

# No. 08-5163-ag

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

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner**

**v.**

**LOCAL ONE-L,  
AMALGAMATED LITHOGRAPHERS OF AMERICA**

**Respondent**

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**ON APPLICATION FOR ENFORCEMENT  
OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce a Board Order issued against Local One-L, Amalgamated Lithographers of America (“the Union”). The Board’s Decision and Order issued on July 31, 2008, and is reported at 352 NLRB 906. (A. 143-

66.)<sup>1</sup> In its decision, the Board found that the Union violated Section 8(b)(3) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 158(b)(3)) (“the Act”), by failing and refusing to provide the Metropolitan Lithographers Association (“the Association”) with certain requested information, relevant to the administration of the parties’ collective-bargaining agreement. (A. 143, 155.)

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), which empowers the Board to prevent unfair labor practices affecting commerce. The Board submits that this Court has jurisdiction under Section 10(e) of the Act (29 U.S.C. § 160(e)), because the unfair labor practice occurred in New York, New York, and because the Board’s Order is a final order issued by a properly-constituted, two-member Board quorum within the meaning of Section 3(b) of the Act (29 U.S.C. § 153(b)).<sup>2</sup> (*See* A. 143 n.1.)

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<sup>1</sup> Record references are to the joint appendix (“A.”) filed with the Union’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” references are to the Union’s opening brief.

<sup>2</sup> In 2003, the Board sought an opinion from the United States Department of Justice’s Office of Legal Counsel (“the OLC”) concerning the Board’s authority to issue decisions when only two of its five seats were filled, if the two remaining members constitute a quorum of a three-member group within the meaning of Section 3(b) of the Act. The OLC concluded that the Board had the authority to issue decisions under those circumstances. *See Quorum Requirements*, Department of Justice, OLC, 2003 WL 24166831 (O.L.C., Mar. 4, 2003). The Seventh Circuit and the First Circuit have agreed, upholding the authority of the two-member Board to issue decisions. *New Process Steel, L.P. v. NLRB*, \_\_\_ F.3d

The Board filed its application for enforcement on October 21, 2008. This filing was timely, as the Act places no time limit on the institution of proceedings to enforce Board orders.

### **STATEMENT OF THE ISSUE PRESENTED**

Whether substantial evidence supports the Board's finding that the Union violated Section 8(b)(3) of the Act by failing and refusing to comply with the Association's request for information relevant to the enforcement of the "Better Contracts" clause of the parties' collective-bargaining agreement.

### **STATEMENT OF THE CASE**

Acting on a charge filed by the Association (A. 35), the Board's General Counsel issued a complaint (A. 38-48) alleging that the Union violated Section 8(b)(3) of the Act (29 U.S.C. § 158(b)(3)) by failing and refusing to provide certain information requested by the Association in a letter dated February 13, 2007.<sup>3</sup> (A. 40.) Following a hearing, an administrative law judge issued a decision and

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\_\_\_\_\_, 2009 WL 1162556 (7th Cir. May 1, 2009); *Northeastern Land Services, Ltd. v. NLRB*, 560 F.3d 36, 40-42 (1st Cir. Mar. 13, 2009). The D.C. Circuit has disagreed. *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, \_\_\_ F.3d \_\_\_, 2009 WL 1162574 (D.C. Cir. May 1, 2009). The issue has been briefed before this Court in *Snell Island SNF LLC v. NLRB* (2d Cir. Nos. 08-3822-ag and 08-4336-ag), which was argued on April 15, 2009.

<sup>3</sup> The complaint specifically alleged that the Union unlawfully failed and refused to provide the information requested in paragraphs 1-3, 5-6, 8, 12-21, and 28-33 of the letter. (A. 40, 43-46.)

recommended order finding that the Union violated Section 8(b)(3) of the Act insofar as it failed to provide information responsive to paragraphs 8, 12-21, and 28-33 of the February 13 letter. (A. 144-66.) The Union filed timely exceptions to the judge's unfair-labor-practice finding. (A. 140-41.) After considering those exceptions, the Board issued a decision affirming the judge's finding. (A. 143-44.) The facts supporting the Board's decision, as well as the Board's Conclusions and Order, are summarized below.

## **STATEMENT OF FACTS**

### **I. THE BOARD'S FINDINGS OF FACTS**

#### **A. Background; the "Better Contracts" Clause of the Parties' Collective-Bargaining Agreement Entitles the Association to Any Better Contractual Terms That the Union Grants to Another Employer, Unless that Employer is a First-Time Union Signatory**

The Association is a group of six employers involved in the printing industry. (A. 144; 17-18.) The Union is the longtime collective-bargaining representative of the lithographic production employees working for the Association employers in the New York and New Jersey areas. (A. 144; 63.)

