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BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the matter of )  
TEGNA, INC., D/B/A KGW-TV ) No. 19-CA-148474  
Respondent, )  
and )  
INTERNATIONAL BROTHERHOOD OF )  
ELECTRICAL WORKERS, LOCAL 48, AFL- )  
CIO. )  
Charging Party. )  
\_\_\_\_\_ )

RESPONDENT TEGNA, INC.'S  
BRIEF IN SUPPORT OF  
EXCEPTIONS

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## I. INTRODUCTION

The Administrative Law Judge (“ALJ”) erroneously held that Tegna, Inc., d/b/a KGW-TV (“KGW”), violated Section 8(a)(1) and (5) of the National Labor Relations Act (the “Act”), 29 U.S.C. § 158(a)(1) and (5), by failing or refusing to provide information in response to an excessive number of information requests propounded by the International Brotherhood of Electrical Workers, Local 48 (“IBEW”). As will be shown below, the ALJ incorrectly analyzed—or, in some cases, didn’t analyze—the information requests and the context in which they were made. The ALJ’s decision is not supported by the law or the evidence presented at the hearing.

First, there is no evidence (or finding by the ALJ) that KGW’s conduct constituted bad faith bargaining. The obligation to respond to information requests is inextricably tied to the duty to bargain in good faith under Section 8(a)(5). An employer may, in certain circumstances, lawfully refuse to provide responses to a union’s information request where the employer is acting in good faith. The requests and responses must be considered within the context of the negotiations, the other bargaining conduct of both parties, and whether the employer’s response acted as a purposeful impediment to an agreement. Here, the ALJ refused to acknowledge any evidence of KGW’s good faith effort to respond to the relevant requests.

Indeed, when KGW’s conduct is evaluated under the proper standard, the evidence shows that KGW made a good faith effort to respond (and did respond) to those requests that were relevant to the parties’ bargaining. For many other requests, KGW effectively rebutted any presumption of relevance (or simply pointed out that requests were not presumptively relevant in the first place). KGW also timely raised legitimate concerns

1 regarding confidentiality, burdensomeness, and overbreadth, to which the IBEW made no  
2 response nor expressed any interest in accommodating. KGW repeatedly offered to  
3 discuss the information requests at the bargaining table, offers the IBEW dismissed out of  
4 hand.

5 Second, in stark contrast to KGW's good faith efforts, the evidence shows that  
6 IBEW engaged in bad faith bargaining. The IBEW intensely disliked KGW's bargaining  
7 proposals and sought to use its information requests as a cudgel to force KGW to withdraw  
8 them. The vast majority of the information requests were not relevant to KGW's actual  
9 bargaining proposals and sought intrusive and confidential information that could be used  
10 for other agendas of the IBEW. It also refused several offers by KGW to discuss its  
11 requests or to identify which were the most important. Once KGW provided information  
12 in response to the legitimate requests submitted, the IBEW resubmitted the exact same  
13 requests. It also submitted additional requests, many of which sought overlapping  
14 information. Moreover, when KGW provided information, the IBEW did not even look at  
15 it, did not share it among its team, asked KGW to provide the information again because it  
16 could not be found, and did not even attempt to use the information to develop bargaining  
17 proposals. These are the hallmarks of bad faith.

18 Third, the ALJ applied an impermissibly broad definition of relevance. In doing  
19 so, she would allow the IBEW to conduct an unencumbered review of confidential  
20 documents regarding KGW's financial information without any legitimate reason for doing  
21 so.

22 Finally, even if scrutiny of the individual requests and responses is required, KGW  
23 met its legal obligations. KGW responded to the relevant requests, sought clarification

1 where necessary, raised legitimate objections of confidentiality and burdensomeness, and  
2 told the IBEW when no responsive documents existed. In each case, the ALJ failed to  
3 evaluate why any additional response would be necessary or appropriate.

## 4 II. STATEMENT OF THE CASE

### 5 A. Negotiations Began in June 2014.

6 IBEW represents a unit of technicians and engineers in KGW's engineering  
7 department. JE 1 at 1, JE 17. On June 26, 2014,<sup>1</sup> KGW and IBEW began negotiating a  
8 successor collective bargaining agreement. T Tr. 33:5-7, 379:2-22, 456:17-457:2; JE 17.

9 Timothy Fair, Director of Labor Relations for Tegna, oversees labor strategy for  
10 various business units, including KGW. He also served as the chief negotiator for KGW.  
11 374:24-375:16. To prepare for the first day of negotiations, Mr. Fair researched scholarly  
12 articles, conducted business research, met with management, and prepared written remarks.  
13 Tr. 280:10-19, 375:23-376:12, 383:5-15. However, IBEW was unprepared to present a  
14 proposal or to engage in collective bargaining on June 26. Tr. 34:13-21, 380:3-7.

15 The parties' first day of actual negotiations took place on July 16. JE 16. At the  
16 meeting, Mr. Fair delivered the remarks he initially planned to give on June 26. Tr. 383:4-  
17 15, 385:21-386:7; R 12 at KGW000036-45. He also presented KGW's opening bargaining  
18 proposals:

- 19 1) Replace existing jurisdictional language with non-exclusive language;
- 20 2) Remove certain restrictions on its ability to subcontract;
- 21 3) Eliminate a requirement that it provide notice to the Union when it used  
22 temporary employees and instead require the Union to affirmatively request  
23 such information;

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<sup>1</sup> Unless otherwise specified, all dates are in 2014.

- 1 4) Replace the job classifications of Broadcast Operator 1 and 2 with a single,  
2 new classification, “Broadcast Technician”, and develop an associated pay  
3 scale;<sup>2</sup>
- 3 5) Change the payment of overtime to be consistent with the Fair Labor  
4 Standards Act; and
- 4 6) Remove the requirement that any successor or assign assume the  
5 obligations of the collective bargaining agreement.

5 JE 3. *See also* R12 KGW000039-42. Of these, the first proposal created the most  
6 controversy.

7 The singular goal of KGW’s non-exclusive jurisdiction proposal was to create  
8 opportunities to find, develop, and broadcast a greater amount and a greater variety of  
9 content. *See, e.g.*, Tr. 105:5-7, 111:14-17 (IBEW admitting that KGW explained the basis  
10 for its proposal was to be “flexible” and “nimble” with regards to content). To support the  
11 proposal, Mr. Fair provided an example of how the current CBA could create obstacles to  
12 putting content on the air.

13 During a recent breaking news story, bargaining unit employees were not available  
14 to operate the master control and a manager performed the master control operations. That  
15 work, however, was within the exclusive jurisdiction of IBEW employees per the terms of  
16 the CBA, and the IBEW complained that bargaining unit work had been assigned to a non-  
17 bargaining unit employee. Tr. 389:16-390:10. By eliminating the exclusive jurisdiction  
18 language, KGW would be able to make work assignments in dynamic situations to get  
19 content on the air without risking a union grievance over an alleged CBA violation.<sup>3</sup> *Id.*

20 Mr. Fair also focused his reasons for the proposal on KGW’s desire to have  
21 sufficient content to satisfy the changing nature of media consumers. *See* GC 2 NLRB005-  
22

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23 <sup>2</sup> The company has since withdrawn this proposal.

<sup>3</sup> While the IBEW did not, in the end, grieve this incident, KGW hoped to avoid having such disputes in the future.

1 006. Millennials, Mr. Fair explained, constitute the largest demographic group in the  
2 United States, accounting for \$1.3 trillion in consumer spending annually. R 12  
3 KGW000040. An overwhelming majority of them enjoy unrestricted access to content and  
4 use multiple electronic devices and social media platforms (Facebook, Twitter, YouTube,  
5 etc.) while watching TV. R 12 at KGW000039-40. But, Millennials are not brand loyal to  
6 TV networks. They also create their own media content. Mr. Fair explained that with  
7 technological improvements in mobile devices, broadband internet access, and cloud  
8 computing, cost was no longer a barrier to creating and distributing content. R 12  
9 KGW000041.

10 Mr. Fair offered “Chelsea” as a hypothetical example. *Id.*; Tr. 391:21-393:19.  
11 Chelsea was a college student who invited her friends to her dorm room to watch her  
12 favorite sitcom, only the sitcom was produced by her classmates and uploaded to YouTube  
13 or shared via the cloud. *Id.* Mr. Fair explained that eliminating the jurisdictional  
14 limitations in work assignments would allow KGW to gather and broadcast Chelsea’s  
15 sitcom, providing KGW access to content that Millennials cared about. *Id.*

16 At no point during Mr. Fair’s presentation did he make any claims about KGW’s  
17 revenue, operating expenses, or general financial situation. Tr. 394:14-395:8, 433:20-  
18 434:14. *See also* GC 2 NLRB 0007-011. He also did not make any specific claims that its  
19 non-jurisdictional proposal would result in greater revenue for KGW, reduce its expenses,  
20 attract any particular advertisers, or prevent the defection of any advertisers. In short, Mr.  
21 Fair’s message was that with more and varied content, KGW would better serve its  
22 audience, resulting in better performance for the station and more job security for the  
23 employees. R 12 at KGW000043; Tr. 103:17-104:15.

1 It is undisputed that Mr. Fair never relied on economic hardship or an inability to  
2 pay bargaining unit employees to support KGW's proposals. In fact, at a later session, Mr.  
3 Fair explicitly told the IBEW that KGW would entertain proposals for wage increases. Tr.  
4 434:508 (stating that KGW would be open to economic enhancements). *See also* R 12 at  
5 KGW000043; Tr. 103:17-104:15.

6 After Mr. Fair's presentation, the IBEW presented its proposal. *See* JE 2. The  
7 parties agreed to meet again on July 30.

8 **B. IBEW Submitted a Seven-Page Information Request In Retaliation for**  
9 **KGW's Bargaining Proposals.**

10 When the parties met on July 30, the IBEW submitted a seven-page Request for  
11 Information (the "July Request") containing more than three-dozen subparts. JE 4.

