Nos. 18-2108 & 18-2225

In the United States Court of Appeals

FOR THE SIXTH CIRCUIT

MARATHON PETROLEUM, LP,
D/B/A CATLETTSBURG REFINING, LLC,
PETITIONER/CROSS-RESPONDENT,

v.

NATIONAL LABOR RELATIONS BOARD
RESPONDENT/CROSS-PETITIONER.

On Appeal From The National Labor Relations Board
Case No. 09-CA-162710

AMICUS CURIAE BRIEF OF AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, AMERICAN PETROLEUM INSTITUTE, THE HR POLICY ASSOCIATION AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER/CROSS-RESPONDENT

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CORPORATE DISCLOSURE STATEMENT

The undersigned counsel for *Amici Curiae,* furnishes the following statement in compliance with 26.1 of the Federal Rules of Appellate Procedure.

1. Does the party/*amicus* have any parent corporation? If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

   No.

2. Is 10% or more of the stock of a party/*amicus* owned by a publicly held corporation? If yes, identify all such owners.

   No.

3. Does any publicly held corporation, whether or not a party to the present litigation, have a direct financial interest in the outcome of the litigation by reason of a franchise, lease, or other profit sharing agreement, insurance, or indemnity agreement?

   No.

Dated: December 26, 2018

/s/ Bernard J. Bobber
Bernard J. Bobber

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Statutes

Other Authorities/Publications/Opinions

STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 29(a)(4)(E)

American Fuel & Petrochemical Manufacturers, American Petroleum Institute, HR Policy Association, and the National Association of Manufacturers, *Amici Curiae*, hereby make the following statements:

(A) No party's counsel authored this brief in whole or in part;

(B) No party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(C) No person – other than the *Amici Curiae*, their members, or their counsel – contributed money that was intended to fund preparing or submitting the brief.

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE OF *AMICI CURIAE*

The American Fuel & Petrochemical Manufacturers ("AFPM") is a national trade association whose members comprise virtually all U.S. refining and petrochemical manufacturing capacity.

American Petroleum Institute ("API") is the only national trade association representing all facets of the natural gas and oil industry, which supports 10.3 million U.S. jobs and nearly 8 percent of the U.S. economy. API's more than 600 members include large integrated companies, as well as exploration and production, refining, marketing, pipeline, and marine businesses, and service and supply firms. They provide most of the nation's energy and are backed by a growing grassroots movement of more than 47 million Americans.

The HR Policy Association ("HRPA") is a public policy advocacy organization representing the chief human resource officers of major employers. HRPA consists of more than 375 of the largest corporations doing business in the United States and globally. Collectively, their companies employ more than 10 million employees in the United States, nearly 9 percent of the private sector workforce. Since its founding, one of HRPA's principle missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually and has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agency that helps manufacturers compete in the global economy and create jobs across the United States. The NAM has participated as *amicus curiae* in many significant labor cases before the Supreme Court, federal courts of appeal, and the National Labor Relations Board ("NLRB" or "Board"), where such participation has been permitted.

According to the Bureau of Labor Statistics, there were approximately 1,461,000 union-represented employees employed by manufacturers in 2017 – one of the largest industry groups of unionized private sector workers.[1] Both manufacturers and their employees rely on fairness and balance in our labor law system, and maintaining the time-tested balance between labor unions and employers is critical to economic growth and job creation.

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[1] *Union Members Summary—2017*, The United States Bureau of Labor Statistics, (Jan 19, 2018) https://www.bls.gov/news.release/union2.nr0.htm.

Amici members have a vital interest in the Board's decision in this case. Specifically, their members need to be able to rely on the rules afforded to them, and to be able to seek correction when the Board departs from established precedent. Moreover, members need to know their rights with regard to bargaining and responding to information requests, particularly when they involve subjects as to which the union has contractually waived its right to bargain, as well as where sensitive subcontracting cost information is requested.

All parties have consented to the filing of this brief of AFPM, API, HRPA and NAM, *Amici Curiae*, in support of Petitioner/Cross-Respondent. As such, and in accordance with Federal Rule of Appellate Procedure 29(a), *Amici* are not required to file an accompanying motion for leave to file as *Amici Curiae*.

