

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 REQUEST
FOR REHEARING EN BANC**

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I. FRAP 35(b)((1)(A) STATEMENT.

Petitioner Nob Hill General Stores, Inc. (hereinafter “Nob Hill”) seeks a Rehearing En Banc on the grounds that the December 24, 2020 Memorandum Decision issued by the Panel (Chief Judge Thomas, and Circuit Judges Schroeder and Berzon) directly conflicts with (1) United Supreme Court precedent, (2) this Court’s precedent, and (3) precedent from numerous federal appellate courts as well as State Supreme Courts. The Panel’s Memorandum Decision lacks *any* supporting legal authority for its conclusion (and none exists). Consideration by the full court is necessary to ensure uniformity of law and maintain the integrity of this Circuit’s judicial process. (A copy of the Memorandum Decision is attached.)

II. THE CONTRACTUAL ISSUE PRESENTED FOR REVIEW.

The issue before the Panel arose from a case adjudicated by the National Labor Relations Board and presented a relatively mundane question, to wit, was Nob Hill, a retail grocery store chain operator, required to respond to a union information request pertaining to a *yet-to-be-opened store* (a store at which the union did not represent any employees). Nob Hill rejected the union’s request as “premature” on the basis that the collective bargaining agreement (“CBA”), upon which the union’s information demand was premised, contained a “notwithstanding” clause which precluded *any*

contractual provision from having any applicability to a *new store until it was opened to the public for fifteen days.*¹ Specifically, Section 1.13 of the CBA provided in relevant part:

NEW STORES AND REMODELS:

* * *

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

* * *

(emphasis added.)

III. THE PANEL DISREGARDED AND IMPLICITLY OVERRULED SUPREME COURT PRECEDENT AS WELL AS THIS COURT'S PRECEDENT HOLDING THAT A "NOTWITHSTANDING" CLAUSE TRUMPS ALL OTHER CONTRACTUAL PROVISIONS.

It is universally established principle of American jurisprudence that a "notwithstanding" clause *trumps all other contractual provisions*. No matter how clever the lawyerly argument, no other contractual provision can survive a

¹ An employer is not required to respond to a premature information request. *E.g. Tri-State Generation*, 332 NLRB 910, 912 (2000) and *General Electric Co. v. NLRB*, 916 F.2d 1163, 1171 (7th Cir. 1990). Here, the union's request was made in October 2017 and the store did not open until January 2018. Consistent with the "notwithstanding" clause, Nob Hill told the union that it would respond to any information requests made 15 days *after* the store opened to the public.

“notwithstanding” clause.

In *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 17 (1993), the Supreme Court was directly confronted with the meaning and effect of a contractual “notwithstanding” clause. The Supreme Court unequivocally concluded that a contractual “notwithstanding” clause trumped *all* other contractual provisions, *even those that arguably could apply*, stating:

“As we have noted previously in construing statutes, the use of such a ‘notwithstanding’ clause clearly signals the drafter’s intention that the provisions of the ‘notwithstanding’ section *override conflicting provisions of any other section*. See *Shomberg v. United States*, 348 U.S. 540, 547-548 (1955). Likewise, the Courts of Appeals generally have ‘interpreted similar “notwithstanding” to supersede all other laws, stating that “a clearer statement is difficult to imagine.”’ [numerous courts of appeal citations omitted] Thus, we think it clear beyond peradventure that §1.9(d) [the notwithstanding language] provides that contract rents ‘shall not’ be adjusted...*even if other provisions of the contracts might seem to require such a result.*”

508 U.S. at 18 (emphasis added.)

This Court reached the identical result in *F.B.T. Productions, LLC v. Aftermath Records*, 621 F.3d 958, 964 (9th Cir. 2010) (emphasis added):

“The parties use of the word ‘notwithstanding’ plainly indicates that even if a transaction *arguably falls* within the scope of the Records Sold provision, F.B.T. is to receive a 50% royalty if Aftermath licenses an Eminem master to a third party for ‘any’ use.”²

² The State and Federal cases holding that the use of the word “notwithstanding” trumps all other contractual provisions, whether or not other contractual provisions *arguably apply*, are voluminous. *E.g.*, *Boghos v. Certain Underwriters at Lloyd’s of London*, 36 Cal. 4th 495, 502 (2005). Additional cases can be found by reviewing the Supreme Court’s decision in *Cisneros* (as well as the additional

The plain truth is that, *until now*, there was not a single case where *any appellate* court has ever found *any* exception to the “trumping” effect of a “notwithstanding” clause. *For the first time ever*, and in direct contravention of controlling precedent, the Panel held that other contractual provisions had to be considered in “conjunction” with the “notwithstanding” clause. Without citing a single legal authority for its unprecedented conclusion, the Panel held:

“As Nob Hill stresses, ‘a “notwithstanding” clause signals the drafter’s intention that provisions of the “notwithstanding” section override conflicting provisions of any other section.’ [citing *Cisneros*] But a ‘notwithstanding clause is necessarily *tethered to other language that determines its scope*; the clause has no independent meaning.”