12 Broadly speaking, the July Request sought information relating to 10 topics of information:

- 13 1) An explanation of how various bargaining proposals would provide KGW  
14 with more flexibility;
- 15 2) Information on broadcast trends, including confidential financial  
16 information;
- 17 3) Information about work assignments outside the bargaining unit;
- 18 4) Information about subcontracting;
- 19 5) Information about temporary employees;
- 20 6) Information about the proposed new job classification;
- 21 7) Information about overtime paid to bargaining unit employees;
- 22 8) Information about KGW's corporate restructuring, including confidential  
23 financial information about both the company and its shareholders;
- 9) Information about a hypothetical sale of KGW; and
- 10) Information about benefits conversion.

JE 4. Although the parties were actively engaged in face-to-face negotiations, and some of  
the requests sought clarification of KGW's bargaining position and the underlying reasons

1 for its proposals—issues most effectively explored through dialogue—the IBEW  
2 demanded the “ultimate responses from the employer to be in writing.” *Id.*

3 On July 30 and 31, KGW responded to the July Request. Mr. Fair believed  
4 providing a verbal response was the quickest way to provide the IBEW with the  
5 information requested and to explain KGW’s several objections, including, without  
6 limitation, that the requests sought confidential financial information, were overly  
7 burdensome, sought information that did not exist, and appeared not to have been made in  
8 good faith. Tr. 401:13-20, 448:13-16; R5 KGW00007-9; R11 KGW000011-13.

9 In response, IBEW’s chief negotiator, Mr. Virgil Hamilton, refused to discuss  
10 accommodations or find mutually agreeable terms for disclosure. Instead, Mr. Hamilton  
11 called KGW’s proposal “bullshit,” GC 2 NLRB010; R5 KGW000010, R11 KGW000013,  
12 and stated “we aren’t buying what you’re selling.” R5 KGW000008; R11 KGW000013;  
13 Tr. 435:2-14. Mr. Hamilton demanded responses to all of IBEW’s information requests  
14 before he would provide a counterproposal. *Id. See also* Tr. 220:13-15.

15 In an effort to deal reasonably with IBEW’s unreasonable demands, Mr. Fair  
16 walked through the July Requests item by item. *See e.g.*, GC 2 NLRB014-018; Tr. 83:10-  
17 19. Specifically,<sup>4</sup>

- 18 • In response to Requests 2(a)-(c), which sought market share, ratings,  
19 revenues, and expenses, Mr. Fair objected because the request sought  
20 confidential financial business information that was not relevant to KGW’s  
21 proposal. Tr. 204:22-25, Tr. 408:3-409:11; GC 2 NLRB015; R 12  
22 KGW000029-35, 47-50.
- 21 • In response to Requests 2(d) and (e), which asked for reports, analyses, and  
22 data concerning competition from other media outlets, like Google,  
23 Amazon, YouTube, Netflix, and the like, Mr. Fair provided a scholarly

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<sup>4</sup> Only those requests identified in the Complaint are discussed.

1 article entitled, “The New Network Compact: Consumers Are in Charge.”  
2 JE 8. Mr. Fair also indicated that he would provide additional reports in a  
3 supplemental response but that KGW did not possess reports that pertained  
4 to KGW or the Portland, Oregon, media market, in particular. Tr. 208:14-  
5 18, 209:23-210:4, 9-11. Tr. 409:12-411:24; GC 2NLRB015; KGW000029-  
6 35, 47-50.

- 7 • In response to Requests 3(a) and (b), which demanded documents  
8 concerning plans to assign bargaining unit work to non-bargaining unit  
9 employees and job descriptions of non-bargaining unit employees, Mr. Fair  
10 explained that KGW had no such plans and had no job descriptions. Tr.  
11 84:4-14, 210:21-211:5, 212:1-5; Tr. 411:24-413:25; GC 2 NLRB 015;  
12 KGW000029-35, 47-50.
- 13 • In response to Requests 4(a)-(c), which sought documents concerning  
14 KGW’s plans to subcontract work, Mr. Fair informed IBEW that KGW had  
15 no plans to subcontract work of bargaining unit or non-bargaining unit  
16 employees. Tr. 84:17-19, 212:10-213:3; 414:1-415:18; GC 2 NLRB 015  
17 KGW000029-35, 47-50.
- 18 • In response to Requests 5(a) and (b), which demanded a list of temporary  
19 hires and copies of company policies with respect to hiring temporary  
20 workers, Mr. Fair objected that the scope of the request was overbroad  
21 because it sought information about employees outside of the bargaining  
22 unit. Tr. 213:4-9. Nevertheless, Mr. Fair identified the small number of  
23 temporary employees that KGW had employed, all of whom were outside  
of the bargaining unit. Tr. 213:10-19. Mr. Fair informed IBEW that KGW  
had no written policies or plans regarding the use of temporary workers. Tr.  
214:12-16, 415:19-416:15; GC 2 NLRB016; KGW000029-35, 47-50.
- In response to Request 7, which asked for an accounting of all overtime  
paid to all bargaining unit employees, Caryn Lilly, the Regional Finance  
Director, explained at the bargaining table that because of a corporate  
restructuring, KGW no longer had access to all the information requested  
but that it had access to some of it, and KGW would provide that  
information to the IBEW. Tr. 85:14-23, 215:24-216:16, 416:23-417:7; GC  
2 NLRB016; KGW000029-35, 47-50.
- In response to Requests 8(a)-(c), which sought documents concerning the  
corporate relationships between KGW, Gannett, and Sander Media  
Company, Mr. Fair provided a copy of the FCC license and several SEC  
filings. See JE 5 (Form 8-K), 6 (Form 10-Q, March 30, 2014), 7 (Form 10-  
Q, June 29, 2014), GC 6 (FCC license). Tr. 216:17-217:3 (acknowledging  
receipt of SEC Forms); JE 15 at 4 (acknowledging receipt of FCC license

1 on July 31).<sup>5</sup> KGW also pointed the IBEW to information available on  
2 Yahoo! Finance responsive to its requests. Tr. 89:16-90: 15; Tr. 428:8-  
429:19; R12 KGW000033-34; GC 2 NLRB016-017.

- 3
- 4 • In response to Request 8(d), which asked for a list of all current  
5 shareholders for Gannett, Sander Media and KGW, Mr. Fair explained that  
6 Gannett was publicly traded and had public shareholders. Tr. 89:16-90: 15;  
7 Tr. 428:8-429:16; R12 KGW000034. Mr. Fair also questioned whether this  
8 request was relevant and made in good faith, since there were over 200  
9 million shares of Gannett stock, which traded daily. *Id.* Providing the list  
10 of shareholders would, therefore, be unduly burdensome. *Id.*; GC 2  
11 NLRB008, NLRB017.
  - 12 • In response to Requests 8(e)-(i), and 9(a)-(b), which sought various types of  
13 information regarding corporate plans for restructuring, minutes of board  
14 member and shareholder meetings, and copies of SEC filings, Mr. Fair  
15 objected because the request either sought confidential financial information  
16 that was not relevant to KGW's proposal, sought records that did not exist,  
17 sought information that IBEW could readily obtain, or were made in bad  
18 faith. Tr. 87:11-12, 429:20-436:25; R12 KGW000034; GC 2 NLRB017.

19 Mr. Fair sought clarification on several requests as well, but the IBEW refused to  
20 provide any. *See* Tr. 408:19-24 (requests for clarification on item 2(a) unanswered);  
21 415:5-12 (requests for clarification on item 4(b) unanswered); 430:6-21 (requests for  
22 clarification on item 8(f) unanswered); 431:1-17 (request for clarification on item 8(g)  
23 unanswered). Instead of showing any willingness to clarify its requests, address KGW's  
concerns about the requests, or narrow the requests to relevant information, the IBEW  
demanded that KGW provide it with *all* of the information requested, without qualification  
or limitation. GC 2 NLRB018; Tr. 87:15-88:1; 90:24-91:2. The parties closed the July 30  
and 31 bargaining sessions by scheduling additional bargaining sessions.

21 \_\_\_\_\_  
22 <sup>5</sup> Mr. Bishop testified that KGW did not provide IBEW with a copy of the FCC license  
23 (GC 6) at the bargaining table. *See, e.g.*, Tr. 227:7-11. As the ALJ found, Mr. Bishop's  
testimony is not credible. ALJD 16:16. Mr. Fair's testimony is supported by documentary  
evidence, including IBEW's November Request, which acknowledges receipt of the FCC  
license. *See* Tr. 426:24-427:13, JE 9 (under heading "Question 8(a)-(i)"), JE 15 at 4.

1           **C.     KGW Sent a Supplemental Response to IBEW on August 29.**

2           On August 29, 2014, KGW sent the IBEW its supplemental written response,  
3 including documents where they were relevant, responsive, and available. JE 9. Among  
4 the documents provided, KGW produced copies of all of the scholarly articles (JEs 10-12)  
5 upon which Mr. Fair relied in formulating KGW's proposals, *see* Tr. 411:5:12, and a  
6 spreadsheet detailing the number of overtime hours worked for each bargaining unit  
7 employee and the amount of overtime pay each employee received for each pay period  
8 dating back to December 2012 (the period for which it had records). JE13. KGW stated  
9 that with this response it believed there were no outstanding information requests. JE 9.

