NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NOB HILL GENERAL STORES, INC., Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent, UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 5, Intervenor.	No. 19-72429 NLRB No. 20-CA-209431 MEMORANDUM* (Filed Dec. 24, 2020)
NATIONAL LABOR RELATIONS BOARD, Petitioner, v. NOB HILL GENERAL STORES, INC., Respondent.	No. 19-72523 NLRB No. 20-CA-209431

* 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]

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

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[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. 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

Notice of Docket Activity

The following transaction was entered on 02/23/2021 at 11:18:26 AM PST and filed on 02/23/2021

Case Name: Nob Hill General Stores, Inc. v. NLRB

Case Number: 19-72429

Docket Text:

Filed text clerk order (Deputy Clerk: AF): The request for publication, Dkt. No. [56], is denied. [12013483] [19-72429, 19-72523] (AF)

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Nob Hill General Stores, Inc. *and* United Food and Commercial Workers Union, Local 5. Case 20–CA–209431

August 29, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND
MEMBERS KAPLAN AND EMANUEL

On January 31, 2019, Administrative Law Judge Amita Baman Tracy issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief. The General Counsel and the Charging Party filed cross-exceptions and supporting briefs, to which the Respondent filed a combined answering brief. The Charging Party also filed an answering brief in support of the General Counsel's cross-exceptions as well as a reply brief in support of its own cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has

decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order as modified.[2]

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[1] We agree with the judge that the information requested by the Charging Party regarding the opening of the new Santa Clara store is relevant to the administration of its collective-bargaining agreement with the Respondent, and that the Respondent's failure to provide certain information and unreasonable delay in providing other information therefore violated Sec. 8(a)(5) and (1) of the Act. We find it unnecessary to rely on the judge's alternative findings that the information requested is also relevant to counseling unit members regarding potential transfers to the Santa Clara store or bargaining over the effects of the opening of the Santa Clara store.

[2] The General Counsel and the Charging Party each filed a cross-exception to the judge's remedy requiring the Respondent to post the notice only at the Respondent's store in Santa Clara, California. We find merit in their exceptions. The notice should be posted at the Respondent's stores where affected employees perform their duties and would thereby have an opportunity to read it. See *Postal Service*, 345 NLRB 426, 426 fn. 3 (2005), enfd. 486 F.3d 683 (10th Cir. 2007); *Southwestern Bell Telephone Co.*, 235 NLRB 963, 963 fn. 3 (1978). Here, all bargaining unit employees could have requested transfers to the Santa Clara store, and therefore all unit employees were potentially affected by the Respondent's unfair labor practices. Accordingly, we shall modify the judge's recommended Order to require that the notice be posted in all of the Respondent's stores where bargaining unit employees work, as well as the Santa Clara store where several former bargaining unit employees work.

The Charging Party has requested numerous additional remedies for the violations found. We deny these requests because the Charging Party has not established that the Board's traditional remedies are insufficient to ameliorate the effects of the Respondent's unfair labor practices. See, e.g., *Nexstar Broadcasting, Inc. d/b/a KOIN-TV*, 367 NLRB No. 117, slip op. at 1 fn. 3 (2019); *Alstyle Apparel*, 351 NLRB 1287, 1288 (2007) (denying request for a broad cease-and-desist order where the General Counsel had

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Nob Hill General Stores, Inc., West Sacramento, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

"(b) Within 14 days after service by the Region, post at its store located at 3555 Monroe Street, Suite 90, Santa Clara, California, and at all of its stores within the geographical jurisdiction of the United Food and Commercial Workers Union, Local 5, where bargaining unit employees are employed, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the

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not shown that traditional remedies were insufficient to address the violations found in the case).

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 25, 2017."

Dated, Washington, D.C. August 29, 2019

John Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Min-Kuk Song, Esq., for the General Counsel.
Henry F. Telfeian, Esq., for Respondent.
David A. Rosenfeld, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

AMITA BAMAN TRACY, Administrative Law Judge. This case was tried based on a joint motion and stipulation of facts approved by me on July 23, 2018.[1]

The United Food and Commercial Workers Union, Local 5 (the Union or the Charging Party) filed the original charge on November 3, 2017,[2] and first amended charge on February 16, 2018. The General Counsel issued the complaint on March 6, 2018.[3] Nob Hill General Stores, Inc. (Respondent) filed a timely answer denying all material charges.

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[1] The findings of fact in this decision are based entirely upon the parties' stipulation of facts. However, many of these facts are actually responsive to the Union's information request at issue in this proceeding. The General Counsel's brief notes that these stipulated facts that are responsive to the contested information request such as the number of employees and their bargaining unit status were only provided during these proceedings, and not any time prior (GC Br. at 9, fn. 12-13).

[2] All dates hereinafter are in 2017, unless otherwise noted.

[3] Via the joint motion to submit stipulated record, the General Counsel seeks to amend complaint paragraph 9(a) due to an incorrect date: "October 31, 2018" should be amended to "October 31, 2017." The unopposed amendment is hereby granted.

The complaint alleges Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by failing and refusing or unreasonably delaying providing the Union with requested information relevant and necessary for the Union to discharge its duties.