STATEMENT OF THE CASE

This case presents important labor law policy issues including addressing the critical question of whether an employer is legally obligated to provide confidential subcontracting cost information to a union under the National Labor Relations Act ("NLRA" or "Act"), where the union has contractually waived its right to bargain over the employer's decision to subcontract in the first instance, such that the requested information relates only to the parties' agreement to "meet and discuss"—not "bargain over"—certain topics during the term of a collective bargaining agreement.

This case arises from Marathon Petroleum Co., d/b/a Catlettsburg Refining, LLC's ("Marathon" or the "Company") refusal to furnish confidential subcontracting cost information to the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 8-719 ("Union"). The parties' prior collective bargaining agreement contained provisions explicitly affirming the Company's right to unilaterally subcontract routine maintenance work (*i.e.*, bargaining unit work) so long as no unit employee was subject to involuntary layoff. In negotiations for a successor agreement in 2015, the Union unsuccessfully sought to place limitations on the Company's right to subcontract and went on strike in furtherance of its bargaining demands. The strike ended when the membership ratified the current collective bargaining agreement, which retains the critical provisions affording the Company the right to unilaterally subcontract out unit work.

Marathon also entered into a "Letter Agreement" with the Union affirming the parties' agreement to "discuss ongoing opportunities in the area of maintenance recruitment, development and day-to-day routine maintenance craft needs," as well as certain topics including "[p]rofile of occupations of the contractors performing day-to-day routine maintenance" and "[w]ays in which day-to-day routine maintenance work currently performed by contractors could be efficiently

performed by bargaining unit employees." (A54.)[2] Consistent with the contractual provisions safeguarding the Company's right to unilaterally subcontract work, the Letter Agreement specifically states that any hiring of maintenance employees remains in Marathon's sole discretion and provides that Marathon will develop a hiring plan that it will "share" with the Union after the parties have concluded their discussions. (*Id.*, A54-A55.)

In May 2015, the Union requested information from the Company relating to the parties' "discussions" of topics including how routine maintenance work could be efficiently performed by unit employees. In relevant part, the Union asked for "the wage/roll up/overhead costs of [the] contractor employees. . . [including] any premiums and margins paid to the contractor firms and any bonus/completion milestones paid to them." (A83.) Thereafter, the Company repeatedly declined to produce the requested information on the grounds that it was (1) not relevant; and (2) confidential. The Company unequivocally maintained that its decision to subcontract was not based on cost and emphasized its concern over revealing confidential third-party cost information, explaining:

> Contracting supplemental workers is a means to expand and contract our workforce to meet the cyclical nature of our business, and the costs do not alter the Company's need to maintain that operational flexibility. In addition, this request involves highly sensitive, confidential

[2] Parenthetical references to "A__." herein refer to the relevant pages of the Administrative Record contained in Petitioner's Appendix, filed pursuant to Sixth Circuit Rule 30.

> information involving the Company's business relationships with third parties. Disclosing such information could damage the Company's ability to reach agreements with these third parties.

(A88.) The Union subsequently filed an unfair labor practice charge with the NLRB alleging the Company unlawfully failed to provide the requested information relating to subcontracting costs. On July 18, 2018, a three-member Board panel ruled the Company's refusal to provide the cost information violated Section 8(a)(5) of the NLRA. 366 NLRB No. 125, slip op. (2018). In a footnote, the panel majority determined the facts failed to establish the Union had waived its right to bargain over subcontracting; rejected the possibility that the parties' agreement to "meet and discuss" certain topics pursuant to the Letter Agreement "may not give rise to a bargaining obligation;" and held the Company was obligated to provide the subcontracting cost information. *Id.*, slip op. at 1, fn. 1. Thereafter, Marathon timely filed a petition for review of the Board's Order and the Board cross-petitioned for enforcement of its Order.