In addition to its relationship with the Association, the Union has an independent collective-bargaining relationship with certain of the Association's competitors — most notably, Barton Press, Inc. ("Barton Press"), and Barton Printing, Inc. ("Barton Printing"). (A. 146; 19-21, 33, 94-100.) Barton Press and

Barton Printing are, in turn, owned by a non-Association printing enterprise named EarthColor. (A. 146; 10, 20.) At an unspecified point in time prior to the events here, EarthColor purchased Barton Press as an existing union company.<sup>4</sup> (A. 146; 20, 33.) EarthColor separately purchased Associated Printing Technologies, Inc. (“APT”), as an existing nonunion company, and thereafter renamed APT “Barton Printing, Inc.” (A. 146; 19, 20, 22-23.) Barton Press continued as a union company after its purchase, maintaining a collective-bargaining agreement with the Union that essentially mirrored the terms of the Association’s agreement with the Union. (A. 146; 20-21.) Barton Printing, for its part, established a collective-bargaining relationship with the Union on March 30, 2006. (A. 146; 22-23, 94-100.)

At all relevant times, the Union and the Association have been bound by a collective-bargaining agreement<sup>5</sup> containing the following clause:

**BETTER CONTRACTS**

40.(a) In the event the Union grants or intentionally permits any employer engaged in the commercial lithographic printing industry within the territorial jurisdiction of the Union more favorable terms than those applicable to the Employers covered by this Agreement, the Association shall have the right to demand that such more favorable terms are deemed to be a part

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<sup>4</sup> Barton Press had participated in multi-employer bargaining for a number of years as a member of the Association. (A. 146; 33.)

<sup>5</sup> The parties’ collective-bargaining agreement took effect on July 1, 2005, and it remains in effect through June 30, 2009. (A. 144; 59-93.)

of this agreement; *provided however, that this provision shall not apply to any Employer who, as of the effective date of the Agreement, (a) has never been covered by any agreement with the Union . . . .*

(b) Any dispute arising under this provision shall be submitted to arbitration in accordance with the arbitration provisions of this Agreement.

(c) On request of the Association, the Union shall exhibit to a designated representative of the Association any collective bargaining agreements between the Union and any Employer or Employers.

(A. 145; 80 (emphasis added).) The Better Contracts clause is intended to ensure that the Association will nearly always have “the best contract that is negotiated with [the Union] of any union shops.” (A. 145-46; 8-9.)

As indicated in subparagraph (b) quoted above, the Union and the Association are required to arbitrate any dispute arising under the Better Contracts clause. (A. 145; 80.) In addition, the collective-bargaining agreement generally states that “any dispute with reference to the interpretation[,] application or breach of any of the terms contained in this contract” must be submitted to arbitration, if the dispute cannot be resolved by a joint committee of the parties. (A. 145; 78.) The collective-bargaining agreement contains no specific reference, however, to the arbitration of claims for information between the parties. (A. 145; 78-79, 80.)

**B. The Association Learns of a Better Agreement between the Union and Another Employer; the Association Requests a Copy of the New Agreement, Pursuant to the Better Contracts Clause; the Union Responds, Over One Year Later, With a Copy of the Barton Printing Contract**

In the latter part of 2005, the Association received information that the Union may have negotiated a new collective-bargaining agreement with another employer. (A. 146; 11.) Although the identity of this employer was not precisely known, the Association believed, based on its own informal investigations, that the employer in question was related to EarthColor. (A. 146; 9-11.) The Association further believed that the employer in question was potentially benefitting from a better contract than the Association's. (A. 11.) The Association accordingly invoked the Better Contracts clause and requested, in a letter dated October 26, 2005, that the Union provide a copy of the new collective-bargaining agreement with "EarthColor and/or Barton Kashen and/or APT."<sup>6</sup> (A. 146; 121.)

Over 1 year later, on February 2, 2007, the Union responded with a copy of its Memorandum of Agreement ("MOA") with Barton Printing. (A. 146; 12, 101.) The MOA explicitly admitted that its terms were "not the same as the terms of employment prevailing in the shops belonging to the [] Association." (A. 146; 94.) The MOA, however, stated that the Union nonetheless agreed to such different terms for Barton Printing, on the understanding that Barton Printing was an entity

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<sup>6</sup> The record does not explain the identity of "Barton Kashen."

entirely separate and independent from any member of the Association, including former Association member Barton Press, and, thus, was a new non-Association employer for purposes of the Better Contracts clause. (*Id.*) The MOA further recited Barton Printing's commitment to retain its separate identity from Barton Press throughout the term of the MOA and to "*take such steps as are necessary so that there is no violation of the [Association's] Better Contracts Clause.*" (*Id.*)