On the entire record, and after considering the briefs filed by the General Counsel, the Charging Party, and Respondent,[4] I make the following

FINDINGS OF FACTS

I. JURISDICTION

At all material times, Respondent, a California corporation with an office and place of business in West Sacramento, California (Respondent's facility), has been engaged in the business of retail sale of groceries and related products. During the 12-month period ending November 30, Respondent in conducting its business operations received gross revenues in excess of $500,000, and purchased and received goods valued in excess of $5000 directly from sources outside the State of California. The parties admit and I find that Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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[4] Abbreviations used in this decision are as follows: "Jt. Exh." for joint exhibit; "GC Br." for the General Counsel's brief; "CP Br." for the Charging Party's brief, and "R. Br." for Respondent's brief.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Operations

Respondent, a separate corporation, is part of a corporate family that operates supermarkets and other types of food stores in Northern California and Northern Nevada under various "name banners" including Nob Hill General Stores, Inc. (Jt. Exh. W). Nearly all non-supervisory employees can be categorized as either in the retail department (a clerk) or as a meat cutter. The representation of non-supervisory employees, who are either retail department clerks or meat cutters, varies by store; at a given store, the Union or its sister locals represent all non-supervisory employees, represent some non-supervisory employees, or represent no non-supervisory employees. Raley's, a California corporation, provides various corporate support services including labor and human relations services to all of these stores, and directly operates some of the stores.[5]

With respect to Respondent's stores which have opened previously in the Union's (or its predecessor local unions) jurisdiction, Respondent staffed each new store with a cadre of employees, as defined and used in

[5] During the relevant time period, Mark Foley (Foley) held the position of executive vice president and chief people officer for Raley's and was a supervisor and agent of Respondent within the meaning of Secs. 2(11) and 2(13) of the Act. Also Tara Locaso (Locaso) held the position of Labor Relations Manager for Raley's and was an agent of Respondent within the meaning of Sec. 2(13) of the Act. Finally, Henry Telfeian (Telfeian) was the legal representative of Respondent and an agent of Respondent within the meaning of Sec. 2(13) of the Act.

Section 1.13 of the CBA, from employees who voluntarily sought a transfer to a new store. In all instances, some existing unit employees, represented by the Union, and some existing non-unit employees transferred into the new store. Respondent notified all of its existing unit employees, represented by the Union, of the opportunity to transfer to and request a transfer to a new store. Respondent also notified the employees working in non-unit stores of the opportunity to transfer and request to transfer to the new store. Respondent did not require or force any employee to transfer to a new store. All employees who requested a transfer were considered for transfer, but not all employees who requested a transfer were granted a transfer.

B. The Union

The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act and constitute a unit in existence for many years (the Unit):

> All Retail Department Employees and Meat Cutters working in Respondent's stores located within the geographical jurisdiction of the Union, as described in the collective-bargaining agreement between the Union and Respondent effective by its terms from October 12, 2014 to October 11, 2017 and extended by the parties to February 8, 2018.

Since at least January 1, 2000, Respondent has recognized the Union as the exclusive collective-bargaining

representative of the Unit (at those store locations and for those employees where the Union has demonstrated its majority status).[6] This recognition has been embodied in successive collective-bargaining agreements between Respondent and the Union concerning the terms and conditions of employment of unit employees, the most recent of which was effective by its terms from October 12, 2014, to October 11, 2017, and extended by agreement of the Union and Respondent to February 8, 2018 (Collective-Bargaining Agreement or CBA) (Jt. Exh. J).

Of relevance in this matter, Section 1.1 concerns union recognition; Section 1.11 concerns individual agreements; Section 1.14 of the CBA concerns new jobs; Section 2.4 concerns hiring when employees are transferred to jobs covered by the CBA from outside the Union's jurisdiction; Section 2.5 concerns new employees; Section 2.6 concerns extra work; Section 4.3.4 concerns recall when employees who have been laid off for lack of work have seniority rights in recall for jobs subsequently available; Section 4.9 concerns transfers; Section 4.10 concerns part-time employees; and Section 5.9 concerns union business (Jt. Exh. J).

Specifically, Section 1.11, Individual Agreements, states: The Employer agrees that no employee covered by this Agreement shall be compelled or allowed to enter into any individual contract or agreement with said

[6] During the relevant time period, David Rosenfeld (Rosenfeld) was the legal representative of the Union and agent of the Union. Also, John Nunes (Nunes) held the position of President of the Union and was an agent of the Union.

Employer concerning wages, hours of work, and/or working conditions that provides less benefits than the terms and provisions of this Agreement, except by written agreement of the Employer, the employee and the Union. Section 1.13 of the CBA states:

> [. . .] Notwithstanding any language to the contrary contained in this [CBA] between the parties, it is agreed this [CBA] 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. [. . . .]
>
> The Employer shall staff such new or reopened food market with a combination of both current employees and new hires, in accordance with current industry practices of staffing such stores with a cadre of current employees possessing the necessary skills, ability and experience, plus sufficient new hires to meet staffing requirements. Employees, who are thus transferred, upon whom contributions are made to the various trust funds, shall continue to have contributions to the several trust funds made on their behalf in the same manner and in the same amount per hour as such contributions were made prior to their transfer.
>
> [. . . .]

(Jt. Exh. J). Section 4.9, Transfers, states: No employees shall be required to accept a permanent transfer outside the jurisdiction of this Local Union unless approved by the Union. Requests for transfers, within the

Union's geographical jurisdiction, so an employee may work nearer his home will be given proper consideration and will not be refused arbitrarily. Similarly, an employee will not be arbitrarily or capriciously transferred. Management will give proper consideration to transfer requests.