10           KGW received no indication that IBEW had any concerns with KGW's responses.  
11 Tr. 441:1-7. On October 10, the parties met again. JE 16. During this meeting, the only  
12 reference to the July Requests and KGW's response involved a claim by an IBEW  
13 bargaining representative that he did not receive all of the attachments to the August 29  
14 letter. Tr. 441:8-442:14; GC 2 NLRB019-021.<sup>6</sup>

15           To jump start bargaining on the substantive issues, Mr. Fair presented proposed  
16 contract language in support of the proposal for non-exclusive jurisdiction. For the rest of  
17 the meeting, the parties discussed the initial contract language proposed by Mr. Fair. Tr.  
18 442:18-444:21; JE 14; GC 2 NLRB 019-021. Mr. Fair offered the language as an example  
19 only and as proof that KGW did not intend to change the IBEW's representation rights.  
20 Mr. Fair hoped that by presenting language as a starting point, the parties could move  
21 towards a resolution. Tr. 442:23-443:4; GC 2 NLRB019. The IBEW, however,

22 \_\_\_\_\_  
23 <sup>6</sup> It is undisputed that at the October 10 meeting, KGW re-sent the documents to the IBEW  
representatives and confirmed that the IBEW representatives were able to access them. Tr.  
101:20-102:3

1 steadfastly refused to bargain or even provide a counterproposal. Tr. 444:34-445:5, 446:7-  
2 447:2. It also disputed whether the request for non-exclusive jurisdiction addressed a  
3 legitimate need of the Company. *Id.*; R5 KGW000006.

4 **D. When the Parties Met Again on November 20, the IBEW Resubmitted**  
5 **the July Request Along With Several Additional Information Requests,**  
6 **None of Which Were Necessary or Relevant to Bargaining.**

7 The IBEW did not respond, object, or request to bargain about any of KGW's prior  
8 responses to its information requests until November 18. At that time, nearly three months  
9 after KGW submitted its supplemental response, the IBEW took the position that KGW's  
10 responses were not adequate. *See* JE 15. In a letter to KGW, the IBEW demanded that  
11 KGW supplement its responses, clarify in writing the reasons KGW believed it had  
12 responded to the July Request, and respond to 12 additional (and redundant) information  
13 requests by November 20 (the "November Request"). *Id.* These requests included  
14 expansive requests for: information regarding KGW's advertising, including pricing  
15 information and a list of current, former, and prospective advertisers; a list of KGW's  
16 "primary competitors"; information on ratings and viewerships; information on viewer and  
17 advertiser comments and complaints regarding programming and service, *regardless* of the  
18 subject matter of the complaint; information on employees of KGW who were employed  
19 by an entirely different union, IATSE; and information on specific instances of  
20 subcontracting. ALJD, 13:23-14:36. Notably, the IBEW did not clarify any of the  
21 requests to which Mr. Fair had sought clarification and made no effort to accommodate the  
22 legitimate concerns KGW had raised in its prior responses. It simply repeated—and added  
23 to—its prior requests.

1           Although John Bishop had replaced Mr. Hamilton as IBEW’s chief negotiator by  
2 this time, the change in negotiators did not lead to a change in IBEW’s unreasonable  
3 position or in any willingness to actually bargain. When the parties met on November 20,  
4 Mr. Bishop claimed—incorrectly—that the IBEW was entitled to KGW’s financial  
5 information because KGW premised its proposals on what the IBEW described as a  
6 “competitive disadvantage of inflexibility.” JE 15. Mr. Bishop also alleged, without any  
7 supporting rationale, that IBEW was entitled to information on employees outside of the  
8 bargaining unit. *Id.* KGW offered to provide verbal responses and asked to discuss its  
9 objections to the IBEW’s additional demands. But Mr. Bishop refused, again demanding  
10 that KGW provide responses to each request. Tr. 450:16-451:11; R 11 at KGW000017.

11           **E.     The IBEW’s Unreasonable Position Only Hardened In Subsequent**  
12           **Negotiation Sessions.**

13           The parties met again on December 4. At that meeting, the IBEW refused to move  
14 off its earlier position that because it still had open information requests, it had no  
15 obligation to bargain over KGW’s proposals. JE 17; GC 2 at NLRB032; R 11 at  
16 KGW000018.

17           The next negotiation session took place on January 6, 2015. At that session, Mr.  
18 Fair asked the IBEW to identify which information it believed was most important to it.  
19 GC 2 NLRB035. Again, the IBEW refused, demanding answers to all its information  
20 requests before bargaining over KGW’s proposal. Tr. 238:4-23.<sup>7</sup> Despite the IBEW’s

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21 <sup>7</sup> Mr. Bishop claimed that the IBEW tried to negotiate accommodations with KGW  
22 regarding IBEW’s information request and cited for support remarks made at the end of the  
23 December 4 bargaining session. In those remarks, Mr. Bishop stated that “there are other  
things in the request for information which we think you can provide. Having that  
information would be helpful in our working toward getting a deal.” GC2 NLRB032; Tr.  
239:8-15. But when Mr. Fair asked Mr. Bishop to indicate which information requests it

1 obstruction, Mr. Fair stated that KGW will continue to negotiate in good faith and  
2 remained committed to responding to all reasonable requests. GC 2 NLRB035; Tr.  
3 240:11-14. After this meeting, the parties did not have significant additional follow-up  
4 discussions about the July or November requests, although they continued to meet to  
5 discuss collective bargaining and other matters. JE 17; Tr. 241:11-15.

6 **F. The Parties Continued Negotiations on a Successor Collective**  
7 **Bargaining Agreement (CBA) While Awaiting a Decision From the**  
8 **ALJ.**

9 After the hearing in this case but before the ALJ's decision, the parties continued  
10 negotiations for a successor agreement. On August 18, 2016, the Company emailed its  
11 "Second Amended Comprehensive Proposal for a New Contract." Fair Decl. ¶ 2, Ex. A,  
12 attached to Motion to Reopen Record. This proposal introduced a signing bonus, among  
13 other terms, in exchange for the IBEW's acceptance of non-exclusive jurisdiction. KGW  
14 intentionally left the amount of the signing bonus and wage increase open for negotiation.  
15 *Id.*

16 On August 24, 2016, the IBEW submitted its "Response to Company's Second  
17 Amended Comprehensive Proposal for a New Contract." *Id.* ¶ 3, Ex. B. In this proposal,  
18 the IBEW reserved rights pending the outcome of the ALJ's decision on the outstanding  
19 ULP charge. The response stated, "The union may also make additions, modifications, and  
20 withdrawals, in whole or in part, in response to any and all information that may be  
21 obtained through the Administrative Law Judge's decision regarding the Union's  
22 information request/Unfair Labor Practice Charge." After reviewing this language, Mr.

23 \_\_\_\_\_  
needed answers to, Mr. Bishop refused to provide a priority list, insisting instead that  
IBEW required answers to all outstanding items before it would move forward with a  
counterproposal. Tr. 241:11-15.

1 Fair asked the IBEW’s representative what would happen to the ULP charge if the parties  
2 ratified a successor agreement before the ALJ issued a decision. *Id.* ¶ 4. The IBEW’s  
3 representative stated that the ULP charge would “go away.” *Id.* See also Boyd Decl. ¶ 2,  
4 Ex. A and Lilley Decl. ¶ 2, Ex. A. Based on this commitment from the IBEW, KGW  
5 amended its proposal, including increasing its wage proposal from 1% to 1.5%. It also  
6 offered a \$350 signing bonus. Fair Decl. ¶ 5, Ex. C.

7 The IBEW responded a short time later with its “Response to Company’s Third  
8 Amended Comprehensive Proposal For a New Contract.” *Id.* ¶ 6, Ex. D. Consistent with  
9 the IBEW’s commitment that the ULP will “go away”, the IBEW deleted the language  
10 regarding its reservation of rights related to the ALJ’s pending decision on the ULP charge.

11 The parties reached a tentative agreement at 5:01 pm on August 24, 2016. *Id.* ¶ 7,  
12 Ex. E. The tentative agreement also omitted any reservation of rights language. On  
13 August 28, 2016, the IBEW bargaining unit members ratified the tentative agreement. Fair  
14 Decl. ¶ 8. On September 8, 2016, the IBEW signed the successor CBA. Fair Decl. ¶ 9,  
15 Ex. G.

### 16 III. QUESTIONS INVOLVED

17 a) Did KGW respond in good faith to the IBEW’s requests for information?

18 [Exceptions 6-14, 18-28, 30-38,43-43-47]

19 b) Did the IBEW seek relevant information by its requests? [Exceptions 6-13,

20 15-29, 32-38, 41, 43, 44-47]

21 c) Did the IBEW propound its Requests for information in bad faith?

22 [Exceptions 7-13, 21, 23, 25-26, 29, 30-31, 33-36, 38-42]

23

- 1 d) Did the IBEW refuse to bargain in good faith with KGW about its  
2 confidentiality concerns? [Exceptions 30-32, 39-42]
- 3 e) Did KGW violate Sections 8(a)(5) and (1) of the Act by refusing to produce  
4 information in response to the IBEW's Requests for information 2(a)  
5 through (c)? [Exceptions 6-13, 18-20, 22-32, 39-42, 45-47]
- 6 f) Did KGW violate Sections 8(a)(5) and (1) of the Act by failing to produce  
7 additional information in response to the IBEW's Requests for information  
8 2(d) through (e) after it informed IBEW that it did not possess further  
9 responsive information? [Exceptions 6-13, 18-20, 22-32, 39-42, 45-47]
- 10 g) Did KGW violate Sections 8(a)(5) and (1) of the Act by failing to respond  
11 to the IBEW's Requests for information 3(a) through (b) where it informed  
12 IBEW that responsive information did not exist? [Exceptions 14-15, 18, 33-  
13 47]
- 14 h) Did KGW violate Sections 8(a)(5) and (1) of the Act by failing to respond  
15 to the IBEW's Requests for information 4(a) through (c) where it informed  
16 IBEW that responsive information did not exist? [Exceptions 14-15, 18,  
17 33-35, 39-47]
- 18 i) Did KGW violate Sections 8(a)(5) and (1) of the Act when it produced  
19 information in response to the IBEW's Requests for information 5(a)  
20 through (b)? [Exceptions 14-15, 18, 33-35, 39-47]
- 21 j) Did KGW violate Sections 8(a)(5) and (1) of the Act by failing to respond  
22 to the IBEW's Request for information 7(a) where it informed IBEW that  
23

1 responsive information no longer existed? [Exceptions 14-15, 18, 33-34,  
2 39-47]

3 k) Did KGW violate Sections 8(a)(5) and (1) of the Act by failing to respond  
4 to the IBEW's Requests for information 9(a) through (b) where it informed  
5 IBEW that responsive information did not exist? [Exceptions 14-15, 18,  
6 33-35, 39-47]

7 l) Did KGW violate Sections 8(a)(5) and (1) of the Act by refusing to produce  
8 information in response to the IBEW's Requests for information 11(a)  
9 through (h)? [Exceptions 6-13, 18-25, 30-32, 39-42, 45-47]

10 m) Did KGW violate Sections 8(a)(5) and (1) of the Act when it produced  
11 information in response to the IBEW's Requests for information 13(a)  
12 through (b)? [Exceptions 14-15, 18, 33-47]

13 n) Did KGW violate Sections 8(a)(5) and (1) of the Act by refusing to produce  
14 information in response to the IBEW's Requests for information 14(a)  
15 through (b), where the information was not relevant and was available from  
16 other documents already provided to the IBEW? [Exceptions 14-15, 18, 33-  
17 35, 39-47]

18 o) Did the ALJ improperly deny KGW's motion to reopen the record?  
19 [Exceptions 1-5].