Memorandum, pp. 3-4 (emphasis added.)

Such a “tethering” is precisely what the Supreme Court (and this Court) prohibited. Contrary to the Panel’s belief, a “notwithstanding” clause does have an independent meaning. As held by the Supreme Court, a “notwithstanding” clause serves to preclude the application of *any other* contractual provision. The Panel’s conclusion is nothing more than a claim that other language in the CBA “arguably” applies and, therefore, survives -- a conclusion foreclosed by precedent.

Indeed, Nob Hill’s “notwithstanding” clause sought to make it crystal

cases referenced in the cases cited in the *Cisneros* opinion).

clear that no other contractual provision survived stating: “it is agreed this Agreement shall have no application *whatsoever*...” Obviously, the use of the word “whatsoever” was intended to preclude the very conclusion reached by the Panel. Nonetheless, the Panel held that other contractual clauses could be administered even though the new store was months away from opening. The Panel’s conclusion is nothing more than a wholesale rejection of *Cisneros* and *F.B.T. Productions*, rendered without citing a single legal authority.

The Panel allowed this circumvention by concluding that the Union was seeking to administer contractual provisions that applied to current union-represented employees. (Memorandum, p. 4.) While certainly true, that facile observation disguises the critical point that the contractual claims were all related to the current employees rights *vis-à-vis the new store*; e.g. the right to transfer to the new store. To use the Panel’s descriptive term, each and every information request was “tethered” to the new store. The Union’s initial request made that precise point stating:

“According to published reports, Nob Hill will be opening a store in Santa Clara in October of this year. Nob Hill has not sought to negotiate over this opening and the impact on the bargaining unit. It has ignored the provisions of the contract *which apply to the store*.”

* * *

Finally this is a reminder that there are various provisions of the collective bargaining agreement *which apply to the opening of this store*.”

(Excerpt of Record, p. 106.) (Emphasis added.)

Moreover, as a factual matter, the Panel ignores the fact that *most* of the Union information requests had absolutely nothing to do with current employees or the existing CBA. Most of the items of information requested by the Union focused on the terms and conditions of employment at the yet-to-be-opened store. The Union requested (1) a copy of the new store employee handbook; (2) the wage rates at the new store; (3) copies of any benefit plans in effect at the new store; and (4) a breakdown of the job classifications in the new store. Under any contractual administration theory, this requested information could have no conceivable relevance to the Union's CBA or current union-represented employees. Yet, somehow (because the Panel chose not to discuss these information requests), these requests survive the trumping action of the "notwithstanding" clause even though they solely pertain to the new, yet-to-be-opened, store.

A CBA *must be interpreted* under *ordinary principles of federal common law*. *CNH Industrial N.V. v. Reese*, 583 U.S. ___, 138 S. Ct. 761 (2018) (*per curiam*). The Panel's Memorandum fails to conform to the common law as enunciated by the Supreme Court and this Court, and therefore, en banc review is required.

IV. CIRCUIT INTEGRITY AND THE PRINCIPLE OF STARE DECISIS DEMANDS EN BANC REVIEW OF THE PANEL'S FLAWED DECISION.

A case concerning a union's demand for information hardly presents the most compelling case for en banc review and the use of scarce judicial resources. Here, however, the judicial process itself is at issue as is the integrity of this Court.

A Panel of this Court, without explanation, and little discussion, has ignored and implicitly overruled *controlling* Supreme Court and Ninth Circuit precedent. Moreover, the Panel screens its decision from public view through the expedient measure of issuing an unpublished Memorandum Decision, thus effectively precluding Supreme Court review and *making it difficult to obtain en banc review*. Significantly, having chosen to establish a new and remarkable rule of contract interpretation, the Panel precludes other litigants from finding the decision or relying upon it.

Under this Court's Circuit Rule 36-2(a) a disposition that "establishes, alters, or modifies a rule of federal law" is *required* to be designated an "Opinion" and published. Here, *for the first time ever*, an appellate court has found that contractual exceptions to a "notwithstanding" clause *can exist*.

