National Nurses Organizing Committee-Texas/National Nurses United (Bay Area Healthcare Group, Ltd. d/b/a Corpus Christi Medical Center, an indirect subsidiary of HCA Holdings, Inc.) *and* Esther Marissa Zamora. Case 16–CB–225123

August 30, 2022

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS RING AND WILCOX

On June 24, 2020, Administrative Law Judge Keltner W. Locke issued the attached decision. Former General Counsel Peter Robb filed exceptions and a supporting brief, an answering brief to the Respondent's cross-exceptions, and a reply brief. The Charging Party filed exceptions and a supporting brief and a combined answering brief to the Respondent's cross-exceptions and reply brief. The Respondent filed cross-exceptions and a supporting brief, answering briefs to the General Counsel's and Charging Party's exceptions briefs, and reply briefs to the General Counsel's and Charging Party's answering briefs. In addition, the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) filed an *amicus* brief[1] to which the General Counsel and Charging Party filed answering briefs.

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,[2] and conclusions for the following reasons and to adopt the recommended Order.

I. INTRODUCTION

The issues presented in this case center on an employee's demand to receive a copy of a purported "neutrality agreement" (as denominated by the Charging Party and the General Counsel) between the Respondent, National Nurses Organizing Committee-Texas (NNOC or Respondent), and HCA Holdings, Inc. (HCA), the holding company for Corpus Christi Medical Center (CCMC or Employer). As explained below, during a 2018 decertification effort, Esther Marissa Zamora (Zamora or Charging Party), a CCMC employee and member of a bargaining unit of nurses represented by NNOC, first requested a copy of the purported "neutrality agreement" from CCMC. After CCMC failed to provide Zamora with a copy of any agreement, she then made the same request of the Respondent NNOC. In its response, NNOC informed Zamora that there was no agreement that controlled how the Employer could deal with her as an employee in the bargaining unit other than the operative collective-bargaining agreement. The Respondent attached the collective-bargaining agreement to its response but did not provide any other documents or agreements.

Zamora subsequently filed a charge against the Respondent alleging, in relevant part, that it violated the Act by refusing to give her a copy of the "neutrality agreement." After an investigation, the Regional Director dismissed Zamora's charge. On internal appeal within the General Counsel's office, former General Counsel Robb found that the Respondent arguably violated Section 8(b)(1)(A) of the Act by, inter alia, refusing to provide the Charging Party a copy of its "neutrality agreement" with the Employer, and directed the Region to settle the allegations or issue a complaint. The Regional Director subsequently issued a complaint alleging that the Respondent violated Section 8(b)(1)(A) of the National Labor Relations Act by failing to provide the Charging Party with copy of a "neutrality agreement" between NNOC and HCA. The complaint was later amended to additionally allege that the Respondent's response to the Charging Party's request for the "neutrality agreement" was arbitrary or in bad faith, also in violation of the Act.

As found by the judge, and discussed more fully below, this case reflects an almost complete failure of proof on the part of the General Counsel. With respect to the first allegation, the judge found that the General Counsel did not offer any credible evidence that a "neutrality agreement" between NNOC and HCA related to, governed, or affected unit employees' terms and conditions of employment. The judge therefore concluded that the "neutrality agreement" did not relate to NNOC's role as unit employees' exclusive representative and, accordingly, NNOC did not have any duty to provide it to Zamora. He dismissed the second allegation for essentially the same reasons, observing that NNOC's representative accurately told Zamora that the collective-bargaining agreement was the only agreement affecting how CCMC

[1] On December 21, 2020, the Board granted the AFL–CIO's motion for permission to file an amicus brief and accepted its brief, which was attached to the motion.

[2] The General Counsel and Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

could "deal with" her as a unit employee. We agree with the judge, for the reasons discussed below, that the General Counsel failed to prove that NNOC breached its duty of fair representation and violated Section 8(b)(1)(A).

II. FACTS

NNOC has represented a bargaining unit of nurses working at the Employer's facility in Corpus Christi, Texas since about 2010. Zamora is a registered nurse who works in the bargaining unit represented by NNOC, but she is not a member of NNOC. In 2018, Zamora tried to persuade other employees to support her efforts to decertify NNOC.

The Employer allows employees to use a conference room to conduct meetings, sometimes called "in-services," which other employees can attend. Zamora requested and received permission to hold meetings to discuss the Respondent. To publicize such meetings, she prepared a flyer titled "Making A Critical Decision, Evaluating Pros and Cons, What Has Your Union Done For You?" The flyer included information regarding when and where the meetings would be held.

At the facility, the Employer maintains two types of bulletin boards – some protected behind locked glass doors and some open. The Employer has protected bulletin boards for its own notices. Under its collective-bargaining agreement with the Respondent, it also provides both protected and open bulletin boards for "the posting of Union notices" which are "limited to appropriate Union business," as provided for by Article 4, Section 3 of the collective-bargaining agreement. There are also open bulletin boards, available to employees who wish to post notices. Only NNOC agents and Employer managerial personnel have access to protected bulletin boards and there is no evidence than anyone other than NNOC agents and Employer managerial personnel have posted anything on their respective protected bulletin boards.

Zamora posted her flyers on the open bulletin boards, on break room walls, and on the outside of protected bulletin boards. However, someone later removed the flyers. On June 20, 2018,[3] Zamora sent an email to the Employer's vice president of human resources, Vince Goodwine, and to the Employer's liaison with NNOC, Michael Lamond, stating, among other things, that she wished "to file a formal complaint against the NNOC union organizers for removing my in-service flyer." Zamora concluded by saying, "Mike, please follow up with the appropriate individuals to be respectful and leave our educational in-service flyers alone. I promise you, they will not occupy any space or area on their bulletin boards but rather on the walls." Later that day, Goodwine responded, with Lamond copied on the response, stating that "[a]ll employees have the same privilege in use of our employee information bulletin boards" and that he would "defer to Michael to resolve with the NNOC."

On June 28, Zamora called Lamond and described the removal of her flyers and requested permission to use the Employer's protected bulletin boards. (The judge did not credit Zamora's testimony regarding the substance of this conversation and Lamond did not testify at the hearing.) On July 3, Zamora emailed Lamond, copying Goodwine and two others, stating:

> On Thursday, June 28th, I spoke to you concerning my request for the protected bulletin board and you said I was denied because it pertained to opposition to the Union. I've included Mr. Goodwine's response below which states all employees have the same privilege in use of informational bulletin boards. Are you both telling me that ALL employees would be denied use of the protected bulletin boards. Because as I see it, the employees that are pro-union are getting all the privileges and those of us anti-union are being denied the same privileges. I am simply asking for the same privileges my pro-union counterparts have established. This is very unfair and biased on my employers part and I am requesting you and those you report to review our policies to establish fairness across the board to ALL employees. I would greatly appreciate your immediate response as my team's window is extremely limited.

On July 8, Zamora sent another email to Lamond, copying Goodwine and others, stating:

> I have been told on numerous occasions from you, Mr. Goodwine and several others that I can not have a protected bulletin board because it would be "facilitating" anti-union support. By not providing me with the same privileges you are thereby facilitating pro-union support. I would very much like to see this language in writing. I am formally requesting a copy of the Neutrality Agreement between HCA and NNOC at your earliest convenience. I will gladly make a trip to your office to retrieve or if you like you can email it to me. Mr. Goodwine informed me that it is an HCA policy. I cannot find this so-called policy. Can you direct me to that as well, please?

The Employer did not provide a copy of any "neutrality agreement."

On July 11, Zamora wrote a letter to the Respondent, which read:

> My name is Esther M. Zamora. I am an RN employed at Corpus Christi Medical Center-Doctor's Regional Hospital in Corpus Christi, Texas and am currently represented by the National Nurse's Organizing Commit-

[3] All dates are in 2018 unless otherwise noted.

> tee. I am formally requesting a copy of the HCA/NNOC Neutrality Agreement that brought your union into our facility. I understand that the first stage has expired, but that my employment remains governed by the second, post-organizing stage of this agreement. I understand that aspects of this current agreement control how my employer can deal with me, and vice versa. Since my working life at Corpus Christi Medical Center-Doctor's Regional Hospital is being affected by the neutrality agreement's current terms and conditions, I have a right to a copy of this Agreement and you have a fiduciary duty to provide it to me. Please send the agreement to me as soon as possible, and no later than 14 days from now. If you refuse to send it, please explain your refusal. I thank you kindly for your expedited services."

On July 25, NNOC Labor Representative Bradley Von Waus replied to Zamora's letter with a letter which stated, in relevant part, that there was "no agreement between HCA and NNOC that controls how your employer, Corpus Christi Medical Center-Doctor's Regional Hospital can deal with you as a [sic] employee in the NNOC bargaining unit, other than the September 21, 2015 – June 30, 2018 collective-bargaining agreement between NNOC/Texas and Corpus Christi Medical Center." By its terms, the collective-bargaining agreement "constitute[s] the entire agreement between the parties." Van Waus enclosed a copy of the collective-bargaining agreement with his letter.

III. PROCEDURAL HISTORY

Zamora filed unfair labor practice charges related to these events, alleging, as relevant here, that NNOC refused to provide her with a copy of the requested "neutrality agreement."[4] As noted above, the unfair labor practice charge against NNOC was initially dismissed by the Regional Director,[5] before being reinstated as the result of an appeal to former General Counsel Robb.[6] On October 31, 2019, the Regional Director, acting pursuant to authority delegated by the Board's General Counsel, issued a complaint and notice of hearing, alleging that NNOC violated Section 8(b)(1)(A) of the Act by refusing to provide Zamora with a copy of the "neutrality agreement."[7] At the hearing, the General Counsel moved to amend the complaint and the judge granted the motion. As amended, the complaint alleges that NNOC breached its duty of fair representation and violated the Act by refusing to provide

[4] Zamora's charge against NNOC additionally alleged that NNOC violated Sec. 8(b)(1)(A) of the Act by (1) having NNOC agents knowingly and purposefully confiscate or rip down Zamora's flyers regarding union issues; (2) having bulletin boards in the Employer's facility that facilitate viewpoint discrimination based upon support or non-support for NNOC, while Zamora was not allowed to use the same bulletin boards or provided with similar access to secure bulletin boards; (3) maintaining a neutrality agreement with the Employer that controls Zamora's and other employees' terms and conditions of employment and limits how the Employer can deal with her and other employees; and (4) accepting unlawful support and assistance from the Employer. The General Counsel, however, did not proceed to file a complaint making such allegations, and they are not before the Board now.

Zamora also filed a charge against the Employer, Case 16–CA–225103, alleging that the Employer violated Sec. 8(a)(3), (2), and (1) of the Act by (1) discriminatorily denying her access to a secure bulletin board in the facility to prevent the confiscation and destruction of her flyers; (2) giving NNOC bulletin boards in the facility that facilitate viewpoint discrimination based on support or non-support for NNOC while not allowing Zamora to use the same bulletin boards or providing similar access to secure bulletin boards; (3) maintaining a neutrality agreement with NNOC that controls Zamora's and other employees' terms and conditions of employment and limits how the Employer can deal with Zamora and other employees; and (4) providing NNOC with unlawful support and assistance. After an investigation, the Regional Director dismissed Zamora's charge against the employer and Zamora's appeal of that dismissal was denied by former General Counsel Robb. *Corpus Christi Medical Center and HCA Holdings, Inc.*, 16–CA–225103, letter dated September 17, 2019. Accordingly, no allegations against the Employer are before the Board.

[5] *National Nurses Organizing Committee and NNOC-Texas/NNU (Corpus Christi Medical Center and HCA Holdings, Inc.)*, 16–CB–225123, letter dated December 28, 2018.

[6] *National Nurses Organizing Committee and NNOC-Texas/NNU (Corpus Christi Medical Center and HCA Holdings, Inc.)*, 16–CB–225123, letter dated September 13, 2019, sustaining the appeal in part, and concluding, as relevant here, "that the Union arguably violated Sec[.] 8(b)(1)(A) of the National Labor Relations Act . . . . by refusing to provide her a copy of its purported neutrality agreement with the Employer." Only this aspect of Zamora's allegations is at issue in this case.

The approach taken by former General Counsel Robb reflects a change from the position taken by his predecessors in similar cases. See NLRB General Counsel Advice Memorandum, *Rescare, Inc.*, Case 11–CA–21422, 2007 WL 7567786 (Nov. 30, 2007).

In this case, after the Regional Director initially dismissed the charge, former General Counsel Robb reversed course, issuing a complaint consistent with his policy views. See generally General Counsel Memorandum 20-13, *Guidance Memorandum on Employer Assistance in Union Organizing* (Sept. 4, 2020), 2020 WL 5705909 (N.L.R.B.G.C.).

Former Acting General Counsel Ohr, in turn, took a different policy view, see General Counsel Memorandum 21-02, *Rescission of Certain General Counsel Memoranda* (Feb. 1, 2021), 2021 WL 367842 (N.L.R.B.G.C.), and promptly sought dismissal of the complaint in this case, arguing that "further prosecution of the [c]omplaint undermines current Board law and is not in the public interest." Motion of the Acting General Counsel to Remand the Complaint at 1 (Feb. 23, 2021). The Board rejected former Acting General Counsel Ohr's request, over a dissent from Chairman McFerran. *National Nurses Organizing Committee-Texas*, 370 NLRB No. 128 (2021). The Board has not been asked to reconsider that decision.

[7] The Charging Party's allegation that NNOC violated Sec. 8(b)(1)(A) of the Act by confiscating or removing her union-related flyers, which was also sustained on appeal to former General Counsel Robb, was settled.

Zamora with a copy of the "neutrality agreement" and also that NNOC's response to Zamora's request was arbitrary or in bad faith.[8]

After the hearing, the administrative law judge, applying existing Board law, recommended dismissal of the complaint. The judge found that a "neutrality agreement" between NNOC and HCA exists,[9] but because the General Counsel failed to offer any credible evidence that the requested agreement related to, governed, or affected unit employees' terms and conditions of employment, NNOC did not have any duty to provide it to Zamora. He likewise found that NNOC's representative accurately told Zamora that the collective-bargaining agreement was the only agreement affecting how CCMC could "deal with" her as a unit employee. Thus, the judge concluded that the response was not arbitrary or in bad faith. Both prior General Counsel Robb and the Charging Party filed exceptions, arguing that the Board should reverse the judge and find the violations as alleged.[10]

IV. DISCUSSION

The duty of fair representation was first recognized by courts under the Railway Labor Act (RLA), implying the duty from a union's statutory grant of exclusive bargaining rights under that statute. *Steele v. Louisville Nashville Railway Co.*, 323 U.S. 192 (1944). As the Board has recognized, "when Congress empowered unions under the RLA to bargain exclusively for all employees in a particular bargaining unit, and thereby subordinated individual interests to the unit as a whole, it imposed on unions a correlative duty, inseparable from the power of representation, to exercise that authority fairly." *California Saw & Knife*, 320 NLRB 224, 228 (1995), enfd. 133 F.3d 1012 (7th Cir. 1998). In *Miranda Fuel Co.*, 140 NLRB 181 (1962), enf. denied 326 F.2d 172 (2d Cir. 1963), the Board adopted and applied the judicially-developed duty of fair representation, under the National Labor Relations Act, holding for the first time that breaches of a union's duty of fair representation constitute unfair labor practices under Section 8(b)(1)(A) or Section 8(b)(2). In *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), the Supreme Court confirmed that these principles extended to unions under the Act. See also *United Steelworkers v. Rawson*, 495 U.S. 362, 373 (1990) ("The Union's duty of fair representation arises from the National Labor Relations Act itself"). The Supreme Court has established that "[a] breach of the duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). This standard "applies to all union activity" in its capacity as bargaining representative. *Air Line Pilots v. O'Neill*, 499 U.S. 65, 67 (1991).

A union's duty of fair representation is precisely coextensive with its status as employees' exclusive representative "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment" under Section 9(a) of the National Labor Relations Act. 29 U.S.C. § 159(a). Thus, a union's duty of fair representation may include the obligation to provide employees with requested information pertaining to matters affecting their terms of employment, a matter squarely within the union's exclusive representative authority. Employees generally are entitled to that information so that they can determine whether they have been fairly treated by the union with regard to their terms and conditions of employment. For example, where a union represents employees (as the result of a Board certification or voluntary recognition by the employer), and it reaches a collective-bargaining agreement with the employer that establishes terms and conditions of employment, the union is generally required to provide the agreement to an employee, when she requests it, to determine whether, in fact, the union has fairly represented her in administering the agreement. See, e.g., *Law Enforcement & Security Officers, Local 40B (South Jersey Detective Agency)*, 260 NLRB 419, 419–420 (1982) (union violated its duty of fair representation when it offered no reason at all for its refusal to provide the collective-bargaining agreement and health and welfare plan to an employee who wished to determine his entitlement to overtime pay under the agreement and eligibility for reimbursement of medical expenses).[11] Where a union has a duty of fair representa-

[8] In discussing the amended complaint, the judge stated that amended paragraph 8(b) read "[o]n or about July 25, 2018, Respondent, by its agent Bradley Van Waus, responded to the Charging Party's July 22, 3028 request in a manner that was arbitrary and/or in bad faith." Paragraph 8(b) of the amended complaint actually states the correct date of the Charging Party's request, July 11, 2018. We correct this inadvertent error, which does not affect the decision.

[9] The Respondent excepts to the judge's use of the term "neutrality agreement," but did not except to the judge's finding that HCA is party to *an* agreement with the Respondent or an affiliate of the Respondent that "does not affect the terms and conditions of employment of bargaining unit employees." R. Exh. Br. at 2. Thus, the term "requested agreement" will be used here.

[10] For reasons explained, no arguments by General Counsel Robb's successors in office (first Acting General Counsel Ohr and then General Counsel Abruzzo) are before the Board.

[11] The Board has similarly required unions to provide employees with other information related to their representative obligations: grievance forms related to an employees' grievance settlement, *Letter Carriers Branch 529*, supra, 319 NLRB at 882; job referral information in the operation of an exclusive hiring hall, *Boilermakers Local 197 (Northeastern State Boilermaker Employers)*, 318 NLRB 205, 205 (1995); copies of the union's health and welfare plan, *Law Enforcement & Security Officers Local 40B (South Jersey Detective Agency)*, supra,

tion to the requesting employee, it may lawfully decline to provide requested information provided that its reasons for doing so are not arbitrary, discriminatory, or in bad faith.[12]

Conversely, where a union is *not* the exclusive representative of employees, it owes them no duty of fair representation, and it is not required to provide them with requested information. See, e.g., *Carpenters Local 370 (Eastern Contractors Assn.)*, 332 NLRB 174, 174–175 (2000) ("no duty of fair representation attached to the Respondent's operation of its nonexclusive hiring hall" and it was not required to provide referral-related information to employee who used hall). "Without the exclusive bargaining representative status, the statutory justification for the imposition of a duty of fair representation does not exist." Id. at 174 (quoting *Teamsters Local 460 (Superior Asphalt)*, 300 NLRB 441, 442 (1990)). Similarly, a union has no duty to provide to employees information that does not pertain to matters affecting employment. See, e.g., *International Union of Operating Engineers, Local 12 (Nevada Contractors Association)*, 344 NLRB 1066, 1068–1069 (2005) (union only required to turn over hiring hall information that was relevant to ascertaining whether hiring hall dispatchers were treating employees fairly).

