

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

H & R INDUSTRIAL SERVICES, INC.

and

Case 4-CA-34848

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA,
METROPOLITAN REGIONAL COUNCIL
OF CARPENTERS, SOUTHEASTERN
PENNSYLVANIA, STATE OF DELAWARE
AND EASTERN SHORE OF MARYLAND

Jennifer Roddy Spector, Esq., for the General Counsel
Stephen J. Holroyd, Esq., for the Charging Party
David R. Keene, II, Esq., for the Respondent

DECISION

STATEMENT OF THE CASE

Jane Vandeventer, Administrative Law Judge. This case was tried on March 6, 2007, in Philadelphia, Pennsylvania. The complaint alleges Respondent violated Section 8(a)(5) of the Act by failing and refusing to provide relevant and necessary information to the Charging Party Union. The Respondent filed an answer denying the essential allegations in the complaint. After the conclusion of the hearing, the parties filed briefs which I have read.

At the time of the trial herein, this case had been consolidated for trial with another matter on a similar separate complaint allegation, involving a different employer, Heartland Development Co., Case 4-CA-34860. Shortly after the record herein opened, the General Counsel moved to sever Case 4-CA-34860 from the instant case. No party objected, and I granted the General Counsel's motion to sever Case 4-CA-34860, and remanded that case to the Regional Director for Region 4. This decision applies solely to the Respondent in the case caption above.

Based on the testimony of the witnesses, including particularly my observation of their demeanor while testifying, the documentary evidence, and the entire record, I make the following

FINDINGS OF FACT

I. JURISDICTION

5 Respondent is a corporation with an office and place of business in Allentown, Pennsylvania, where it is engaged in the construction industry as a plumbing, heating, and air conditioning contractor. During a representative one-year period, Respondent purchased and received at its Allentown facility goods valued in excess of \$50,000
10 directly from points outside the Commonwealth of Pennsylvania. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

15 The Charging Party (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. The Facts

20 There are very few disputed facts in this case. It is undisputed that Respondent is signatory to a memorandum agreement binding it to the Union's area collective bargaining agreement with the Philadelphia and Vicinity Millwright Contractors
25 Association. The current collective bargaining agreement, herein called the Agreement, is effective by its terms from July 1, 2003, through June 30, 2008. On page 3 of the Agreement, Article 2(e) provides as follows:

30 To protect and preserve for the employees covered by this Agreement, all work they have performed and all work covered by this Agreement, and to prevent any device or subterfuge to avoid the protection and preservation of such work, it is agreed as follows:

35 If the contractor performs on-site construction work of the type covered by this Agreement under its own name, or the name of another as a corporation, company, partnership, or other business entity including a joint venture, where the contractor through its officers, directors, partners
40 or owners exercises directly or indirectly management control, the terms of this Agreement shall be applicable to all such work.

45 It is also undisputed that Respondent received from the Union a letter dated July 26, 2006, requesting certain information about its operations and the operations of a similarly named company, H & R Maintenance (herein called Maintenance), and that Respondent did not provide the requested information to the Union.

50 The record evidence shows that in May 2006, an auditor for the health and welfare trust fund which the Union administers jointly with employers under the Agreement was at Respondent's facility performing a routine audit of employees' hours and trust fund contributions. The auditor, Brandon Galloway, saw a truck at the facility bearing the name "H & R Maintenance." When he inquired about Maintenance, he was

told that it performed duct work, i.e., work which was not covered under the Agreement. Nevertheless, Galloway informed Bob Pierce, who is an assistant to the Union's executive secretary, of the facts he observed at Respondent's facility.

5 Within a month or so, an organizer and representative of the Union named Timothy Eubank was at a jobsite in Allentown called the Kraft-Nabisco jobsite. He observed trucks at the jobsite which were marked with "H & R", but Eubank was unable to see whether the trucks were marked with Respondent's name or the name of
10 Maintenance. Eubank was told that employees on the jobsite who were performing millwright work covered under the Agreement had stated to other subcontractors that they worked for "H & R." Eubank reported these experiences to Bob Pierce and Michael Tapken, another assistant to the Union's executive secretary. Tapken then investigated Maintenance by searching the Pennsylvania corporation records as well as
15 other internet sites to see if he could find the address and the officers of Maintenance. Tapken found that both Respondent and Maintenance shared the same address and were owned by the same individual, Robert Durnan.

20 Tapken telephoned Respondent's office and spoke with admitted supervisor Michael O'Keefe. Tapken reminded O'Keefe that Respondent is signatory to the Agreement, and was therefore obligated to have a surety bond guaranteeing benefit payments for the Kraft-Nabisco jobsite. O'Keefe stated that Maintenance was a
25 "different company." Tapken stated that Maintenance was obligated to abide by the contract because of its relationship with Respondent. O'Keefe then requested owner Robert Durnan to join the telephone call. Both O'Keefe and Durnan stated that Maintenance was a separate company, and that it had nothing to do with Respondent.