SUMMARY OF ARGUMENT

The panel majority decision of the NLRB in this case represents a significant departure from established legal precedent governing an employer's obligation to bargain with and to provide requested information to a union. In the span of a single footnote, the Board has seemingly abandoned its prior holdings that a union must establish the relevance of requested information relating to non-unit matters such as

subcontracting costs by demonstrating its relationship to a bargainable subject and/or potential breach of some specific provision(s) of the collective bargaining agreement. Without explanation, the Board ignores years of federal labor law precedent establishing the standard pursuant to which a union will be found to have waived its right to bargain over a mandatory subject such as subcontracting, as well as its right to receive information relating to the waived subject of bargaining. As if these sudden departures from settled federal labor law principles were not troubling enough, the Board's decision establishes a highly problematic, new legal precedent pursuant to which an employer may be found to have unwittingly forfeited the hard-won benefits of its contractual bargain by merely agreeing to "discuss" with the union a subject the employer reasonably believes it has no obligation to bargain over.

The ramifications of the Board's holdings will be felt throughout the manufacturing sector and beyond. Countless employers and unions are parties to labor agreements that contain similar provisions waiving the union's right to bargain over subcontracting and other mandatory subjects of collective bargaining. Many of them have also agreed to discuss topics of mutual interest during the terms of their agreements in an effort to promote positive labor relations and explore potential solutions to shared concerns, without committing to bargain over subjects where they have no obligation to do so. The Board's decision throws the parties to such agreements into an uncertainty they could not have anticipated. Additionally, the

Board's decision has suddenly expanded the bases upon which an employer may be found obligated to provide a union information, including the confidential subcontracting cost information at issue here. These sweeping changes to the determination of an employer's bargaining obligations have been effected without precedent or explanation. They will only foster chaos and discord as employers and unions attempt to navigate the illogical new legal landscape the Board has created in a footnote.

This Court should reverse the Board's decision that Marathon's failure to provide subcontracting cost information violates Section 8(a)(5) of the Act because by finding the Company had a duty to provide such information, the Board erroneously: (1) failed to follow relevant NLRB precedent without any explanation; and (2) created new legal precedent without any explanation.

ARGUMENT

A. FEDERAL LABOR LAW DEFINES AN EMPLOYER'S RIGHTS AND OBLIGATIONS RELATING TO THE CONDUCT OF BUSINESS WITH A UNIONIZED WORK FORCE.

The duty to bargain with a union carries with it numerous related legal obligations. Generally speaking, where a union is recognized as the exclusive collective bargaining representative of a group of employees, management's ability to make and carry out decisions relating to its work force and its business is sharply restricted in many significant ways. Before taking action, an employer with a

unionized workforce must provide the union notice and opportunity to bargain over proposed changes to many terms and conditions of employment including wages, work rules, and the use of subcontractors to perform work that has been performed by the employees in the bargaining unit.

An employer has a statutory duty to provide a union with requested information relevant to subjects over which the parties are legally required to bargain. Under federal labor law, a union enjoys a broad right to demand even confidential and proprietary information that is relevant and necessary to the performance of its duties as the bargaining representative. *See, e.g., Disneyland Park*, 350 NLRB 1256, 1257 (2007) ("An employer has the statutory obligation to provide, on request, relevant information that the union needs for the proper performance of its duties as collective-bargaining representative.") Where an employer fails to comply with its legal duty to produce such information, it faces potential consequences including administrative proceedings before the NLRB, federal court injunctions, bargaining orders, and unfair labor practice strikes.

Importantly, a union does not enjoy a broad right to receive any and all requested information relating to the employer and its operations. The Board has specifically held that information about an employer's agreements with subcontractors is not "presumptively relevant" to a union's functions as the collective bargaining representative. *Disneyland Park, supra*, 350 NLRB at 1258

("Information about subcontracting agreements, even those relating to bargaining unit employees' terms and conditions of employment, is not presumptively relevant. Therefore, a union seeking such information must demonstrate its relevance."); *see also E.I. DuPont de Nemours & Co. v. NLRB*, 744 F.2d 536, 538 (6th Cir. 1984) ("Courts have required an initial showing of relevance to prevent needless and expensive explorations by unions into company records. Unions do not have carte blanche to examine employer information merely because the union can articulate some bargaining strategy that will render the information pertinent in some peripheral or theoretical fashion to the bargaining process.") Limitations on a union's right to receive information are of special importance to employers who must safeguard sensitive information about not only their own company, but also their customers and business partners (such as subcontractors). An employer who is not legally required to produce such information is free to withhold it entirely, as explained below.