The Board's unanimous decision in *Operating Engineers Local 18 (Precision Pipeline)*, 362 NLRB 1438 (2015), is instructive on this point. In *Precision Pipeline*, two employees (one had filed a grievance challenging his termination for poor performance) asked the union that represented them to disclose "pre-job conference reports" generated after a meeting between the union and the employer, which were parties to a nationwide, multi-employer collective-bargaining agreement. Id. at 1439–1440. As described in the decision of the administrative law judge (which the Board adopted), the pre-job reports were "documents devoted to and containing information about the operational requirements of the specific job" to be conducted pursuant to the collective-bargaining agreement. Id. at 1444. The reports were a "guide for the local union and contractor to anticipate how many and what type of employees will need to be referred to the job," and they "contain[ed] a raft of information about anticipated equipment, labor costs, pipeline materials, and length of the project," as well as information such as "wage rates" and "benefit compensation" taken from the collective-bargaining agreement. Id. at 1444–1445. A report "place[d] on one sheet of paper a summary of the job, including terms and conditions of employment negotiated elsewhere, or in a few cases, permitted (through prior bargaining) to be within the employer's discretion." Id. at 1445. But there was "no evidence that the pre-job reports [were] the *source* of any rights for employees." Id. (emphasis in original).

On these facts, the Board held that the duty of fair representation did not require the respondent union to disclose the pre-job reports on demand. Id. at 1445–1448. "No party to th[e] case . . . ha[d] explained or [could] explain what the pre-job report [would] add to [the one employee's] consideration of the grievance," while the other employee sought the pre-job reports "purely on principle, believing that if it concern[ed] the job, he should be able to see it." Id. at 1445. Neither employee thus had shown "any legitimate need" for the requested reports. Id. at 1446. The Board distinguished the lead case holding that unions may be required to disclose a collective-bargaining agreement to requesting employees, *Law Enforcement & Security Officers,* supra. That decision did not establish a "'right' under the Act for employees to receive upon request any paper that might have a term or condition of employment on it—even if that document is not the negotiated source of the term and condition, even when the source of the agreement (the collective-bargaining agreement) is available to employees, and even when the union has sound reasons for not wanting to disclose the document." Id.

Here, NNOC was the exclusive representative of the unit employees, including the Charging Party, and it did provide her with the collective-bargaining agreement that controlled the terms and conditions of her employment. But this was not what the Charging Party sought. She

360 NLRB at 420; and a union steward's list of employee overtime hours used to monitor the employer's distribution of overtime work, *Letter Carriers Branch 47 (Postal Service)*, 330 NLRB 667, 667 (2000), enfd. mem. 254 F.3d 316 (D.C. Cir. 2000).

[12] Compare *Culinary Workers Local 226 (Host International, Inc.)*, 363 NLRB 318, 318 fn. 1 (2015) (finding that union reasonably rejected telephonic request for dates of employee's dues checkoff when the union's standard procedures required that such requests be made in writing); *Local 307 Postal Mail Handlers Union (Postal Service)*, 339 NLRB 93, 93–94 (2003) (union did not act arbitrarily in denying employee request for witness statements from settled grievance; employee did not proffer a legitimate need for the statements and union policy forbade the release of statements related to settled grievances*); Electrical Workers, Local 3 (White Plains)*, 331 NLRB 1498, 1500–1501 (2000) (finding that union had a legitimate reason for refusing to provide names instead of referral numbers on out-of-work list) with *Letter Carriers Branch 529*, 319 NLRB 879, 881–882 (1995) (union acted arbitrarily, in breach of its duty of fair representation, when it raised no reasoned explanation for refusing to provide employee copies of her grievance forms); *Letter Carriers Branch 47 (Postal Service)*, 330 NLRB 667, 668 (2000) (union acted arbitrarily and in violation of its duty of fair representation when it refused to provide employee with an "overtime desired list" and "did not give any legitimate reason the requested information should not be supplied"), enfd. mem. 254 F.3d 316 (D.C. Cir. 2000).

asked instead for what she called a "neutrality agreement" between NNOC and the Employer—an agreement presumably reached before the Respondent became the exclusive bargaining representative and that perhaps restricted the Employer's ability to oppose NNOC's efforts to become (or remain) employees' bargaining representative. The Charging Party ostensibly believed that the requested agreement somehow required the Employer to deny her access to a bulletin board reserved for NNOC under the collective-bargaining agreement. Thus, in prosecuting this case, the former General Counsel's contention was that NNOC arbitrarily refused to provide the requested agreement to the Charging Party.

As explained, the law is clear that the duty of fair representation applies when represented employees request information covering their terms and conditions of employment, such as a collective-bargaining agreement, to determine whether they are being fairly represented. If a collective-bargaining agreement required an employer to establish or maintain certain terms or conditions of employment in the name of "neutrality," its disclosure might indeed be required, depending on the circumstances. But a "neutrality" agreement between a union and an employer reached *before* employees have chosen the union to represent them is not a collective-bargaining agreement and does not govern their terms and conditions of employment. No duty of fair representation applied to the negotiation of the agreement because the union was not their statutory bargaining representative and, indeed, did not represent the employees, at the time it was negotiated.

Nor would the duty have applied with respect to the maintenance of such agreement after the union became the exclusive representative because only a future collective-bargaining agreement could actually establish terms and conditions of employment—and so provide a benchmark for employees to determine whether the union was fairly representing them in administering *that* agreement. Judicial authority supports this analysis.[13]

The reasoning of *Precision Pipeline*, supra, is also applicable here. There is no basis to presume that any document deemed a "neutrality" agreement establishes terms and conditions of employment—even if some such agreements might mention prospective terms and conditions of employment—in contrast to an actual collective-bargaining agreement, available to employees. Nor is an employee's desire to see such a "neutrality" agreement—either because it generally "concerns the job" or because she has some work-related dispute which she speculates might be illuminated by the agreement—the sort of legitimate need that implicates the duty of fair representation.

Of course, the record evidence in this case reveals virtually nothing about the requested agreement here, except that it appears to exist. The purported "neutrality agreement" at the center of this case is not in the record. It was never examined by the administrative law judge. It apparently was never seen by the General Counsel. There has been no proof—no documentary evidence, no credited witness testimony—that the requested agreement governed the Charging Party's terms and conditions of employment. What the record does contain is a position statement from the Employer's parent company, which recites that the parent company had entered into an agreement with the Respondent's parent organization, but states that the "agreement does not govern the terms and conditions of employment of bargaining unit employees" and that while the agreement "provides that neither [the Employer] nor [the parent company] shall encourage or support decertification," it "does not otherwise limit how they can deal with bargaining unit employees." No documentary evidence, and no credited witness testimony, contradicts this statement.[14]

Nor does the record evidence permit a reasonable inference that the requested agreement has any bearing on any term and condition of employment of the Charging Party or her fellow employees, much less that it bears on her access to the union bulletin board—the issue that

[13] See *Simo v. Union of Needletrades, Southwest District Council*, 322 F.3d 602, 615 (9th Cir. 2003). The issue in *Simo* was whether a union breached its duty of fair representation when it refused to provide employees with a collective-bargaining agreement between the union and a *different* employer. The employees argued that the "duty of fair representation requires a union to give its members access to any documents necessary for the members to assess the union's conformance with its duty," that the union had relied on the requested agreement to pressure their employer to take work away from them and thus they were thus entitled to see it. Id. The Ninth Circuit rejected this argument. The court explained that "a union can breach the [duty of fair representation] only if it is in fact representing the workers; here, the union was not representing the . . . workers when it negotiated, agreed to, enforced, or administered any portion of the" requested collective-bargaining agreement. Id. at 615.

The dissent argues that "*Simo* did not involve the issue of whether the duty of fair representation applies to pre-recognition agreements between an employee's union and the employee's *own* employer," but the fact remains that here, just as in *Simo*, the applicable principle is that a union cannot breach a duty of fair representation to employees in negotiating an agreement when it does not represent the employees. As explained, the Ninth Circuit rejected the broad view of the duty of fair representation advanced by the *Simo* employees, which corresponds to the dissent's position.

[14] As the judge explained:

> The credited evidence does not establish that the [requested] agreement controls or even relates to any term or condition of employment. Both the Employer and the Respondent state that it does not, and there is no credible evidence to the contrary. The Charging Party's testimony, that she "felt" that the [requested] agreement must have some effect on working conditions, amounts to nothing more than speculation.

ostensibly triggered her request for the agreement. No credited testimony or documentary evidence supports the contention that the Employer relied on or referred to the requested agreement in connection with the Charging Party's access to the union bulletin board. To the contrary, the successive collective-bargaining agreements in the record include provisions specifically governing the Union's use of bulletin boards. These agreements also state that by their terms, they constitute the entire agreement between the parties, and "supersede[] all previous agreements … whether oral or written, unless expressly stated to the contrary herein." Jt. Exh. 5–6.

Thus, we agree with the judge's finding that the "credible and credited evidence falls well short of establishing that the [requested] agreement affected any term or condition of employment of bargaining unit employees." The Respondent, therefore, owed no duty of fair representation to the Charging Party with respect to the requested agreement. We likewise agree with the judge that Van Waus's response to the Charging Party's request for the agreement was not arbitrary or in bad faith. As the judge observed, Van Waus's letter did not mislead the Charging Party. It stated clearly that the collective-bargaining agreement was the sole agreement affecting how the Employer could deal with her as a bargaining unit employee. Moreover, Van Waus's response included a copy of the collective-bargaining agreement. Thus, we adopt the judge's conclusion that the Respondent also did not breach its duty of fair representation in violation of Section 8(b)(1)(A) of the Act in its response to the Charging Party's request.

V. RESPONSE TO THE GENERAL COUNSEL, CHARGING PARTY, AND DISSENT

As explained below, neither the Charging Party's arguments on exception, nor those offered by the former General Counsel or the dissent persuade us otherwise.[15] To begin, we find no basis for overruling the judge's credibility determinations, as noted above, supra, fn. 1. The judge provided a detailed explanation for why he did not credit the Charging Party's testimony and her speculation about the contents of the requested agreement.[16] We are likewise unconvinced by the General Counsel and Charging Party's argument that the judge erred by not reviewing the requested agreement in camera or requiring its production pursuant to subpoena. The judge was not obligated to do so under any controlling precedent.[17] Moreover, he also reasonably observed that there is no credited evidence supporting the General Counsel's claim that the requested agreement related to unit employees' terms and conditions of employment.[18] As the judge found, the General Counsel did not establish that the Charging Party had a non-speculative basis for believing that the requested agreement caused the Employer to deny her request for a protected bulletin board. Thus, there is no credible evidence of a connection between the requested information and employees' terms and conditions of employment.[19]

A.

The General Counsel asserts that so-called "neutrality" agreements generally are presumptively relevant to bar-

[15] We additionally agree with the judge, for the reasons he states, that the Respondent's amended answer effectively denied the complaint allegation as required by Sec. 102.20 of the Board's Rules and Regulations.

[16] In adopting the judge's credibility determinations, we do not rely on his statements about her possible "ulterior motive" for filing charges against the Respondent and CCMC; what she may have been using the charges as a "vehicle" for accomplishing; her Congressional testimony about neutrality agreements; or that she may have had an "ax to grind" about neutrality agreements in general.

[17] We likewise agree with the judge that the subject of the subpoenas is, in essence, the same information that Zamora was seeking from the Respondent and that the Charging Party's attempt to use a subpoena as a substitute for the Board Order sought by the complaint would be improper. Cf. *Electrical Energy Services, Inc.*, 288 NLRB 925, 931 (1988) (adopting judge's finding that a subpoena for documents allegedly withheld unlawfully "would undercut the statutory requirement for an unfair labor practice hearing where the ultimate issue to be decided is whether the General Counsel is entitled to the information in question"). Although they argue that *Electrical Energy Services* is distinguishable, the General Counsel and Charging Party cite no contrary precedent on point. Moreover, as explained below at fn. 19, while the requested agreement may be the best evidence of its contents, it is far from the *only* evidence that could be probative of whether it affects employees' terms and conditions of employment. Thus, we reject the General Counsel's argument that "[t]he Board should hold that in a request for information case, whether it be a case against an employer or a union, [*Electrical Energy Services, Inc.*] does not prohibit subpoena production of the at-issue document where the existence and substance of the document is highly relevant to a central, indeed dispositive issue, as in this case." GC Exh. Br. at 46.

[18] The Charging Party criticizes the judge for holding Zamora to "an impossible 'chicken and egg' or Catch-22 standard," arguing that the judge erred in finding Zamora's testimony to be speculative since having "never seen the secret agreement [Zamora] could not know its contents." Even without seeing the requested agreement, however, employees (or the General Counsel) can certainly introduce evidence (if any exists) permitting a reasonable inference that a "neutrality" agreement affects employees' terms and conditions of employment. In this case, for example, credible witness testimony or documentary evidence might have established that it was the requested agreement that prohibited the Employer from allowing the Charging Party to post anti-union material on the bulletin board and not, as shown, the disclosed collective-bargaining agreement. Here, however, Zamora's testimony was not credited. That in this case neither the General Counsel, nor the Charging Party introduced *any* credible evidence concerning the contents of the requested agreement does not mean that there was an insurmountable obstacle to doing so.

[19] For these reasons, we also find the General Counsel's reliance on *Mail Handlers Local 307 (Postal Service)*, 339 NLRB 93, 95 (2003), unpersuasive.

gaining unit employees "because they include information concerning the relationship between the employer and the union and may impact represented employees in a variety of ways and, if unlawful, may infringe upon their rights under the Act" even if they do *not* contain provisions concerning employees' terms and conditions of employment. Thus, according to the General Counsel, "absent some compelling reason to the contrary, a union should be required to provide, upon request by unit members, documents concerning their union's relationship to the employer, such as easily accessible neutrality agreements."[20]

We are not persuaded, nor does Board precedent support this view. In *Precision Pipeline*, supra, the Board firmly rejected an expansive interpretation of the duty of fair representation in settings like this one, including applying a presumption that a union's failure to disclose information was unlawful.[21] The Board observed that the General Counsel had "presume[d] a violation and the right of employees to receive the [requested information] and challenge[d] the union to prove why it [could not] honor this 'right,'" but explained that this "approach turn[ed] the law on its head," given the deferential review of its actions to which a union is entitled under long-established authority. 362 NLRB at 1446.

Precision Pipeline also illustrates an important aspect of the legal question that the General Counsel's argument obscures: unions have legitimate, and thus nonarbitrary reasons for keeping some agreements with employers confidential, and such reasons are obviously relevant in assessing whether the duty of fair representation requires the disclosure of information to employees. In *Precision Pipeline*, the union had a rational concern that routine disclosure of the pre-job conference reports would ultimately enable non-union contractors to access them (indeed, one of the requesting employees was also a contractor) and then use the information to underbid union contractors who were parties to the collective-bargaining agreement. Id. at 1444–1445. Refusing to disclose the reports, then, could not be arbitrary, all the more so given the failure of the General Counsel to demonstrate that the requesting employees had any legitimate need for the reports.

In this case, in an amicus brief filed with the Board, the AFL–CIO has persuasively pointed out that unions may well have legitimate confidentiality interests with respect to "neutrality" agreements:

> Unions rationally believe that employees will be better off if they have representation and that employees are more likely to achieve that objective if their employer does not oppose representation. The employer may condition such an agreement on confidentiality for many reasons, for example, to prevent its competitors from obtaining information concerning its labor relations strategy. A union certainly may act rationally by acceding to such a confidentiality demand and by subsequently honoring the confidentiality agreement.

AFL–CIO Amicus Brief at 13. As the *Precision Pipeline* Board explained, the union there was "not required to prove an enforceable confidentiality interest in order to win its case." Id. at 1446. What mattered, rather, was that the union's "concerns about disclosure of the pre-job reports [were] credible, rational, and nonarbitrary." Id. Here, the

[20] The Charging Party similarly argues that the Board should "rule broadly that employees (the principal) are presumptively entitled to see *any and every contract* their union (the agent) makes or has made with their employer." Charging Party Brief in Support of Exceptions at 13 (emphasis in original). According to the Charging Party, this is "because all such agreements necessarily affect employees' working lives, and the union has no countervailing reason for hiding them from the employees they purport to represent." Id. As explained herein, employees are not entitled to see any agreement that merely "affect[s their] . . . working lives." Moreover, as explained below, unions may very well have a countervailing reason for keeping confidential some agreements with employers.

[21] In *Precision Pipeline*, the General Counsel attempted to conflate a union's obligation to provide employees with information with an employer's Sec. 8(a)(5) obligation to provide information, and the General Counsel makes a similar argument here. As in *Precision Pipeline*, we reject this argument. Sec. 8(a)(5) imposes on an employer a statutory duty to furnish its employees' exclusive collective-bargaining representative with requested information which is relevant to and necessary for the performance of the union's representative function. See e.g., *Murray American Energy, Inc. and the Monongalia County Coal Co.*, 370 NLRB No. 55, slip op. at 4–5 (2020), citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967). The union's obligation, if any, to provide information to employees, by contrast, arises not from Sec. 8(a)(5) of the Act, but rather from the union's duty of fair representation. That duty requires that a union's conduct toward unit members, including with respect to providing requested information, not be arbitrary, discriminatory, or in bad faith. See, e.g., *Letter Carriers Branch 529*, supra, 319 NLRB at 881.

Our dissenting colleague similarly attempts to analogize a union's obligation to provide information to employees under the duty of fair representation with an employer's statutory duty under Sec. 8(a)(5), referencing the Board's recent decision in *Crozer-Chester Medical Center* and asserting that "[e]ven taking into account the different legal standards applicable to the two situations, it is difficult to see why a union is to be afforded such lenience in obtaining the information it wants, while so much more is required of an individual employee who, as here, legitimately wants to know what agreements her own union has made that affect her job." But, of course, "different legal standards" lead to different results. An employee seeking information from a union subject to the duty of fair representation is not in the same legal position as a union, serving as the exclusive bargaining representative of employees, which seeks information from an employer subject to the duty to bargain in good faith. As even our dissenting colleague concedes, the Board could not, consistent with the duty of fair representation, "impose on unions the same duty to provide information requested by unit employees that the Act imposes on employers when presented with a union's information request."

Board must take into account the fact that the Employer, who was party to the requested agreement, refused to disclose it when subpoenaed. And whatever the facts of this case, the Board—consistent with *Precision Pipeline* and with prior precedent[22]—cannot accept the former General Counsel's invitation to adopt a general standard for mandating disclosure of "neutrality" agreements that would entirely exclude consideration of a union's reasons for refusing to disclose such an agreement. Indeed, Supreme Court precedent precludes the adoption of such a standard.[23]

B.

Similarly, the dissent proposes a new rule to apply when employees demand to see an agreement that was reached between the union and their employer before the union became their representative. According to the dissent, "pre-recognition agreements" (the term the dissent uses instead of "neutrality agreements") "can and often do address terms and conditions of employment" and for the duty of fair representation "to have meaning, it must include a duty to disclose any pre-recognition agreement that affects unit employees' post-recognition terms and conditions of employment." But there is more. The dissent also proposes a rebuttable presumption that a requested "pre-recognition agreement" in fact "affected or currently affects [sic] the terms and conditions of employment of the bargaining unit to which the requesting employee belongs," and thus that "[i]f the General Counsel establishes certain elements . . . a violation of Section 8(b)(1)(A) would be presumptively established."

Remarkably, the dissent then argues that this rebuttable presumption should be applied retroactively to remand the case, placing the burden on the *Union* to "introduce evidence that the agreement never affected [sic] any term or conditions of employment of the unit employees," instead of finding that the General Counsel failed to establish this crucial fact. The irony of the situation—and the arbitrariness of the dissent's position—should be obvious: The dissent would rescue the former General Counsel from the failure to prove his case, require the current General Counsel to prosecute a case the former Acting General Counsel disavowed, and force the Union to defend itself all over again against an allegation that had no factual support in the prior record and no legal merit under the law as it stood when the Union refused to provide the requested agreement.