Notwithstanding these recitations, the Association was skeptical that Barton Printing was an entirely new union signatory to whom the Union could grant better terms without any repercussions under the Better Contracts clause. (A. 146; 9-11, 13.) Thus, on finding better terms in the Barton Printing MOA regarding wages, press manning, and holiday schedules (A. 146; 12-13), the Association undertook its own investigation into Barton Printing's asserted status as a new union signatory. (A. 146; 13.) A search of the internet gave the Association some preliminary reason to believe that Barton Printing might not be a bona fide "new" union signatory: from the EarthColor website, it appeared that Barton Printing was related to established union signatory Barton Press, and that the two entities were operating under the common "umbrella" of EarthColor. (*Id.*)

**C. The Association Requests Additional Information About Barton Printing and Its Related Entities in a February 13, 2007 Letter, “to evaluate further the parties’ rights and obligations under the Better Contracts provision”; the Union Refuses to Provide Most of the Requested Information**

In a letter dated February 13, 2007, the Association informed the Union that it found the Barton Printing MOA “far more favorable to the employer than the agreement between the Union and the [Association].” (A. 146-47; 101.) In view of this finding, the Association stated, it reserved the right “to adopt and implement some or all of [the MOA’s] more favorable terms,” pursuant to the Better Contracts clause. (A. 147; 101.) The Association nevertheless requested additional information from the Union, “in order to evaluate further the parties’ rights and obligations under the Better Contracts provision.” (A. 147-48; 101-05.)

The Association’s request sought numerous items of information. Nearly every item addressed some dimension of the suspected relationship between Barton Printing (the supposedly new union signatory) and Barton Press (the established union signatory).<sup>7</sup> (*Id.*) Generally, the Association sought to elicit information regarding:

- Any facilities and equipment shared between Barton Printing and Barton Press (A. 147-48; 102-03 ¶¶ 8, 12-17);

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<sup>7</sup> The letter sought 33 items of information, but only 17 of those items are at issue in this case. (A. 147-48, 152, 164.)

- Any customers, salespersons, supervisors, managers, or employees shared between Barton Printing and Barton Press (A. 148; 103-04 ¶¶ 16, 28-31);
- Any shop stewards and other union agents shared between Barton Printing and Barton Press (A. 148; 105 ¶¶ 32-33); and
- The identity of individuals involved in bargaining for the Barton Printing contract, and the substance of any proposals and other communications exchanged between the parties' respective bargaining agents (A. 148; 104 ¶¶ 18-21).<sup>8</sup>

While seeking the above information from the Union, the Association continued its own informal investigations into the relationship between Barton Printing and Barton Press. (A. 149; 13-14.) In the course of these informal investigations, the Association learned, from a former Barton Printing employee, that the pressrooms of Barton Printing and Barton Press were located in the same building — separated only by a glass wall — and were operated with a common and interchanged workforce, a common sales force, and common management. (*Id.*)

Meanwhile, in early March 2007, the Union made its first response to the Association's February 13 requests for information. (A. 149; 122.) By letter dated March 9, the Union indicated that it did not believe it had any obligation to “engage in far reaching and burdensome efforts to generate responses to [the

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<sup>8</sup> The Association's February 13 letter is reprinted, in its entirety, in the administrative law judge's underlying decision. (A. 147-48; 101-05.)

Association's] interrogatories.” (*Id.*) The Union accordingly resubmitted a copy of the Barton Printing MOA to the Association, and nothing else. (*Id.*)

By letter dated May 21, 2007, the Union offered a second response to the Association's February 13 information requests. (A. 149; 106-13.) In this second response, the Union again denied any obligation to provide the information requested in the Association's February 13 letter, but nevertheless gave itemized responses to each of the Association's information requests. (*Id.*) The Union, however, provided little information, instead seeking clarification of the information requests or otherwise stating that it could not provide the requested information, either because the information was “still being assembled,” or because the Union considered it confidential or irrelevant. (*Id.*)

The Association replied to the Union by letter dated May 31, 2007. (A. 150-52; 114-20.) In this reply, the Association stated that the Union's responses were, for the most part, substantively inadequate. (A. 150; 114.) The Association went on to specifically address each of the Union's itemized responses to the February 13 requests, reiterating the Association's need for the information. (A. 150-52; 114-20.) In conclusion, the Association noted that the Union's “dilatory response” to the Association's information requests was “unfairly delaying the [Association's] consideration of whether to pursue implementation or a contractual grievance relating to the Better Contracts provision of the [Association's]

agreement with [the Union].” (A. 152; 120.) The Union made no reply to this letter and provided no further response to the Association’s February 13 information requests. (A. 152.)