A union may waive its right to bargain over even a subject that would otherwise be found a "mandatory" subject of bargaining under the law, such as the subcontracting involved in the instant case. *Galaxy Towers Condo. Ass'n*, 361 NLRB 364, 366 (2014) (holding a union "clearly and unmistakably waived its right to bargain over" the employer's decision to subcontract unit work, where the collective bargaining agreement provided the right to subcontract was "vested solely

and exclusively in" the employer). Once a union has waived its right to bargain over a subject, the employer is no longer required to provide the union information relating to a bargaining demand with which the employer cannot be legally compelled to comply. *Am. Stores Packing Co.*, 277 NLRB 1656, 1658 (1986) (concluding employer did not violate the NLRA by refusing to provide requested information, where the Board found "the Union had waived its right to bargain about the matters it was discussing with" the employer).

When an employer in the give-and-take of negotiations gives enough (of something) to get a union's waiver of the bargaining obligation on a particular topic, this is a valuable part of the contract because it eliminates the employer's legal duties and potential legal consequences as to bargaining oblthat topic. Importantly, such a waiver also frees the employer to operate more efficiently. This is especially true with regard to issues such as the right to expand and contract the workforce (*i.e.*, subcontract) in response to fluctuating operational needs that arise in real time. An employer who has reached an agreement with the union that provides for unilateral employer action with regard to subcontracting thereby attains an important advantage. The employer is no longer legally required to give the union notice and opportunity to engage in potentially protracted negotiations before the employer can lawfully take action with regard to subcontracting.

Like all specific rights bargained for and agreed to, a union's waiver of its right to bargain over a particular subject must be respected and enforced by the Board and courts. Here, the collective bargaining agreement indisputably provides the Company has the right to unilaterally subcontract work without any contractual restrictions relevant to the instant dispute. Under the NLRB's legal precedent discussed herein, this fact is sufficient to establish the Union has clearly and unmistakably waived its right to bargain over subcontracting. Yet, the Board has found—without explanation—that Marathon somehow forfeited its right to reasonably rely upon the Union's explicit contractual waiver, seemingly because the Company agreed to participate in a mere discussion with the Union about topics relating to subcontracting.

Creating such disincentives for employers to engage in discussion with unions not only is unwise labor relations policy, it contradicts some of the fundamental purposes of the Act. *See, e.g., NLRB v. Financial Institution Employees (Seattle-First National Bank)*, 475 U.S. 192, 208 (1986) ("The basic purpose of the National Labor Relations Act is to preserve industrial peace."); *Pontiac Osteopathic Hosp.*, 284 NLRB 442, 461 (1987) ("The purpose of the Act is to encourage and promote harmonious relations between employers and employees."); *Retail Clerks Local 1222 (Mayfair Markets)*, 133 NLRB 1458, 1466 (1961) ("The primary purpose of the Act is to foster labor peace by fostering a respect for labor contracts."). The

Board's decision represents an unwarranted departure from applicable legal precedent governing an employer's concomitant duties to bargain and to produce relevant information. This Court should deny enforcement of the Board's Order.

B. THE BOARD ABUSED ITS DISCRETION BY FINDING THE UNION DID NOT CONTRACTUALLY WAIVE ITS RIGHT TO BARGAIN OVER SUBCONTRACTING.

As set forth in footnote 1 to the Board's general affirmations of the administrative law judge's rulings, findings, and conclusions, Chairman Ring noted the employer's obligation to provide the requested information "may not be so clear," where:

> (i) the parties' collective-bargaining agreement reserved to the employer the right to subcontract routine maintenance work unilaterally and thus waived the union's right to bargain over the subcontracting of such work, (ii) the parties also had a side agreement to engage in mid-term discussions--not bargaining--regarding ways to preserve routine maintenance work for unit employees, and (iii) the side agreement reiterated the contractual bargaining waiver by providing that the transfer of contracted-out maintenance work to unit employees remained within the employer's sole discretion.