Surely, such a precedent-shattering holding is deserving of publication.³ Other litigants, confronted with a contractual “notwithstanding” clause should be entitled to find and reference a Ninth Circuit decision that concludes that a “notwithstanding” clause is, in the words of this Panel, tethered to other contractual language – a unique and unprecedented holding in American jurisprudence. Moreover, because the Supreme Court has held that a “notwithstanding” provision *in a statute* has the *same broad “trumping” effect* (*NLRB v. SW General*, ___ U.S. ___ 135 S. Ct. 926 (2015)), the Panel’s newly created tethering exception, if published, could also be used by litigants challenging statutory construction.⁴

The judicial process is premised on the principle of *stare decisis* and adherence to precedent. Here, the Panel has disregarded both Supreme Court and Ninth Circuit precedent. En banc review is required to correct the Panel’s failure. Predictability and judicial coherence, as well as this Circuit’s integrity,

³ Just as the Panel cites no case from *any* jurisdiction establishing an “exception” to the broad trumping effect of a “notwithstanding” clause, neither the National Labor Relations Board or Intervenor Union in their respective briefs cited such a case. Until now, no such case existed.

⁴ While Nob Hill can file a request for publication, it is unlikely that the Panel will grant such a request. Therefore, in the event that this Court declines Nob Hill’s Request for Rehearing En Banc, Nob Hill requests that the Court order the Memorandum Decision be published as an Opinion of this Court as required by Circuit Rule 36-2(a).

require no less.

V. CONCLUSION

For the aforesaid reasons, Nob Hill's Request for Rehearing En Banc Review should be granted, or in the alternative, the Panel's Memorandum decision should be published as an Opinion of the Court.

Dated: December 31, 2020

Respectfully Submitted,

s/ Henry F. Telfeian

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By: Henry F. Telfeian

Attorney for Nob Hill General Store, Inc.

FILED

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

DEC 24 2020

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOB HILL GENERAL STORES, INC.,

No. 19-72429

Petitioner,

NLRB No. 20-CA-209431

v.

MEMORANDUM*

NATIONAL LABOR RELATIONS
BOARD,

Respondent,

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 5,

Intervenor.

NATIONAL LABOR RELATIONS
BOARD,

No. 19-72523

Petitioner,

NLRB No. 20-CA-209431

v.

NOB HILL GENERAL STORES, INC.,

Respondent,

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 5,

Intervenor.

On Petition for Review of an Order of the
National Labor Relations Board

Argued and Submitted November 18, 2020
San Francisco, California

Before: THOMAS, Chief Judge, and SCHROEDER and BERZON, Circuit
Judges.

Nob Hill General Stores, Inc. (“Nob Hill”) petitions for review of an order of the National Labor Relations Board (“the Board”). The Board determined that Nob Hill violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing to provide information requested by Intervenor United Food and Commercial Workers Union, Local 5 (“the Union”) for the purpose of administering the collective bargaining agreement (“CBA”). The Board cross-petitions for enforcement of the order. We deny Nob Hill’s petition for review and grant the Board’s cross-petition.

1. It is an unfair labor practice for an employer to refuse to provide a union with information relevant to its duties, including the administration of a CBA. *NLRB v. Associated Gen. Contractors of Cal., Inc.*, 633 F.2d 766, 770 (9th Cir. 1980). “The Board may order production of information relevant to a dispute if there is some probability that it would be of use to the union in carrying out its

statutory duties and responsibilities” under the CBA, even when there is a dispute as to whether the underlying CBA issue could give rise to a potentially meritorious grievance. *NLRB v. Safeway Stores, Inc.*, 622 F.2d 425, 430 (9th Cir. 1980).

Although we interpret CBAs de novo, see *Int’l Longshore & Warehouse Union, Local 4 v. NLRB*, 978 F.3d 625, 640–41 (9th Cir. 2020), where the issue is information production, we need only determine that there is “some probability” that the information would be useful to administration of the CBA. *Safeway Stores, Inc.*, 622 F.2d at 430.

Nob Hill contends that the language of its CBA with the Union entirely forecloses any probability that the information requested in this case could be useful to the Union in administering the CBA. For this position, Nob Hill relies on the “notwithstanding clause” in section 1.13, which reads, in relevant part:

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

As Nob Hill stresses, “a ‘notwithstanding’ clause clearly signals the drafter’s intention that the provisions of the ‘notwithstanding’ section override conflicting provisions of any other section.” *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993). But a “notwithstanding” clause is necessarily tethered to other language

that determines its scope; the clause has no independent meaning. Here, the “notwithstanding” clause precludes the application of the CBA “to any new food market or discount center” for fifteen days after opening. But the provisions that the Union sought to administer, such as section 4.9, governing transfers of employees, and section 1.11, relating to individual contracts between covered employees and Nob Hill, applied to currently covered employees. That the issues here involve changes resulting from the new store does not necessarily mean that applying those provisions *to current employees* is equivalent to applying the CBA *to the new store*.