With regard to Respondent's staffing of new stores to be opened within the Union's jurisdiction, the Union never filed grievances asserting that Respondent's staffing practices as described in Respondent's operations violated any contractual provision. In addition, with the exception of this conflict in this matter, the Union never filed an information request or demand seeking any type of information regarding any store prior to the date the store opened to the public.

Previously, when Respondent opened a new store within the Union's jurisdiction, the parties negotiated separate agreements that upon proof, offering or availability of the Union's majority status, the Union would become the representative of the employees working in that new store, on a date subsequent to the new store's opening. All Respondent's stores within the Union's jurisdiction, except the Santa Clara, California Nob Hill General Store (Santa Clara Store), are covered by the parties' CBA.

C. Santa Clara Store

From September 15 through September 22, Respondent posted at store numbers 315, 316, 604, 606, 634, and 635 a physical flyer notice soliciting current

employees from those stores to transfer to a new store that Respondent was opening at 3555 Monroe Street, Suite 90, Santa Clara, California (Santa Clara Store) (Jt. Exh. S). The open positions listed in the flyer were non-supervisory positions normally included in the bargaining unit. In addition, Respondent posted a notice on Raley's intranet site, known as "the Pantry", on August 17 and on August 24, advising employees of the availability of jobs in the Santa Clara Store and inviting employees to request a transfer by going to the posted job opening on the "Raley's Jobs" website. These Santa Clara Store's job openings continued to be posted on the "Raley's Jobs" website throughout additional dates in September, October and November (Jt. Exh. T). Any employees from stores within the Raley's family had access to the intranet job notice postings.

Respondent originally scheduled the Santa Clara Store to open in October, postponed the opening to December, and then finally opened to the public on January 10, 2018. As of January 10, 2018, a total of 13 current employees sought a transfer to work in the Santa Clara Store. Any employee working in any of the store locations listed on Joint Exhibit W was eligible to request a transfer to the Santa Clara Store. The 13 employees who requested to transfer consisted of the following:

> 1 Unit employee from Store 615 was not offered a transfer.
>
> 1 non-Unit employee from Store 236 accepted a transfer offer.

> 1 non-Unit employee from Store 315 accepted a transfer offer.
>
> 1 Unit employee from Store 603 accepted a transfer offer.
>
> 3 Unit employees from Store 604 accepted transfer offers.
>
> 1 Unit employee from Store 620 accepted a transfer offer, but employment terminated prior to the transfer date.
>
> 1 Unit employee from Store 628 accepted a transfer offer.
>
> 2 Unit employees and 1 non-Unit employee from Store 634 were offered transfer where 1 Unit employee and 1 non-Unit employee accepted the offer while 1 Unit employee declined the offer.
>
> 1 Unit employee from Store 635 accepted a transfer offer.

Furthermore, all non-supervisory employees who transferred to the Santa Clara Store were volunteers who requested and accepted transfers.

As of January 10, 2018, 10 existing employees transferred to and worked at the Santa Clara Store. The remaining 47 nonsupervisory employees working in the Santa Clara Store as of January 10, 2018, were "new hires." The opening and operation of the Santa Clara Store has not resulted in the layoff of any unit employees or in the reduction of any unit employee's work hours. Also, the opening and operation of the

Santa Clara Store has not resulted in any unit employees then on "lay-off" status for lack of work during the pendency of the Union's information requests. Any positions or work hours vacated by unit employees transferring to the Santa Clara Store have become available to other unit employees that did not transfer.

The Santa Clara Store employees are not represented by any labor organization. While the Union represented some of the Santa Clara Store employees when they worked in the Unit at their former work locations, the Union has never represented those employees after they began working at the Santa Clara Store. Also, prior to the opening of the Santa Clara Store, Respondent, on an unspecified date, indicated to the Union that, absent agreement, it would not recognize the Union in that store without a National Labor Relations Board conducted election.

D. Timeline of Events Regarding the Union's Information Request

On September 25, via letter to Foley, the Union requested that Respondent provide the following information "within the next week":

> (1) Please provide a list of classifications and the number of employees in each classification to be initially hired in the store. Let us know how many in each classification will be full time (40 hours per work) and part time.
>
> (3) Provide a list of those employees who are currently working in the bargaining unit who

> have been asked to work in the new store. We want the names of those employees and the dates that they were asked to work in the store.
>
> (4) Please provide a list of all current employees who have indicated their willingness to work in the store or have agreed to work in the store as of the date of this request and as of the date of your reply. Provide the classifications they will be working in and the wage rates promised them.
>
> (5) Please provide a copy of any employee handbook that [Respondent] intend[s] to apply to the employees in the store.
>
> (6) Please provide a statement of the ranges of rates to be paid to each classification of employee in the store.
>
> (7) Please provide a copy of any benefit plans to be applicable to employees in the store.
>
> (8) When will employees begin actually working in the store? What is the projected opening date?

The Union also asked for the following information which is unnumbered in its request:

> Please advise us of Nob Hill's position as to whether employees who are currently working in the bargaining unit may transfer into the store and under what circumstances.
>
> Local 5 has members who are working short hours, not working or who are otherwise

> available to work in the new store. Please advise Local 5 of how we can make arrangements for them to be hired.