1.

Both aspects of the dissent's proposal are contrary to established law and, for the following reasons, we reject them.[24] First, careful attention must be paid to the precise wording for when the dissent would require a union to disclose a "pre-recognition" agreement (in the dissent's parlance): when the agreement "affected or currently affects" employees' terms and conditions of employment. That standard is irrationally broad and inconsistent with duty-of-fair-representation doctrine grounded in the Act. The dissent's rationale—with its invocation of *Dana*, a case upholding the legality of a voluntary-recognition "framework" agreement between a union and an employer[25]—makes clear that the dissent uses the

[22] See, e.g., *Mail Handlers Local 307 (Postal Service)*, 339 NLRB 93 (2003). There, the Board held that a union did not violate its duty of fair representation when it denied an employees' request for witness statements in connection with his grievance. The Board explained that it was required to consider several factors, including whether the "employee communicated a legitimate particular interest in the statements to the Respondent Union, and whether the Respondent Union has asserted any countervailing interest for its refusal to provide the statements." 339 NLRB at 93–94. The Board noted the employee had no particular, legitimate interest in the statements and that the union had a "countervailing confidentiality policy regarding witnesses' statements." Id. at 94.

[23] *Rawson*, supra, 495 U.S. at 372 ("This duty of fair representation is of major importance, but a breach occurs 'only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith'") (citing *Vaca v. Sipes*, supra at 190); *Huffman*, supra, 345 U.S. at 338 ("A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion").

[24] One preliminary point should not be overlooked. Even if the dissent's mistaken proposal were correct in every respect, there is no basis in Board law for requiring a union to disclose a "pre-recognition" agreement *in its entirety*, including those portions of the agreement that have no connection to employees' terms and conditions, post-recognition, but that instead simply regulate the conduct of the parties to the agreement (union and employer) during the pre-recognition period. Those provisions simply cannot implicate the union's duty of fair representation, insofar as they apply only to a period when the union is not the exclusive bargaining representative. Board law is clear that a union has no duty to provide employees with information that does not pertain to their employment. See, e.g., *Operating Engineers Local 12 (Nevada Contractors Assn.),* 344 NLRB 1066, 1069 (2005) (union required to turn over only such hiring hall information as was related to union's treatment of requesting employee).

[25] *Dana Corp*., 356 NLRB 256 (2010), petition for review denied sub nom. *Montague v. NLRB*, 698 F.3d 307 (6th Cir. 2012). A careful review of the Board's decision in *Dana* helps illustrate the fundamental errors of the dissent's argument here. The issue in *Dana* was whether the employer had rendered unlawful support to the union, in violation of Sec. 8(a)(2) of the Act, and whether the union restrained and coerced employees in violation of Sec. 8(b)(1)(A) by accepting that support, when the parties entered into and maintained an agreement "setting forth ground rules for additional union organizing, procedures for voluntary recognition upon proof of majority support, and substantive issues that collective bargaining would address if and when [the employer] recognized the [union] at an unorganized facility." Id. at 256. There was *no* allegation that the union had violated its duty of fair representation to employees. See id. at 258 fn. 6 (noting that while charging parties had advanced duty-of-fair-representation theory of

word "affect" in its sense of "influence."[26] Thus, a "pre-recognition" agreement that *influences* terms and conditions of employment would have to be disclosed, even though the agreement does not (and legally could not, per *Dana*) *establish* terms and conditions. The dissent's standard would require unions to disclose agreements that not only were reached before the union had a duty of fair representation to employees, but which also do not enable employees to determine whether the union has fairly represented them after becoming the exclusive representative.[27] Put another way, the disclosure of such agreements has no genuine connection to determining a union's compliance with the duty of fair representation.

Citing *Dana*, the dissent asserts that "[i]t . . . defies reason to suggest that employees could fairly evaluate the representation their union provided during those negotiations [for a collective-bargaining agreement] without being able to examine the terms of a pre-recognition agreement, negotiated by the same union, that affected the course of bargaining or the terms of the collective-bargaining agreement subsequently reached."[28] That assertion is wrong.

To be sure, the duty of fair representation would apply to the union's negotiation of the actual collective-bargaining agreement, following agreement to a pre-recognition framework like the one in *Dana* and the union's achieving representative status. But disclosure of the pre-recognition agreement would serve no purpose in determining whether the union had complied with its duty of fair representation in negotiating the collective-bargaining agreement. Rather, the results of the union's negotiation—the new agreement—would provide that benchmark. As the Supreme Court has explained in the seminal *O'Neill* decision, the "*final product of the bargaining process* may constitute evidence of a breach of duty," but "only if it can be fairly characterized as so far outside a 'wide range of reasonableness,' …. that it is wholly 'irrational' or 'arbitrary.'"[29] A "pre-recognition "agreement sheds no light on whether a subsequently-negotiated collective-bargaining agreement is "so far outside a wide range of reasonableness that it is wholly irrational or arbitrary" (in the Supreme Court's words).

Our dissenting colleague is mistaken then when he insists that the "majority opinion in *Dana* all but forecloses th[e] position" that employees do not need the "pre-recognition" agreement in order to evaluate whether the collective-bargaining agreement violates the duty of fair representation. The dissent cites language in *Dana* rejecting the argument that "framework" agreements coerce employees into supporting the union. The *Dana* Board observed that a "framework" agreement, rather, "tends to promote an informed choice by employees,"

liability, it had not been alleged by General Counsel, who controlled complaint).

The *Dana* Board found no violation of the Act. It observed that in contrast to an unlawful collective-bargaining agreement entered into by an employer and a union that lacked majority support among employees, the challenged agreement "did no more than create a framework for future collective bargaining," if the union attained majority status. Id. at 261. The Board explained that "set[ting] forth certain principles that would inform future bargaining on particular topics … is not enough to constitute exclusive recognition" and that "[n]othing in the [agreement] affected employees' existing terms and conditions of employment or obligated [the employer] to alter them." Id. at 262. Rather, "[a]ny potential effect on employees would have required substantial negotiations." Id; see also id. at 263 (observing that agreement "had no immediate effect on employees' terms and conditions of employment, and even its potential future effect was both limited and contingent on substantial future negotiations").

What *Dana* shows is that a "pre-recognition" agreement like the one at issue there is fundamentally distinct from a collective-bargaining agreement that unions must disclose under the duty of fair representation. The *Dana* framework agreement might have *influenced* any collective-bargaining agreement ultimately reached between the parties, but it did not itself *establish* terms and conditions of employment. (If it had, it would have violated Sec. 8(a)(2), as the *Dana* Board explained.) In *Dana*, the union never became the exclusive representative through the agreed-upon recognition process. But if the union had achieved that status, it could not have been compelled to disclose the challenged agreement (had it not already been made public), as explained above.

[26] "Effect," in contrast, means "to cause to come into being." A "pre-recognition" agreement does *not* "effect" terms and conditions of employment; only a collective-bargaining agreement does that. The dissent's word choice is no accident, although it threatens to be misleading.

[27] Notably, the dissent does not suggest, nor could it, that the duty of fair representation somehow applies to a union's negotiation of the "pre-recognition" agreement itself. As explained, unless and until the union becomes the exclusive bargaining representative of employees under Sec. 9(a) of the Act, it owes them no duty of fair representation, including during the period when it seeks the right to represent them. That a "pre-recognition" agreement between a union and an employer may be enforceable under Sec. 301 of the Labor-Management Relations Act, 29 U.S.C. §185, as our colleague points out, is immaterial to the issue presented here.

[28] In this case, there is no claim that the Union breached its duty of fair representation in negotiating the collective-bargaining agreement that applied to the Charging Party. As explained above, the former General Counsel's contention, rather, was that the Union arbitrarily refused to provide the requested agreement when requested by the Charging Party. The Charging Party ostensibly believed that the requested agreement somehow required the Employer to deny her access to a bulletin board reserved for the Union under the collective-bargaining agreement.

[29] *O'Neill*, supra, 499 U.S. at 78 (emphasis added) (quoting *Huffman*, supra, 345 U.S. at 338). The *O'Neill* Court observed that with respect to the duty of fair representation (enforceable by the federal courts, as well as by the Board), "[a]ny substantive examination of a union's performance . . . must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities." 499 U.S. at 78. The Court likened a negotiating union to a legislature, subject only to very limited review, and explained that Congress did not "permit the court [or an agency like the Board] to substitute its own view of the proper bargain for that reached by the union." Id.

because they "presumably will reject the union if they conclude (or suspect) that it has agreed to a bad deal or that it is otherwise compromised by the agreement from representing them *effectively*."[30] This language—which addresses the pre-recognition period when employees will decide whether or not to support the union—does not hold that the duty of fair representation applies to the negotiation of a framework agreement or that disclosure of a "pre-recognition" agreement is compulsory because that agreement is relevant in determining whether the union has complied with the duty in negotiating a subsequent collective-bargaining agreement that actually establishes terms and conditions of employment. As mentioned above, *Dana* involved no duty-of-fair representation issues. The Board there referred to employees' assessment of whether the union would be able to represent them "effectively" —i.e., to negotiate improved working conditions – not whether it would represent them "fairly."[31] As the Supreme Court's decision in *O'Neill* demonstrates, the duty of fair representation does not require a union to represent employees "effectively" (however that might be judged), but only to represent them fairly, i.e., in a way that falls within "a wide range of reasonableness" and is not "wholly irrational or arbitrary." A "bad deal" (in *Dana*'s phrase) is not the same as an unlawful deal.

Our dissenting colleague is similarly off-base, in turn, when he invokes statutory policy to support his new duty-of-fair representation framework. First, the dissent argues that mandatory disclosure of a "pre-recognition" agreement is "necessary" to the policy of promoting employee free choice with respect to union representation. According to the dissent, "employees can hardly make an informed choice concerning whether to continue to be represented by a union" without access to the "pre-recognition" agreement. Nothing in judicial or Board precedent supports such a sweeping rationale or in any way links the duty of fair representation to the notion of "informed choice" in union representation. A union does not act arbitrarily or irrationally simply because it denies employees information that they claim is necessary to make an "informed choice" about *future* representation (as opposed to being necessary to determine whether the union has represented them fairly, as required by law). Tellingly, the dissent cites no supporting authority for its assertion. Moreover, the dissent's claim is incorrect even on its terms. It is the collective-bargaining agreement—the charter that establishes terms and conditions at work—that will necessarily inform an employee's choice as to continued representation, along with a union's administration and enforcement of that agreement. The "pre-recognition" agreement tells the employee nothing about the union's actual performance as the bargaining representative.

Even less tenable is the dissent's further claim that the "policy of employee free choice" requires disclosure of "pre-recognition" agreements because otherwise agreements that violate the Act (as described in *Dana*) "will inevitably escape detection." According to the dissent, in order to ensure that they have not violated the law by accepting an employer's recognition as exclusive bargaining representative without majority support, unions must disclose their "pre-recognition" agreements with employers. But the dissent cites no authority (there is none) for the proposition that the duty of fair representation is designed to enable employees to police unions' compliance with the Act across the board. Nor does the dissent's claim make any sense as a factual matter. When an employer unlawfully recognizes a union, the fact of recognition will be obvious to employees: the union will purport to represent them in the workplace to the exclusion of all others, and the employer will deal with the union in connection with terms and conditions of employment. Disclosure of the unlawful agreement might confirm this obvious fact, but it is hardly necessary to require the disclosure of all "pre-recognition" agreements in order to ferret out the unlawful ones. And, of course, the "pre-recognition" agreement itself does not suffice to establish a violation of the Act; rather, there must be proof that the union did not have majority support at the time that it was recognized.[32] Finally, the fact that the Board (as discussed in *Dana*) *has* discovered and remedied violations of the Act involving unlawful recognition, without ever before having imposed a disclosure

[30] 356 NLRB at 264 (emphasis added). Note that the asserted coercive effect on employees of the "framework" agreement in *Dana* depended on the disclosure of the agreement to employees during the pre-recognition period. A party could hardly argue both that "framework" agreements coerce employees and that they must be disclosed to employees.

[31] The *Dana* Board's choice of words was surely no accident. Here, too, the dissent treats language loosely to reach its desired result, as when it refers to "pre-recognition" agreements that "affect" terms and conditions of employment, even when they clearly do not *effect* them.

[32] Our dissenting colleague posits a situation where employees never learn that the union and the employer have unlawfully agreed to a "pre-recognition" agreement establishing terms and conditions of employment before the union has majority support, because the union *subsequently* achieves majority support. He cites no case illustrating such a situation. Of course, as explained, employees who are represented by a union will know as much, and they will be entitled, under the duty of fair representation, to see the collective-bargaining agreements that actually govern their terms and conditions of employment, regardless of when they were reached.

obligation on unions like that established today, refutes the dissent's point.[33]

2.

For all of these reasons, then, the standard advanced by the dissent is impermissible. But even if this standard could be defended as rational and consistent with the Act, another fundamental error in the dissent's proposed framework would remain: the adoption of a rebuttable presumption that a "pre-recognition" agreement "affected or currently affects the terms and conditions of employment of the bargaining unit to which the requesting employee belongs," and thus, if the General Counsel establishes certain elements, "a violation of Section 8(b)(1)(A) would be presumptively established." Neither of the two reasons offered by the dissent for the presumption is sufficient, separately or together, to establish a rational basis for it. Moreover, as explained above, the Board has squarely rejected the application of a presumption like this one in cases involving a union's disclosure obligations under the duty of fair representation. Nor, in any case, could the presumption be applied retroactively here to expose the Union to liability under the Act.

Our dissenting colleague begins by insisting that the presumption is necessary to the new duty of disclosure he proposes, asserting that this

> obligation . . . would be effectively nullified if employees had to prove that the agreement did or does affect their terms and conditions of employment in order to be entitled to a copy of it. *After all, employees cannot know what is in the agreement unless they see it.* [emphasis added]

The dissent's assertion is misplaced. As explained above, supra note 19, the General Counsel had every fair opportunity to investigate the Charging Party's unfair labor practice charge and to litigate the case, following his decision to issue a complaint. While the dissent expresses sympathy for "poor Ms. Zamora," the fact remains that the Charging Party's testimony was not credited and the General Counsel failed to introduce *any* evidence concerning the contents of the requested agreement. The dissent offers no sound rationale for rejecting the judge's factual findings, essentially arguing that the Union's refusal to disclose the requested agreement is evidence that it is the kind of agreement that must be disclosed. But the General Counsel's complete failure to substantiate the allegation that he chose to pursue in this case does not mean that there was an insurmountable obstacle to doing so and cannot serve as a predicate for an unprecedented expansion of the duty of fair representation.[34]

Our dissenting colleague fares no better in attempting to justify his proposed presumption as factually based. Because "[u]nions primarily exist for the purpose of 'dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work,'" the dissent asserts that it is "reasonable to assume that most pre-recognition agreements *will* affect employees' terms and conditions of employment" (emphasis in original). The dissent's conclusion—which uses the word "affect" in the sense of "influence"—does not follow from its premise.

Before a union lawfully can deal with an employer, it must first become the exclusive bargaining representative of employees. "Pre-recognition" agreements, by definition, address this preliminary stage, so there is no overriding reason to assume that they would routinely address terms and conditions of employment, as opposed to the representation process. Of course, such agreements do not (and cannot lawfully) *establish* terms and conditions of employment for employees when they are reached. Indeed, as *Dana* illustrates, a "framework" agreement reached before the union achieves representative status may raise difficult issues under the Act and so must be drafted with care. Thus, it stands to reason that in reaching agreements with employers to govern the representation process, unions might well *avoid* addressing terms and conditions of employment at all—even merely in reference to a framework for future collective bargaining—in order to minimize potential legal problems. In any case, our dissenting colleague cites no evidence in the record of this case and no Board experience developed through the adjudication of post-*Dana* cases as a basis for the new presumption. Our colleague's invocation of *Dana*, meanwhile, is at odds with the Board's holding in that case: namely, that the "framework" agreement there did not constitute exclusive recognition, despite addressing future terms and conditions of employment, if employees chose union representation. 356

[33] The dissent's proposal reflects a deep skepticism toward agreements between unions and employers that attempt to reduce conflict in the representation process—conflict that is notorious for disrupting American workplaces and for undermining the prospects of successful collective bargaining envisioned by the National Labor Relations Act. See, e.g., The Dunlop Commission on the Future of Worker-Management Relations, *Final Report* at 38 (1994), available at https://ecommons.cornell.edu/handle/1813/79039 ("Representation elections as currently constituted are highly conflictual for workers, unions, and firms. This means that many new collective bargaining relationships start off in an environment that is highly adversarial.").

[34] In fact, the administrative law judge here expressed concern that the Charging Party was "attempting to make this case a vehicle for obtaining a precedent establishing that a union has a duty to furnish employees, on request, a copy of an existing neutrality agreement when, in fact, the neutrality agreement had nothing at all to do with the Employer's decision denying [her] access to the protected bulletin boards." That concern was prescient.

NLRB at 262. The duty of fair representation, as explained, is premised on the union's exclusive representation of employees—and that status must be proven, not presumed, in order to establish a violation of the duty. There is a final, fatal problem with our dissenting colleague's presumption. Like other aspects of the dissent's proposal, it conflicts with precedent, again *Precision Pipeline*, supra.[35] There, in finding no violation of the duty of fair representation, the Board decisively rejected the argument that a union's failure to disclose requested information could be presumed unlawful, as explained above.[36]

For all the reasons we have explained, however, the dissent's approach is inconsistent with the basic principles that inform the duty of fair representation, as reflected in the decisions of the Supreme Court[37] and the Board, and it is specifically contrary to Board precedent, *Precision Pipeline*, that remains good law. The sparse record in this case, meanwhile, cannot serve as a proper predicate for the adoption of a new legal rule. Accordingly, we reject the dissent's proposal.

VI. CONCLUSION

Applying well-established duty-of-fair-representation principles and precedent to the credited evidence, we have no difficulty concluding that the former General Counsel has failed to prove a violation of the Act here. All employees have a right to fair representation from their unions, including non-members who seek to oust the union from the workplace, and the union's duty to fairly represent employees may require it to provide them information. However, we are not persuaded that the Board should adopt the novel approach advocated by the former General Counsel, the Charging Party, or the dissent, which would expand the duty of fair representation far beyond its permissible boundaries.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. August 30, 2022

Lauren McFerran, Chairman

Gwynne A. Wilcox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER RING, dissenting.

Poor Ms. Zamora. Back in 2018, she asked her union for a copy of an agreement it had entered into with her employer's corporate parent because she had reason to believe it affected the terms of her employment. Instead of the agreement, the union gave her the runaround. It refused to acknowledge that the agreement even existed, even though it clearly does. Instead, it responded with a circumlocutious reply, stating that there is "no agreement between HCA [the corporate parent] and NNOC [Zamora's union] that controls how your employer, Corpus Christi Medical Center-Doctor's Regional Hospital can deal with you as a [sic] employee in the NNOC bargaining unit, other than the September 21, 2015 – June 30, 2018 collective bargaining agreement between NNOC/Texas and Corpus Christi Medical Center."