#### 20 IV. ARGUMENT

##### 21 A. The ALJ Incorrectly Failed To Consider KGW's Good Faith When 22 Analyzing Its Response To IBEW's Requests

23 An employer's obligation to respond to a union's request for information arises  
from the duty to bargain in good faith. Therefore, just as an employer lawfully may

1 engage in hard bargaining by withdrawing from tentative agreements (*White Cap, Inc.*, 325  
2 NLRB 1166, 1167 (1998)) or implementing alternative, harsher proposals upon impasse  
3 (*Telescope Casual Furniture, Inc.*, 326 NLRB 588, 589 (1998)), so too may an employer  
4 refuse to respond to a union's request for information, provided that the employer is not  
5 acting in bad faith in doing so. Put differently, there is no *per se* rule that an employer's  
6 failure to provide requested information violates Section 8(a)(5). *West Penn Power Co.*,  
7 339 NLRB 585, 587 (2003). Instead, as the Supreme Court has required, the inquiry must  
8 always be whether, under the circumstances of the particular case, the statutory obligation  
9 to respond in good faith has been met. *See NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-54  
10 (1956).

11 The ALJ incorrectly held that the duty to provide a union with relevant information  
12 is absolute and that withholding such information is a *per se* violation of the Act *without*  
13 regard to the employer's subjective good or bad faith. ALJD at 17:10. Not only has such a  
14 *per se* rule never been established, the U.S. Supreme Court expressly rejected such a rule:

15 The Board's position appears to rest on the proposition that  
16 union interests in arguably relevant information must always  
17 predominate over all other interests, however legitimate. ***But  
such an absolute rule has never been established, and we  
decline to adopt such a rule here.***

18 *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 318, 99 S. Ct. 1123, 1132-1133, 59 L. Ed. 2d  
19 333, 348-349 (1979) (emphasis added); *Emeryville Research Center, Shell Development  
20 Co. v. NLRB*, 441 F.2d 880, 886 (9th Cir. 1971) ("We do not understand the Supreme  
21 Court to have enunciated such a *per se* rule."); *West Penn Power Co.*, 339 NLRB 585, 587  
22 (2003) ("Indeed, it is ***well established that the duty to furnish requested information  
23 cannot be defined in terms of a per se rule.*** What is required is a reasonable ***good faith***

1 effort to respond to the request as promptly as circumstances allow.”) (emphasis added);  
2 quoting *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993); *Penn. Power &*  
3 *Light Co.*, 301 NLRB 1104, 1105 (1991) (“A union’s interest in information, however, will  
4 not always predominate over other legitimate interests.”).

5 Instead, as the Court long ago admonished in *Truitt Mfg. Co.*:

6 Each case must turn upon its particular facts. The inquiry  
7 ***must always be*** whether or not under the circumstances of  
8 the particular case the statutory obligation to bargain in good  
9 faith has been met.

10 351 U.S. at 153-54 (emphasis added); *see also Penn. Power & Light Co.*, 301 NLRB at  
11 1107 (“It is incumbent on us to examine the facts of this case ***in light of the surrounding***  
12 ***circumstances.***”(emphasis added); *see also, Hotel Roanoke*, 293 NLRB 182, 184 (1989);  
13 *Port Plastics*, 279 NLRB 362, 382 (1986); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603  
14 (1984)..

15 Consistent with this precedent, an employer does not violate the Act when it acts in  
16 good faith in not providing all information requested by a union. *Hawkins Construction*  
17 *Co.*, 285 NLRB 1313, 1314 (1987) (employer’s refusal to furnish relevant information was  
18 not unlawful because the union’s request was made in bad faith); *Soule Glass & Glazing*  
19 *Co. v. NLRB*, 652 F.2d 1055, 1094 (1st Cir. 1981) (employer entitled to make a good faith  
20 objection on grounds of burdensomeness or otherwise).

21 The ALJ cites to *Piggly Wiggly Midwest, LLC*, 357 NLRB 2344, 2355 (2012) and  
22 *Procter & Gamble Mfg. Co.*, 237 NLRB 747, 751 (1978) for the proposition that once the  
23 relevance of information is established, a refusal to furnish it is a *per se* violation of the  
Act. While the cases cited by the ALJ (and others) contain some broad language that  
seemingly announces a *per se* rule, a closer examination of the decisions reveals that the

1 holdings are considerably narrower. *See, Emeryville, supra*, 441 F.2d at 886. Indeed  
2 language about a *per se* rule “appears to be merely gratuitous” since the employer’s *only*  
3 defense in those decisions was to challenge the relevance of the information requested  
4 there. *Id.* at 887; *see also, United Parcel Serv. of Am., Inc. & Int’l Bhd. of Teamsters,*  
5 *Local Union 373*, 362 NLRB No. 22, 2015 WL 849193, at \*3 (where “employer  
6 effectively rebuts the presumption of relevance ..., or otherwise shows that it has a valid  
7 reason for not providing the requested information, the employer is excused from  
8 providing the information or from providing it in the form requested.”) (citing *Coca-Cola*  
9 *Bottling Co.*, 311 NLRB 424, 425 (1993); *American Cyanamid Co.*, 129 NLRB 683, 684  
10 (1960)). Here, KGW raised a number of defenses to the IBEW’s requests, including  
11 relevance, and the ALJ erred in applying what amounted to a mechanical test of whether  
12 KGW did or did not provide requested information. Moreover, a *per se* rule violates the  
13 Supreme Court’s instruction in *Truitt*.

14 **B. KGW Negotiated In Good Faith**

15 The record evidence demonstrates that KGW responded in good faith to the  
16 IBEW’s requests for information. KGW came prepared to the bargaining table, it made  
17 specific proposals, it made several different moves at the bargaining table, and it spent a  
18 great deal of time explaining its bargaining position. It also provided prompt responses to  
19 the proposals, raised concerns to the IBEW about the proposals where appropriate and  
20 sought discussions at the table, gave information in its possession, and supplemented the  
21 information it provided.<sup>8</sup> Thus, even if one were to disagree with KGW’s response to any  
22

23 <sup>8</sup> KGW also provided multiple copies of the information when the IBEW mishandled the  
information it was given.

1 individual request, there should be no doubt that KGW made the reasonable good faith  
2 effort required by the statute. Nothing in the record suggests otherwise.

3 *United Parcel Service of America*, cited *supra*, is particularly instructive here. In  
4 that case, the union submitted several information requests, only some of which related to  
5 bargaining unit employees. 2015 WL 849193, at \*2. On the whole, however, the union's  
6 requests went far beyond what was relevant to determine the issue at hand, and several  
7 records requested contained overlapping information. Yet, neither the General Counsel  
8 nor the union ever explained how the requested information was relevant or how the union  
9 would benefit from having redundant reports. Moreover, the respondent timely raised  
10 burdensomeness and overbreadth concerns and made several overtures to reach an  
11 accommodation with the union. But the union rejected each offer, taking the intractable  
12 position that it receive *all* of the requested information, precluding any test of the  
13 respondent's willingness to divulge the information on mutually agreeable terms.

14 Considering a totality of these circumstances, the Board refused to find that the respondent  
15 violated the Act. *Id.*

16 *United Parcel Service of America* is indistinguishable from this case.<sup>9</sup> A great  
17 many of the IBEW's information requests, indeed, the vast majority of them, sought  
18 information that had no bearing on KGW's proposals at all.

19 \_\_\_\_\_  
20 <sup>9</sup> The ALJ incorrectly disregarded KGW's reliance on *United Parcel Service of America*  
21 because "the Board in that case explicitly declined to rely on the administrative law judge's  
22 conclusion that the requesting union had acted in bad faith." ALJD at 24, fn. 20. The  
23 ALJ's cavalier disregard of the decision misses the import of the holding. KGW was not  
relying on *United Parcel Service of America* to demonstrate *that IBEW had acted in bad  
faith* (although it did) but, rather, to show that *KGW had acted in good faith* in nearly  
identical circumstances where the Board held that an employer did not violate the Act  
when it had a good faith basis for refusing to acquiesce to a union's request for  
information.

1 For example, the IBEW requested information regarding the corporate structure of  
2 the parent corporation as well as a list of all shareholders of over 200,000,000 shares of  
3 Gannett stock, as well as board member and shareholder meeting minutes. The IBEW also  
4 asked to contact past, present, and future KGW advertisers, and it sought information  
5 about non-bargaining unit employees. *None* of this information had the slightest relevance  
6 to KGW's bargaining proposals, and neither the General Counsel nor the IBEW have  
7 otherwise explained how it is relevant. Similarly, the IBEW submitted multiple,  
8 overlapping requests for general financial information, including KGW's market share,  
9 ratings, revenues, and expenses. *Compare* JE 4 and JE 15. KGW's proposals, however,  
10 had nothing to do with an immediate economic hardship, were not tied to any specific  
11 claim about financial results, and were not based on an inability to pay bargaining unit  
12 employees for their work.