The Union explained that the above information is necessary and relevant to administer the following provisions of the CBA (Sections 1.14, 2.4, 2.5, 4.3.4, 4.9, 4.10, 5.9, and various other provisions of the CBA) and to bargain over the effects of the opening of the Santa Clara Store (Jt. Exh. K).

On October 18, Respondent, via letter from Locaso, refused to furnish the information requested by the Union on September 25. Respondent stated that it was not obligated to furnish the information because Section 1.13 of the CBA indicates that the CBA does not apply to the Santa Clara Store but also stated that it would consider any information requests made by the Union after the Santa Clara Store had been open to the public for 15 days (Jt. Exh. L).

On October 31, the Union via letter again requested that the information it first requested on September 25, be provided. The Union stated that it was entitled to this information based on the CBA provisions regarding the staffing of new stores and the continuation of trust fund payments on behalf of unit employees after those employees transferred to the Santa Clara Store. The Union requested that the information be provided "within the next 48 hours" (Jt. Exh. M).

Again on December 5, the Union via letter requested the information it first requested on September 25. The

Union reiterated that the Union is entitled to the information because the CBA includes a provision allowing unit employees to staff a new store and because the information is relevant and necessary for the Union to administer Sections 1.14, 1.1, 1.11, 1.13, and 2.6 of the CBA. The Union stated in response to Respondent's position that the Santa Clara Store is not covered by the CBA per Section 1.13, "Staffing is a critical issue. The contract protects the current bargaining unit by allowing them to staff a new store. When a new store opens it often compete [sic] with existing stores and the right to transfer and the staffing obligation protects current employees and the bargaining unit" (Jt. Exh. N).[7]

On December 13, Respondent via letter again refused to furnish the information the Union first requested on September 25. Respondent reiterated that it was not obligated to provide the information (Jt. Exh. O). However, in this letter, Respondent did answer the following unnumbered requests from the Union:

> Please advise us of Nob Hill's position as to whether employees who are currently working in the bargaining unit may transfer into the store and under what circumstances.
>
> Local 5 has members who are working short hours, not working or who are otherwise

[7] The December 5 letter from the Union references Section 1.14 of the CBA but subsequent correspondences between the parties indicates that the Union intended to address Section 1.13 of the CBA as originally noted by Locaso in the October 18 letter (Jt. Exhs. O, P).

> available to work in the new store. Please advise Local 5 of how we can make arrangements for them to be hired.

On December 19, the Union reiterated its position that it is entitled to the information it first requested on September 25. The Union explained that it is entitled to the information requested as the CBA includes a provision requiring Respondent to staff a new store with a combination of current employees and new hires (Jt. Exh. P).

On December 23, Respondent responded to the Union's December 19 letter, and again stated that its position remained the same (Jt. Exh. Q).

On December 27, the Union via email from Nunes to Foley and Locaso, again requested the information it originally requested on September 25. The Union stated that it needs the information to represent unit employees who are accepting a transfer or considering a transfer to the Santa Clara Store. Nunes set forth various scenarios as to why the request for information is relevant and necessary (Jt. Exh. R). Nunes wrote with regard to the September 25 information request,

> [. . .] As with Nob Hill and our other contracted Union employers, when new stores open there are many additional opportunities afforded current employees and Local 5 members with a process in which to attain those opportunities contained in the collective bargaining agreements. Some of those opportunities would include job transfers so employees may work nearer to their homes, promotions,

> additional full-time positions and more work hours for part-time workers to name a few. It is the duty of the Union to monitor these matters and make sure they are performed in a fair and equitable manner consistent with the terms of the Union agreement. On the other hand, if Raley's employment recruiters are informing Local 5 members the store will be a non-union operation it is important they have all the facts before making such an important decision. It is not possible for the Union to educate current Local 5 Nob Hill members of the possible pitfalls of accepting such a transfer if we do not know prospectively the Union members choosing to go to the new store. For example, employees in the pension plan will cease to be participants which will impact their retirement income and will also have severe negative effects on their retiree medical eligibility. It is also important to receive impartial information from the Union on the differences in the medical plans offered by the company compared to the medical benefits provided under the Union Trust Fund plan. [. . .]

(Jt. Exh. R.)

Since September 25, Respondent has refused to provide the following information requested by the Union:

> (1) Please provide a list of classifications and the number of employees in each classification to be initially hired in the store. Let us know

how many in each classification will be full time (40 hours per work) and part time.

(3) Provide a list of those employees who are currently working in the bargaining unit who have been asked to work in the new store. We want the names of those employees and the dates that they were asked to work in the store.

(4) Please provide a list of all current employees who have indicated their willingness to work in the store or have agreed to work in the store as of the date of this request and as of the date of your reply. Provide the classifications they will be working in and the wage rates promised them.

(5) Please provide a copy of any employee handbook that [Respondent] intend [s] to apply to the employees in the store.

(6) Please provide a statement of the ranges of rates to be paid to each classification of employee in the store.

(7) Please provide a copy of any benefit plans to be applicable to employees in the store.

(8) When will employees begin actually working in the store? What is the projected opening date?