## **II. THE BOARD’S CONCLUSIONS AND ORDER**

On the foregoing facts, the Board found that the Union violated Section 8(b)(3) of the Act (29 U.S.C. § 158(b)(3)) by failing and refusing to provide much of the information requested in the Association’s February 13 letter. (A. 143 n.2, 146-49.) The Board specifically found that the Union unlawfully failed and refused to provide the information sought in paragraphs 8, 12-21, and 28-33 of the February 13 letter. (A. 143 n.2.)

The Board’s Order requires the Union to cease and desist from the unfair labor practice found, and from in any like or related manner engaging in conduct in derogation of its statutory duty to bargain in good faith with the Association, on behalf of bargaining unit employees. (A. 143, 163.) Affirmatively, the Board’s Order requires the Union to provide the information that was unlawfully withheld, post a remedial notice, and provide signed copies of the notice for the Association to post, if the Association is willing to do so. (*Id.*)

## **SUMMARY OF ARGUMENT**

Substantial evidence supports the Board’s finding that the Union violated Section 8(b)(3) of the Act (29 U.S.C. § 158(b)(3)) by failing and refusing to

provide the Association with requested information relevant to the enforcement of the Better Contracts clause of the parties' collective-bargaining agreement. The Better Contracts clause gives the Association a right to demand more favorable contract terms from the Union, if the Union has granted such terms to a non-Association employer. However, the Better Contracts clause contains an exception, specifying that the Association has no right to demand more favorable terms granted to a first-time union signatory. As the Board reasonably found, the Association's request for information followed from a reasonable belief that the Association might be entitled to the more favorable terms of a new agreement executed between the Union and Barton Printing, an allegedly new union signatory.

By early 2007, the Association had reason to believe that Barton Printing was related to an established union signatory named Barton Press, which raised serious questions about Barton Printing's status as a first-time union signatory for purposes of the Better Contracts clause. Specifically, as the Board found, the Association learned from its own investigations that Barton Printing and Barton Press shared a common owner. As the Board further found, the Association also received information from a former Barton Printing employee, indicating that the two companies operated from the same building, separated only by a glass wall, with a common and interchanged workforce, a common sales force, and common

management. In light of these objective facts suggesting a single-employer or alter-ego relationship between Barton Printing and Barton Press, the Association requested that the Union provide information, in addition to the Barton Printing contract, regarding the relationship between the two companies. Specifically, the Association requested information about any resources shared between the two companies (i.e., shared customers, equipment, salespersons, supervisors, managers, employees, and bargaining agents).

Given the terms of the Better Contracts clause, and particularly the exception to the Better Contracts clause, the Board reasonably found that the requested information was relevant to the Association's enforcement of its rights. Under Section 8(b)(3) and (d) of the Act (29 U.S.C. § 158(b)(3) and (d)), the Union is obligated to provide such relevant information upon request. The Board reasonably found, therefore, that the Union's failure and refusal to provide the information at issue violated Section 8(b)(3) of the Act (29 U.S.C. § 158(b)(3)).

Contrary to the Union's contentions, the Association has a statutory right to the requested information, and this right is not in any way limited or controlled by the parties' collective-bargaining agreement. Moreover, there is no merit in the Union's contention that the Association's right to the requested information should have been decided in arbitration. The Board properly decided the information

dispute herein, and declined to defer the dispute to arbitration, in keeping with the Board's longstanding, court-approved policy of nondeferral in information cases.

In view of the foregoing, the Board is entitled to enforcement of its Order.

## ARGUMENT

### **SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE UNION VIOLATED SECTION 8(b)(3) OF THE ACT BY FAILING AND REFUSING TO COMPLY WITH THE ASSOCIATION'S REQUEST FOR INFORMATION**

#### **A. The Parties to a Collective-Bargaining Agreement are Mutually Obligated to Provide Information Relevant to the Enforcement of Their Agreement, and a Union's Refusal to Provide Such Information Violates Section 8(b)(3) of the Act**

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain" with the duly selected bargaining representative of its employees. Section 8(b)(3) of the Act (29 U.S.C. § 158(b)(3)) similarly makes it an unfair labor practice for the employees' bargaining representative "to refuse to bargain" with the employer.<sup>9</sup> As a result of these parallel provisions, the parties to collective bargaining under the Act are bound in

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<sup>9</sup> See *Local 13, Detroit Newspaper Printing & Graphic Communications Union v. NLRB*, 598 F.2d 267, 270 (D.C. Cir. 1979) (noting the "parallel[]" statutory duties of union and employer); *Teamsters Local 500 (Acme Markets)*, 340 NLRB 251, 252 (2003) ("A labor organization's duty to furnish information pursuant to Section 8(b)(3) of the Act is commensurate with and parallel to an employer's obligation to furnish it to a union pursuant to Section 8(a)(1) and (5) of the Act.") (internal quotation marks omitted); *Iron Workers Local 207 (Steel Erecting Contractors)*, 319 NLRB 87, 90 (1995) (same).

“mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder . . . .” 29 U.S.C. § 158(d). *See Fafnir Bearing Co. v. NLRB*, 362 F.2d 716, 717 (2d Cir. 1966).

The duty to bargain “imposed on both sides”<sup>10</sup> by the above provisions “unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement.” *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 436 (1967). The parties accordingly have an ongoing obligation to provide one another with information “requested in order properly to administer and police a collective bargaining agreement . . . .” *Oil, Chem. & Atomic Workers v. NLRB*, 711 F.2d 348, 358 (D.C. Cir. 1983). *See also Prudential Ins. Co. v. NLRB*, 412 F.2d 77, 84 (2d Cir. 1969) (recognizing that bargaining obligation “extends to the negotiation of new contracts and also to the administration of collective [bargaining] agreements already adopted”).

The key question in determining whether information must be produced is “always one of relevance.” *Emeryville Research Ctr. v. NLRB*, 441 F.2d 880, 883 (9th Cir. 1971). Requested information is deemed relevant if it is germane to the collective-bargaining relationship between the parties and if there is a “probability” that it will be of use to the party requesting it. *Acme Indus.*, 385 U.S. at 437. *See*

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<sup>10</sup> *Fafnir Bearing Co.*, 362 F.2d at 717.

also *Local 13, Detroit Newspaper Printing & Graphic Communications Union v. NLRB*, 598 F.2d 267, 271 (D.C. Cir. 1979) (noting that Board’s relevance standard is, appropriately, aligned with the “liberal” discovery standard set forth in the Federal Rules of Civil Procedure). The Board’s liberal, discovery-type standard for relevance<sup>11</sup> furthers intelligent bargaining and, by extension, “full development of the role of collective bargaining contemplated by the Act.” *Id.*

In keeping with the above principles, the Board and the courts have repeatedly held that the parties to collective bargaining have a duty to provide one another with information relevant to the investigation of suspected contract violations or suspected noncompliance with the contract. *See Acme Indus.*, 385 U.S. at 436-38; *NLRB v. Leonard B. Hebert, Jr. & Co.*, 696 F.2d 1120, 1124-25 (5th Cir. 1983); *NLRB v. Associated Gen. Contractors*, 633 F.2d 766, 771 n.6 (9th Cir. 1980); *Maben Energy Corp.*, 295 NLRB 149, 152 (1989). To secure non-bargaining-unit information for purposes of such investigation, a requesting party must show “an objective basis for [its] suspicions” and thus “a reasonable basis for further investigation.” *Associated Gen. Contractors*, 633 F.2d at 771 n.6. The requesting party can meet this burden by reference to indirect evidence, including hearsay accounts. *Dodger Theatricals Holdings, Inc.*, 347 NLRB 953, 968 (2006)

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<sup>11</sup> *Acme Indus.*, 385 U.S. at 437.

(observing that information supporting reasonable basis for further investigation need not be “accurate, non hearsay or even ultimately reliable”).

In evaluating whether a party requesting information has a “reasonable basis for further investigation” of some contractual violation or other noncompliance with a contract, the Board does not pass on the merits of the contractual claims involved. *See Acme Indus.*, 385 U.S. at 437 (observing that the discovery-type standard for relevance decides nothing about the merits of the contractual claims underlying an information request); *Associated Gen. Contractors*, 633 F.2d at 771 (“Actual violations need not be established in order to show relevancy.”).

Similarly, where a party seeks information to establish an alter-ego or single-employer relationship allegedly affecting the requesting party’s contractual rights, the requesting party “is not required to prove the existence of [the alter-ego or single-employer] relationship.” *Maben Energy*, 295 NLRB at 152. Rather, “it is sufficient ‘that the General Counsel has established that the [requesting party] had an objective factual basis for believing’ that one entity is an ‘alter ego or single employer’ of the other.” *Id.* (quoting *M. Scher & Son, Inc.*, 286 NLRB 688 (1987)).