13 Moreover, KGW timely raised objections verbally and in writing. On July 30, July  
14 31, August 29, and November 20, KGW rebutted claims of relevance and objected to the  
15 requests on the basis of confidentiality, burdensomeness and overbreadth. *See, e.g.,* Tr.  
16 238:7-13. Yet, still hoping to find a middle ground with the IBEW, KGW asked the IBEW  
17 to consider clarifying, narrowing, or prioritizing its requests so the parties could work  
18 towards a resolution. *See, e.g.,* Tr. 435:3-14. The IBEW rejected every offer without any  
19 evident consideration. *See, e.g.,* Tr. 448:13-16. If an employer has a legitimate claim that  
20 a request for information is unduly burdensome or overbroad, and it articulates those  
21 concerns to the union, "***the union may not ignore the employer's concerns or refuse to***  
22 ***discuss a possible accommodation, even when the requested information is***  
23 ***presumptively relevant.***" *United Parcel Serv. of Am., Inc. & Int'l Bhd. of Teamsters, Local*

1 *Union 373*, 2015 WL 849193, at \*3 (citations omitted) (emphasis added). Under these  
2 circumstances, there is no doubt that KGW engaged in good faith bargaining, and nothing  
3 KGW did constitutes a violation of Act.

4 **C. The ALJ Incorrectly Held That IBEW’s Requests Sought Relevant**  
5 **Information**

6 Where the union’s request for information does not pertain to employees in the  
7 bargaining unit—as do many of the requests at issue here—the burden is on the union to  
8 demonstrate the relevance of the requested information. *Disneyland Park*, 350 NLRB  
9 1256, 1257 (2007). Although the Board uses a broad, discovery-type standard in  
10 determining the relevance of requested information, an employer’s obligation to provide  
11 information is not limitless. *Id.* Even in civil discovery, the broad construction of  
12 relevancy should not be misapplied so as to require parties to produce a variety of  
13 information which does not reasonably bear on the issues in the case. *Hofer v. Mack*  
14 *Trucks, Inc.*, 981 F.2d 377, 380 (8th Cir. 1993). “Judges are trusted to prevent ‘fishing  
15 expeditions’ or an undirected rummaging through bank books and records for evidence of  
16 some unknown wrongdoing.” *Cuomo v. Clearing House Ass’n, L.L.C.*, 129 S. Ct. 2710,  
17 2719, 557 U.S. 519, 531, 174 L. Ed. 2d 464, 473 (2009). Therefore, to demonstrate  
18 relevance, the General Counsel must present evidence either (1) that the union  
19 demonstrated relevance of the nonunit information, or (2) that the relevance of the  
20 information should have been apparent to the Respondent under the circumstances.  
21 *Disneyland Park*, 350 NLRB at 1257. Absent such a showing, the employer is not  
22 obligated to provide the requested information. *Id.*

23 Here, the ALJ blithely holds that IBEW’s Requests were relevant based either on  
Fair’s prefatory presentation at the first bargaining session or because the information was

1 linked to certain bargaining proposals. Indeed, she—on her own initiative—  
2 recharacterized what Mr. Fair said, rather than limiting the Union’s Requests to what he  
3 actually said. *See ALJD, pp. 20-21.* Where the test is that a union is entitled to  
4 information to verify an employer’s claims, one must examine the claims specifically made  
5 by the employer. The ALJ impermissibly expanded the claims made beyond what Mr. Fair  
6 said or intended.

7           With regard to Mr. Fair’s presentation, his comments focused on Millennials and  
8 KGW’s desire to obtain and broadcast more and varied content. As Mr. Fair explained  
9 several times, KGW’s proposals anticipated changes in an increasingly fractured media  
10 market and sought to ensure that KGW could provide an increasing volume of interesting  
11 content relevant to its changing audience. *See, e.g.,* Tr. 51:6-9, 105:5-7, 111:14-17, 117:3-  
12 9, 118:6-10, 120:1-4, 132:17-133:3. Mr. Fair repeatedly emphasized that the  
13 “competition” he sought to address was competition for video content and the eyeballs of  
14 Millennials. *See, e.g.,* Tr. 392:21-394:11, 408:18-22, 409:14-22, 410:1-12, 433:24-434:2;  
15 443:13-16. The purpose of his statements was to set a context for KGW’s proposals; the  
16 statements were not meant as specific claims made in support the proposals. The ALJ  
17 incorrectly held that this handful of comments—about a generational demographic—  
18 justified the IBEW’s requests for information on advertisers, competitors, market share,  
19 ratings, revenue and expenses. At no point during his presentation, however, did Mr. Fair  
20 discuss any of these topics, with the exception of saying that large media companies like  
21 Google and Apple also had content available for Millennials. The ALJ latched on to the  
22 word “competition” and held that because Mr. Fair used the concept of competition *for the*  
23 *attention of Millennials* through additional varied content, KGW financial records related

1 to *any* kind of competition were relevant. This is not the proper standard of relevance.  
2 Indeed, the ALJ’s analysis is equivalent to requiring an employer to provide all its  
3 information about customers, sales, and revenue just because an employer’s negotiator  
4 said: “it is a dog-eat-dog world out there, and we need to compete better.” Contrary to the  
5 ALJ’s exaggerated holdings, Mr. Fair’s comments did not imply that new media signaled  
6 the “end times” for the station. His comments, which he later clarified, reflected a desire  
7 by the station to remain relevant. The ALJ characterizes this clarification as an attempt to  
8 “walk back” his original remarks—there is no evidence (either on direct or cross-  
9 examination) to support the ALJ’s finding in this regard. Rather, Mr. Fair’s clarification is  
10 consistent with his original comments about the newspaper industry; he used newspapers  
11 as an example of an entire industry that did not stay relevant (particularly to the Millennial  
12 generation), not an individual company that failed to remain competitive. In fact, Tegna (a  
13 spinoff of Gannett Company) has a keen understanding of the importance of remaining  
14 relevant. The ALJ’s attempt to use Mr. Fair’s comments about an entire industry to hold  
15 that Mr. Fair was claiming that KGW, an individual company within an admittedly  
16 dynamic industry, was in danger of shuttering is a bridge too far.

17 With regard to the bargaining proposals, the ALJ unquestioningly accepted the  
18 IBEW’s superficial testimony that it made the requests directly in response to KGW’s  
19 specific bargaining proposals. The ALJ *did not*, however, require that the General Counsel  
20 present any evidence linking the specific requests with IBEW’s actual concerns with or  
21 responses to the proposals. Rather, if any link existed between the subject matter of the  
22 request and a proposal, *no matter how tenuous or hypothetical*, the ALJ held the request  
23 was relevant. The ALJ allowed the General Counsel to do precisely what the Supreme

1 Court forbids: conduct an “undirected rummaging through ... records for evidence of some  
2 unknown wrongdoing.” *Cuomo*, 557 U.S. at 531.

3 Moreover, the ALJ ignored the situation directly in front of her. While KGW  
4 sought to lay the groundwork to be able to access and broadcast more content, the  
5 bargaining unit’s role in that goal is limited. They are not the ones who create content or  
6 who go out in the field and gather it. This bargaining unit simply puts the content on the  
7 air. Thus, for KGW’s proposals for *this* agreement, KGW simply wanted the flexibility to  
8 be able to put content on the air, however sourced. The IBEW’s information requests, and  
9 particularly those concerning advertisers, revenue, and expenses, had very little  
10 relationship to this context.

11 **D. The ALJ Incorrectly Held That IBEW Did Not Engage In Bad Faith**  
12 **Bargaining**

13 The ALJ incorrectly held that the IBEW’s Requests for information were not made  
14 in bad faith because they were directed at specific bargaining proposals and made early on  
15 in bargaining. This superficial analysis ignores the largely unrefuted record evidence of  
16 the IBEW’s bargaining misconduct.

17 When information requests are made to harass or burden an employer or are  
18 otherwise in bad faith, an employer is not required to provide the requested information.  
19 *Illinois Power Company*, 35 NLRB AMR 82 (2001) (if a request is made for purposes of  
20 harassment, the employer is not required to comply with the request); *Island Creek Coal*  
21 *Co.*, 292 NLRB 480, 489 (1989) (same); *Hawkins Construction Co.*, 285 NLRB 1313  
22 (1987) (same), *enfd. denied on other grounds* 857 F.2d 1224 (8th Cir. 1988). Many of the  
23 same factors that demonstrate KGW’s good faith also demonstrate the IBEW’s bad faith.

1           The July Request demonstrates bad faith because, in large part, it asked for  
2 information that was obviously not related to the bargaining unit employees nor to KGW's  
3 bargaining proposals. Mr. Fair explained on several occasions that KGW's bargaining  
4 proposals pertained to KGW's ability to gather and broadcast content in a fractured media  
5 market. He never claimed that KGW was unable to pay employee wages and, in fact, told  
6 the IBEW that KGW would consider increases. Mr. Fair also never said that advertisers  
7 were not placing ads with KGW, that revenue was declining, or that viewership had  
8 declined. In fact, Mr. Fair made very clear that KGW was looking forward and planning  
9 for changes in the industry that were on the way. He encouraged the Union to also be  
10 forward thinking rather than act like newspapers which had done so too late. Yet, the  
11 IBEW demanded repeatedly that KGW "open its books" to the IBEW without ever  
12 providing a legitimate basis for its demand. Even a request for the name of each  
13 Millennial who wanted more content would have been more closely related to KGW's  
14 proposals than the IBEW Requests.