366 NLRB No. 125, slip op. at 1, fn. 1 (2018). The Chairman found that under the facts of the case as outlined above, "the employer may not have an obligation to provide requested information regarding the costs of subcontracting, absent evidence that the employer had actual or constructive notice of some other basis for the

request."[3] *Ibid.* Unfortunately, the Chairman declined to "reach or address" the issue he identified on the basis of an erroneous conclusion that "no such argument was raised to the administrative law judge in this case." *Ibid.* However, the record evidence establishes that beginning with its Answer to the NLRB's Complaint, Marathon repeatedly asserted its refusal to provide the disputed information was not unlawful because it was contractually entitled to unilaterally subcontract routine maintenance work, and because the subcontracting cost information sought by the Union had no relationship to negotiation over terms and conditions of employment subject to mandatory bargaining, nor to any potential grievance the Union might pursue under the Collective Bargaining Agreement ("CBA"). (A39.)

Regardless, the panel majority held:

> Contrary to the Chairman, we do not agree that the facts he describes, or anything in the side agreement itself, would amount to a waiver even had such an argument been properly raised to the judge. We also find no merit to his suggestion that the side agreement's requirement to meet and discuss the preservation of bargaining unit work may not give rise to a bargaining obligation.

366 NLRB No. 125, slip op. at 1, fn. 1 (2018). Neither the record evidence nor established federal labor law supports the majority's holding that the facts of this case are insufficient to establish the Union has contractually waived its right to bargain over the subcontracting of routine maintenance work. As the Chairman

[3] Neither the Board's decision nor the record evidence suggests there was any such notice in this case.

correctly found, the CBA explicitly affirms the Company's right to unilaterally subcontract such work. Moreover, the Letter Agreement reaffirms the Company's right in this regard and specifically provides only that the parties agree to "discuss" certain topics, including but not limited to whether unit employees might be able to perform subcontracted work "efficiently." (A54.)

This was no accident. The Letter Agreement was made after the Union attempted in the 2015 negotiations to change the CBA language waiving the Union's right to demand that Marathon bargain over subcontracting and went on strike in the face of Marathon's unwillingness to agree to alter the waiver language. No doubt, the "meet and discuss" concept created in the Letter Agreement was a nod to good labor relations that helped solve a labor dispute, and a strike no less, in a time-tested manner—the employer's commitment to tell the union what it intends to do and hear the union's feedback before doing it. But this compromise resolution falls well short of a "bargaining" obligation under the Act with all the legal duties and consequences attendant thereto. Indeed, that is precisely why the "meet and discuss" compromise presumably helped bridge that gap and resolve the labor dispute on this particular topic. But the Board majority ignored this.

Numerous manufacturing employers have bargained for, and reasonably rely upon, similar contractual provisions that preserve management's right to subcontract work in its sole discretion. Under longstanding NLRB law, the Board has repeatedly

held that by agreeing to such provisions, a union waives its right to bargain over subcontracting decisions. The Board has also held that by waiving its right to bargain over subcontracting decisions, the union likewise waives its right to receive information relevant to the employer's decision to subcontract. *Ethicon*, 360 NLRB 827, 832-833 (2014) (holding employer was not obligated to provide subcontracting information including labor rates where the CBA provided the employer had the "exclusive" and "inherent right" to subcontract, and there was no evidence that the employer had violated the CBA by subcontracting).

In the span of a single footnote, the panel majority has seemingly ignored the plain language of a valid collective bargaining agreement and cast aside longstanding NLRB law without explanation, leaving similarly-situated employers to wonder whether the benefit of their hard-won contractual bargain may turn out to be nothing more than a fiction, if they agree to merely "discuss" a mandatory subject regarding which the union has explicitly waived its right to bargain.

Thus, not only is the panel majority's holding contrary to established Board law, it is furthermore contrary to fundamental principles of positive and productive labor relations, to the extent it creates a disincentive for potentially fruitful, non-bargaining "discussions" between management and labor. Employers will not want to risk a similar evisceration of their contractual rights and will therefore be reluctant

to agree to engage in discussions with the union where bargaining is not required, for fear they will lose what they have attained in prior bargaining with the union.

C. THE BOARD ABUSED ITS DISCRETION BY FINDING THE COMPANY INCURRED A BARGAINING OBLIGATION BY AGREEING TO "MEET AND DISCUSS" WITH THE UNION DURING THE TERM OF THE CBA.