**B. This Court Accords Considerable Deference to the Board’s Findings**

The Board’s finding of a duty to provide information depends on “the circumstances of the particular case.” *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153-

54 (1956). This Court has stated that it will enforce a Board order “where [the Board’s] legal conclusions are reasonably based, and its factual findings are supported by substantial evidence on the record as a whole.” *NLRB v. Katz’s Delicatessen of Houston St., Inc.*, 80 F.3d 755, 763 (2d Cir. 1996). “Substantial evidence,” for purposes of this Court’s review of factual findings, consists of “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). The Court must canvass “the whole record” to determine whether such substantial evidence exists. *Id.* at 488. In that process, however, the Court “may not displace the Board’s choice between fairly conflicting views [of the evidence], even though [the Court] would justifiably have made a different choice had the matter been before [it] *de novo*.” *Newspaper Guild of N.Y., Local No. 3 v. NLRB*, 261 F.3d 291, 301 (2d Cir. 2001) (internal quotation marks omitted).

**C. The Board Reasonably Found That the Union Violated Section 8(b)(3) of the Act by Withholding Requested Information Relevant to the Enforcement of the Better Contracts Clause**

Substantial evidence supports the Board’s finding (A. 143 n.2, 162) that the Union unlawfully failed and refused to provide relevant information to the Association in response to the Association’s February 13 requests. The Association’s clear and lawful purpose, in making these requests, was to police the Union’s compliance with the Better Contracts clause of the collective-bargaining

agreement. (A. 154-55.) As the Board found (A. 154), moreover, the Association reasonably believed that its rights under the Better Contracts clause were implicated by the “better contract” executed between the Union and Barton Printing. The Board concluded (A. 155) that the information sought by the Association was relevant, “under the liberal discovery-type standard that applies here,” given the probability that the requested information would be of use to the Association in determining whether its contractual rights were operative, as suspected.

In reaching this conclusion, the Board appropriately noted (A. 154-55) the ample factual bases for the Association’s suspicion that it “might be entitled to implement the more favorable terms in the Barton Printing contract.” The Association was obviously aware that, by virtue of an exception to the Better Contracts clause, the Association had no right to the terms of any “better contract” executed between the Union and a first-time union signatory. The Association, however, demonstrated objective reasons (A. 154) for believing that Barton Printing might not be a true first-time union signatory to whom this exception could apply.

In the first place, the Barton Printing MOA that was furnished to the Association suggested a relationship between Barton Printing and an established union signatory, Barton Press. (A. 146; 94) The MOA, indeed, recited that Barton

Printing “shares or will share in the near future a common owner with Barton Press.” (*Id.*) The Association’s research tended to confirm that Barton Printing was related to established union signatory Barton Press and operating, with Barton Press, under the common “umbrella” of corporate parent EarthColor — all of which was admitted on EarthColor’s website. (A. 146; 13.) On further investigation, the Association learned that the relationship between Barton Printing and Barton Press extended beyond common ownership: a former Barton Printing employee reported that Barton Printing and Barton Press operated in the same building, separated only by a glass wall, with a common workforce, a common sales force, and common management. (A. 149; 13-14.) Under the cumulative weight of these objective facts, the Association formed the entirely reasonable belief “that there might exist a single [employer] or joint employer or alter ego relationship between the two companies,” making “the exception to the Better Contracts clause inoperable.” (A. 154.)

In light of the Association’s reasonable belief regarding the contractual rights at stake, the Board found (A. 154-55) that the Association was legally entitled to request information about the suspected single-employer or alter-ego relationship between Barton Printing and Barton Press. Indeed, as the Board observed (A. 155), the information sought in the Association’s February 13 letter “is precisely the sort of information that has been ordered to be produced by the

Board in connection with claims of suspected joint or single-employer or alter ego status.” And, Board precedent fully supports that claim.<sup>12</sup> The Board accordingly concluded (A. 162) that the Union’s refusal to provide such relevant information violated Section 8(b)(3) of the Act (29 U.S.C. § 158(b)(3)).

Notwithstanding the Board’s full examination (A. 154-55) of the objective facts underlying the Association’s suspicions and ensuing information request, the Union hyperbolically argues here (Br. 10) that the Association proceeded based on “mere innuendo.” The Union apparently takes the view (Br. 8-10) that nothing short of “documentary proof” can qualify as an “objective factual basis” for suspecting, and investigating, a single-employer or alter-ego relationship. The Board, however, embraces no such stringent view. Although the Board has recognized that documentary evidence can also provide an objective factual basis for suspecting a relationship between employers, the Board has equally recognized that informal reports from employees and other observers can provide an objective factual basis for such suspicion. *See Proctor Mechanical Corp.*, 279 NLRB 201, 204 (1986) (finding reasonable suspicion of relationship between companies, based on documentary proof that companies shared officers, and based on employee

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<sup>12</sup> *See Pulaski Construction Co.*, 345 NLRB 931, 939-42 (2006) (ordering production of detailed information regarding ownership and operations of suspected alter-ego employers); *Contract Flooring Systems*, 344 NLRB 925, 930-33 (2005) (same).

reports that companies shared facilities, equipment, supplies, and bidding information).