15           The IBEW's request for an accounting of the more than 200,000,000 million shares  
16 of Gannett common stock provides another illustration of the IBEW's gamesmanship.  
17 While responding to such a request is nearly impossible (and unreasonably burdensome),  
18 KGW cooperated to the extent feasible. It directed the IBEW to public sources of  
19 information from which it could gather whatever information about KGW's parent  
20 corporation it deemed relevant, including the identities of its biggest shareholders. Tr.  
21 89:16-90: 15; Tr. 428:8-429:19; R12 KGW000033-34; GC 2 NLRB016-017. However,  
22 when KGW pointed the IBEW to the very information it sought, the IBEW never looked at  
23 it. Not once did the IBEW access the public website (where the information was available

1 free of charge) or otherwise inform KGW that information the IBEW deemed relevant was  
2 not there. Tr. 217:4-218:21. The IBEW's inaction gives the lie to any claim that it took its  
3 bargaining obligations seriously or that it required the information to provide a  
4 counterproposal.

5         Additionally, the IBEW never explained the relevance of disputed requests beyond  
6 providing "because we said so" responses. Bare assertions like these are insufficient to  
7 establish relevance. *Viking*, 312 NLRB 622, 625 (1993) (citing *Detroit Edison Co. v.*  
8 *NLRB*, 440 U.S. 301 (1979)). Moreover, the IBEW called KGW's proposals "bull shit",  
9 stated "we aren't buying what you're selling", and demanded response to *all* of its  
10 information requests before it would even make proposals. *See, e.g.*, GC 2 NLRB 018, R5  
11 KGW000008; R11 KGW000013; Tr. 238:23-239:3, ("We [the IBEW] wanted all of the  
12 information we were requesting."), 435:2-14 (same). In so doing, the IBEW precluded any  
13 test of KGW's willingness to hand over information on mutually agreeable terms, just like  
14 the union in *United Parcel Service of America*. *See also American Cyanamid*, 129 NLRB  
15 683, 684 (1960) (no violation where employer raised confidentiality concerns and union's  
16 "adamant insistence . . . on its right to have the Respondent's records in the terms set forth  
17 in its demand precluded, in effect, a test of the Respondent's willingness to give the Union  
18 access to the [presumptively relevant] wage information involved on mutually satisfactory  
19 terms").

20         The timing of the IBEW's Requests for information further demonstrates bad faith.  
21 Its first request was not made until the parties were at the bargaining table, rather than in  
22 the interim between the July 16 and July 30 bargaining sessions. That guaranteed that the  
23

1 July 30 and 31 sessions would not be spent on bargaining as no one could have expected  
2 KGW to provide the requested information within a day.

3 It is undisputed that KGW provided its initial responses to the July Request at the  
4 bargaining table and later supplemented its responses in the August 29 email. In that  
5 August 29 communication, KGW stated that it believed that there were no longer any  
6 outstanding information requests. JE 9. The IBEW then waited three months to  
7 communicate its disagreement when it submitted a dozen additional requests that sought  
8 much of the same information as the July Requests. *See e.g.*, Tr. at 112:1-6 (admitting that  
9 the November Requests were just “another way” of getting at the same information).  
10 Moreover, the November request was submitted immediately preceding a bargaining  
11 session at a time that prevented KGW from responding before the session and, perhaps,  
12 making the bargaining session actually productive.

13 Under the totality of these circumstances, the IBEW’s conduct demonstrates  
14 dilatory tactics, bad faith negotiations, and information requests meant to impede rather  
15 than advance negotiations. KGW is not legally obligated to respond to information  
16 requests like these. *See NLRB v. Wachter Construction*, 23 F.3d 1378 (8th Cir. 1994),  
17 *rev’g* 311 NLRB 215, 143 LRRM 1181 (1993) (union requests for subcontracting  
18 information were made in bad faith to harass the employer).

19 **E. KGW Responded to Each Request and There Is No Evidence Showing**  
20 **that Additional Responses Were Required.**

21 To the extent scrutiny on the individual requests and responses is required, KGW  
22 fully responded with the information in its possession. And in those instances where KGW  
23 told the IBEW that its request was not relevant or it sought confidential information, the

1 IBEW made no effort to address KGW's concerns. The IBEW simply stood on its  
2 requests.

3 Incredibly, the ALJ held that KGW did not meet its duty when KGW told the  
4 IBEW that it had no responsive documents. But the ALJ has not cited to any evidence that  
5 any additional responsive information exists or whether a further response would be  
6 necessary or appropriate. Without such evidence, the law cannot—and does not—require  
7 that KGW produce a litany of records that it does not have. *See Harmon Auto Glass*, 352  
8 NLRB 152 (2008).

9 **1. Requests About Viewership, Revenue and Expense Information**  
10 **Sought Confidential Information and Were Not Relevant to**  
11 **Bargaining.**

12 The ALJ improperly found merit in the allegation that:

13 On about July 30, 2014, and again on about November 18, 2014, the Union  
14 requested, in writing, that Respondent furnish the Union with ... [d]ata  
15 reports, analysis, communications, and other documents, since October 24,  
16 2011, concerning:

- 17 (A) Respondent's market share, ratings, and viewership;
- 18 (B) Respondent's revenue;
- 19 (C) Respondent's expenses;

20 Am. Compl. ¶ 6(a)(i). This allegation corresponds to the IBEW's Requests 2(a) through  
21 (c). JE 4 at 2.

22 On July 31 and August 29, KGW told the IBEW that its requests for market share,  
23 ratings, viewership, revenue and expenses sought non-public confidential business  
information and, also, that the requests were not relevant. R 12 at KGW000030; Tr. 408:3-  
8; 409:2-11; JE 9. KGW also explained that at no time did it maintain that any of its  
proposals were based on or arose out an "inability to pay", and, therefore, the IBEW was

1 not entitled to review private and confidential financial information. JE 9. *See also* Tr.  
2 185:2-22; 204:22-25.

3 IBEW's Requests clearly seek KGW's financial information and, by seeking  
4 revenue and expenses, are no different from a request that KGW open its books for a  
5 financial audit. There are two circumstances when an employer must disclose financial  
6 information. First, when an employer claims that it will be unable to pay the economic  
7 demands of the union, it must demonstrate the support for such a claim by permitting an  
8 audit of its general financial records. *Cf. Nielsen Lithographing Co.*, 305 NLRB 697  
9 (1991). Second, if an employer makes a specific claim in bargaining about its financial  
10 status, it must allow the union to verify that claim with limited financial information  
11 directly relevant to the specific claim made. *See, e.g., Olivetti Office U.S.A., Inc., v. NLRB*,  
12 926 F.2d 181, 188 (2nd Cir. 1991) (union entitled to limited financial records to verify  
13 company's claim that its labor costs were too high). Neither of those situations occurred  
14 here.

15 It is undisputed that KGW never made an "inability to pay" claim. The IBEW  
16 conceded that KGW's proposals grew of out a desire to compete for content and not an  
17 inability to pay. *See, e.g.,* Tr. 58:21; 201:14-19. Indeed, KGW made clear that it would  
18 consider economic enhancements. Tr. 434:508. Thus, KGW had no obligation to open its  
19 books for a general financial review, as these requests demanded.

20 As discussed in Section IV.C. above, the ALJ followed the lead of the General  
21 Counsel and latched on to the word "competition." But competing to have the best product  
22 is not the same as claiming that an employer's finances prevent it from competing. *See,*  
23 *e.g., Nielsen*, 305 NLRB at 701 (1991) ("We do not equate 'inability to compete,' whether

1 or not linked to job loss, with a present ‘inability to pay.’”). Requests about KGW’s desire  
2 to compete for content must be limited to verifying the claims made at the bargaining  
3 table, not about claims that were never made at the bargaining table.

4 Similarly, while the ALJ applauds IBEW’s subsequent requests for calling KGW’s  
5 “bluff”, the follow-up requests were nothing but harassing. The requests, which were  
6 clearly propounded in retaliation for KGW’s bargaining position, sought detailed  
7 information regarding various aspects of advertising, despite the fact that Mr. Fair never  
8 made any specific claims about KGW’s advertising results. He said, in total, that KGW  
9 needed more content to compete for viewers with other media companies outside the  
10 television industry. None of the IBEW’s Requests for information were aimed at this  
11 statement by Mr. Fair.

12 While it is true that, ultimately, more and varied content could eventually result in  
13 better financial performance for the station, that result is far too attenuated from the  
14 specific reason provided at the table by KGW to warrant providing financial data or  
15 overcoming KGW’s confidentiality concerns about its financial records. At no time did  
16 KGW say that its current access to content created a financial problem or otherwise imply  
17 that the station was in any way in danger of shutting down; it only wanted to get better. If  
18 that was enough to justify a request for financial data, all employers would be required to  
19 provide financial data any time they proposed to modify a collective bargaining agreement.  
20 Most employer proposals are designed to allow the employer to “get better.”

21 In addition, even assuming *arguendo*, there was an obligation to provide the  
22 requested financial data, KGW’s concerns about confidentiality were never addressed.  
23 The IBEW renewed the information requests without challenging KGW’s claim that the

1 information sought was confidential or engaging in discussions on how best to  
2 accommodate KGW's confidentiality interest. Tr. 208:3-5, 408:3-409:11. The November  
3 Request states:

4 We understand KGW's position to be that it responded to questions 2(a)  
5 through (c) verbally on July 30, 2014. However, KGW did not provide  
6 concrete information during the July 30, 2014 bargaining session  
7 concerning market share, ratings, and other indicia of viewership since  
8 October 24, 2011, or its revenue or expenses in that period.

9 JE 15. In other words, the IBEW simply ignored KGW's concerns. By refusing to  
10 engage in any conversation about the confidential nature of the information, the IBEW  
11 waived whatever right it might have had to the information. The obligation to bargain in  
12 good faith is mutual, and the ALJ improperly put the burden solely on KGW to "bargain"  
13 over the confidential information. She ignored the intractable position taken by the IBEW,  
14 including its repeated unwillingness to consider legitimate concerns raised by KGW. The  
15 record clearly illustrates KGW's willingness (and not the IBEW) to continue to negotiate  
16 in good faith and to problem-solve over the objectionable information requests.