My colleagues endorse this unhelpful response. They assert that Zamora was not entitled to see the agreement

[35] Our dissenting colleague attempts to distinguish *Precision Pipeline*, asserting that there, "record evidence affirmatively showed that the pre-job reports were not the source of any rights for employees" but that "[n]o parallel facts are present here." However, he also acknowledges that "there is at present no reliable evidence of the contents of the pre-recognition agreement Zamora seeks." Thus here, as there, no reliable evidence exists that the requested documents governed terms and conditions of employment. He also claims that *Precision Pipeline* is distinguishable because "there the union articulated a specific and substantial confidentiality justification," but here "HCA has, at best, advanced a bare claim" to confidentiality and the Union has said nothing. Thus, the dissent concludes that "[m]uch more was required in *Precision Pipeline* to establish a legitimate confidentiality justification, and the majority fails to justify their position that any less should be required here." Our dissenting colleague misses the mark. As explained above, unions may have legitimate, and thus nonarbitrary, reasons—such as confidentiality concerns—for refusing to disclose requested agreements to employees, and such reasons are relevant in assessing whether the duty of fair representation requires the disclosures of information to employees. Here, as explained above, the Respondent owed no duty of fair representation to the Charging Party with respect to the requested agreement, which is sufficient, separate and apart from any confidentiality interest, to justify the Respondent's refusal to disclose the document.

[36] The dissent only compounds this error by arguing that "the proper course would be to remand the case to the judge to provide the Respondent with an opportunity to rebut that presumption, if it can." This, too, turns the law on its end. The Board has held that it will not retroactively apply a new rule with respect to the duty of fair representation when a union could reasonably have believed that its actions were lawful at the time that it took them. *Machinists Local 2777 (L-3 Communications)*, 355 NLRB 1062, 1069 (2010). This is clearly such a case, as demonstrated by the decision of the administrative law judge recommending dismissal of the complaint.

[37] Those decisions include, as we have already explained, *O'Neill,* supra, which are dissenting colleague cites not for its actual holding, but for its broad comparison of the duty of fair representation to other legal duties.

because she did not prove what was in it. She obviously could not prove what was in the agreement because she had not seen it, which was the reason for her request in the first place. But even if Ms. Zamora had proven to the majority's satisfaction that the agreement did affect terms and conditions of employment, they apparently still would hold that she cannot see it. They say the agreement was negotiated before the Respondent became her bargaining representative, and it owed her nothing at that time.

But a union does have a duty of fair representation to the employees it represents. For that duty to have meaning, it must include a duty to disclose any pre-recognition agreement that affects unit employees' post-recognition terms and conditions of employment.[1] Contrary to the majority, pre-recognition agreements can and often do address terms and conditions of employment. Indeed, in its 2010 decision in *Dana Corp.*, the Board upheld a pre-recognition agreement that did just that.[2] Employers and unions, of course, are well aware of the terms of these pre-recognition agreements. There is no valid reason why unit employees alone should be kept in the dark. Such agreements may contain terms that could affect unit employees' continued support of their union—and the right of employees to decide for themselves whether to be represented by a labor organization and, if so, which one, is at the heart of the Act.[3]

[1] I shall use the term "pre-recognition agreement" instead of "neutrality agreement," the meaning of which the parties dispute. Notably, the Board has previously referred to the negotiations that result in such agreements as "prerecognition negotiations." See *Dana Corp*., 356 NLRB 256, 259 (2010) (holding lawful a pre-recognition agreement that covered procedure for union's recognition, specified framework for bargaining if union achieved majority status, and prospectively addressed terms and conditions of employment), petition for review denied sub nom. *Montague v. NLRB*, 698 F.3d 307 (6th Cir. 2012). It is therefore puzzling that the majority would quibble with this terminology.

[2] *Dana Corp*., 356 NLRB 256. See also *Amalgamated Clothing & Textile Workers Union, AFL–CIO v. Facetglas, Inc*., 845 F.2d 1250, 1253 (4th Cir.1988) (pre-recognition agreement required employer to be neutral in election and included an agreement on wages and benefits to be implemented if the union won); Matthew Bowness, *Protecting Employees from Quid Pro Quo Neutrality Arrangements*, 63 Emory L. J. 1499, 1513 (2014) (identifying *Dana* as part of a "recent trend whereby unions have begun trading contract concessions for neutrality agreements"); Zev J. Eigen and David Sherwyn, *A Moral/Contractual Approach to Labor Law Reform*, 63 Hastings L. J. 101, 130 (2012) ("Neutrality is a huge gain for the union, and unions should and do give up other demands in exchange for neutrality."); James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 Iowa L. Rev. 819, 826 (2004) (pre-recognition agreements commonly require employer neutrality regarding unionization, card check recognition, and special access rights for the signatory union).

[3] See Sec. 7 of the Act.

Nor is the majority justified in faulting the General Counsel for failing to prove that the pre-recognition agreement in this case did affect unit employees' terms and conditions of employment. That finding rests on a flawed analysis of the record evidence, as discussed below. Moreover, any analysis of this issue must take into account the inherent difficulty faced by an employee, or the General Counsel, in establishing the contents of an agreement they do not have, as a prerequisite to obtaining a copy of it in the first place. The majority offers no useful solution to this dilemma. Indeed, they seem to regard it as an unproblematic feature of current precedent, not as a flaw in need of correction. I, on the other hand, am unwilling to turn a blind eye to the rights of employees like Ms. Zamora.

I. BACKGROUND

The Respondent Union represents a unit of registered nurses employed by Corpus Christi Medical Center (CCMC). The judge found that CCMC's parent company, Hospital Corporation of America Holdings, Inc. (HCA), and the Respondent are parties to a "neutrality agreement" that may have "govern[ed] [CCMC's] conduct during the Respondent's earlier organizing campaign." The judge noted that the Respondent "repeatedly avoided revealing whether or not it had entered into . . . a 'neutrality agreement,'" and he found it "puzzling why the Respondent worked so hard to leave uncertain whether or not any kind of neutrality agreement existed."[4] Indeed, the judge observed that the documentary evidence "appeared to conflict" with representations by the Respondent's counsel that there was no "agreement between the Union and HCA Holdings . . . as to how the Employer will act in the face of a union organizing effort, or in the face of an election [conducted] by the Labor Board."

Nevertheless, the judge found that the agreement does exist based on a position statement submitted by HCA in a related unfair labor practice case.[5] In relevant part, HCA's position statement acknowledged that

> HCA Holdings, Inc. is a party to an agreement with California Nurses Association, of which NNOC-Texas, NNU is an affiliate. That agreement requires the parties and their affiliates to conduct their relationships in a manner consistent with mutual respect and joint commitment to problem solving. The agreement does

[4] Judge Locke was being charitable when he characterized the Respondent's conduct as "puzzling." It wasn't puzzling at all. It was deliberate obfuscation, from which it can only be inferred that the Respondent very much wanted to keep the pre-recognition agreement out of Zamora's hands.

[5] HCA submitted the position statement in *Corpus Christi Medical Center and HCA Holdings, Inc.*, 16–CA–225103.

not govern the terms and conditions of employment of bargaining unit employees at CCMC. The agreement provides that neither CCMC nor HCA Holdings shall encourage or support decertification, but does not limit how they can deal with bargaining unit employees.

In 2018, Zamora began soliciting other employees to support decertification of the Respondent. In connection with those efforts, she requested and received permission from CCMC to hold in-service meetings with other employees. Zamora prepared a flyer, entitled "Making a Critical Decision, Evaluating Pros and Cons, What Has Your Union Done for You?," that stated when and where the meetings would occur. But she was denied permission to post her flyer on bulletin boards within CCMC's facility, and she believed that the restriction was derived from the pre-recognition agreement between her union and HCA.

Subsequently, Zamora asked CCMC to provide her a copy of "the Neutrality Agreement between HCA and NNOC."[6] When CCMC did not do so, she requested the same document from the Respondent.[7] Two weeks later, the Respondent, through Labor Representative Bradley Van Waus, replied that there is "no agreement between HCA and NNOC that controls how your employer, Corpus Christi Medical Center-Doctor's Regional Hospital can deal with you as a [sic] employee in the NNOC bargaining unit, other than the September 21, 2015 – June 30, 2018 collective bargaining agreement between NNOC/Texas and Corpus Christi Medical Center." Van Waus enclosed a copy of that collective-bargaining agreement with his reply.

Based on the above-quoted excerpt from HCA's position statement in Case 16–CA–225103, the judge found that the Respondent, as an affiliate of California Nurses Association, is party to a "neutrality agreement" with HCA. No such agreement is in evidence, however. Zamora sought to compel its production pursuant to subpoena, to no avail, and counsel for CCMC and HCA refused the judge's request that the agreement be provided to him for in camera inspection.[8] The judge nevertheless found that the General Counsel failed to prove that the agreement affected unit employees' terms and conditions of employment and, thus, that it related to the Respondent's status as the unit employees' bargaining representative. Accordingly, he found that the Respondent had no duty to provide Zamora the agreement. For essentially the same reasons, he determined that there was no merit in the additional allegation that the Respondent answered Zamora's request for the agreement "in a manner that was arbitrary and/or in bad faith." He found that although the Respondent could have responded to Zamora with greater clarity, its agent accurately stated that the collective-bargaining agreement was the only agreement affecting how CCMC could "deal with" Zamora as a unit employee. My colleagues affirm these findings. I respectfully dissent.

II. DISCUSSION

Section 9(a) of the National Labor Relations Act provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes,

[6] Zamora's July 8, 2018 email to CCMC Vice-President of Human Resources Vince Goodwine and Human Resources representative Michael Lamond reads as follows:

> I have been told on numerous occasions, from you, Mr. Goodwine, and several others that I can not have a protected bulletin board because it would be "facilitating" anti-union support. . . . [Y]ou are thereby facilitating pro-union support. I would very much like to see this language in writing. I am formally requesting a copy of the Neutrality Agreement between HCA and NNOC at your earliest convenience. I will gladly make a trip to your office to retrieve or if you like you can email it to me. Mr. Goodwine informed me that it is an HCA policy. I cannot find this so-called policy. Can you direct me to that as well, please?

[7] That request reads as follows:

> My name is Esther M. Zamora. I am an RN employed at Corpus Christi Medical Center Doctor's Regional Hospital in Corpus Christi, Texas and am currently represented by the National Nurse's Organizing Committee. I am formally requesting a copy of the HCA/NNOC Neutrality Agreement that brought your union into our facility. I understand that the first stage has expired, but that my employment remains governed by the second, post organizing stage of this agreement. I understand that aspects of this current agreement control how my employer can deal with me, and vice versa. Since my working life at Corpus Christi Medical Center Doctors Regional Hospital is being affected by the neutrality agreement's current terms and conditions, I have a right to a copy of this Agreement and you have a fiduciary duty to provide it to me. Please send the agreement to me as soon as possible, and no later than 14 days from now. If you refuse to send it, please explain your refusal. I thank you kindly for your expedited services.

[8] Zamora subpoenaed HCA and CCMC for the agreement. HCA and CCMC petitioned to revoke the subpoena. During a prehearing conference call, the judge informed counsel for the parties, as well as counsel for HCA and CCMC, that he would not grant the petition to revoke at that time but would instead examine the pre-recognition agreement in camera before deciding how to proceed. However, HCA and CCMC refused to present the neutrality agreement for the judge's in camera review. The judge did not explicitly rule on the petition to revoke, noting that Zamora did not seek enforcement of the subpoena.

The General Counsel and Zamora except to the judge's failure to compel HCA and CCMC to produce the pre-recognition agreement or to present it for in camera review. I would find it unnecessary to pass on the merits of these exceptions. As described below, I would remand the case for the judge to analyze the subpoena issue in light of the approach I would apply regarding unions' duty to provide employees with a copy of an applicable pre-recognition agreement.

shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." A union's status as unit employees' exclusive bargaining representative carries with it a corresponding duty of fair representation owed to the unit employees it represents.[9] "Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). The Board has long held that a union violates its duty of fair representation if it fails to provide unit employees, on request, with a copy of the collective-bargaining agreement applicable to them. *Law Enforcement & Security Officers Local 40B (South Jersey Detective Agency)*, 260 NLRB 419 (1982). "[W]hen a union denies the employees it represents the opportunity to examine its agreement with their employer," the Board explained, "it severely limits the employees' ability to determine whether they have been afforded the fair representation that is their due." Id. at 420.

Consistent with the foregoing principles, I would hold that the duty of fair representation also obligates a union to provide an employee, on request, with a copy of any pre-recognition agreement that affected or affects the employee's post-recognition terms and conditions of employment. Pre-recognition agreements may not lawfully establish terms and conditions of employment because they are negotiated at a time when the union does not represent the unit employees. *Ladies Garment Workers v. NLRB (Bernhard-Altmann)*, 366 U.S. 731 (1961).[10] Importantly, however, under current Board law, pre-recognition agreements may "create a framework for future collective bargaining" if and when the union lawfully achieves representative status. *Dana Corp*., supra, 356 NLRB at 261.[11] Indeed, as in *Dana,* pre-recognition agreements may even "prospectively address[] . . . substantive terms and conditions of employment." Id. at 264.[12] When they do, such agreements condition the course of bargaining that the signatory union will undertake on behalf of unit employees if it subsequently becomes their exclusive representative, and they affect the terms of any collective-bargaining agreement that will be negotiated. It thus defies reason to suggest that employees could fairly evaluate the representation their union provided during those negotiations without being able to examine the terms of a pre-recognition agreement, negotiated by the same union, that affected the course of bargaining or the terms of the collective-bargaining agreement subsequently reached. Indeed, the majority opinion in *Dana* itself all but forecloses that position. There, after touting the merits of pre-recognition agreements, the Board went on to reject the view that

> a reasonable employee—a rational actor presumed by Federal labor law to be capable of exercising free choice—would feel compelled to sign a union-authorization card simply because the [pre-recognition] agreement prospectively addresses some substantive terms and conditions of employment. If anything, such an agreement tends to promote an informed choice by employees. They presumably will reject the union if they conclude (or suspect) that it has agreed to a bad deal or that it is otherwise compromised by the agreement from representing them effectively.

---

[9] *Air Line Pilots Assn. v. O'Neill*, 499 U.S. 65, 75–78 (1991); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181 (1967); *Miranda Fuel Co.*, 140 NLRB 181, 189–190 (1962), enf. denied 326 F.2d 172 (2d Cir. 1963).

[10] Special rules not applicable here apply to collective-bargaining agreements in the construction industry. See Sec. 8(f) of the Act.

[11] See fn. 2, supra.

[12] The *Dana* pre-recognition agreement, for example, included a no-strike/no-lockout commitment, effective at a covered facility beginning when the union requested an employee list for the facility, and continuing until a first contract was negotiated or any contract-related dispute was resolved. Of particular significance to this case, the agreement in *Dana* included the union's commitment "that in no event will bargaining between the parties erode current solutions and concepts in place or scheduled to be implemented January 1, 2004, at Dana's operations which include premium sharing, deductibles, and out-of-pocket maximums." The agreement also provided that the minimum duration of any collective-bargaining agreement would be 4 years and that "in labor agreements bargained pursuant to this Letter, the following conditions must be included for the facility to have a reasonable opportunity to succeed and grow":

- Healthcare costs that reflect the competitive reality of the supplier industry and product(s) involved
- Minimum classifications
- Team-based approaches
- The importance of attendance to productivity and quality
- Dana's idea program (two ideas per person per month and 80% implementation)
- Continuous improvement
- Flexible Compensation
- Mandatory overtime when necessary (after qualified volunteers) to support the customer.

Finally, the agreement provided for binding interest arbitration in the event the parties were unable to reach a collective-bargaining agreement after six months. Id. Compare *Majestic Weaving Co.*, 147 NLRB 859 (1964) (finding that employer violated Sec. 8(a)(2) by negotiating a collective-bargaining agreement with a union contingent on the union obtaining majority status), enf. denied on procedural grounds 355 F.2d 854 (2d Cir. 1966). I believe *Dana* was wrongly decided. Nevertheless, it is binding precedent, and under *Dana*, pre-recognition agreements plainly may include provisions that affect unit employees' post-recognition terms and conditions of employment.

Dana, 356 NLRB at 264. To hold that employees do not have a right to see a pre-recognition agreement that affected their terms and conditions of employment after the union became their exclusive bargaining representative would be irreconcilable with the reasoning of this precedent. And yet that is precisely what the majority holds today.

Ensuring that employees have the right to obtain copies of pre-recognition agreements that affected or affect their terms and conditions of employment is necessary to effectuate the policies of the Act. The right of employees to choose whether to be represented by a union and, if so, which one is at the core of the Act. Yet, employees can hardly make an informed choice concerning whether to continue to be represented by a union if they are prevented from learning about the terms of any pre-recognition agreement entered into by their union that affected or affects their terms and conditions of employment. The congressional policy of employee free choice enshrined in the Act is also frustrated when employers and unions negotiate pre-recognition agreements that go beyond permissible limits and effectively confer unlawful recognition on a union that lacks majority status. *Ladies Garment Workers v. NLRB (Bernhard-Altmann)*, supra; *Dana*, supra at 263 (recognizing that pre-recognition agreements can cross the line into unlawful recognition, depending on their terms). Such agreements will inevitably escape detection if the employers and unions that are party to them can keep them hidden from the very employees to whom they apply.[13] Shielding from disclosure pre-recognition agreements that affected or currently affect unit employees' terms and conditions of employment subverts these fundamental policies of the Act.[14]

A union's obligation, under its duty of fair representation, to provide pre-recognition agreements would be effectively nullified if employees had to prove that the agreement did or does affect their terms and conditions of employment in order to be entitled to a copy of it. After all, employees cannot know what is in the agreement unless they see it. Moreover, it is reasonable to assume that most pre-recognition agreements *will* affect employees' terms and conditions of employment.[15] Contracting parties do not typically agree to give something for nothing, so it is reasonable to assume that employers often require concessions in any future collective-bargaining agreement—as happened in *Dana*—as the price of agreeing to whatever the union seeks, such as the employer's neutrality during the union-organizing campaign. Moreover, unions primarily exist for the purpose of "dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."[16] If a union has negotiated a pre-recognition agreement with an employer about something other than one or more of these matters, it is hard to imagine what those matters would be, and even more difficult to imagine how any such agreement could not have some effect on terms and conditions of employment. Accordingly, although the ultimate burden of proof to establish a violation of the Act rests with the General Counsel, I would establish a rebuttable presumption that a pre-recognition agreement affected or currently affects the terms and conditions of employment of the bargaining unit to which the requesting employee belongs.[17] If the General Counsel establishes certain elements—in the margin below, I suggest what those might be—a violation of Section 8(b)(1)(A) would be presump-

[13] The majority claims that employees could not be kept in the dark because they will know if their employer has recognized a minority union. This entirely misses the point. A union could agree to the terms of a contract covertly, and then go on to obtain majority support. Since both employer and union will have violated the Act, each has leverage against the other, which makes it unlikely that either one will ever reveal the truth. Today's decision would help them keep their unlawful secret.

[14] Obviously, my opinion is limited to pre-recognition agreements that apply to the bargaining unit of which the requesting employee is a member. Agreements that apply only to other bargaining units bear no reasonable relationship to the union's representation of that employee and are thus outside the scope of the duty of fair representation. *Simo v. UNITE*, 322 F.3d 602, 615 (9th Cir. 2003). In *Simo,* the court held that a union did not breach its duty of fair representation to employees it represented when it failed to provide the employees with requested copies of collective-bargaining agreements between the union and an employer other than the requesting employees' employer. In support of this holding, the court noted that the union was not representing those employees when it negotiated the agreement with the second employer. However, *Simo* did not involve the issue of whether the duty of fair representation applies to pre-recognition agreements between an employee's union and the employee's *own* employer. For the reasons explained herein, I would find that it does.

[15] See also fn. 2, supra.

[16] Sec. 2(5) of the Act.