ISSUES PRESENTED

The parties stipulated as to the following:

1. Whether Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to furnish the Union with the information it requested on September 25, identified in items 1 and 3 to 8 of subparagraph 9(a) of the complaint, and as follows:

> (1) Please provide a list of classifications and the number of employees in each classification to be initially hired in the store. Let us know how many in each classification will be full time (40 hours per work) and part time.
>
> (3) Provide a list of those employees who are currently working in the bargaining unit who have been asked to work in the new store. We want the names of those employees and the dates that they were asked to work in the store.
>
> (4) Please provide a list of all current employees who have indicated their willingness to work in the store or have agreed to work in the store as of the date of this request and as of the date of your reply. Provide the classifications they will be working in and the wage rates promised them.
>
> (5) Please provide a copy of any handbook that [Respondent] intend[s] to apply to the employees in the store.
>
> (6) Please provide a statement of the ranges of rates to be paid to each classification of employee in the store.

> (7) Please provide a copy of any benefit plans to be applicable to employees in the store.
>
> (8) When will employees begin actually working in the store? What is the projected opening date?

2. Whether Respondent violated Section 8(a)(1) and (5) of the Act by unreasonably delaying in furnishing the Union with the information it requested on September 25, identified in the unnumbered items of subparagraph 9(a) of the complaint, and as follows:

> (1) Please advise us of Nob Hill's position as to whether employees who are currently working in the bargaining unit may transfer into the store and under what circumstances.
>
> (2) Local 5 has members who are working short hours, not working or who are otherwise available to work in the new store. Please advise Local 5 of how we can make arrangements for them to be hired.

DISCUSSION

A. Respondent Failed to Provide Relevant and Necessary Information to the Union In the Performance of Its Duties as the Collective-Bargaining representative of the Unit Employees

The General Counsel argues that the Union explained the relevance of its requested information as its need to ensure that Respondent (1) complied with the staffing requirements for new stores set forth in CBA Section 1.13; (2) did not compel or allow

employees covered by the CBA to enter individual contracts or agreements providing less benefits than the CBA as covered by Section 1.11; and (3) complied with the transfer provisions of Section 4.9. Furthermore, the Union explained the relevance for the requested information to engage in effects bargaining. Among its many arguments, Respondent argues that since the CBA did not apply to the Santa Clara Store as it was a new store until 15 days after it was open to the public the Union had no basis for the information requested. Moreover, Respondent argues that the Union failed to provide "specific facts" to support a "viable and valid" claim of breach of contract (R. Br. at 25–30). Respondent argues that the Union waived its right to enforce the contractual provisions it cites (R. Br. at 32–37).

An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative to assess claims made by the employer relevant to contract negotiations as well as administration of the contract. In addition, an employer is required to furnish the union representing its employees with information that is relevant to the union in the performance of its collective-bargaining duties. *Piggly Wiggly Midwest, LLC*, 357 NLRB 2344, 2355 (2012); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). This includes information which concerns the terms of transfer of bargaining unit employees. See *Kansas Education Assn.*, 275 NLRB 638, 640 (1985).

Generally, a union's request for information pertaining to employees in the bargaining unit is

presumptively relevant and an employer must provide the information *CVS Albany, LLC*, 364 NLRB No. 122, slip op. at 2 (2016). However, where the information requested concerns non-unit employees, the union bears the burden of establishing relevancy. *Public Service Electric & Gas Co.*, 323 NLRB 1182, 1186 (1997). A union satisfies its burden to do so, if it demonstrates either "a reasonable belief, supported by objective evidence, that the requested information is relevant,"[8] or "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,' "[9] The required showing is subject to a liberal, "discovery-type standard" and is not an exceptionally heavy one. *DirectSat USA, LLC*, 366 NLRB No. 40, slip op. 1, fn. 2 (2018). The union need only show a probability that the desired information was relevant, and would only be used by the union to carry out its statutory duties and responsibilities. But "[t]he union's explanation of relevance must be made with some precision; and a generalized, conclusory explanation is insufficient to trigger an obligation to supply information." *Disneyland Park*, 350 NLRB 1256, 1258, fn. 5 (2007). The determination of relevance "depends on the factual circumstances of each particular case." *San Diego Newspaper Guild, Local No. 95 v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977).

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[8] *Disneyland Park*, 350 NLRB 1256, 1257-1258 (2007) (citation omitted).

[9] *Kraft Foods North America, Inc.*, 355 NLRB 753, 754 (2010) (quoting *NLRB v. Acme Industrial Co.*, supra at 437).

As explained below, I find that Respondent failed to provide the information requested by the Union which violates Section 8(a)(5) and (1) of the Act. In this matter, the Union repeatedly explained that it sought to administer the CBA regarding the staffing of the Santa Clara Store as well as to bargain any effects of its opening. In summary, the Union sought the classifications and numbers of employees to be hired at the Santa Clara Store along with the full or part-time status of each position; the Union sought the number of unit employees asked to work at the Santa Clara Store as well as the date these employees were asked this question; a list of all current employees who had indicated a willingness to work or who have agreed to work in the Santa Clara Store; the employment handbook which would be applicable to those employees working in the Santa Clara Store; the ranges of rates of pay for each employee in the Santa Clara Store; the benefits applicable to the employees working in the Santa Clara Store; and the dates of when the employees would be working in the Santa Clara Store and what date the Santa Clara Store would be opened to the public. The Union explained the relevancy of such information to its statutory duties and responsibilities via written correspondence with Respondent from September to December. Generally the Union mentioned various contractual provisions as well as the potential for effects bargaining.