17 **2. KGW Fully Responded to Demands for Reports and Analyses**  
18 **Describing Changes in the Media Market.**

19 The ALJ improperly found merit in the allegation that:

20 On about July 30, 2014, and again on about November 18, 2014, the Union  
21 requested, in writing, that Respondent furnish the Union with ... [d]ate  
22 reports, analysis, communications, and other documents, since October 24,  
23 2011, concerning:

- (D) Competition from other media outlets such as Google,  
Amazon, etc., in Portland, Oregon, and nationally; and
- (E) Changes in advertising placement and revenue for television  
stations include Respondent.

24 Am. Compl. ¶ 6(a)(i). This allegation corresponds to the IBEW's Requests 2(d) through  
25 (e). JE 4 at 2.

1           Requests 2(d) and (e) highlight the problems with Requests 2(a)-(c). KGW  
2 expressed its belief that its audience was changing and that it was competing against  
3 different entities. *See e.g.*, Tr. at 49:20-24. Thus, information to verify that claim could be  
4 relevant, and KGW did not object to these requests as being irrelevant. It is undisputed  
5 that on July 31 and August 29, KGW provided the several reports on which Mr. Fair relied  
6 to make his presentation at the bargaining table about the need for more varied content.  
7 *See* JEs 5-13; Tr. 409:14-22. KGW also explained that it did not possess reports and  
8 analyses that pertained to KGW specifically or to the local media market. Tr. 208:14-  
9 210:7, 409:12-22; 410:22-411:12.

10           Nevertheless, the IBEW reiterated its request on November 18:

11           KGW provided several generic reports about national trends concerning  
12 television, media consumership [sic], and Millenials [sic]. The company's  
13 response ignored our requests for information specific to the Portland  
14 market and to KGW in particular... We therefore renew Question 2d-e to  
15 the extent that they have not already been answered.

16           JE 15. Of course, the IBEW's claim that KGW "ignored" the requests is just wrong.  
17 KGW told them it had no such documents. Accordingly, this reiteration deserved no  
18 additional response. What else could KGW provide? KGW had already provided the  
19 information it had to support the claims it made at the bargaining table. Employers are not  
20 obligated to provide information it does not have. *See Harmon Auto Glass*, 352 NLRB  
21 152 (2008).

22           The ALJ does not cite any evidence that demonstrates why KGW's response was  
23 insufficient.

### 3.       **KGW Responded to Requests Concerning Work Assignments.**

          The ALJ improperly found merit with the allegation that:

1 On about July 30, 2014, and again on about November 18, 2014, the Union  
2 requested, in writing, that Respondent furnish the Union with the following  
information:

3 (ii) As to non-unit individuals performing unit work:

4 (A) Documents, analyses, or communications concerning plans to  
assign unit work to non-unit individuals;

5 (B) The job descriptions and current wage rates of employees to  
whom such work would be assigned if non-exclusive  
jurisdiction were implemented.

6 Am. Compl. ¶ 6(a)(ii). This allegation corresponds to the IBEW's Requests 3(a) and (b) of  
7 the July Request. JE 4 at 3(a)-(b).

8 On July 31 and August 29, KGW informed the IBEW that it has no plans to  
9 transfer work out of the bargaining unit. Tr. 412:1-413:19. Inasmuch as KGW was not  
10 required to provide information that did not exist, this answer met KGW's obligation. Yet,  
11 again, the IBEW reiterated its request in November:

12 In response to our requests [3(a)-(b)] . . . , KGW indicates it provided that  
13 information verbally on July 30, 2014. If you are referring to your  
14 statements that KGW had no concrete plans to transfer work out of the  
bargaining unit as of July 30, 2014, we renew the requests contained in  
15 Questions 3(a)-(b), given that KGW's verbal responses occurred almost  
four months ago and that such plans may be created since July 30.

16 JE 15.

17 Attempting to require KGW to answer the same question repeatedly, when  
18 circumstances have not changed, underscores the IBEW's bad faith. KGW had made no  
19 additional claims in support of this proposal; in fact, there had been no further discussion  
20 of this proposal. The ALJ cites only the passage of time as evidence that KGW did not  
21 respond. She also criticizes Mr. Fair for failing to provide the IBEW with an update on  
22 KGW's plan to assign work outside the bargaining unit. The ALJ makes this holding  
23 despite the fact that no plan to assign work existed in the first instance. The ALJ fails to  
explain how KGW was supposed to provide an update on a plan *that never existed in the*

1 *first instance.* Neither the IBEW nor the General Counsel presented any evidence of a  
2 change of circumstance, either at the bargaining table or away from it, that would warrant  
3 re-asking the question and, tellingly, the ALJ does not cite any such evidence in her  
4 decision.

5 **4. KGW Responded to Relevant Requests Concerning**  
6 **Subcontracting.**

7 The ALJ improperly found merit in the allegation that:

8 On about July 30, 2014, and again on about November 18, 2014, the Union  
9 requested, in writing, that Respondent furnish the Union with the following  
10 information:

11 (iii) As to subcontracting:

- 12 (A) Written agreements between Respondent and other entities for  
13 subcontracted work since October 24, 2011;  
14 (B) Documents about customer, calendar period, and dollar volume  
15 of subcontract work since October 24, 2011; and  
16 (C) Documents, analysis, and communications about Respondent's  
17 future plans to subcontract Unit work.

18 Am. Compl. ¶ 6(a)(iii). This allegation corresponds to the IBEW's Requests 4(a) through  
19 (c) of July Request. JE 4 at 4(a)-(c).

20 Requests about subcontracting are not presumptively relevant. *Ethicon*, 360 NLRB  
21 No. 104, at p. 6 (2014). Nevertheless, it is undisputed that KGW informed IBEW that it  
22 has no responsive documents with respect to the bargaining unit. KGW has not  
23 subcontracted bargaining unit work, and it has no written plans to subcontract bargaining  
unit work now or in the future. Tr. 414:1-9; R 12 at KGW000031. As with the previous  
requests for information, KGW fully responded to this inquiry as well, and the allegation  
must be dismissed.

Indeed, the IBEW acknowledged KGW's full response in November: "We  
understand KGW's position to be that it has no written agreements of any sort with any

1 subcontractor, nor any documentation concerning that subcontracting work. If we are  
2 mistaken ..., please ... produce documents responsive to our requests.” In this instance,  
3 the IBEW was not mistaken about KGW’s earlier response. Therefore, even by the literal  
4 terms of the request, KGW had no further obligation. Moreover, as noted above, the  
5 simple passage of time does not warrant repeating the question. The ALJ does not cite to  
6 any evidence of a change of circumstance or new claim by KGW. The ALJ completely  
7 fails to provide any explanation as to why KGW’s response to this inquiry was insufficient  
8 and violated the Act.

9 To the extent the request sought information about subcontracting of non-unit work  
10 , *See* JE 15 (“Questions 4a and 4b are not limited to inquiring only about IBEW bargaining  
11 unit work. Instead, those requests are aimed at understanding KGW’s practices regarding  
12 subcontracting more generally.”), such requests are not presumptively relevant.

13 *Disneyland Park*, 350 NLRB at 1258 (2007) (emphasis added) (“Information about  
14 subcontracting agreements, even those relating to bargaining unit employees’ terms and  
15 conditions of employment, is not presumptively relevant.”). At no time did the ALJ (or the  
16 IBEW) explain any specific relevance of information about non-unit subcontracting. In  
17 fact, the IBEW conceded it had no specific evidence that subcontracting practices had  
18 affected the bargaining unit. *See, e.g.*, Tr. 62:10-63:5.

19 **5. Although Requests About Non-Unit Temporary Workers Were**  
20 **Not Presumptively Relevant, KGW Responded as a Show of**  
21 **Good Faith.**

22 The ALJ improperly found merit with the following allegation:

23 On about July 30, 2014, and again on about November 18, 2014, the Union  
requested, in writing, that Respondent furnish the Union with the following  
information:

(iv) As to temporary employees:

- 1 (A) A list of all individuals who have been hired as temporary  
2 employees since October 24, 2014, including date of hire, rate  
3 of pay, classification, date of termination, and reason for  
4 hiring; and  
5 (B) A copy of company policies and procedures for hiring  
6 temporary employees.

7 Am. Compl. ¶ 6(a)(iv). This allegation corresponds to the IBEW's Requests 5(a) and (b)  
8 of July Request. JE 4 at 5(a)-(b).

9 KGW's responses were fourfold. First, it told the IBEW that it had no such  
10 temporary employees for bargaining unit work. Tr. 416:4-11. Second, it told the IBEW  
11 that it had no "company policies and procedures for hiring temporary employees." Tr.  
12 416:12-15. Accordingly, to the extent the request sought presumptively relevant  
13 information about the bargaining unit, KGW provided the information it had. Third, KGW  
14 objected to providing non-unit information as irrelevant. As discussed above, information  
15 about non-bargaining unit employees is not presumptively relevant, and the IBEW failed to  
16 demonstrate a reasonable belief, supported by objective evidence, that the requested  
17 information was relevant, as it was required to do. *Disneyland Park*, 350 NLRB at 1257-  
18 58 (2007). Fourth, as a show of good faith, KGW provided the IBEW with information  
19 about the few instances when temporary employees were hired to perform non-unit work at  
20 KGW. Tr. 415:19-24; R 12 at KGW000032. Despite the fact that KGW fully responded  
21 to this request, the ALJ found a violation of the Act based on these responses. The ALJ  
22 does not make any effort to explain why KGW's responses were inadequate.