[17] My colleagues take issue with the word "affects." They "[sic]" it and declare that "attention must be paid," and they even suggest that I mean to mislead the reader. Apparently, I have more faith in the reader's grasp of the difference between "affects" and "effects" than they do. In any event, I have no quarrel with their suggestion of the word "influence" as a synonym of "affect," but I disagree with their claim that my proposed standard is overbroad because it would encompass any agreement that merely influences terms and conditions of employment, even if it does not establish them, and that disclosure of such agreements would not assist employees in determining whether their union has fairly represented them after becoming their exclusive representative. But they accept, as well they must, that the agreement at issue in *Dana* "*influenced* any collective-bargaining agreement ultimately reached between the parties." No reasonable employee would agree that examination of that agreement was irrelevant to determining whether the union had fairly represented them, nor would the *Dana* Board agree with this view, for the reasons explained above.

tively established, and the burden of going forward would shift to the respondent union to introduce evidence that the agreement never affected any term or condition of employment of the unit employees. See *St. George Warehouse,* 351 NLRB 961, 964 (2007) (burden of going forward with evidence properly placed on party having knowledge of the relevant facts), enfd. 645 F.3d 666 (3d Cir. 2011).[18]

Applying such a framework here, I would find that the General Counsel has established the existence of a pre-recognition agreement between the California Nurses Association and HCA, CCMC's parent, binding on the Respondent as an affiliate of California Nurses Association and on CCMC as an affiliate of HCA, and applicable to a bargaining unit of registered nurses employed by CCMC. It is undisputed that Zamora is a member of that unit, that she requested a copy of that agreement at a time when the Respondent was her exclusive representative, and that the Respondent refused to provide it.[19] On this basis, I would find that a rebuttable presumption has been established that the agreement affected or currently affects the terms and conditions of employment of the unit of registered nurses to which Zamora belongs. Accordingly, the proper course would be to remand the case to the judge to provide the Respondent with an opportunity to rebut that presumption, if it can.

The majority takes a different approach. Disregarding reasonable inferences and practical difficulties, they place the entire burden on the General Counsel and the Charging Party to prove "that a 'neutrality agreement' between NNOC and HCA related to, governed, or affected unit employees' terms and conditions of employment." Insisting that this requirement imposes no "insurmountable obstacle" on the General Counsel, the majority claims that she can "certainly" "introduce evidence (if any exists) permitting a reasonable inference that a 'neutrality' agreement affects employees' terms and conditions of employment." I cannot agree that employee rights are adequately protected so long as the obstacles to their vindication are not "insurmountable." Nor is there anything certain about the ability of the General Counsel or Charging Party to present evidence regarding the terms of an agreement that neither has ever seen, as this case readily demonstrates.

To be sure, the judge found that the agreement between HCA and the Respondent did not affect employees' terms and conditions of employment, but that finding cannot withstand scrutiny. Contrary to my colleagues, the judge's analysis is fundamentally flawed. First, it is based in part on his speculation that if the agreement did affect terms and conditions of employment, it would have been referenced in the parties' collective-bargaining agreement. There is no reason to assume so. As discussed above, pre-recognition agreements can lawfully condition the course of future bargaining in ways that affect the contents of any collective-bargaining agreement ultimately reached without dictating any specific term. There would be no reason why the collective-bargaining agreement would refer to the pre-recognition agreement under those circumstances.[20] The judge also opined that if the pre-recognition agreement

[18] To establish a rebuttable presumption that a pre-recognition agreement affected or affects terms and conditions of employment, one possible approach would be to require that the General Counsel show the following: (a) an employee requested a pre-recognition agreement from the respondent union, (b) the agreement was binding on the union and the requesting employee's employer (either by virtue of having been concluded by and between those parties or, as in this case, as a result of an agreement by and between the union and the employer's parent company that is binding on the employer as a subsidiary or affiliate of the parent), (c) the agreement applied to the bargaining unit of which the requesting employee is a member, (d) the employee was represented by the union at the time he or she requested the agreement, and (e) the union refused the request. To overcome the presumption, a union could then satisfy its burden of production by presenting sworn testimony that the pre-recognition agreement solely addresses matters unrelated to employees' terms and conditions of employment. If the union satisfied this burden, the presumption that its refusal to furnish the agreement violated Section 8(b)(1)(A) would disappear, and the ultimate burden of proof would rest on the General Counsel to establish, by a preponderance of the evidence, that the agreement did or currently does affect unit employees' terms and conditions of employment. The General Counsel could meet this burden by introducing evidence, other than the pre-recognition agreement itself, establishing that the agreement either "create[d] a framework for future collective bargaining" or "prospectively addresse[d] some substantive terms and conditions of employment" to be included in any collective-bargaining agreement, *Dana Corp*., supra, 356 NLRB at 261, 264, and at least one term or condition of employment contained in at least one collective-bargaining agreement the parties subsequently negotiated was affected accordingly. The judge could also examine the pre-recognition agreement in camera.

[19] Because Zamora submitted her request after the Union became her exclusive representative, I need not address a union's obligations in responding to a request made at a time prior to the union's achieving exclusive representative status.

I reject the judge's finding that Zamora only requested those portions of the agreement that may have controlled her terms and conditions of employment at the time of her request or that the language used in her request in any way justified the Respondent's refusal to provide the agreement she requested. Zamora's request, quoted in full above, stated: "I am formally requesting a copy of the HCA/NNOC Neutrality Agreement that brought your union into our facility." Zamora's subsequent explanation of the reasons and justifications for that request do not detract from its scope in any way.

[20] Accordingly, there is no merit to the majority's claim that the existence of a pre-recognition agreement affecting terms and conditions of employment is disproved by provisions in the parties' collective-bargaining agreements addressing the Respondent's use of bulletin boards and stating that the agreement constitutes the entire agreement between the parties and supersedes all previous agreements unless expressly stated to the contrary.

affected the terms of the collective-bargaining agreement, the parties would have no reason to keep it a secret. In other words, from the fact that the parties *did* want to keep the pre-recognition agreement secret,[21] the judge apparently inferred that the agreement did not affect subsequently negotiated contract terms.[22] Precisely the opposite inference is warranted. If a pre-recognition agreement affected the terms of a collective-bargaining agreement to an extent that tested or exceeded permissible limits under *Dana*, supra, and exposed the parties to potential liability under *Majestic Weaving*, supra, the union and employer would have *every* reason to keep it secret. Under these circumstances, HCA's representation that the agreement "does not limit how [HCA and the Respondent] can deal with bargaining unit employees," in a hearsay position statement submitted in a separate case, is an insufficient basis for the judge's finding concerning its contents. Apart from such unsupported representations, no other record evidence supports a finding that the agreement has never affected and currently does not affect the terms and conditions of employment of Zamora's bargaining unit.

But these factual issues are entirely beside the point as far as the majority is concerned. My colleagues assert that there is no justification for a presumption that pre-recognition agreements affect employees' terms and conditions of employment under any circumstances. They further claim that even when they do, the duty of fair representation still would not require their disclosure. And in any event, the majority contends that the framework I propose could not properly be applied retroactively in this case. As shown below, these arguments are wholly unpersuasive.

First, there is ample justification for a presumption that pre-recognition agreements affect employees' terms and conditions of employment. Not only did the Board address in *Dana* an agreement that would have affected employees' terms and conditions of employment if the union achieved majority status, but its discussion makes clear that the importance of pre-recognition "substantive discussions" had grown in recent years and that employers' ability to predict the consequences of voluntary recognition was inextricably intertwined with their willingness to grant such recognition. 356 NLRB at 263.[23] The *Dana* Board cited scholarly studies in support of this point, and I have cited other authorities as well.[24] My colleagues' contrary assumption that unions "might well avoid addressing terms and conditions of employment at all—even merely in reference to a framework for future collective bargaining—in order to minimize potential legal problems" not only ignores but directly contradicts these authorities.

Second, I also disagree with the narrow conception of the duty of fair representation that my colleagues espouse. The Supreme Court has likened it to the fiduciary duty that corporate officers and directors owe to shareholders, trustees owe to beneficiaries of a trust, or lawyers owe to their clients. *Airline Pilots Association v. O'Neill,* 499 U.S. 65, 75 (1991). This conception of the duty of fair representation cannot be reconciled with the Union's secretive and obfuscatory conduct in this case—tactics that my colleagues effectively condone.

The majority says that "the duty of fair representation applies when represented employees request information covering their terms and conditions of employment, such as a collective-bargaining agreement, to determine whether they are being fairly represented." I agree. But, they continue, the duty of fair representation does not apply to a pre-recognition agreement because such an agreement "is not a collective-bargaining agreement and does not govern [unit employees'] terms and conditions of employment." Apparently, the majority means by this that the duty of fair representation only requires disclosure of agreements that rise to the level of a collective-bargaining agreement that "governs" terms and conditions of employment—a term they do not define. No precedent supports this proposition. In fact, our precedent is to the contrary. See *Law Enforcement & Security Officers Local 40B (South Jersey Detective Agency)*, 260 NLRB at 420 (union breached its duty of fair representation by denying unit employees the opportunity to exam-

[21] The judge recognized as much. He found that the pre-recognition agreement was a "document which the Respondent, and also presumably the Employer, wished to keep secret," and he took note of the Respondent's strenuous efforts to obscure whether any pre-recognition agreement even existed.

[22] The Respondent's answer to the complaint is worded as carefully as its response to Zamora when she asked for the agreement. The Respondent denied only "that it failed or refused to provide Charging Party with a copy of a neutrality agreement with the Employer that controls how the Employer can deal with her or has any effect on her working life with the Employer as requested in Charging Party's July 11, 2018 letter to Respondent." As discussed above, the judge also found that the Respondent's counsel made representations at the hearing about the agreement between the Respondent and HCA that contradicted HCA's own characterization of the agreement.

HCA also sought to keep the agreement secret, filed a petition to revoke Zamora's subpoena for a copy of the agreement, and refused to provide a copy of the agreement to the judge for in camera review. One can only infer that all parties to the pre-recognition agreement had a reason or reasons to keep it out of Charging Party Zamora's hands.

[23] The majority's discussion of *Dana*, moreover, is woefully incomplete. They note that it established a "framework" for collective bargaining without ever grappling with the specifics of that framework. As shown above, the *Dana* "framework" prospectively addressed important terms and conditions of employment that would be agreed to if the union became the employees' representative.

[24] See fn. 2, supra.

ine "its agreement with their employer"). The federal courts agree, inasmuch as they recognize that both pre-recognition agreements and collective-bargaining agreements negotiated after recognition is achieved are contracts between a labor organization and an employer enforceable under § 301 of the Labor Management Relations Act.[25] Taken at face value, the majority opinion would foreclose any duty to provide even the pre-recognition agreement at issue in *Dana*. I strenuously disagree for the reasons previously stated.

The majority also says that the duty of fair representation does not apply to the negotiation of a pre-recognition agreement or to its maintenance after the union has become the unit employees' representative. There is no dispute that the duty of fair representation arises from exclusive-representative status,[26] and a union is not yet the unit employees' exclusive bargaining representative at the time it negotiates a pre-recognition agreement with their employer. But the majority misses the point. It does not matter whether the terms of that agreement are so irrational that the agreement itself contravenes the duty of fair representation, any more than the obligation to provide a copy of an agreement negotiated after the union becomes the employees' representative turns on whether the terms of that agreement are so irrational as to breach the duty of fair representation. What matters is whether that agreement affects or affected unit employees' terms and conditions of employment at a time when the union *is* their exclusive bargaining representative. If so, the duty of fair representation requires the disclosure of that agreement, even if it does not comprehensively "govern" all terms and conditions of employment, and regardless of the fact that the duty did not yet apply when the agreement was negotiated. Employees alone have the right to decide whether to keep or change their bargaining representative. Surely a document that reveals what their union gave away in advance to secure, say, employer neutrality during the organizing campaign is relevant to this decision. The majority permits an exclusive representative that owes a duty of fair representation at the time a pre-recognition agreement is requested to force employees to make that decision in the dark. Obviously, I disagree.

To support their cramped conception of the duty of fair representation, the majority chiefly relies on *Operating Engineers Local 18 (Precision Pipeline)*, 362 NLRB 1438 (2015), but that case does not bear the weight my colleagues place on it. *Precision Pipeline* involved employees' requests for pre-job conference report forms that recorded information about an upcoming construction job to be performed using union labor. A blank pre-job report form was entered into evidence and established that "[t]he pre-job reports are documents devoted to and containing information about the operational requirements of the specific job—a guide for the local union and contractor to anticipate how many and what type of employees will need to be referred to the job," id. at 1444—not a document that affected the terms and conditions under which those employees will work. Indeed, a provision in the parties' collective-bargaining agreement expressly provided that no agreement reached at any pre-job conference could modify the terms of the collective-bargaining agreement unless formally ratified by the parties themselves. In sum, the record evidence affirmatively showed that the pre-job reports were not the source of any rights for employees and instead were "a memorialization—not an independently enforceable agreement." Id. at 1445. No parallel facts are present here: there is at present no reliable evidence of the contents of the pre-recognition agreement Zamora seeks nor any basis for finding it did not condition the course of collective bargaining post-recognition.

Precision Pipeline is also readily distinguishable because there the union articulated a specific and substantial confidentiality justification for not providing the pre-job reports. The reports contained competitive bid information that would be useful to competing contractors when bidding on future jobs, and the union reasonably believed that employers would refuse to provide the information if it were disclosed. Here, HCA has, at best, advanced a bare claim that its agreement with the Respondent is confidential, without explaining why. The Respondent, for its part, advances no confidentiality claim. Without even admitting that the agreement exists, the Respondent instead states that if it does then it is confidential because HCA says it is. Much more was required in *Precision Pipeline* to establish a legitimate confidentiality justification, and the majority fails to justify their position that any less should be required here.[27]

[25] See *Hotel & Restaurant Employees Local 217 v. J. P. Morgan Hotel*, 996 F.2d 561 (2d Cir. 1993) (enforcing card-check and neutrality agreement pursuant to Sec. 301 of Labor Management Relations Act); *Amalgamated Clothing & Textile Workers Union, AFL–CIO v. Facetglas, Inc*., 845 F.2d at 1253 (holding neutrality and nondiscrimination provisions of election agreement enforceable under Sec. 301 of the LMRA as "an agreement between an employer and a labor organization significant to the maintenance of labor peace between them") (citation and internal quotation marks omitted).

[26] See, e.g., *Teamsters Local 460 (Superior Asphalt)*, 300 NLRB 441, 441 (1990) ("Without the exclusive bargaining representative status, the statutory justification for the imposition of a duty of fair representation does not exist.").

[27] The majority instead posits "unions may well have legitimate confidentiality interests with respect to 'neutrality' agreements," citing to the following extract from an amicus brief filed by the AFL–CIO:

The majority's interpretation of the duty of fair representation is also in tension with the provision of the Labor-Management Reporting and Disclosure Act (LMRDA) guaranteeing employees the right to "a copy of each collective bargaining agreement made by such labor organization with any employer to any employee who requests such a copy and whose rights as such employee are directly affected by such agreement." 29 U.S.C. § 414. Even assuming that there would be no duty to disclose a pre-recognition agreement under this provision of the LMRDA, that statute also explicitly provides that "[n]othing contained in this subchapter shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization." 29 U.S.C. § 413. The majority's interpretation of the duty of fair representation, in contrast, gives employees no greater right to see the agreements their union has negotiated than they would possess in any event under the LMRDA.

I recognize that the duty of fair representation is breached only by union conduct that is shown to be arbitrary, discriminatory, or in bad faith. As the majority correctly notes, the Board could not, consistent with this standard, impose on unions the same duty to provide information requested by unit employees that the Act imposes on employers when presented with a union's information request. But that is not the only alternative to simply leaving employees to the mercy of employers and unions, as my colleagues do.[28] To the contrary, the refusal by a union to permit employees it represents to examine "its agreement with their employer" is arbitrary, as the Board has long held. *Law Enforcement & Security Officers Local 40B (South Jersey Detective Agency)*, 260 NLRB at 420. If that agreement affected or affects employees' terms and conditions of employment, it should not matter whether it does so directly or by conditioning the course of post-recognition bargaining, for all the reasons stated above. I have suggested a framework for determining *whether* a pre-recognition agreement affected or affects employees' terms and conditions of employment. No policy of the Act or principle of the duty of fair representation precludes its adoption by the Board. My colleagues reject it, not because they must, but because they can.

Finally, I disagree with the majority's assertion that retroactive application of the rebuttable presumption standard discussed above would be unjustified. In making this claim, my colleagues neither cite nor apply the settled rule that the Board's "usual practice is to apply new policies and standards retroactively to all pending cases in whatever stage" unless retroactive application will work a manifest injustice. *SNE Enterprises*, 344 NLRB 673, 673 (2005) (internal citations and quotations omitted). No such manifest injustice would be presented here, where no controlling precedent supported the Union's refusal to disclose the pre-recognition agreement, the Board's *Dana* decision strongly suggests that employees are entitled to see such agreements, and the litigation of this case to date has been unnecessarily complicated by the Union's strenuous effort to obscure whether the agreement even exists.[29]

CONCLUSION

In *Dana*, the Board promised that employees would be able to review pre-recognition agreements and decide for

> Unions rationally believe that employees will be better off if they have representation and that employees are more likely to achieve that objective if their employer does not oppose representation. The employer may condition such an agreement on confidentiality for many reasons, for example, to prevent its competitors from obtaining information concerning its labor relations strategy. A union certainly may act rationally by acceding to such a confidentiality demand and by subsequently honoring the confidentiality agreement.

AFL–CIO Amicus Brief at 13. But there is no evidence that the Respondent refused to provide its agreement with HCA based on these considerations. Moreover, I reject as contrary to the basic principles of the Act any contention that any purported confidentiality interest could justify a union's refusal to disclose an agreement that was shown to affect unit employees' terms and conditions of employment.

[28] Notably, my colleagues' position in this case stands in marked contrast to *Crozer-Chester Medical Center,* 371 NLRB No. 129 (2022). There, a panel majority comprised of two members of the current majority ordered the employer to give the union copious amounts of information, finding some of it presumptively relevant simply because it "could" relate to employees' terms and conditions of employment, regardless of whether it actually did, and that relevance was shown for other information based on "mere suspicion at best, and pure speculation at worst." Id., slip op. at 11 (Member Ring, dissenting). Even taking into account the different legal standards applicable to the two situations, it is difficult to see why a union is to be afforded such lenience in obtaining the information it wants, while so much more is required of an individual employee who, as here, legitimately wants to know what agreements her own union has made that affect her job.

[29] *Machinists Local 2777 (L-3 Communications)*, 355 NLRB 1062, 1069 (2010), cited by the majority, is clearly distinguishable. There, the Board found that the union violated the duty of fair representation by requiring *Beck* objectors to renew their objection annually but determined that its remedial order should only run prospectively because relevant judicial precedent and prior guidance from the Board's General Counsel supported the union's position that the annual objection requirement was lawful. No such circumstances are presented here. Moreover, although the majority does not note it, the Board still found a violation in that case and issued an order requiring the respondent union prospectively to cease and desist from the unlawful conduct. The case thus provides no support whatsoever for the majority's refusal to even consider remanding the case to determine whether a violation of the Act should be found and whether any remedial order should be entered.

themselves whether their union "agreed to a bad deal" or "is otherwise compromised by the agreement from representing them effectively." I would keep that promise. The majority breaks it. Accordingly, I respectfully dissent.