The panel majority further abused its discretion and failed to follow relevant legal precedent by finding "no merit" to Chairman Ring's "suggestion that the side agreement's requirement to meet and discuss the preservation of bargaining unit work may not give rise to a bargaining obligation." 366 NLRB No. 125, slip op. at 1, fn. 1 (2018). Such "meet and discuss" language has been specifically held by the Board as creating a distinct and lesser obligation from the bargaining obligation under the Act and creating a waiver of such statutory rights. *Omaha World-Herald*, 357 NLRB No. 156 (2011) (holding "meet and discuss" language demonstrates waiver of bargaining obligation); *Tesoro Refining & Marketing Co.*, 360 NLRB No. 46 (2014) (reaffirming unanimously *Omaha World-Herald* holding that "meet and discuss" language demonstrates waiver of bargaining obligation).

In this case, Marathon and the Union had already concluded collective bargaining negotiations. They reached a complete agreement, including with respect to the issue of subcontracting, which the Company indisputably has the unilateral

right to do subject to the sole condition that no unit employee is subject to layoff.[4] The Company's agreement to "discuss" topics including whether unit employees could perform contracted work "efficiently" does not establish an agreement to enter into negotiations over subcontracting while the CBA remains in effect. To the contrary, in addition to reaffirming that the decision to subcontract routine maintenance work remains in the Company's sole discretion as stated in the CBA, the Letter Agreement explicitly provides that after the parties "discussed" the agreed-upon topics, Marathon would prepare a hiring plan that it would "share" with the Union. It was clear error for the Board to affirm that the "discussions" contemplated by the parties' Letter Agreement equated to "bargaining," where the Letter Agreement itself made clear that such discussions would culminate not in any agreement or impasse, but in unilateral action by the Company in its sole discretion.

A good-faith agreement to engage in conversation about a topic of mutual interest is an important tool used by countless employers and unions to foster more positive and productive labor relations. The Board in this case has abused its discretion by holding the Letter Agreement creates a bargaining obligation and the Board does not explain the basis for its holding in this regard, which is unsupported by the plain language of the Letter Agreement itself. Significantly, "[w]ays in which

[4] Neither the Board's decision nor the record evidence suggests any employee has been laid off so as to implicate this sole contractual restriction on the Company's right to subcontract.

day-to-day routine maintenance work currently performed by contractors could be efficiently performed by bargaining unit employees" is but one item in a list of topics the parties agreed to discuss. "Age and service profiles of the company craft workforce" is also on the list, yet it would be nonsensical to find the parties had agreed to "bargain" over that subject. (A54.) Nor did they agree to "bargain" over other items on the list.

The Board's holding is contrary to relevant NLRB precedent in similar cases. In *Detroit Edison Co.*, the parties' collective bargaining agreement provided management had the right to unilaterally subcontract work that was "regularly and customarily done by" unit employees, subject only to the conditions that (1) the employer was required to give the union prior notice of subcontracting that "appear[ed] to threaten their security of employment;" and (2) the employer was prohibited from contracting out work "for the purpose of laying off or reducing in classification employees who regularly and customarily do such work." 314 NLRB 1273, 1277 (1994). Much like the instant case, the union in *Detroit Edison* had engaged in unsuccessful efforts to restrict the employer's right to subcontract, and the parties had entered into a side agreement that "created a joint union-management committee to meet on a semiannual basis to review the use of outside contractors." *Ibid.* In connection with such meetings, the union requested specific cost information relating to the employer's subcontracting. The union claimed the cost

information was relevant because the employer had remarked "that union members were going to have to compete with outside contractors," such that the union asserted the cost information was necessary "in order to assess its ability to compete and to represent its members." *Id.* at 1274. However, the Board found the union was not entitled to the requested subcontracting cost information based on factors including the following:

- The collective bargaining agreement allowed the employer to unilaterally contract out unit work, subject only to the two conditions described above;
- The cost information the union requested had "no apparent connection" to either of the two contractual requirements relating to subcontracting; and
- "[T]he Union was not in the process of formulating any 'particular grievance' when it made the information request," nor could the cost information provide any basis for the union to claim a violation of any of the parties' agreements relating to subcontracting.