More importantly, the Board and courts have found that a party may form reasonable suspicions, relating to the alter-ego or single-employer status of other entities, based on objective facts similar to those relied upon by the Association here. *See, e.g., NLRB v. George Koch Sons, Inc.*, 950 F.2d 1324, 1333 (7th Cir. 1991) (finding that union formed reasonable suspicion of relationship between employers, based on “observations of union officials, employee reports and records”) (citing cases); *accord Proctor Mechanical Corp.*, 279 NLRB at 204. Accordingly, the Union’s challenge to the reasonableness of the Association’s suspicions is meritless.

#### **D. The Union’s Remaining Arguments Lack Merit**

##### **1. The “Presumptive Relevance” Doctrine Is Not Applicable Here**

The Union argues (Br. 5, 12) that it is under no statutory duty to provide the information requested by the Association because this information is not “presumptively relevant.” In so arguing, the Union betrays a profound misunderstanding of its obligations under the Act.

Sections 8(b)(3) and 8(d) of the Act (29 U.S.C. § 158(b)(3) and (d)) impose on the Union a duty to “confer in good faith” with its bargaining partner, the Association. It is well settled that this duty encompasses a general duty to “furnish

the employer with relevant information.” *Local 13*, 598 F.2d at 271. Information pertaining directly to employees in the bargaining unit (e.g., employee wage and benefit data) is presumed to be relevant and therefore must be produced, unless the party from whom the information is sought can show irrelevance, or otherwise rebut the presumption of relevance. *See Prudential Ins. Co. v. NLRB*, 412 F.2d 77, 84 (2d Cir. 1969); *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 69 (3d Cir. 1965). Requests for other types of information require an initial showing of relevance by the requesting party. *See Prudential Ins.*, 412 F.2d at 84; *Curtiss-Wright Corp.*, 347 F.2d at 69.

As this Court has recognized, the distinction between “relevant” and “presumptively relevant” information bears on the burden of proof only: the statutory obligation to provide relevant information, as well as “the ultimate standard of relevancy[,] is the same in all cases.” *Prudential Ins.*, 412 F.2d at 84. Indeed, information that is not presumed to be relevant may, at times, have “an even more fundamental relevance than [information] considered presumptively relevant.” *Prudential Ins.*, 412 F.2d at 84.

In the present case, the Board did not apply the presumptive relevance doctrine to the Association’s information request. Rather, the Board required the Association to demonstrate mere relevance, which it did by proving that the non-bargaining-unit information it sought was relevant to the enforcement of the Better

Contracts clause. Thus, even though the requested information was not presumptively relevant, the Union's statutory duty to provide it clearly attached.

**2. The Union's obligation to provide information was not limited by the terms of the collective-bargaining agreement**

Contrary to the Union's contentions (Br. 5-8, 12-13), the information provision of the Better Contracts clause does not limit the scope of the Union's duty to disclose information, nor does it displace the statutory duty to disclose discussed above. In the first place, the contractual information provision (A. 80) to which the Union refers contains no language expressing limitation. Rather, the information provision only states that the Union must exhibit, on request from the Association, "any collective bargaining agreement between the Union and any Employer or Employers."

As the Board found (A. 155), and as judicial and Board precedent hold,<sup>13</sup> such affirmative language "entitling a party to certain specific information will not

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<sup>13</sup> See *Standard Oil v. NLRB*, 399 F.2d 639, 642 (9th Cir. 1968) ("The fact that [the company] had not contracted to furnish the information is not controlling."); *Mt. Sinai Hospital*, 331 NLRB 895, 911 (2000) (rejecting company's argument that union was only entitled to information specified in contract, and observing that "a contract provision requiring an employer to provide certain information to a union will not be found to waive a union's statutory right to other information, unless such a waiver is expressly stated in the agreement"), *enforced mem.* 8 Fed.Appx. 111 (2d Cir. 2001); *Bozzuto's, Inc.*, 275 NLRB 353, 358 (1985) (rejecting company's argument that union was only entitled to information specified in contract).

be found to constitute a waiver of that party's right to receive other relevant information, unless such a waiver is expressly stated in the agreement." Under well-settled law, a waiver of statutory rights (here, the right to relevant information) must be "clear and unmistakable." *See generally Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) (holding that waiver of statutory rights must be "clear and unmistakable"). A waiver cannot be inferred from silence. *See Fafnir Bearing Co.*, 362 F.2d at 722 (finding that "silence in these circumstances cannot be construed as a 'clear and unmistakable' waiver") (citation omitted). The Union does not point to any "clear and unmistakable" waiver, in the collective-bargaining agreement, of the Association's statutory right to the requested information. The Association's statutory right to the requested information accordingly remains in force, regardless of contract language providing for the disclosure of a single piece of information.