After the Union's initial request, Respondent declined to provide any information claiming that Section 1.13 of the CBA indicated that the CBA would not

apply to the Santa Clara Store any sooner than 15 days after it was open to the public, and thus, the Union had no contractual need for the information. In response, the Union explained that it was entitled to the information as Section 1.13 concerning staffing of a new store as well as the trust fund contributions of unit employees who transferred. To reiterate, Section 1.13 states that Respondent shall staff such new food market with a combination of both current employees and new hires, in accordance with current industry practices of staffing such stores with a cadre of current employees possessing the necessary skills, ability and experience, plus sufficient new hires to meet staffing requirements. In addition, employees, who are thus transferred, upon whom contributions are made to the various trust funds, shall continue to have contributions to the several trust funds made on their behalf in the same manner and in the same amount per hour as such contributions were made prior to their transfer. Even after such explanation, Respondent did not respond to the Union and did not provide the Union with any information. Again, the Union renewed its request in early December stating that the CBA covers staffing of a new store. Later, in December, the Union again renewed its request for information, and explained that the Union needed to monitor the transfers of employees to ensure that the staffing was conducted in a "fair and equitable manner consistent with the terms of the Union agreement" (Jt. Exh. R). The Union also provided information that its members were being informed that the Santa Clara Store would be a non-union store, and thus, the Union needed this

information to "educate" unit employees on the effects of any transfer to a non-union store.

Based on the parties' stipulated record, I find that the Union has satisfied its burden by showing 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. Again, the Union's burden is "not an exceptionally heavy one." *SBC Midwest*, 346 NLRB 62, 64 (2005). Per Section 1.13 of the CBA, the staffing of the new store would be a mix of new hires and current employees, some of whom could have been unit employees. As such, it appears relevant to the Union's duties to determine which positions would be filled by at the Santa Clara Store as well as the work hours of such positions. In the same vein, it appears relevant and necessary for the Union to need the list of employees who have been asked to work in the Santa Clara Store along with a list of employees (and their classifications and wage rates) who were willing to work in the store.

The Union listed other CBA provisions which could also impact any employee who transferred to the Santa Clara Store including provisions concerning the employees' pension plans as well as transfer provisions. For example, Section 1.11, cited by the Union, covers employment agreements, and specifies that no unit employee will be compelled or allowed to enter into an employment agreement with the Employer which reduces wages and benefits of the employee. In addition, Section 4.9 concerns transfers and when and by whom those should be approved. The Union

obviously should know which unit employees sought to transfer so as to provide them counsel as needed including any benefits that may be changed due to the transfer. In addition, the need for the employee handbook, range of rates to be paid, and benefit plans is clear from the Union's duties to ensure that any unit members who chose to transfer would be well-informed as to any difference between their current wages, benefits, and terms and conditions of employment. Furthermore, the need by the Union to know when the store would be open for employees and the public directly relates to Section 1.13 which states that the CBA shall apply no sooner than 15 days after a new store is open to the public—thus, how would the Union know when to be prepared any bargaining or recognition if the date of the Santa Clara Store's opening is not known. Thus, I find that the information sought by the Union was necessary to determine whether Respondent was following the CBA concerning staffing at the new location as well as any effects on unit employees transferring to the Santa Clara Store.

Moreover, as the Union indicated in its last correspondence of December 27, the Union certainly may need this information to bargain over the effects of the opening of the Santa Clara Store. This explanation is certainly valid, and provides another basis in which the Union overcomes its burden to prove the probability that the desired information is relevant to fulfill its statutory duties. As Nunes articulated, with the opening of a new store, the unit employees remaining in their current stores also creates the need for the Union

to monitor the CBA to ensure that all provisions are being met.

Respondent argues that the CBA, specifically at Section 1.13, does not apply to the Santa Clara Store, and thus the information requested was not relevant and necessary to the Union's representational duties (R. Br. at 9). Respondent elaborates that the CBA only applied to the Santa Clara Store 15 days after the opening of the store, and thus, Respondent had no existing contractual obligation to the Union at the time of the information request (R. Br. at 16). The language in Section 1.13 mirrors the language analyzed by the Board in *Raley's*, 336 NLRB 374 (2001). In *Raley's* the Board found that the provision such as in the parties' CBA at Section 1.13 is known as an "after acquired stores clause," "additional stores clause," or "after acquired." Id. at 376; see also *Alpha Beta Co.*, 294 NLRB 228 (1989). The Board determined that these types of clauses affected an employer's obligation to recognize a union at a new store 15 days after a store opens. However, I do not find that this after acquired provision affects the Union's information request regarding the staffing of the new store, the impact of any transfer by unit employees to the Santa Clara Store, or the applicability of the CBA to these unit employees as they seek to transfer. Again, the Union's burden is not a heavy one, but simply one where the Union should show a probability that the desired information is relevant. The Board has affirmed administrative law judge decisions in similar situations involving whether a union is entitled to requested information to evaluate or process a grievance

where the employer refuses to provide the requested information based on its interpretation of the parties' collective-bargaining agreement. *United-Carr Tennessee*, 202 NLRB 729, 731–732 (1973) (employer unlawfully refused to provide certain information to the union based on its reliance on its own interpretation of the contract where the employer determined the information was not relevant to the union's decision to take a grievance to arbitration). Here too, Respondent may continue to argue that the CBA does not apply to the Santa Clara Store until 15 days after the store opens, but such an argument on any potential grievance or bargaining issue would only arise in those proceedings, not under these circumstances where the Union seeks information to determine whether in its view the CBA is being followed appropriately. An actual grievance need not be pending, and it is sufficient if the requested information is potentially relevant to a determination as to whether a grievance should be pursued. *United Technologies Corp.*, 274 NLRB 504 (1985).