Id. at 1274-1275. The Board explicitly rejected an argument that the employer made subcontracting cost information relevant to the issue of "preservation of unit work" based on management's statements "that it cost less to use outside contractors than to use unit employees and that unit employees needed to 'get competitive with the contractors.'" *Id.* at 1274. The Board held:

> It is understandable that these remarks stimulated a desire on the part of the union representatives to attempt to prove that unit employees

> were "competitive," and contractor cost data would be relevant to such an attempt. **The fact remains, however, that, given the agreements on maintenance of unit employment levels and the Respondent's acknowledged freedom to make unilateral subcontracting decisions—subject only to the contractual conditions mentioned above—the requested subcontractor cost data simply had no potential linkage to any bargaining which the Union could demand on behalf of the unit employees at or near the time of its information request.** Thus, even though Breen testified that the requests were motivated by "our concern" for "the threat to our members' employment security," he conceded that no unit member had been laid off or reduced in classification; and he did not identify any basis for suspecting either that the Respondent might be in breach of the 3000-job-level requirement or that any unit employee might suffer a job loss.

Ibid. (Emphasis added.) For nearly a quarter century, employers and unions alike have relied on *Detroit Edison* and the guidelines it established to solve issues relating to unions' right to demand the production of information. *See, e.g., Ingham Reg'l Med. Ctr.*, 342 NLRB 1259, 1262 (2004); *Staten Island Univ. Hosp.*, 334 NLRB 286, 288 (2001); *Connecticut Yankee Atomic Power Co.*, 317 NLRB 1266, 1268 (1995).

Here, the Board held Marathon was required to produce subcontracting cost information in the absence of any evidence to support a finding that such information has a "potential linkage to any bargaining which the Union could demand," or that it could potentially support any alleged breach of the CBA. The Board thereby abused its discretion by altering, without any explanation, the relevant legal standard for determining the union's rights and the employer's obligations relating to the

provision of information. The Board's unprecedented finding that an employer may have a duty to hand over information such as the confidential subcontracting cost information at issue here—in the absence of any imminent negotiations or potential contractual grievances—jeopardizes the ability of employers to safeguard such information, which the Board inexplicably holds an employer may be required to produce by merely agreeing to converse (not negotiate) with the union about a subject the employer is not otherwise obligated to bargain over.

Such a finding is contrary to established federal labor law holding "the duty to provide information is coextensive with the statutory duty to bargain." *Service Employees Local 535 (North Bay Center)*, 287 NLRB 1223, 1223 at fn. 1 (1988) (holding a nonmandatory subject of bargaining "is not transformed into a mandatory subject by virtue of the parties' agreement to bargain concerning it;" therefore, an employer has no duty to produce requested information in connection with bargaining over the nonmandatory subject); *NLRB v. Goodyear Aerospace Corp.*, 497 F.2d 747 (6th Cir. 1974) (denying enforcement of the Board's order for an employer to produce requested information relating to its proposed midterm modifications to a collective bargaining agreement where the union had only agreed to meet with the employer to "discuss" and "listen"—not negotiate—with regard to the proposed modifications). It is furthermore counterproductive to the development of harmonious and productive labor-management relations. *See, e.g., NLRB v.*

Davison, 318 F.2d 550, 557–58 (4th Cir. 1963) ("A determination that a subject which is non-mandatory at the outset may become mandatory merely because a party had exercised this freedom by not rejecting the proposal at once, or sufficiently early, might unduly discourage free bargaining on non-mandatory matters. Parties might feel compelled to reject non-mandatory proposals out of hand to avoid risking waiver of the right to reject."). Once a union has contractually waived its statutory right to bargain over a mandatory subject of bargaining—as the Union has indisputably done here—such a contractual waiver is not voided by an employer's willingness to merely talk with the union about that subject.

D. THE BOARD ABUSED ITS DISCRETION BY FINDING THE COMPANY HAD A DUTY TO PROVIDE CONFIDENTIAL SUBCONTRACTING COST INFORMATION.