### **3. The Board properly resolved the instant information dispute, rather than leaving it for arbitration**

Finally, the Union argues (Br. 15) that the Board should have deferred the present information dispute to arbitration, as "the parties clearly intended to defer to arbitration *information* disputes arising under the [Better Contracts] clause." (Emphasis added.) Exercising its discretion, however, the Board (A 143 n.2, 159-

60) declined to defer the underlying information dispute to arbitration,<sup>14</sup> even assuming that the contract provided for arbitration of this disagreement. In taking this approach, the Board adhered to its longstanding, court-approved “policy of nondeferral to arbitration in information request cases.” *Shaw’s Supermarkets*, 339 NLRB 871, 871 (2003). *See also Acme Industrial*, 385 U.S. at 438; *Curtiss-Wright Corp.*, 347 F.2d at 71-72. Borrowing from the Supreme Court’s reasoning in *NLRB v. Acme Industrial*,<sup>15</sup> the Board has explained that “the policy of nondeferral in information request cases actually aids the functioning of the arbitration process, by allowing evaluation of the merits of [a] claim before placing the effort and expense of arbitration on the parties.” *Shaw’s Supermarkets*, 339 NLRB at 871. “The point of the request,” as the Board explained, “is precisely to determine whether [arbitration or litigation] is warranted in the first place.” *Id.* The Union presents no compelling justification for rejecting the Board’s reasonable policy, to which this Court should defer. *See UNITE HERE v. NLRB*, 546 F.3d 239, 242 (2d Cir. 2008) (“[D]ecisions based upon the Board’s expertise should receive, pursuant to longstanding Supreme Court precedent, ‘considerable deference,’” and the Court

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<sup>14</sup> Deferral is committed to the Board’s discretion by Section 10(a) of the Act (29 U.S.C. § 160(a)), which empowers the Board “to prevent any person from engaging in any unfair labor practice” and specifies that “[t]his power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . .”

<sup>15</sup> 385 U.S. 432, 438 (1967).

only reviews “the Board’s legal conclusions to ensure that they have a reasonable basis in law.”) (internal quotations omitted); *accord NLRB v. Am. Nat’l Can Co.*, 924 F.2d 518, 522 (4th Cir. 1991) (“The Board's decision concerning deferral to arbitration is to be affirmed unless found to be an abuse of discretion.”).

In arguing against the Board’s policy of nondeferral, the Union relies (Br. 13-15) solely on the dissenting and personal views of certain individual Board Members in a handful of recent Board cases. The views of those individual Board Members, however, are entirely nonprecedential. As this Court noted long ago, “the Board acts as a unit, and a dissent no more reduces the legal effect of its findings and order than does a dissenting opinion of a member of a court detract from the legal effect of the court’s judgment.” *Sperry Gyroscope Co. v. NLRB*, 129 F.2d 922, 929 (2d Cir. 1942). The Union has thus failed to present any authoritative reason why this Court should disturb the Board’s considered approach in this case, which simply and reasonably prevented the Union from demanding “that the [Association] use the grievance machinery as its method of data accumulation.” *Curtiss-Wright Corp.*, 347 F.2d at 71-72.<sup>16</sup>

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<sup>16</sup> In any event, there is no specific reference to the arbitration of *information* disputes in the Better Contracts clause. Nor is there any such specific reference elsewhere in the parties’ collective-bargaining agreement, as the judge observed (A 145, 160). Thus, it is unclear whether this dispute would be subject to arbitration in the first place.

**CONCLUSION**

The Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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National Labor Relations Board

May 2009

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD

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Petitioner

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\* No. 08-5163-ag

v.

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\* Board Case No.

\* 02-CB-21027

LOCAL ONE-L, AMALGAMATED  
LITHOGRAPHERS OF AMERICA

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Respondent

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32, the Board certifies that its brief contains 6,491 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

s/Linda Dreeben

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Dated at Washington, D.C.  
this 4th day of May 2009

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UNITED STATES COURT OF APPEALS  
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	*
Respondent	*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by e-mail to [agencycases@ca2.uscourts.gov](mailto:agencycases@ca2.uscourts.gov), and first-class mail the required number of copies of the Board's brief in the above-captioned case, and has served two copies of that brief by e-mail and first-class mail upon the following counsel at the address listed below:

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