30 Following this phone call, Tapken informed Bob Pierce of all the facts he had gathered as well as what happened when he telephoned Respondent. Pierce testified that he believed the facts justified further investigation to see if in fact Maintenance was the same employer or an alter ego of Respondent, and therefore subject to the Agreement in the same manner. On July 26, 2006, Pierce sent Respondent a letter
35 requesting information about Maintenance and its relationship to Respondent. There is no dispute that the letter was received by Respondent. The letter contained 79 requests for such information as is commonly used to provide a basis for establishing single employer or alter ego status. The requests included ownership, officers and agents of both companies, type of business, geographic area, addresses, location of
40 accounts and other corporate records, service providers, financial and contractual interrelationships between the two companies, tools and equipment ownership and/or arrangements, customers, work performed, employees, and labor relations of both companies. As a preface to the requests for information, the letter also stated the
45 following reasons for the requests:

We have recently learned and have reason to believe that your company is affiliated or otherwise related to H & R Maintenance, a firm which does not have a collective bargaining relationship with our labor organization.

As I know you can well appreciate, the recent influx of non-union and double-breasted companies may have a significant impact on our efforts

to administer and police compliance with our existing collective bargaining agreement. To enable us to satisfy our obligation to service and protect the employment rights of our members, it is necessary that this organization request that you promptly answer the following questions:

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After receiving the information request, Respondent did request a copy of the Agreement, which was provided by the Union. It is undisputed that no response was received by the Union to its information request, and no information was provided by Respondent.

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B. Positions of the Parties

General Counsel argues Respondent violated Section 8(a)(5) of the Act by failing to provide the requested information to the Union. The Agreement clearly provides that signatory employers who act through double-breasted or other disguised entities to perform work covered under the Agreement will still be obligated to apply the terms of the Agreement to such operations. The Union sought information which was relevant and necessary to the enforcement of this provision of the Agreement when it requested information concerning the relationship between Respondent and Maintenance. General Counsel contends that the information which came to its attention in May through July of 2006 reasonably led it to believe that Maintenance was performing work covered under the Agreement, and that it was related to Respondent. General Counsel further contends that the Union sufficiently supported the reasons for its information request in its letter to Respondent, and that Respondent therefore had an obligation to provide the information.

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Respondent argues that the Union failed to provide a sufficient reason for its information request, that the information request was overbroad and burdensome, that the request was a standardized one not tailored to Respondent's specific situation, that the Union had some of the information already, and finally that the Union could have obtained the information from other sources. Respondent argues that it has no obligation to provide the Union with the requested information.

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C. Discussion and Analysis

It is long-established law that the duty to bargain in good faith embodied in Section 8(a)(5) of the Act includes the obligation of employers to provide their employees' collective bargaining representatives with requested information which is relevant and necessary to the representative's duty to bargain on behalf of employees. **NLRB v. Acme Industrial Co.**, 385 U.S. 432 (1967). Such information may be needed for bargaining, for administering and policing collective bargaining agreements, for communicating with bargaining unit members, or for preserving unit employees' work, among other reasons. The requested information at issue in this case falls into the categories of policing and administering the Agreement and of preserving unit employees' work. Information requests concerning possible double-breasting or alter ego arrangements by signatory employers have been dealt with by the Board on many occasions, and have been found to be relevant to a union's duty to represent employees. Since much of the information relevant to the structure of the employer

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does not directly relate to bargaining unit employees, this information falls largely into the category of information about non-bargaining unit issues, and is therefore subject to the Board's requirement that there be a justification for the information request. See, e.g., **Bentley-Jost Electric Corp.**, 283 NLRB 564 (1987).

The General Counsel established that the Union's information about Maintenance working out of the same facility as Respondent, its information about Maintenance performing millwright work on the Kraft-Nabisco jobsite, and its discovery of the common addresses and common ownership of the two companies clearly gave rise to its reasonable belief that there might be an alter ego or double-breasting relationship between the two companies. This evidence was undisputed. I find that the Union had a reasonable belief that Respondent and Maintenance were closely related companies.

There is no dispute that the Union requested information concerning the two companies' relationship by letter on July 26, 2006, and that Respondent refused to provide any information in response. Several of the questions in the letter referred to Respondent's employees, their work and their skills. These questions are presumptively relevant and require no justification, since they relate to bargaining unit employees. They should have been answered in any event. As to those questions, there is no doubt that Respondent violated Section 8(a)(5) of the Act by refusing to provide information, and I so find.

A majority of the questions, however, relate to Respondent and Maintenance, and their interrelationship. Under Board law, these information requests require the Union to state a reasonable objective basis for believing that an alter ego relationship exists. **Shoppers Food Warehouse**, 315 NLRB 258, 259 (1994). Board law holds that "the requesting union need not inform the signatory employer of the factual basis for its requests, but need only indicate the reason for its request." **Corson and Gruman Co.**, 278 NLRB 329, 334 (1986), *enfd.* 811 F.2d 1504 (4th Cir. 1987). In its July 26, 2006, letter, the Union stated the reason for its request, its belief that Maintenance might be related to Respondent and its need to police the Agreement. In addition, the Union, by Michael Tapken, had informed Respondent by telephone that it took the position that the unit work being done by Maintenance at the Kraft-Nabisco jobsite was covered under the Agreement *because both companies were owned by the same person and operated out of the same facility*. Tapken thus provided Respondent with two facts upon which the Union's belief was based.