Respondent also argues that the Union never requested to bargain even after the Santa Clara Store opened. However, as the Union never received its requested information, the argument that the Union never requested to bargain makes little sense. See *NLRB v. Postal Service*, 18 F.3d 1089, 1100–1101 (3d Cir. 1994) ("a union may be entitled to information [probative of discrimination] before it has made a bargaining demand"). The relevance for the information requested is clear—the Union sought to ensure that the parties' agreement regarding the staffing for the

Santa Clara Store was being followed along with other provisions of the CBA including the transfer provisions.

To the extent Respondent argues that the Union waived its rights to enforce the contractual provisions cited in support of its claim for relevance, the Board requires a waiver of a party's statutory right to be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *Timken Roller Bearing Co.*, 138 NLRB 15, 16 (1962). "A clear and unmistakable waiver may be found in the express language and structure of the collective-bargaining agreement or by the course of conduct of the parties. The burden is on the party asserting waiver to establish that such a waiver was intended." *Leland Stanford Junior University*, 307 NLRB 75, 80 (1992). Respondent presented no evidence to support its burden of proof that the Union waived its right to enforce the contractual provisions.

Accordingly, Respondent violated Section 8(a)(5) and (1) of the Act when it refused to provide the Union relevant and necessary information it requested on September 25, and repeated on October 31, December 5, December 19, and December 27,

B. Respondent Unreasonably Delayed Providing Information to the Union

The General Counsel argues that Respondent violated Section 8(a)(5) of the Act when it provided the following information in an untimely manner: (1) Please advise us of Nob Hill's position as to whether

employees who are currently working in the bargaining unit may transfer into the store and under what circumstances; and (2) Local 5 has members who are working short hours, not working or who are otherwise available to work in the new store, and please advise Local 5 of how we can make arrangements for them to be hired. Respondent argues that it did not need to provide the information, and Respondent had timely responded to the Union's requests.

"[A]n unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all." *Monmouth Care Center*, 354 NLRB 11, 41 (2009) (citations omitted), reaffirmed and incorporated by reference, 356 NLRB 152 (2010), enfd. 672 F.3d 1085 (D.C. Cir. 2012). "[I]t is well established that the duty to furnish requested information cannot be defined in terms of a per se rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow." *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). "In evaluating the promptness of the employer's response, the Board will consider the complexity and extent of information sought, its availability, and the difficulty in retrieving the information." *West Penn Power Co.*, 339 NLRB 585, 587 (2003) (quoting *Samaritan Medical Center*, 319 NLRB 392, 398 (1995)), enfd. in relevant part 394 F.3d 233 (4th Cir. 2005); see *Pan American Grain*, 343 NLRB 318 (2004) (3-month delay); *Bundy Corp.*, 292 NLRB 671 (1989) (2.5-month delay); *Woodland Clinic*, 331 NLRB 735, 736 (2000) (7-week delay).

To determine whether an employer has failed to furnish information in a timely manner, the Board considers a variety of factors, including the nature of the information sought (including whether the requested information sought is time sensitive); the difficulty in obtaining it (including the complexity and extent of the requested information); the amount of time the party takes to provide it; the reasons for the delay in providing it; and whether the party contemporaneously communicates these reasons to the requesting party. *West Penn Power Co.*, 339 NLRB 585, 587 & fn. 6, 588 & fn. 9. See also *Postal Service*, 308 NLRB 547, 551 (1992); *Valley Inventory Service Inc.*, 295 NLRB 1163, 1166 (1989).

To repeat, the Union requested the information on September 25, and Respondent provided two of the requests on December 13. Ultimately, Respondent opened the Santa Clara Store on January 10, 2018. Applying the above factors, it is clear that Respondent unlawfully delayed in providing the information to the Union. The information sought by the Union was not difficult to obtain, complex or voluminous. In fact, Respondent did not provide any indication that providing such information was difficult, and failed to offer any explanation or reason why it delayed providing the information. As the Union did not even know when the Santa Clara Store was to open, any delay in providing this reasonably easy information to obtain was significant. The Board has found that even a 2-month delay in providing information to a union has been found to be untimely. *Gloversville Embossing Corp.*, 314 NLRB

1258 (1994). Yes, the Santa Clara Store opened in January 2018, but the Union did not know of its opening date when it first requested this information in September.

Based on the foregoing, Respondent violated Section 8(a)(5) and (1) by failing and delaying from September 25 to December 13 to provide the following requested information: whether employees who are currently working in the bargaining unit may transfer into the store and under what circumstances, and advise the Union on how to make arrangements for those members who are working short hours, not working or who are otherwise available to work in the new store.

CONCLUSIONS OF LAW

1. Nob Hill General Stores, Inc. (Respondent) is, and has been at all times material, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food and Commercial Workers Union, Local 5 (Charging Party or the Union) is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with information requested on September 25, and repeated on October 31, December 5, 19, and 27, which was necessary and relevant to the Union's

performance of its duties as the collective-bargaining representative of the unit employees.