Dated, Washington, D.C. August 30, 2022

John F. Ring, Member

NATIONAL LABOR RELATIONS BOARD

Roberto Perez, Esq., for the General Counsel.
Micah Berul, Esq., of Oakland California, for the Respondent.
Glenn M. Taubman, Esq. and *Aaron B. Solem, Esq.,* of Springfield, Virginia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge: The credited evidence fails to establish that any term or condition of employment of bargaining unit employees was determined, controlled, or affected by any agreement entered into by the Respondent other than the collective-bargaining agreement between the Respondent and the Employer, together with the "side letters" and memorandum of understanding it references. The record further fails to establish that any other agreement or document related to, affected, or was affected by the Respondent's exercise of its authority and/or discharge of its duties as the employees' exclusive bargaining representative. The Respondent's refusal to provide to a bargaining unit employee a copy of another document, not shown to relate to terms and conditions of employment or its responsibilities as the exclusive bargaining representative, did not violate Section 8(b)(1)(A) of the Act.

Procedural History

This case began on August 6, 2018, when the Charging Party, Esther Marissa Zamora, filed an unfair labor practice charge against the Respondent, the National Nurses Organizing Committee-Texas/National Nurses United. The Board's Regional Office in Fort Worth, Texas, docketed this charge as Case 16–CB–225123.

Following an investigation, the Regional Director dismissed the charge by letter dated December 28, 2018. The Charging Party appealed the dismissal. On September 13, 2019, the Board's Office of Appeals sustained parts of the appeal and remanded to the Regional Director for further action.

On October 31, 2019, the Regional Director, acting pursuant to authority delegated by the Board's General Counsel, issued a complaint and notice of hearing. The Respondent filed a timely answer dated December 5, 2019.

The Respondent's answer included certain affirmative defenses. The third affirmative defense began as follows: "The Complaint was issued in furtherance of an unlawful scheme between the NRTW [National Right to Work Committee] and [the] NLRB General Counsel. . ." The Respondent further asserted that the General Counsel's action in issuing the complaint was "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law." The Respondent contended that any judgment or order arising out of this complaint would violate the Federal Administrative Procedures Act. The fourth affirmative defense in the Respondent's answer again referred to the General Counsel having an "unlawful scheme" and asserted that it violated the First Amendment rights of employees.

The General Counsel moved to strike these portions of the Respondent's answer. On January 10, 2020, the deputy chief administrative law judge issued an order granting the General Counsel's motion. It struck the Respondent's third and fourth affirmative defenses "as well as any other references to an alleged unlawful scheme." The order also stated as follows:

> Furthermore, Respondent Union has not, as required by Section 102.20 of the Board's Rules of Procedure, admitted or denied the allegation in paragraph 8 that it refused to provide to the Charging Party, as requested on July 10, 2018, a copy of the neutrality agreement between Respondent and the Employer. Unless the answer is timely amended, this allegation is deemed admitted.

On January 29, 2020, the Respondent filed an amended answer. The Respondent also has petitioned for reconsideration of the deputy chief judge's ruling but in the absence of any ruling granting that petition, the January 10, 2020 order remains in effect.

The Charging Party also filed a motion to strike portions of the Respondent's answer and affirmative defenses and the Respondent filed an opposition to that motion. For reasons discussed below, I have concluded that the complaint against the Respondent should be dismissed, and reached that conclusion without considering the Respondent's defenses and arguments which are the subject of the Charging Party's motion. Because granting or denying the Charging Party's motion would not affect the outcome of the case, it is not necessary to rule on it.

On February 4, 2020, a hearing opened before me in Corpus Christi, Texas. On that day and the next, the parties presented evidence. Then, I adjourned the hearing until March 18, 2020, when it resumed by telephone conference call so that counsel could present oral argument in lieu of briefs. After the oral arguments, I closed the hearing.

Amendment to Complaint Paragraph 6

At hearing, the General Counsel orally amended complaint paragraph 6, which describes the bargaining unit of nurses which the Respondent represents. Bargaining unit employees work at a number of locations where the Employer provides services to the public, but the original complaint inadvertently left out one of these locations, 6629 Woolridge Road, Corpus Christi, Texas. As amended at hearing complaint paragraph 6 now reads as follows:

The following employees of the Employer, the unit, constitute a unit appropriate for purposes of collective bargaining

within the meaning of Section 9(b) of the Act.

> INCLUDED: All fulltime, regular part-time, and per diem registered nurses employed by the hospital at its facilities located at 3315 South Alameda Street; 7101 South Padre Island Drive; 7002 Williams Drive; 13725 Northwest Boulevard, Corpus Christi, Texas; 1702 Highway 181 North, Suite A-11, Portland, Texas, 78374; and 6629 Woolridge Road, Corpus Christi, Texas.
>
> EXCLUDED: All other employees, confidential employees, physicians, nurse and/or clinical educators or coordinators, clinical nurse specialists, clinical coordinators, case managers/utilization review and/or discharge planners, nurse practitioners, accounting or auditing RNs, infection control/employee health nurses, risk management/performance improvement and/or quality assurance or quality management nurses, employees of outside registries and other agencies supplying labor to the Employer, already represented employees, permanent charge nurses, managerial employees, guards and supervisors as defined by the Act.

Based on the certifications of representative which are included in the joint exhibits, I conclude that this unit is appropriate and find that the Respondent is the exclusive bargaining representative of the employees in this unit.

Amendment to Complaint Paragraph 8

Complaint paragraph 8 describes conduct which complaint paragraph 9 alleges to violate Section 8(b)(1)(A) of the Act. In the original complaint, paragraph 8 alleged that "[W]ithin the past six months, Respondent has refused to provide the Charging Party a copy of its neutrality agreement with the Employer, as requested on or about July 10, 2018."

After the hearing opened, and after the presentation of evidence, the General Counsel moved to amend paragraph 8 and I granted the motion. As amended, the paragraph now reads as follows:

> (a) Within the past six months, Respondent has refused to provide the Charging Party a copy of its neutrality agreement with the Employer, as requested on or about July 11, 2018.
>
> (b) On or about July 25, 2018, Respondent, by its agent Bradley Van Waus, responded to the Charging Party's July 22, 3028 request in a manner that was arbitrary and/or in bad faith.
>
> (c) Respondent owed the Charging Party a duty to represent her in good faith and by its actions described in paragraphs 8(a) and 8(b), it violated that duty.

By this amendment, the General Counsel has recast paragraph 8 of the original complaint as paragraph 8(a) of the amended complaint. The language of the original paragraph 8 is identical to the language of paragraph 8(a) in the amended complaint except that the original paragraph 8 alleged that the Charging Party requested the neutrality agreement "on or about July 10, 2018" whereas paragraph 8(a) of the amended complaint alleges that the Charging Party made this request a day later, "on or about July 11, 2018." The change corrects an error. The Charging Party made her request in a letter dated July 11, 2018.

Respondent's Answer to Complaint Paragraph 8

After receiving the Respondent's original answer, the General Counsel moved to strike certain parts of it because those parts stated or implied that the General Counsel had engaged in misconduct. On January 10, 2020, the Deputy Chief Administrative Law Judge issued an order granting portions of the General Counsel's motion. That order also noted that "Respondent Union has not, as required by Section 102.20 of the Board's Rules of Procedure, admitted or denied the allegation in paragraph 8 that it refused to provide to the Charging Party, as requested on July 10, 2018, a copy of the neutrality agreement between Respondent and the Employer. Unless the answer is timely amended, this allegation is deemed admitted."

As discussed more fully later in this decision, the record fails to establish that Respondent had any kind of neutrality agreement with the Employer, and I conclude that it did not. Rather, I find that the Respondent, or a union affiliated with the Respondent, had entered into a "neutrality agreement" with HCA Holdings, Inc., of which the Employer was an "indirect subsidiary." It is possible that this agreement did govern the Employer's conduct during the Respondent's earlier organizing campaign which led to its certification, in 2010, as the exclusive bargaining representative. However, there is no evidence that it governed, affected or even mentioned either who could post notices on the bulletin board or any other term and condition of employment.

In this situation, the Respondent's answer accurately could have stated that it had not entered into any "neutrality agreement" with the Employer, that the only "neutrality agreement" was with the holding company, and that it did not pertain to or affect use of the bulletin boards or any other term or condition of employment. Instead, the Respondent answered more cryptically. Its answer only denied that it had "failed or refused to provide Charging Party with a copy of a neutrality agreement with the Employer *that controls how the Employer can deal with her or has any effect on her working life with the Employer* as requested in Charging Party's July 11, 2018 letter to Respondent." (Italics added.)

After the January 10, 2020 order which granted portions of the General Counsel's motion to strike, the Respondent filed an amended answer which deleted the portions of its original answer which the Deputy Chief Judge had ordered stricken. However, this amended answer did not resolve the ambiguity inherent in its original answer to complaint paragraph 8. The amended answer again denied that the Respondent had "failed or refused to provide Charging Party with a copy of a neutrality agreement with the Employer that controls how the Employer can deal with her or has any effect on her working life with the Employer as requested in Charging Party's July 11, 2018 letter to Respondent."

Is the Respondent's answer to paragraph 8(a) sufficient to satisfy the requirement, in Section 102.20 of the Board's Rules and Regulations, that a respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint? If it

is not, then the allegation may be deemed admitted.[1]

Section 102.20 applies to "any allegation in the complaint." However, is the existence of a "neutrality agreement" actually alleged in the complaint? As discussed further below under the heading "The Neutrality Agreement," neither the complaint nor the amended complaint separately and specifically alleges that a neutrality agreement exists. Rather, both paragraph 8 of the original complaint and paragraph 8(a) of the amended complaint simply *assume* the existence of such a document by alleging that the Respondent has failed to provide a copy of "its neutrality agreement …"

If the complaint had alleged that a neutrality agreement existed instead of assuming that fact, the Respondent clearly would have been required to admit or deny such a document's existence. However, I have some concerns that the wording of the present complaint did not place the Respondent on notice that it needed to deny the existence of any neutrality agreement.

Moreover, although the Respondent's answer to amended complaint paragraph 8(a) is more cryptic than it needed to be, other parts of the Respondent's answer explained its position. The Respondent included in its answer certain affirmative defenses, one of them being that it, as the exclusive bargaining representative, only had a duty to furnish to the Charging Party any agreement which affected her terms and conditions of employment, and that no "neutrality agreement" had such an effect. Section 102.20 requires a respondent to admit, deny or *explain*, and I conclude that the Respondent's answer included sufficient explanation to satisfy the rule. Further, I conclude that the Respondent effectively has denied the allegations raised in paragraph 8 of the complaint, as amended.

Admitted Allegations

The Respondent has admitted the allegations raised in complaint paragraphs 1, 2(b), 2(c), 3, 4, and 7, and also has admitted the allegations set forth in portions of complaint paragraphs 2(a), 5(a), and 6. Based on the Respondent's answer and the joint exhibits, I find that the General Counsel has proven these allegations.

More specifically, I find that the charge was filed and served as alleged in complaint paragraph 1, that the Respondent is a labor organization, as alleged in complaint paragraph 4, and that at all times material to this case Labor Representative Bradley Van Waus has been an agent of the Respondent within the meaning of Section 2(13) of the Act, as alleged in complaint paragraph 5.

Further, I find that the Respondent is the exclusive bargaining representative, within the meaning of Section 9(a) of the Act, of employees in a bargaining unit which is appropriate within the meaning of Section 9(b) of the Act, and that these employees work for Bay Area Healthcare Group, Ltd. d/b/a Corpus Christi Medical Center (herein called the "Employer"), at its Corpus Christi, Texas, facility. Based on certifications of representative which the parties introduced into evidence as joint exhibits, and which are dated June 7, 2010, and September 14, 2016, I conclude that the Respondent has been the exclusive bargaining representative at all times material to this case. The Employer and the Respondent have entered into successive collective-bargaining agreements, two of which, covering the relevant time period, are part of the present record.

Additionally, based on the Respondent's admissions, I find that the Employer satisfies the Board's standards for the exercise of its jurisdiction, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that it is a health care institution within the meaning of Section 2(14) of the Act.

The Respondent has denied the allegation, in complaint paragraph 2, that the Employer is an "indirect subsidiary of HCA Holdings, Inc." However, for purposes of determining whether the Board can and should assert jurisdiction over the Respondent, the Employer's possible status as a subsidiary is irrelevant. Because the Respondent is the exclusive representative of an appropriate bargaining unit of employees who work for an employer clearly within the scope of the Act and clearly subject to the Board's jurisdiction, I conclude that the Board properly exercises its jurisdiction in this case.

Respondent's Motion to Strike

The Respondent has filed a "Motion to Strike, Or In The Alternative, Dismiss Portion of Paragraph 5 of the Amended Complaint." Specifically, the Respondent seeks to strike from paragraph 5 of the amended complaint the allegation that "Maria (last name unknown)" held the position of "Representative" and was an agent of the Respondent within the meaning of Section 2(13) of the Act.

In its motion, the Respondent contends that this allegation is irrelevant and further asserts that a previous settlement acts as a bar preventing litigation of whether Maria (last name unknown) is the Union's agent. Based on the Respondent's settlement bar argument, I infer that someone named Maria may have acted, or may have been alleged to have acted, on behalf of the Respondent in a previous case which the Respondent settled. However, it is not necessary to consider this matter because the record does not establish that anyone named Maria took any action relevant to the unfair labor practice alleged in the present complaint.

Although the Respondent contends that the allegation concerning Maria's agency status should be stricken from the complaint, or in the alternative dismissed, it suffices to conclude that the General Counsel has not proven this allegation, and I so find.

The Facts

Charging Party Zamora, a registered nurse, works in the bargaining unit represented by the Respondent but is not a member of that union, which she opposes. In 2018, she tried to persuade other employees to support her effort to decertify it.

The Employer allows employees to use a conference room to conduct meetings, sometimes called "in-services," which other

[1] Sec. 102.20 of the Board's Rules and Regulations, as amended, requires a respondent to "specifically admit, deny, or explain each of the *facts alleged in the complaint*, unless the respondent is without knowledge, in which case the respondent shall so state. . ." (Italics added.) Sec. 102.20 further provides, in pertinent part, that "any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown."

workers can attend. Zamora requested and received permission to hold meetings to discuss the Union. To publicize such meetings, she prepared an announcement titled "Making A Critical Decision, Evaluating Pros and Cons, What Has Your Union Done For You?" It concluded with information regarding when and where the meetings would be held.

Zamora wanted to post copies of this notice on bulletin boards where employees could see them. The Employer maintains two types bulletin boards. Certain of the boards are open and available to employees who wish to post notices. Other bulletin boards are behind glass and must be unlocked to gain access. The Employer uses such locked (or "protected") bulletin boards for its own "official" notices. Under its collective-bargaining agreement with the Respondent, it also provides bulletin boards, both open and "protected," for the Respondent to use. Specifically, article 4, Section 3 of that contract states, in part:

> For the posting of union notices communicating to bargaining unit employees, the Hospital will make available to the union a dedicated bulletin board in each break room in each Nursing Department and one (1) locked bulletin board in the following location at each campus: at Bay Area/Heart Hospital on the first floor in the hallway between Radiology and the Cafeteria; at Doctors Regional on the first floor across from the Pharmacy entrance; at Northwest Regional on the first floor in the hallway leading to the cafeteria; and at Northshore Emergency in the hallway outside the employee breakroom.

Zamora could not unlock the protected bulletin boards. Instead, she affixed her flyer to the outside of the glass, at a spot where it would not cover up anything posted on the inside. She also posted copies of the flyers on break room walls. However, someone later removed the flyers.

On June 20, 2018, Zamora sent an email to the Employer's vice president of human resources, Vince Goodwine. The record indicates she also sent a copy of this email to Michael Lamond, whom Zamora identified as the Employer's liaison with the Union. The email stated:

> I would like to file a formal complaint against the NNOC union organizers for removing my in-service flyers from the nurse's break rooms and other bulletin boards through Dr's Regional Medical Center. There are a few of us who are opposed to having this particular union represent us and would like to educate our coworkers on another perspective or viewpoint. These are educational in-services with the intent to open up a dialogue regarding the pros and cons of unionization. We cannot educate our peers if they are unaware of our in-services.
>
> Today at approximately 1230pm, an NNOC union organizer walked out of my break room on Rehab. I went directly into my break room and noticed my flyer was gone. I immediately walked back out and down the hall and encountered this individual and asked for her name. She stated her name was Maria and informed me she was an organizer for the union. I asked her if she had removed my flier from our break room and she stated she had. I informed her that I would expect mutual respect from the union as I do not go to their boards and remove their bulletins/flyers, etc. She responded that I'm not allowed to as that is their designated space. I questioned what gave her the right to remove my flyer as it was not even on the union board as she claims it was. I corrected her and stated the corked area was their personal board space and my flier was on the wall. I demanded she return my flier back to me of which she did. I also informed her that Lynn James and I met with three of the Union nurse reps and discussed our flyers being removed. All three agreed it was not right and would discuss with their fellow members. Maria stated that she can't tell the nurses what to do and she has no control, insinuating to me that the fliers are going to be continued to be taken down.
>
> Mike, please follow up with the appropriate individuals to be respectful and leave our educational in-service flyers alone. I promise you, they will not occupy any space or area on their bulletin boards but rather on the walls.
>
> Thank you for your immediate attention.
>
> On the same day, Goodwine sent Zamora the following reply:
>
> Thanks for your email. All employees have the same privilege in use of our employee information bulletin boards.
>
> I'll defer to Michael to resolve with the NNOC.
>
> Thanks again for your email.

On June 28, 2018, Zamora telephone Michael Lamond. She testified that she told Lamond about the flyers which she had posted being removed and asked for permission to use "the protected bulletin board." According to Zamora, Lamond said that permission had been denied "because of my opposition. It pertained to being antiunion."

The Respondent raised a hearsay objection to Zamora's testimony concerning what Lamond told her. Lamond did not testify and the record suggests that he may have died. The Employer is not a party to this proceeding and even if it were, the record does not establish that Lamond was the Employer's agent. Therefore, I did not receive Zamora's testimony concerning Lamond's words for the truth of the matter asserted, and make no findings concerning what Lamond actually said to Zamora during this telephone conversation.

Moreover, Zamora's testimony was so vague it doesn't credibly establish what she said during this conversation. For example, she said that they discussed a "neutrality agreement" but her testimony does not reveal how that topic arose. Zamora did not indicate whether she raised the subject or he did. She testified, in part:

> I talked to him at great length about the denial and it being unfair and biased on my employer's part. I felt like I was being treated unfairly. We discussed the Neutrality Agreement. I talked to him about that I was fully aware or felt very strongly that there was a Neutrality Agreement based on my --

Thus, Zamora did not say that Lamond brought up the subject of a neutrality agreement. To the contrary, her testimony provides some reason to doubt that Lamond mentioned it first.

If Lamond had said "you can't post on the protected bulletin boards because the company has a neutrality agreement," Zamora would have had definite knowledge that such an agreement really existed and, presumably, would have testified to that effect.

However, Zamora did not testify that Lamond said anything which would indicate that a neutrality agreement was affecting who had access to the bulletin boards. Instead, she testified she told Lamond she was "fully aware or felt very strongly that there was a Neutrality Agreement. . ."

If Zamora said those words to Lamond, and if a neutrality agreement indeed limited who could post notices on the bulletin boards, presumably Lamond, in response, would have acknowledged that her hunch was correct. However, she did not quote Lamond as saying anything which reasonably would be considered an affirmation that, as she suspected, there was a "neutrality agreement" with provisions pertaining to use of the bulletin boards

After Zamora gave the testimony quoted above, the Respondent raised an objection, which I overruled. Zamora then testified:

> Yes, we talked about a Neutrality Agreement that I firmly believed had to be in place based on my past experience with a Neutrality Agreement. I felt that there was something in that that was preventing my hospital from granting my request for these privileges. He did discuss that there was a Neutrality Agreement but that it had expired or a certain portion of it had expired. There --

The vagueness of Zamora's testimony diminishes its credibility. She did not quote Lamond as saying that there was something in a neutrality agreement that prevented her from posting on the locked bulletin boards but only testified that *she felt* there was. Moreover, she is less than clear about whether Lamond told her that there had been a neutrality agreement which had expired or whether he said that part of it had expired. Additionally, although she left open the possibility that Lamond said that only part of the agreement remained in effect, Zamora provided no specific information about the contents of any such part.