While under Board law, there is no need to spell out in the information request itself the factual basis for the belief, there is precedent in the Third Circuit which requires a union to "do more than state the reason" for its information request. The Third Circuit's standard requires a union tell an employer "of *facts* tending to support" its request for non-unit information. **Hertz Corp. v. NLRB**, 105 F.3d 868, 874 (3d Cir. 1997). The Union's letter of July 26, 2006, clearly satisfies the Board's standard by stating its belief that Respondent may have a non-union alter ego or double-breasted company performing some of its work. In addition, the evidence as a whole, including Tapken's statement by telephone to Respondent's managers of two important facts supporting its belief – the shared facility and common ownership – demonstrates that

the Union also satisfied the Third Circuit's more demanding standard.¹

In any event, the facts underlying the Union's belief about the relationship between the two companies, as well as the reasons supporting its information request, were communicated to Respondent in great detail at the hearing herein on March 6, 2007. Whether the Respondent's duty to respond to the Union's information request runs from July 26, 2006, or from March 6, 2007, the remedy would be the same. Respondent would in either case be ordered to provide the requested information.

Respondent's additional contention that the information request was overbroad and burdensome cannot avail it. It is an employer's duty to raise this issue when it receives a request. The burden was on the employer to state to the Union that it considered the request burdensome, and *to bargain about arrangements* to satisfy the request. ***Martin Marietta***, 316 NLRB 868 (1995). Nor can Respondent escape its own duty to provide information by speculating or assuming that the Union has access to the information from other sources. See, e.g., ***King Soopers***, 344 NLRB No. 104 (2005), *enfd.* 476 F.3d 843 (10th Cir. 2007); ***Kroger Co.***, 226 NLRB 512, 513-14 (1976).

Thus, I find that the General Counsel has established that the Union had a valid reason for its request to Respondent for information which included information about non-unit issues, and furthermore, that General Counsel communicated both the reason and some factual bases for the request to Respondent. In view of Section 2(e) of the Agreement quoted above and the reasons and supporting facts advanced by the Union, I find that the requested information was both necessary and relevant to the Union's representation of employees. I further find that the Union communicated its belief, its reasons, and at least two supporting facts to Respondent in justification of its information request. It is undisputed, and I find, that Respondent provided no information in response to the request. I find that Respondent has proven no defense for its failure to provide the requested information.

In summary, I find that by failing and refusing to provide necessary and relevant information to the Union which was requested by letter on July 26, 2006, Respondent has violated its duty to bargain in good faith, and has violated Section 8(a)(5) of the Act.

CONCLUSIONS OF LAW

1. By failing and refusing to provide the Union, in writing, with the information requested in the Union's letter of July 26, 2006, Respondent has unlawfully refused to bargain with the Union and has violated Section 8(a)(5) and (1) of the Act.

2. The violation set forth above is an unfair labor practice affecting commerce within the meaning of the Act.

¹ Chairman Battista and Member Schaumber agree with the more demanding standard described. See, e.g., ***Contract Flooring Systems***, 344 NLRB No. 117 (2005).

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act. I shall recommend that Respondent be ordered to furnish the requested information to the Union, and to post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, H & R Industrial Services, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with United Brotherhood of Carpenters and Joiners of America, Metropolitan Regional Council of Carpenters, Southeastern Pennsylvania, State of Delaware and Eastern Shore of Maryland by failing and refusing to provide the Union with relevant and necessary information requested by the Union in its letter dated July 26, 2006.

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

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

(a) Forthwith furnish the Union with the information requested in its letter of July 26, 2006.

(b) On request, bargain collectively in good faith with the Union with regard to wages, hours, and other terms and conditions of employment of employees in the appropriate unit specified in the collective-bargaining agreement between Respondent and the Union which agreement is in effect through June 30, 2008.

(c) Within 14 days after service by the Region, post at its Allentown, Pennsylvania, location copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 4, 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

² 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.

5 notices to employees are customarily posted. Reasonable steps shall be taken by the
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, 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 July 26, 2006.

10 (d) 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 the Respondent has taken to comply.

15 Dated, Washington, D.C., June 1, 2007.

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Jane Vandeventer
Administrative Law Judge

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 refuse to bargain collectively with United Brotherhood of Carpenters and Joiners of America, Metropolitan Regional Council of Carpenters, Southeastern Pennsylvania, State of Delaware and Eastern Shore of Maryland by refusing to furnish the Union with the information requested in the Union's letter of July 26, 2006.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish the Union with the information requested in its letter to us of July 26, 2006.

H & R INDUSTRIAL SERVICES, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

615 Chestnut Street, One Independence Mall, 7th Floor

Philadelphia, Pennsylvania 19106-4404

Hours: 8:30 a.m. to 5 p.m.

215-597-7601.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 215-597-7643.