Nob Hill argues that the Board erred in reading section 1.13 as an “after acquired stores clause,” affecting only Nob Hill’s obligation to recognize the Union for the new store under section 1.1 of the CBA after 15 days have passed. *See Alpha Beta Co.*, 294 NLRB 228, 229 (1989). The clause may apply more broadly, delaying other CBA provisions as well as section 1.1. *See Raley’s*, 336 NLRB 374, 377 (2001) (describing section 1.13 as “delay[ing] application of the other provisions . . . to new stores”). Nob Hill asserts, for instance, that the Union cannot enforce section 1.13’s requirement for a new store to be staffed by a cadre that includes current employees until after the store has been opened for fifteen days. The Union argues that the section applies by its language to current employees and includes a provision continuing trust fund contributions for

employees in the “cadre,” demonstrating its continuous application. But disputes of this kind over whether a grievance alleging potential violations before and after the fifteen-day period could succeed do not foreclose the Board’s relevance determination for information production purposes. *See Safeway Stores, Inc.*, 622 F.2d at 430. Neither this Court nor the Board is required to “decide whether a contract violation would be found” to determine that an information request is relevant to contract administration. *Dodger Theatricals Holdings*, 347 NLRB 953, 970 (2006). “[W]hen it order[s] the employer to furnish the requested information to the union, the Board [is] not making a binding construction of the labor contract.” *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 437 (1967).

The “notwithstanding” clause therefore does not allow Nob Hill to refuse to provide information relevant to current employees’ interests under the CBA in connection with the future opening of a new store.

2. Substantial evidence supports the Board’s determination that the Union’s information request was relevant to administering the CBA. The Union bears the burden of showing relevance for information concerning employees outside the bargaining unit, but that showing is subject to “a liberal, ‘discovery-type’ standard,” *Press Democrat Publ’g Co. v. NLRB*, 629 F.2d 1320, 1325 (9th Cir. 1980) (quoting *Acme*, 385 U.S. at 437), and requires only a “probability that the desired information was relevant, and that it would be of use to the union in

carrying out its statutory duties and responsibilities,” *Acme*, 385 U.S. at 437.

“[T]he Board’s determination as to whether the requested information is relevant in a particular case is given great weight by the courts.” *San Diego Newspaper Guild, Local No. 95 v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977).

Applying the deference due the Board’s determination, we uphold the Board’s conclusion that information about the classifications and numbers of positions at the new store and the unit and non-unit employees who requested and were offered transfers, could be useful to assess the application of the CBA’s transfer and staffing provisions to unit employees. Information about how unit members could request a transfer and how members could be hired at the new store relate to the terms of transfer of currently represented employees. *See Kansas Educ. Ass’n*, 275 NLRB 638, 640 (1985). Pay scales, benefit plans, and the employee handbook of the new store could have been of use to the Union’s enforcement of section 1.11’s prohibition on individual employment agreements that reduce wages and benefits of covered employees.

Given the “great weight” afforded the Board in determining whether the Union met its burden, *San Diego Newspaper Guild*, 548 F.2d at 867, the Board’s relevance conclusion was not erroneous.¹

¹ Nob Hill does not contest the Board’s determination that Nob Hill’s nearly three-month delay in providing some of the requested information was unreasonable and a separate violation of Section 8(a)(5) and (1) of the National Labor Relations Act.

The petition is **DENIED**, and the Board's order is **ENFORCED**.

As we affirm the Board's relevance conclusion, the Board is entitled to enforcement of its decision and order as to the delay.

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

Form 11. Certificate of Compliance for Petitions for Rehearing or Answers

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form11instructions.pdf>

9th Cir. Case Number(s)

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition is (*select one*):

Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words:** .

(Petitions and answers must not exceed 4,200 words)

OR

In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature **Date**

(use "s/[typed name]" to sign electronically-filed documents)

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 December 31, 2020 I electronically filed the foregoing

PETITIONER'S REQUEST FOR REHEARING EN BANC

with the United States Court of Appeals for the Ninth Circuit, by using the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Notice of Electronic Filing by the Court's CM/ECF system.

I certify under penalty of perjury that the above is true and correct.

Executed at Reno, Nevada on December 31, 2020.

s/ Henry F. Telfeian
Henry F. Telfeian