Clearly, Zamora considered access to the locked bulletin boards a matter important enough to raise with the Employer's vice president of human resources, who referred her to Lamond. She testified that she talked with Lamond "at great length" and protested that she was being treated unfairly. Certainly, she would have considered her conversation with Lamond important.

People tend to remember conversations concerning matters they consider important more than they do discussions about subjects they believe trivial or inconsequential. Similarly, when a person is seeking redress for perceived unfair treatment, emotion burns the matter into memory. Without doubt, Zamora had strong feelings about the bulletin board issue. Otherwise, she would not have contacted Goodwine and Lamond and spoken with the latter "at great length." Yet Zamora's description of the conversation is nebulous and nonspecific. This inconsistency creates the impression that either the witness is not telling the full story or that her memory is too sketchy to be reliable.

Even assuming that Zamora testified to the best of her recollection, her testimony does not support a conclusion that Lamond brought up the existence of a neutrality agreement or cited it as a reason for denying Zamora permission to post her flyer on the protected bulletin boards. As noted above, Zamora did *not* say that she believed there was a neutrality agreement because *Lamond* said that such an agreement existed. Rather, she testified that she "firmly believed" that a neutrality agreement had to be in place "based on my past experience with a Neutrality Agreement."

Her "past experience with a Neutrality Agreement" had nothing to do with her present Employer. She began working for that Employer in February 2012. Two years before that, in January 2010, Zamora gave testimony about neutrality agreements before a Congressional committee.

This history raises the possibility that Zamora, not Lamond, raised the matter of neutrality agreements and that she did so because of a longstanding opposition to such agreements in general and not because a neutrality agreement somehow had precluded her from posting a flyer on a protected bulletin board. Significantly, Zamora did not testify that Lamond *volunteered* that a neutrality agreement was the reason she could not post a notice on the protected bulletin boards. If anything, her testimony points in another direction.

Therefore, I am somewhat concerned that Zamora is attempting to make this case a vehicle for obtaining a precedent establishing that a union has a duty to furnish employees, on request, a copy of an existing neutrality agreement when, in fact, the neutrality agreement had nothing at all to do with the Employer's decision denying Zamora access to the protected bulletin boards.

However, even if Zamora did not harbor such an ulterior motive—an "ax to grind" concerning neutrality agreements in general—the vagueness of her testimony leads me to give it little weight. Thus, even if Zamora is not seeking to set a precedent for the principle that a union has a duty to disclose neutrality agreements to bargaining unit employees, her testimony—that she *believed* that a neutrality agreement was preventing her from posting her notice, based on her *past experience* with a neutrality agreement—leads me to conclude that she simply was speculating, and that some previous experience unrelated to her present Employer inclined her speculation in that direction.

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

On July 3, 2018, Zamora sent an email to Lamond, with copies to several people, including Vice President of Human Resources Goodwine. She included in that email a copy of Goodwine's reply to the email which she had sent Goodwine on June 20, 2018. (Goodwine's brief reply, also dated June 20, 2018, is quoted in full above.) Zamora's July 3, 2018 email to

Lamond stated:

> On Thursday, June 28th, I spoke to you concerning my request for the protected bulletin board and you said I was denied because it pertained to opposition to the Union. I've included Mr. Goodwine's response below which state[s] all employees have the same privilege in use of informational bulletin boards. Are you both telling me that ALL employees would be denied use of the protected boards. Because as I see it, the employees that are pro-union are getting all the privileges and those of us anti-union are being denied the same privileges. I am simply asking for the same privileges my pro-union counterparts have established. This is very unfair and biased on my employer[']s part and I am requesting you and those you report to review our policies to establish fairness across the board to All employees. I would greatly appreciate your immediate response as my team's window is extremely limited.

Zamora testified that "my team's window" referred to the "window" of time for filing a decertification petition.

It is important to give one statement in this email particular scrutiny. Zamora wrote that "as I see it, the employees that are prounion are getting all the privileges and those of us [who are] anti-union are being denied the same privileges. I am simply asking for the same privileges my pro-union counterparts have established." Zamora's testimony indicates that she made a similar claim of disparate treatment during her June 28, 2018 telephone conversation with Lamond:

> Q. What do you recall about that discussion [with Lamond]?
> A. We discussed -- I discussed again about my fliers being removed and I couldn't keep them up. Then I asked him about the protected bulletin board. I felt that *the pro-union nurses* had this privilege and that I should have the same privilege. Just because I'm on the opposing view should not deny me that privilege and that I was having great difficulty getting permission to use it.

(Italics added.) Zamora thus appears to be claiming that the Employer was treating *individual nurses* in two different ways, depending on their support for or opposition to the Union. Specifically, her words imply that the Employer was allowing prounion nurses (acting on their own as individuals and not on behalf of the Respondent) to post messages supporting the Respondent behind the glass of locked bulletin boards, but denying her right to post antiunion messages.

Zamora's words therefore might create the impression that a secret agreement between the Employer and the Respondent—an agreement apart from the collective-bargaining agreement—resulted in certain employees receiving a workplace privilege denied to other employees. Taken at face value, they suggest that some employees are coming to the Employer with prounion messages and that the Employer allows these to be posted behind glass, while denying Zamora the right to post anti-union messages.

Such a situation is highly implausible. The Respondent is well established as the collective-bargaining representative, and is a party to a contract with the Employer. An individual employee who favors such an incumbent union has little if any reason to post a notice expressing support for it. Typically, such employees simply would maintain their memberships in the union by paying dues. They also might attend meetings and participate in union matters and perhaps express their support to coworkers. However, it would be unusual for an employee who wasn't acting on behalf of the union to seek to post an announcement supporting it on a locked bulletin board.

Because of my concerns about the impartiality of Zamora's testimony, and also because it would be out of the ordinary for an individual prounion employee to seek to post a notice supporting an incumbent union on a locked bulletin board, I have looked to the record for corroborating evidence. However, there is no evidence of any instance in which an individual employee requested and was granted permission to post a prounion notice on a protected bulletin board. Indeed, the record does not establish that any individual employee, other than Zamora, sought permission to post any kind of message behind the glass.

In other words, the record does not establish that a privilege to post notices on a locked bulletin board was a condition of employment enjoyed by any bargaining unit employee. I find that it was not. Likewise, the credible evidence is insufficient to establish that the Employer had a practice of allowing individual employees to post notices of any kind on protected bulletin boards.

The Respondent's right to post notices on a locked bulletin board was not a condition of employment of any bargaining unit employee, and it was not a right established by a secret agreement. To the contrary, the collective-bargaining agreement conferred this right on the Respondent so that it had a means of communicating with bargaining unit employees. The Respondent did not keep this contract secret and, as noted below, provided Zamora a copy of it.

On July 8, 2018, Zamora sent another email to Lamond, with copies to Goodwine and some other managers. That email stated:

> I have been told on numerous occasions, from you, Mr. Goodwine, and several others that I can not have a protected bulletin board because it would be "facilitating" anti-union support. By not providing me with the same privileges you are thereby facilitating pro-union support. I would very much like to see this language in writing. I am formally requesting a copy of the Neutrality Agreement between HCA and NNOC at your earliest convenience. I will gladly make a trip to your office to retrieve or if you like you can email it to me. Mr. Goodwine informed me that it is an HCA policy. I cannot find this so-called policy. Can you direct me to that as well, please?

The Employer did not provide Zamora with a copy of any neutrality agreement. She then requested the same document from the Respondent. Her July 11, 2018 letter to the Respondent stated:

> TO WHOM IT MAY CONCERN:
>
> My name is Esther M. Zamora. I am an RN employed at

> Corpus Christi Medical Center-Doctor's Regional Hospital in Corpus Christi, Texas and am currently represented by the National Nurse's Organizing Committee. I am formally requesting a copy of the HCA/NNOC Neutrality Agreement that brought your union into our facility. I understand that the first stage has expired, but that my employment remains governed by the second, post-organizing stage of this agreement. I understand that aspects of this current agreement control how my employer can deal with me, and vice versa. Since my working life at Corpus Christi Medical Center-Doctors Regional Hospital is being affected by the neutrality agreement's current terms and conditions, I have a right to a copy of this Agreement and you have a fiduciary duty to provide it to me. Please send the agreement to me as soon as possible, and no later than 14 days from now. If you refuse to send it, please explain your refusal. I thank you kindly for your expedited services.

It may be noted that Zamora's letter stated as fact some assertions which the present record does not substantiate. For example, no credible evidence indicates that her employment "remains governed by the second, post-organizing stage" of a neutrality agreement. Indeed, the record does not establish that there is a neutrality agreement with two portions, or that one of those "stages" remained in effect at the time of this letter. The credited evidence also does not prove that any agreement other than the collective-bargaining agreement affected the terms and conditions of employment of bargaining unit employees.

Labor Representative Bradley Van Waus, whom the Respondent has admitted to be its agent, answered Zamora's letter: Van Waus' reply, dated July 25, 2018, states as follows:

> Dear Ms. Zamora:
>
> Thank you for your letter of July 11, 2018. There is no agreement between HCA and NNOC that controls how your employer, Corpus Christi Medical Center-Doctor's Regional Hospital can deal with you as a [sic] employee in the NNOC bargaining unit, other than the September 21, 2015-June 30, 2018 collective bargaining agreement between NNOC/Texas and Corpus Christi Medical Center. Enclosed is a copy of that collective bargaining agreement.
>
> If you have issues or concerns involving terms and conditions of your employment, please do not hesitate to contact NNOC Labor Representative, Bradley Van Waus who can be reached at 240-460-0352.
>
> Sincerely,
>
> Bradley Van Waus

The record does not indicate that Zamora filed or attempted to file a grievance concerning the denial of her request to post a message on the locked bulletin boards or seeking access to those boards. Additionally, the record does not establish that Van Waus, or any agent of the Respondent, had any other communication with Zamora, apart from this July 25, 2018 letter, concerning her request for a copy of the "neutrality agreement." At hearing, the General Counsel amended complaint paragraph 8 to add an allegation that this July 25, 2018 response to Zamora violated Section 8(b)(1)(A) because it was arbitrary or in bad faith.

The Neutrality Agreement

There is a threshold question which must be addressed before moving on to the allegation that the Respondent refused to provide the Charging Party with a neutrality agreement it had entered into with the Employer: Does any such agreement exist?

Based on uncontroverted evidence, I find that the Respondent did not provide Zamora with any document titled "neutrality agreement." Indeed, the record clearly establishes that the Respondent did not furnish Zamora with any document at all other than the collect-bargaining agreement.

However, the General Counsel must prove more than that the Respondent did not furnish the Charging Party with a requested document. As a threshold matter, the government first must establish that such a document existed and then must prove that the Respondent, as exclusive bargaining representative, had a duty to provide it to a requesting employee.

These predicate conditions—that the document in question actually exists and that the union has a duty to furnish it upon request by a bargaining unit member—cannot simply be assumed to be true. If a bargaining unit employee asks the exclusive bargaining representative for a copy of a document which does not exist, and that union tells the employee that no such document exists, there can be no breach of the duty of fair representation. An exclusive bargaining representative cannot, and does not have to, furnish a nonexistent document.

That principle seems so axiomatic it hardly needs to be mentioned. However, in the present case, there are complicating factors which make it advisable to state the obvious: First, the Charging Party's July 11, 2018 request, when read carefully, turns out to be more ambiguous than it initially appears. Second, the complaint does not separately allege that a neutrality agreement exists, but just assumes that fact. Third, the Respondent answered the complaint in such a way that it could not be certain whether or not a document entitled "neutrality agreement" actually existed. These three factors come together to create a muddle, a nearly perfect cyclone of ambiguity.

The Charging Party's July 11, 2018 Request

The Charging Party's July 11, 2018 letter to the Respondent states that she was "formally requesting a copy of the HCA/NNOC Neutrality Agreement that brought your union into our facility." If considered just by itself, that language seems pretty clear. However, what the letter says next muddies the water.

After requesting a copy of the neutrality agreement, the Charging Party's letter goes on to state that she understood that the neutrality agreement had two parts, and that the first part had expired. Did that mean that the Charging Party was *only* asking for what she believed to be the unexpired part? Her letter doesn't say, at least not explicitly. However, what reason would she have had even to mention her belief that the agreement had two parts unless she only sought the portion which had not expired?

The next words in her letter support a conclusion that the Charging Party intended to convey that she only sought the unexpired portion of the agreement. These words express her

belief that her "employment remains governed by the second, post-organizing stage of this agreement. I understand that aspects of this current agreement control how my employer can deal with me, and vice versa." These words offer an explanation of why she was requesting the document and also describe why she believed that the Respondent had a legal duty to give her a copy of this agreement.

In these circumstances, I conclude that someone who read this letter reasonably would understand it to be a request only for the supposedly unexpired portion of the neutrality agreement, and would also reasonably understand that the Charging Party wanted this portion of the agreement because she believed that it had an effect on her working conditions. Further, I conclude that she intended the letter to communicate that message.

The Complaint

As noted above, the complaint does not separately allege the existence of a neutrality agreement. But there is an additional potential source of ambiguity. Paragraph 8(a) of the amended complaint alleges that the Respondent "has refused to provide the Charging Party a copy of its neutrality agreement with the Employer, *as requested on or about July 11, 2018*." (Italics added.)

For reasons discussed above, I conclude that someone reading the July 11, 2018 request reasonably would understand that the Charging Party was asking only for the portion of the neutrality agreement which had not expired. Therefore, it is not entirely clear from the complaint whether the General Counsel contends that the Respondent's failure to furnish the Charging Party the entire neutrality agreement was a violation, or only the failure to provide the conjectured unexpired portion.

The Respondent's Answer

The Respondent's answer stated that it "specifically denies that it failed or refused to provide Charging Party with a copy of a neutrality agreement with the Employer that controls how the Employer can deal with her or has any effect on her working life with the Employer as requested in Charging Party's July 11, 2018 letter to Respondent." The Respondent's answer also included an affirmative defense which further explained its position. For reasons discussed above, I have concluded that the Respondent's answer satisfied the Section 102.20 requirement to "specifically admit, deny, or explain each of the facts alleged in the complaint. . ." However, in view of my conclusion that the Charging Party's July 11, 2018 letter reasonably would be understood to be a request *only* for the unexpired portion of the neutrality agreement, the part which she felt might affect her working conditions, I further conclude that the Respondent has effectively denied the existence of the document which the Charging Party requested.

Of course, that still leaves unanswered the question of whether there exists some document titled "neutrality agreement" which does *not* include any provisions affecting terms and conditions of employment. Although this issue need not be reached to decide whether the Respondent committed an unfair labor practice, if left unresolved it would an untidy loose end.

Before and at first during the hearing, the Respondent repeatedly avoided revealing whether or not it had entered into any other pact called a "neutrality agreement," that is, into a "neutrality agreement" which did *not* affect terms and conditions of employment. It is puzzling why the Respondent worked so hard to leave uncertain whether or not any kind of neutrality agreement existed. The existence of such a document would not have affected the Respondent's argument that it had no duty to provide an employee with such an agreement, or, indeed, with any document which did not pertain to or affect the terms and conditions of employment of bargaining unit employees.

The Respondent advanced this argument in the second "affirmative defense"[2] it included with its answer to the complaint. It states, in part:

> Under current Board law Respondent's duty to provide agreements or documents requested by Charging Party are limited to those which reflect or affect her terms and conditions employment.

The "affirmative defense" then states, in effect, that a neutrality agreement "sets terms and conditions for a democratic process to determine a petitioning union's majority support in a bargaining unit" but does not affect the terms and conditions of employment of bargaining unit employees.[3]

It would not have detracted from this argument for the Respondent to have admitted that, in connection with its efforts to organize the employees of the Employer and other subsidiaries of HCA Holdings, Inc., it had entered into a "neutrality agreement" with the holding company. Indeed, this question—whether any "neutrality agreement" existed—would not go away. It arose during the hearing when the General Counsel sought to introduce a position statement submitted to the Board's Regional Office by the attorney for HCA Holdings, Inc., during the investigation of a related matter, a charge which Zamora had filed against the holding company and the Employer because she had been denied the use of the locked bulletin boards. (The position statement, dated October 17, 2018, identified that case as *Corpus Christi Medical Center and HCA Holdings, Inc.*, 16–CA–225103. It is not before me.)

During this discussion, the existence or nonexistence of a neutrality agreement remained unclear. Therefore, I asked the

[2] The term "affirmative defense" appears to be a misnomer because the Respondent does not bear the burden of pleading or proving that the requested document did not relate to terms and conditions of employment. Rather, the General Counsel bears the burden of establishing that the document sought pertains in some way to the Respondent''s duties as the exclusive bargaining representative.

[3] The "affirmative defense" then concludes with a somewhat fuzzy argument which, I believe, can be expanded and restated more plainly as follows: The Charging Party indicated that she believed part of the neutrality agreement remained in affect, but if so, that portion did not pertain to the working conditions of employees in her bargaining unit but instead set rules which the parties would follow when the Respondent tried to organize employees at other facilities controlled by HCA Holdings, Inc. Such provisions do not apply to the Charging Party or her bargaining unit and, therefore, the Act does not require the Respondent to furnish her with a copy.

Respondent's counsel about it:

> JUDGE LOCKE: Well, let me ask you this: Is there any agreement between the Employer and the Union, other than the Collective Bargaining Agreement?
>
> MR. BERUL: There is none.
>
> JUDGE LOCKE: There is none.
>
> MR. BERUL: The Employer being Corpus Christi Medical Center, there is none.
>
> JUDGE LOCKE: So, how about between the Union and the HCA Holdings?
>
> MR. BERUL: There are —I think there is probably multiple agreements, but I don't know the answer exactly. But I will say definitively, there is not any agreement between HCA Holdings and Respondent Union, that has any impact on terms and conditions of employment of the employees of Corpus Christi Medical Center, and it is not our burden to prove -- we are innocent until proven guilty. They haven't proved anything.
>
> JUDGE LOCKE: Well, is there any agreement between the Union and HCA Holdings that -- as to how the Employer will act in the face of a union organizing effort, or in the face of an election [conducted] by the Labor Board?
>
> MR. BERUL: You mean, like what —what position they would take with regard to —
>
> JUDGE LOCKE: Yes.
>
> MR. BERUL: There is not.

This statement by the Respondent's counsel appears to conflict with the position letter submitted by HCA Holdings, described above, which I received into evidence. That letter identified the Employer, Corpus Christi Medical Center (CCMC), as an indirect subsidiary of HCA Holdings, Inc., and stated, in part:

> HCA Holdings, Inc., is a party to an agreement with California Nurses Association, of which NNOC—Texas, NNU is an affiliate. That agreement requires the parties and their affiliates to conduct their relationships in a manner consistent with mutual respect and joint commitment to problem solving. The agreement does not govern the terms and conditions of employment of bargaining unit employees at CCMC.

The position statement further stated that the "agreement provides that neither CCMC nor HCA Holdings shall encourage or support decertification, but does not otherwise limit how they can deal with bargaining unit employees."

