). Congress' insulation of noncoercive speech surely extends to silence. Thus, inserting a neutrality provision into a recognition agreement does not in any way render the agreement suspect.

The fundamental premise of the charge, the complaint, and the theories in this case is incorrect. The conclusion of the ALJ in *IUOE Local 18*, affirmed by a unanimous Board, including Members Miscimarra and Johnson, applies on all fours here: "neither the duty of fair representation specifically, nor Section 8(b)(1)(A) generally, provides legal relief for members [or General Counsels] who object to a non-discriminatory, good faith, and rational [union] policy with which they disagree." 362 NLRB at 1445.

**Conclusion**

The Board should affirm the judge's dismissal of the complaint.

Respectfully submitted,
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