The Board also abused its discretion by finding the Company had an obligation to provide requested detailed cost information relating to subcontracting, notwithstanding Marathon's unequivocal insistence that its decision to subcontract was not predicated on cost, but on the Company's need "to expand and contract our workforce to meet the cyclical nature of our business, and the costs do not alter the Company's need to maintain that operational flexibility." (A88.) Yet the administrative law judge found—and the Board affirmed—that an isolated statement by management that cost was not "the primary determinative factor" in Marathon's decision to subcontract, "thereby suggest[ed] that cost was at least a secondary

factor" such that the Company was obligated to provide the confidential subcontracting cost information on that basis. 366 NLRB No. 125, slip op. at 7 (2018).

Such a finding is contrary to longstanding federal labor law holding "that contracting costs are only relevant if the union can show that the employer justified its contracting to the Union on the basis of cost." *Sara Lee Bakery Grp., Inc. v. NLRB*, 514 F.3d 422, 432 (5th Cir. 2008) and cases cited therein; *see also Gen. Elec. Co. v. NLRB*, 916 F.2d 1163, 1171–74 (7th Cir. 1990) ("[T]hat G.E. endeavors to complete its projects 'within budgetary constraints' and that it takes bids on subcontracted jobs are insufficient to support the Board's decision to presume comparative labor cost-driven subcontracting in the absence of an evocation of this defense by G.E."). Marathon never "justified its contracting to the Union on the basis of cost," and it was error for the Board to find an obligation to provide sensitive financial information based on nothing more than an inferred "suggestion" that cost might be "a secondary factor." The Board's tortured interpretation of the Company's stated reason for subcontracting, which excluded any reference to subcontracting on the basis of cost, withstands neither logical nor legal scrutiny.

Notwithstanding the fact that an agreement to merely "discuss" a topic is not interchangeable with an agreement to "bargain" over an issue, the subcontracting cost information requested by the Union is not even relevant to the parties' agreed-

upon topics of discussion in the instant case. Marathon and the Union agreed to discuss how unit employees might perform subcontracted work "efficiently"—not "more efficiently than subcontractors." Therefore, the plain language of the Letter Agreement does not anticipate a comparison or "contest" at all, but only a discussion about employees' capabilities, availabilities, and their flexibilities perhaps, as part of an overall consideration of the efficiency of the work of the bargaining unit.

The importance of this issue to employers cannot be overstated. Employers are understandably reluctant to provide the confidential information of entities with whom they have business relationships (such as subcontractors) to outside parties such as labor unions. Providing such information potentially jeopardizes the trust placed in the employer by its contractors, who are reasonably concerned by the possibility that their confidential business information could be disclosed without their knowledge or consent to third parties with whom they are not in privity of contract, and over which they have no rights or control. Therefore, some contractors may decline to do business with employers who are unionized for fear that the transactional costs of such business—*i.e.*, the risk that their confidential business information will be disseminated to unions which may leak the information elsewhere—are too high. The Board abused its discretion by finding Marathon had a duty to provide the confidential cost information of its subcontractors to the Union where such information is not relevant to any bargainable issue between the parties.

CONCLUSION

The Board abused its discretion by inexplicably departing from its established legal precedent to find that (1) the Union had not waived its right to bargain over the subcontracting of unit work; (2) by agreeing to "discuss" certain issues in the Letter Agreement with the Union, Marathon incurred an obligation to bargain over the subcontracting of unit work; and (3) Marathon was obligated to provide the Union confidential subcontracting cost information in connection with mere discussions—not negotiations—relating to the efficiency of bargaining unit employees. The Board's decision upends the legal framework within which employers and unions create and abide by contractual agreements, including contractual waivers; unjustifiably attaches a bargaining obligation to the mere discussion of a subject the union has waived its right to bargain over; and improperly expands the scope of information to which a union may be entitled under federal labor law.

For all the above reasons, *Amici* respectfully request this Court deny enforcement of the Board's July 18, 2018 Decision and Order, and dismiss the case.

Dated: December 26, 2018

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I hereby certify that on December 26, 2018, I electronically filed the foregoing Amicus Brief with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit by using the Court's CM/ECF electronic filing system. All participants in the case are registered CM/ECF users who will be served by the CM/ECF system.

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