Thus, this position letter contradicted to some extent the representations of the Respondent's attorney during the hearing. However, neither HCA Holdings nor the Employer is a party to this proceeding, and neither appeared at the hearing. Therefore, there was no opportunity during the hearing to explore the differences between the HCA Holdings position letter and the representations of the Respondent's counsel.

However, the week before the hearing opened, the attorney for HCA Holdings and the Employer did participate in a prehearing conference call concerning petitions to revoke subpoenas, including a petition to revoke a subpoena served by the Charging Party. This subpoena sought to require HCA Holdings and the Employer to produce the neutrality agreement.

The Charging Party's subpoena and the petition to revoke presented an unusual issue. It involves the seemingly paradoxical and uncommon situation in which it is appropriate for the judge to revoke a subpoena seeking information which is relevant to the case. Ordinarily, of course, the judge's job is to revoke a subpoena seeking evidence which does *not* relate to "any matter under investigation or a question in the proceedings. . ." See Section 102.31(b) of the Board's Rules and Regulations. However, on those rare occasions when a subpoena for *relevant* information would deny a party due process, such a subpoena may be revoked notwithstanding the relevance of the information sought. Such rare occasions involve cases in which the alleged violation itself is a refusal to furnish the information and the remedy would be an order directing that the information be provided.

When the Board finds that a respondent has violated the Act by refusing to provide requested information, it remedies that unfair labor practice by ordering the respondent to do so. However, the Board issues such an order only after the General Counsel has proven a violation. To accomplish the same result by use of a subpoena, before evidence had been received and considered, would short-circuit the adjudicative process and eliminate the requirement that a violation be established before a remedy is ordered.

In *Electrical Energy Services, Inc.*, 288 NLRB 925 (1988), the Board approved its administrative law judge's revocation of a subpoena which would have required the respondent to produce the same document that it allegedly had withheld unlawfully. The judge's decision stated:

> In the instant case, the General Counsel is attempting to use the subpoena duces tecum as a substitute for the Board order sought by the complaint. Not only is this procedure improper, but it is an abuse of the subpoena power because it would undercut the statutory requirement for an unfair labor practice hearing where the ultimate issue to be decided is whether the General Counsel is entitled to the information in question.

288 NLRB at 931.

This holding in the *Electrical Energy Services* case concerned a subpoena which the General Counsel had directed towards the respondent. In contrast, the subpoena at issue here comes at the behest of the Charging Party and is directed to the Employer and HCA Holdings, which are not parties to this proceeding. Thus, the subpoena would not require the *Respondent* to take the same action it would be ordered to take if found, after hearing, to have violated the Act. Indeed, it would not require the Respondent to take any action. So, it would not directly deny the Respondent's due process by requiring the Respondent to take the same action it would only have to take if the government proved that withholding the information had violated the Act. But it would, in a sense, commandeer the Board's subpoena power to obtain a document which the Charging Party might otherwise (if the government failed to prove a violation) have no right to see.

Because of these differences, in both the recipient of the subpoena and the party serving it, *Electrical Energy Services* is not squarely on point. Moreover, the present issue, unlike that in *Electrical Energy Services*, involves the clash of two competing principles, both of which are important.

On the one hand, although the subpoena would not require any disclosure by the Respondent, the Charging Party nonetheless would receive the document which the Respondent, and also presumably the Employer, wished to keep secret. Even though the Respondent was not the subpoenaed party, it was a party to the agreement, and thus had some legitimate interest in keeping the document secret.

Additionally, the legal principle that the Act imposes on an exclusive bargaining representative a duty to provide requested information concerning the performance of its statutory duties comes with the corollary that the Act does *not* require a union to furnish a requesting employee with information *not* related to its statutory duties. The Board therefore lacks statutory authority to require a union to provide such information. If the Board has no authority to order such a remedy, may it achieve the same result by allowing a party to subpoena the same information from another source?

On the other hand, granting the petition to revoke the subpoena would deny the Charging Party evidence highly relevant to a central, indeed dispositive issue: Whether the neutrality agreement actually affected or pertained to terms and conditions of employment or whether it simply concerned how the Employer would act during an organizing campaign and election. The neutrality agreement itself would be the most relevant evidence needed to resolve this issue and might be the only evidence.

Although HCA Holdings and the Employer are not parties in this proceeding, I requested their counsel to be present, along with counsel for the various parties, during a telephone conference call the week before the hearing. During this prehearing conference call, after discussion of the issue, I told counsel that I would not grant the petition to revoke the subpoena at this point but rather would examine the neutrality agreement *in camera* before deciding how to proceed.

Such *in camera* examination is disfavored and should be used only rarely. However, in this instance, there appeared to be no ready alternative which would balance the competing interests. An *in camera* examination would allow me to determine whether the neutrality agreement included any provisions which affected the bargaining unit employees' terms and conditions of employment. If so, I could order that other portions of the document be redacted before it was provided to the Charging Party. Thus, only the provisions relevant to the present case would be revealed. But if the neutrality agreement included no provisions affecting the terms and conditions of employment of bargaining unit employees, then I would grant the petition to revoke in its entirety.

On February 3, 2020, the day before the hearing opened, the attorney representing HCA Holdings and the Employer sent me an email, with copies to counsel in this proceeding. That email stated:

> I have discussed with my clients the in camera inspection of documents responsive to Charging Party's subpoenas duces tecum. Respectfully, they do not intend to produce documents for in camera inspection. As the cases we cited in our Petitions to Revoke establish, the Board has held that where the primary issue to be decided in the unfair labor practice hearing is whether the Charging Party is entitled to the requested information, the information cannot be obtained by a subpoena. That being the case, regardless of the outcome of any in camera inspection, the requested documents cannot be obtained by Charging Party's subpoenas duces tecum. Accordingly, my clients do not intend to produce documents for in camera inspection.

HCA Holdings and the Employer did not produce the subpoenaed neutrality agreement and their attorney did not attend the hearing.

When a subpoenaed individual or company does not comply with a subpoena, the Board may petition a federal district court to issue an order enforcing the subpoena. See, e.g., *United Refrigerator Services*, 325 NLRB 258 (1998). However, the record does not indicate that the Charging Party sought such enforcement and I conclude that it did not.

When a *party* to a Board proceeding fails to comply with a subpoena served on it by an opposing party, the Board may impose a variety of sanctions. These sanctions include permitting the party seeking production to use secondary evidence, precluding the noncomplying party from rebutting that evidence or cross-examining witnesses about it, and drawing adverse inferences against the noncomplying party. *McAllister Towing & Transportation Co., Inc.*, 341 NLRB 394 (2004); *International Metal Co.*, 286 NLRB 1106, 1112 fn. 11 (1986); *Bannon Mills*, 146 NLRB 611 (1964).

However, HCA Holdings and the Employer are not parties to this proceeding. Therefore, even were it possible, imposing a sanction would not be appropriate. More specifically, it would not be proper to draw an adverse inference, binding on the Respondent, when the Respondent was not the party served with the subpoena and did not refuse to comply with it.

The most trustworthy evidence concerning a possible neutrality agreement is the October 17, 2018 position letter of HCA Holdings and the Employer, submitted during the investigation of Case 16–CA–225103. That document is in evidence as General Counsel's Exhibit 7. Relying on it, I find that there is a neutrality agreement between HCA Holdings and the Respondent or an affiliate of the Respondent, and that this agreement does not affect the terms and conditions of employment of bargaining unit employees.

Although the Charging Party testified that she believed the neutrality agreement did affect such terms and conditions of employment, she has not seen the agreement. Moreover, for reasons discussed above, I give little weight to her vague testimony concerning a telephone conversation with Michael Lamond, who did not testify. Both the position statement and the words which Zamora attributes to Lamond are hearsay, but I have considerably more confidence in the former than the latter.

Moreover, a "neutrality agreement" typically governs an employer's conduct during a union organizing campaign rather than setting terms and conditions of employment. Here, where the Employer and Respondent have entered into an extensive collective-bargaining agreement addressing wages, hours and many other matters, and where that comprehensive contract makes no mention of a "neutrality agreement," it is difficult to believe that the parties intended it to establish any conditions of employment.

At the end of the 94-page collective-bargaining agreement appear two "side letters" and one "memorandum of understanding." If the "neutrality agreement" had any effect on terms and conditions of employment, presumably the contracting parties would have attached it to the collective-bargaining agreement, as they did these other "side agreements." They did not.

Also, there is no apparent reason for these parties to keep secret a document specifying terms and conditions of employment. Either party might need to cite such a document during a grievance proceeding or arbitration.

Additionally, the Employer was not a party to the neutrality agreement. Only HCA Holdings entered into it. But the collective-bargaining agreement is between the Employer, Corpus Christi Medical Center, and the Respondent. HCA Holdings is not a party to that contract.

The credible and credited evidence falls well short of establishing that the neutrality agreement affected any term or condition of employment of bargaining unit employees. Therefore, I find that the neutrality agreement does not.

Further, I find that although the Employer obviously had exclusive access to those locked bulletin boards which displayed its official notices, the collective-bargaining agreement determined who would have access to the other locked bulletin boards. The complaint does not allege that the Respondent violated the Act by any failure to provide the Charging Party with a copy of this contract. Moreover, the evidence clearly establishes that the Respondent did furnish the Charging Party with a copy.

The relevant portion of the collective-bargaining agreement, Article 4, Section 3 (which is quoted verbatim above) provides that the Employer "will make available to the union a dedicated bulletin board" at certain specified locations. To "dedicate" means to "set aside specifically for a purpose." The collective-bargaining agreement specifies that purpose, "the posting of union notices communicating to bargaining unit employees." Needless to say, the Charging Party's flyers are not "union notices."

The Respondent is the sole author of "union notices" and thus the sole authorizer deciding what to post on the bulletin boards dedicated to its use. However, the complaint in this case does not allege that the Respondent violated the Act by refusing to allow the Charging Party to post anything on any of these bulletin boards. Likewise, the General Counsel has not argued that the Respondent violated the Act by any failing to allow the Charging Party to post on these union bulletin boards.

The credited evidence establishes only that officers or agents of the Respondent posted notices on these union bulletin boards. I do not find that any employee, except for a union officer or agent, has been allowed to post anything on the locked bulletin boards dedicated to the Respondent's use. Similarly, credited evidence fails to establish that anyone other than a manager or agent of management has posted anything on a locked bulletin board dedicated to the Employer's use.

Analysis

The General Counsel alleges, in paragraph 8 of the complaint, that the Respondent "owed the Charging Party a duty to represent her in good faith" and that the Respondent breached this duty by (a) refusing "to provide the Charging Party a copy of its neutrality agreement with the Employer, as requested on or about July 11, 2018," and (b) responding "to the Charging Party's July 11, 2018 request in a manner that was arbitrary and/or in bad faith."

"Breaching a duty" means failing to do something the duty requires. A duty also can be breached by failing to perform the required act in a satisfactory manner. For example, an employer has a duty to furnish the employee's exclusive collective-bargaining representative with requested information which is relevant to and necessary for that union to perform its representation function. It breaches that duty either by failing to provide the information at all, or by delaying unreasonably in doing so. *West Penn Power Co.*, 339 NLRB 585 (2003). Of course, sometimes a duty requires a person to refrain from performing some act. In those instances, a person breaches the duty by doing what he was obliged not to do.

Proving that a duty has been breached begins with establishing that a duty existed. In the present case, the General Counsel alleges, in paragraph 8(c) of the amended complaint, that the "Respondent owed the Charging Party a duty to represent her in good faith." The burden falls on the General Counsel to establish that predicate fact.

Congress created the Board to administer the National Labor Relations Act, giving it authority to determine when the Act has been violated and to issue orders to remedy such violations. The Board's authority to enforce duties is limited to those duties which the Act imposes. So, I begin by considering what the Act requires the Respondent to do.

After employees selected the Respondent to represent them, the Board certified it to be the bargaining unit employees' exclusive representative, as that term is used in Section 9(a) of the Act. Section 9(a) states, in part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . .

29 U.S.C. § 159(a).

The Act requires the employer to bargain with the employees' exclusive representative and that union can invoke the Board's processes to compel the employer to do so. With this power comes responsibility. In *Miranda Fuel Co., Inc.*, 140 NLRB 181 (1962), the Board stated:

> The privilege of acting as an exclusive representative derives from Section 9 of the Act, and a union which would occupy this statutory status must assume "the responsibility to act as a

> genuine representative of all the employees in the bargaining unit."

140 NLRB at 184, citing *Peerless Tool & Engineering Co.*, 111 NLRB 853 (1955). Thus, the duty of fair representation enforced by the Board concerns how a union wields the power which comes with its status as exclusive bargaining representative.

An exclusive bargaining representative answers to the employees it represents. When the union's exercise of its statutory authority affects a bargaining unit employee, it has a duty to provide that employee, on request, with certain information about what it did. For example, if such a union is representing an employee in a grievance proceeding, the union has the duty to furnish the employee, on request, information about the grievance and its status. *Local 1657, United Food & Commercial Workers, AFL–CIO, CLC (Food World)*, 340 NLRB 329 (2003); *Auto Workers Local 909 (General Motors Corp.—Powertrain)*, 325 NLRB 859 (1998); *American Postal Workers Union, AFL–CIO*, 328 NLRB 281 (1998).

The amount of information which it must provide depends on particular circumstances. However, in general, the information must relate in some fashion to the duties which the union assumed when it sought and accepted the status of exclusive bargaining representative. A union can violate Section 8(b)(1)(A) of the Act in some other fashion, by doing something which restrains or coerces employees in the exercise of their rights under the Act, but if the violation does not concern how the union used or failed to use the power bestowed on it by Section 9 of the Act, such a violation does not implicate the duty of fair representation which the Act imposes, and which is cognizable by the Board.

In the present case, the General Counsel only has alleged that the Respondent breached its duty of fair representation and does not allege that the Respondent violated Section 8(b)(1)(A) of the Act in some other manner. The Respondent's failure to furnish the Charging Party with a copy of the neutrality agreement can only be a breach of the duty of fair representation if the neutrality agreement has something to do with the Respondent's representation function, that is, with the Respondent's discharge of its responsibilities as exclusive bargaining representative. The General Counsel bears the burden of proving such a connection.

An exclusive bargaining representative's statutory duties include meeting with the employer at reasonable times and "conferring in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached. . ." 29 U.S.C. § 158(d). Representing employees in grievance proceedings falls within the duty to meet, confer, and negotiate about "any question arising" under the contract.

The credited evidence does not establish that the neutrality agreement controls or even relates to any term or condition of employment. Both the Employer and the Respondent state that it does not, and there is no credible evidence to the contrary. The Charging Party's testimony, that she "felt" that the neutrality agreement must have some effect on working conditions, amounts to nothing more than speculation.

Although the Charging Party believed that the neutrality agreement affected who could post notices on the locked bulletin boards, I find, to the contrary, that the collective-bargaining agreement alone established the Employer's bulletin board policy. Further, the record does not establish that the neutrality agreement prescribed or affected any other terms and conditions of employment of bargaining unit employees. Therefore, I conclude that the General Counsel has not carried the burden of proving that the neutrality agreement has any relationship to the Respondent's exercise of the authority bestowed on it by Section 9 of the Act or to the performance of its duties as the exclusive bargaining representative.

Because the neutrality agreement does not pertain to or affect the Respondent's representation of bargaining unit employees, I conclude that the Respondent's failure to furnish a copy of it to the Charging Party does not breach its duty of fair representation.

The complaint, as amended, also alleges that the Respondent breached its duty of fair representation, in violation of Section 8(b)(1)(A) of the Act, by how its agent, Bradley Van Waus, answered the Charging Party's July 22, 2018 request for a copy of the neutrality agreement. Specifically, complaint paragraph 8(b) asserts that Van Waus's response was "in a manner that was arbitrary and/or in bad faith."

During oral argument, the General Counsel contended that the Respondent "provided the Charging Party with a parsed response intended to conceal whether or not it maintains a Neutrality Agreement with the Employer, or its corporate parent (HCA), that applies to bargaining unit employees. . ." The General Counsel further asserted:

> Respondent's response to the Charging Party was nothing more than wordsmithing or parsing of legal language in effort to conceal whether or not it maintains a Neutrality Agreement with the Employer.

The General Counsel argued that the

> Respondent ultimately has engaged in a classic "hide the ball" game here. It has refused to admit or deny whether any such Neutrality Agreement exists, while at the same time arguing that the Charging Party has never seen the Neutrality Agreement, so the Charging Party cannot prove that the agreement exists, or prove that it affects her terms and conditions of employment.

However, Van Waus' July 25, 2018 reply to Zamora, which the General Counsel alleges to be violative, states plainly that

> There is no agreement between HCA and NNOC that controls how your employer, Corpus Christi Medical Center-Doctor's Regional Hospital can deal with you as a [sic] employee in the NNOC bargaining unit, other than the September 21, 2015-June 30, 2018 collective bargaining agreement between NNOC/Texas and Corpus Christi Medical Center.

Moreover, Van Waus enclosed with this letter a copy of the collective-bargaining agreement. Thus, although Van Waus'

July 25, 2018 letter did not specifically deny the existence of a neutrality agreement, it unequivocally communicated that the collective-bargaining agreement alone set Zamora's terms and conditions of employment.

My conclusion that Van Waus' letter is unambiguous on this point does not suggest that it could not have been clearer regarding the existence or nonexistence of a neutrality agreement. However, Van Waus' letter, which the General Counsel alleges to have been arbitrary and/or in bad faith, does not mislead the Charging Party and it states clearly that the collective-bargaining agreement was the sole agreement affecting how the Employer could deal with her as a bargaining unit employee.

The duty of fair representation imposed by the Act concerns how an exclusive bargaining representative uses the authority conferred by the Act, but the evidence does not establish that the Respondent was exercising such statutory authority when it negotiated the neutrality agreement with HCA Holdings. Since a union typically enters into a neutrality agreement while it is still organizing employees, it cannot be assumed that the Respondent was the exclusive bargaining representative when it negotiated that agreement.

Moreover, not every agreement negotiated by an exclusive bargaining representative pertains to or affects employees in the bargaining unit it represents. When a union enters into an agreement not affecting the terms and conditions of employment of workers in the bargaining unit, it cannot be presumed that the union was performing a function in its capacity as exclusive bargaining representative.

The General Counsel bears the burden of proving the relationship between the information sought and a union's performance of its statutory duties. Here, the evidence does not establish such a relationship.

Therefore, I cannot conclude that the Respondent's reply to the Charging Party's July 11, 2018 request was arbitrary and/or in bad faith. Likewise, I cannot conclude that the Respondent breached its duty of fair representation in violation of Section 8(b)(1)(A) of the Act. Accordingly, I recommend that the Board dismiss the complaint in its entirety.

CONCLUSIONS OF LAW

1. At all material times, the Respondent, National Nurses Organizing Committee-Texas/National Nurses United (Respondent) has been a labor organization within the meaning of Section 2(5) of the Act. Labor Representative Bradley Van Waus is an agent of the Respondent within the meaning of Section 2(13) of the Act.

2. At all material times, the Respondent has been and is the exclusive bargaining representative, within the meaning of Section 9(a) of the Act, of a bargaining unit consisting of employees of the Employer, Bay Area Healthcare Group, Ltd. d/b/a Corpus Christi Medical Center. This unit, which is described above under the heading "Amendment to Complaint Paragraph 6," is an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act. The Charging Party, Esther Marissa Zamora, is an employee of the Employer and a member of this bargaining unit.

3. The Employer, Bay Area Healthcare Group, Ltd. d/b/a Corpus Christi Medical Center, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

4. The Respondent did not violate the Act in any manner alleged in the complaint.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended[4]

ORDER

The complaint is dismissed

.

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