4. By delaying in providing responses to the Union's September 25 request until December 13, Respondent has violated Section 8(a)(5) and (1) of the Act.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has violated the Act by failing and refusing to furnish the Union with the information requested, and delaying providing other information, and thereby engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.[10]

On the basis of the foregoing findings of fact and conclusions of law, and the entire record, I issue the following recommended[11]

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[10] The Union requests that a wide variety of non-traditional remedies, including those remedies recommended due to special circumstances (CP Br. at 5-6). However, I decline to recommend such remedies as the factual scenario in this matter does not warrant such remedies.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

Respondent, Nob Hill General Stores, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to furnish United Food and Commercial Workers Union, Local 5 with information requested on September 25, and repeated on October 31, December 5, December 19, and December 27, that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of Respondent's unit employees.

(b) Unreasonably delaying from September 25 to December 13 in providing responses to requests for relevant information by the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish to the Union, in a timely manner, the information requested on September 25, and repeated on October 31, December 5, 19, and 27, described as follows:

> (1) Please provide a list of classifications and the number of employees in each classification to be initially hired in the store. Let us know how many in each classification will be full time (40 hours per week) and part time.

(3) Provide a list of those employees who are currently working in the bargaining unit who have been asked to work in the new store. We want the names of those employees and the dates that they were asked to work in the store.

(4) Please provide a list of all current employees who have indicated their willingness to work in the store or have agreed to work in the store as of the date of this request and as of the date of your reply. Provide the classifications they will be working in and the wage rates promised them.

(5) Please provide a copy of any handbook that [Respondent] intend[s] to apply to the employees in the store.

(6) Please provide a statement of the ranges of rates to be paid to each classification of employee in the store.

(7) Please provide a copy of any benefit plans to be applicable to employees in the store.

(8) When will employees begin actually working in the store? What is the projected opening date?

(b) Within 14 days after service by the Region, post at its facility in Santa Clara, California, copies of the attached notice marked "Appendix."[12] Copies of the

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in each of the notices referenced herein reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United

notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent at any time since September 25, 2017.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. January 31, 2019

States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to furnish the United Food and Commercial Workers Union, Local 5 (the Union) with the information requested on September 25, 2017, and repeated on October 31, December 5, 19, and 27, 2017, which is relevant and necessary to the Union's performance of its duties as the collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT unreasonably delay in providing responses to requests for relevant information from the Union from September 25, 2017, to December 13, 2017.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the National Labor Relations Act.

WE WILL, in a timely manner, furnish the Union with the information requested on September 25, 2017, and repeated on October 31, December 5, 19, and 27, 2017, described as follows:

> (1) Please provide a list of classifications and the number of employees in each classification to be initially hired in the store. Let us know how many in each classification will be full time (40 hours per week) and part time.
>
> (3) Provide a list of those employees who are currently working in the bargaining unit who have been asked to work in the new store. We want the names of those employees and the dates that they were asked to work in the store.
>
> (4) Please provide a list of all current employees who have indicated their willingness to work in the store or have agreed to work in the store as of the date of this request and as of the date of your reply. Provide the classifications they will be working in and the wage rates promised them.
>
> (5) Please provide a copy of any handbook that [Respondent] intend[s] to apply to the employees in the store.

(6) Please provide a statement of the ranges of rates to be paid to each classification of employee in the store.

(7) Please provide a copy of any benefit plans to be applicable to employees in the store.

(8) When will employees begin actually working in the store? What is the projected opening date?

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NOB HILL GENERAL STORES, INC., Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent, ——————— UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 5, Intervenor.	No. 19-72429 NLRB No. 20-CA-209431 National Labor Relations Board ORDER (Filed Feb. 4, 2021)
NATIONAL LABOR RELATIONS BOARD, Petitioner, v. NOB HILL GENERAL STORES, INC., Respondent, ——————— UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 5, Intervenor.	No. 19-72523 NLRB No. 20-CA-209431 National Labor Relations Board

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

The panel has voted to deny petitioner's petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

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February 18, 2021

Filed Via CM/ECF

Ms. Molly C. Dwyer
Clerk of Court
United States Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

Re: *Nob Hill General Stores, Inc. v. NLRB*
Docket Nos. 19-72429 & 19-72523

Dear Ms. Dwyer:

Pursuant to Circuit Rule 36.4, Petitioner Nob Hill General Stores, Inc. requests that the Court re-designate the Memorandum Decision it issued on December 24, 2020 in the above-referenced cases as an "Opinion" of the Court and certify it for publication.

This request is made on the grounds the Memorandum clearly meets the "criteria" for publication established by Circuit Rule 36-2.

First, the Memorandum meets the criteria under Circuit Rule 36.2 (a) in that it "establishes, alters, modifies or clarifies a rule of federal law" because it, for the first time, provides for an exception or modification or

clarification to the uniformly accepted meaning of a contractual "notwithstanding" clause.

Second, the Memorandum meets the criteria under Circuit Rule 36.2 (d) in that it involves a "legal or factual issue of unique interest or substantial public importance" in that contractual "notwithstanding" clauses are ubiquitous and the Memorandum decision provides future litigants of such clauses a potential argument that does not presently exist in established precedent.

Third, the Memorandum meets the criteria under Circuit Rule 36.2 (e) in that the Memorandum disposes of an underlying NLRB decision that is published and clarifies the Board's ruling.

On any of these grounds, or all of them, the Memorandum meets this Circuit's criteria for publication as an Opinion of the Court.

Very truly yours,

s/ Henry F. Telfeian
Henry F. Telfeian

Attorney for Petitioner
Nob Hill General Store, Inc.