23  
**6. KGW Responded to Requests About Overtime By Providing All  
the Information it Had in its Possession.**

The ALJ improperly found merit with the following allegation:

1 On about July 30, 2014, and again on about November 18, 2014, the Union  
2 requested, in writing, that Respondent furnish the Union with the following  
information:

3 (v) An accounting of all overtime paid to all bargaining unit members since  
4 October 24, 2011, with breakdowns showing the number of overtime hours  
5 worked and paid, the amount of overtime pay, and whether the overtime  
occurred on regular days off, holidays, or regular work days.

6 Am. Compl. ¶ (a)(v). This allegation corresponds to the IBEW's Requests 7(a) in July  
7 Request. JE 4 at 7(a).

8 On July 31, Ms. Lilly explained at the bargaining table that because of a corporate  
9 restructuring, it no longer had access to all the information requested. She told the IBEW  
10 that KGW would do what it could to provide that information to the IBEW. Tr. 215:24-  
11 216:16, 416:23-417:7; GC 2 NLRB016; KGW000029-35, 47-50. KGW provided that  
12 information on August 29, when it emailed a spreadsheet to various IBEW representatives.  
13 JE 9, JE 13. The spreadsheet covers eight pages. For each pay period since December  
14 2012, it lists the number of overtime hours worked and the amount of payment and the  
15 number of holiday hours worked and the amount of holiday payment. JE 13 KGW000081-  
16 89. KGW met its disclosure obligations under the Act.

17 The ALJ claims that she found KGW's claim that it no longer had such records to  
18 be wholly implausible. ALJD, 22: fn. 17. But KGW's evidence that the information was  
19 not available was un rebutted; there had been a change in payroll systems with corporate  
20 changes. Notably, the ALJ does not cite to any evidence supporting her belief or explain  
21 the basis for this statement. As KGW explained, it no longer had access to all the  
22 information requested, and it produced what information it had, Tr. 416:23-417:7, which is  
23 all it is required to do. Nothing in the record suggests that KGW's response was false, and  
the ALJ's unsupported speculation otherwise is inappropriate.

1                   **7. Requests Concerning Future Corporate Transactions Sought**  
2                   **Confidential Information, Were Not Relevant to the Bargaining,**  
3                   **and Sought Information that Did Not Exist.**

4                   The ALJ improperly found merit in the allegation that:

5                   On about July 30, 2014, and again on about November 18, 2014, the Union  
6                   requested, in writing, that Respondent furnish the Union with the following  
7                   information:

8                   (vii) Information about Respondent's potential sale, takeover, or  
9                   restructuring:

10                   (A) Reports from consultants, investment advisors, CPAs or others  
11                   concerning possible sale, takeover, or restructuring of  
12                   Respondent; and

13                   (B) Correspondence about possible sale, takeover, or restructuring  
14                   of Respondent.

15                   Am. Compl. ¶ 6(a)(vii). This allegation corresponds to the IBEW's Requests 9(a) and (b)  
16                   of July Request. JE 4 at 5(a)-(b).

17                   KGW responded on July 31 and again on August 29 that it does not possess any  
18                   reports concerning a sale, takeover, or potential restructuring of KGW. R 12 at  
19                   KGW000034; JE 9. For all of the same reasons as outlined above, this information is  
20                   confidential financial information. Moreover, the ALJ fails to explain how KGW violated  
21                   the Act by failing to provide information that it does not have.

22                   **8. Requests Concerning Advertising Inquiries Sought Confidential**  
23                   **Information and Were Not Relevant to the Bargaining.**

                  The ALJ improperly found merit with the following allegation:

                  On about November 18, 2014, the Union requested, in writing, that  
                  Respondent furnish the Union with the following information:

(i) Advertising Inquiries:

(A) List of media content providers that Respondent views as its  
primary competitors;

(B) Complete description of Respondent's advertising pricing  
structure so the Union may compare Respondent's advertising  
prices to those of competitors;

1 (C) List of Respondent's current advertisers so the Union may  
2 contact them to determine if they have or will consider  
purchasing advertising from a different provider;

3 (D) List of all of Respondent's advertisers who have ceased buying  
4 advertising from Respondent since October 24, 2011, so the  
Union may contact them and determine why they stopped  
5 purchasing advertising from Respondent;

6 (E) A list of all Respondent's advertising prospects since  
7 October 24, 2011, that Respondent contacted concerning  
8 purchasing advertising but that ultimately did not choose to  
purchase advertising, so the Union may contact them and  
determine why they chose not to purchase advertising from  
Respondent;

9 (F) All documents, reports, and analyses concerning Respondent's  
10 ratings, television viewership and web and/or mobile  
readership/viewership since October 24, 2011;

11 (G) Respondent's viewer/consumer comments and complaints  
12 received by Respondent since October 24, 2011, concerning  
Respondent's programming and service; and

13 (H) Respondent's advertiser comments and complaints received by  
14 Respondent since October 24, 2011, concerning Respondent's  
programming and service.

15 Am. Compl. ¶ 6(b)(i). This allegation corresponds to the IBEW's Requests 11(a) through  
16 (h) of November Request. JE 15

17 On November 20, KGW objected to these requests based on relevancy. Tr. at  
18 450:16-19; 451:12-452:4. For the reasons explained above, removing restrictions on  
19 KGW's ability to compete for content has nothing at all to do with targeting specific  
20 advertisers, and the IBEW admitted as much. *See* Tr. 112:17-18 (admitting that KGW  
21 "[did] not [make] accusations or assertions in the bargaining about declining advertising")  
22 Tr. 150:10-21 (admitting that bargaining unit employees are not responsible for pricing  
23 advertising, placing advertising, or interacting with viewers). Moreover, Mr. Fair's

1 rationale for the proposals concerned making adjustments for the future; past results were,  
2 therefore, unrelated to the oncoming problem that KGW saw.

3 The requested information is also sensitive financial information that the IBEW  
4 was not legally entitled to obtain. While it may not be phrased in terms of revenue,  
5 expense, or profit results, the requests seek information that would provide essentially the  
6 same data. Mr. Fair's presentation on the importance of attracting the eyes of Millennials  
7 in order to succeed—in the future—in a competitive advertising market cannot open the  
8 doors to the financial information sought by the IBEW. Inasmuch as KGW did not claim  
9 an inability to pay and did not make any specific financial claims that would be subject to  
10 verification by financial information, KGW had no obligation to provide the requested  
11 information.

12 An analogy might demonstrate the lack of relevancy of this information clearly.  
13 Suppose an employer that manufactured dolls told a union representing its workers that it  
14 had decided to close the department that made blue eyes for the dolls because it believe  
15 that, going forward, its customers would want dolls with brown eyes. Would that require  
16 the employer to provide the names of all of its customers so that the union could verify  
17 what customers would actually want next year? The connection is far too attenuated to be  
18 relevant. Here, because KGW told the IBEW that it wanted non-exclusive jurisdiction to  
19 allow it to gather and broadcast more interesting content, it should not have to provide all  
20 of its advertising books.

21 If allowed to stand, the ALJ's decision will have a chilling effect on healthy and  
22 profitable businesses who want to use bargaining proposals to better their business. If any  
23 mention of competition or strategy requires a company to open its books to the union, a

1 company will be discouraged from making proposals to strengthen its business.  
2 Companies are allowed to develop business plans based on reasonable information—and  
3 formulate bargaining proposals consistent with such a plan—without having the plan be  
4 treated as a plea of poverty. It is far better—from the perspective of both the union and the  
5 employer—for an employer to address issues such as innovation and competition early on,  
6 before they pose an economic hardship and potentially require more onerous or  
7 concessionary proposals.

8 Moreover, Mr. Fair asked KGW to consider narrowing its requests or prioritizing  
9 them so the parties could focus on the IBEW’s specific concerns. Tr. at 450:17-451:3. But  
10 Mr. Bishop refused (as he had every time before this). Mr. Bishop merely repeated his  
11 position that IBEW was not interested in limiting its requests or stating a priority of items.  
12 Tr. at 451:4-11; 452:14-453:12. The IBEW refused to negotiate over accommodations, as  
13 it was required to do. *Viking*, 312 NLRB 622, 625 (1993).

14 It must also be noted that the information requested in the November Request  
15 overlaps with the July Request. *Compare, e.g.*, JE 4 and JE 15. No good-faith basis exists  
16 for making the same requests multiple times, especially given KGW’s earlier responses.<sup>10</sup>  
17 The ALJ does not explain why these redundant requests were necessary to IBEW’s  
18 representational responsibilities. KGW met its obligations under the Act. The IBEW’s  
19 conduct, by comparison, is incapable of legal justification.

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20 <sup>10</sup> KGW fully and faithfully answered the IBEW’s Requests the first time it made them.  
21 Mr. Fair produced the media reports describing changes in competition in the media  
22 market, and he discussed the impact that Amazon, Apple, Samsung, Netflix and social  
23 media websites like Facebook and Twitter had on competition during several bargaining  
sessions. *See* R12 KGW000038; R5 KGW0000299; Tr. 390:17-391:6, 472:21-473:5. Mr.  
Fair also discussed competition from sports teams, which had started selling their own ad  
space. Tr. 411:17-24; R5 KGW000008.

1                   **9.     KGW Responded to Requests Concerning IATSE Member**  
2                   **Information.**

3                   The ALJ improperly found merit with the following allegation:

4                   On about November 18, 2014, the Union requested, in writing, that  
5                   Respondent furnish the Union with the following information:

6                   (ii) Specific IATSE member information:

- 7                   (A) Documents concerning all changes in job responsibilities for  
8                   members represented by IATSE since October 24, 2011,  
9                   including but not limited to changes in responsibilities  
10                  concerning operation of new trucks; and  
11                  (B) Documents concerning IATSE members' training and  
12                  qualifications for operation of new trucks.

13                  Am. Compl. ¶ 6(b)(ii). This allegation corresponds to the IBEW's Requests 13(a) and (b)  
14                  of the November Request. JE 15.

15                  General information concerning the job responsibilities, training, and qualification  
16                  requirements of employees represented by IATSE<sup>11</sup> is not presumptively relevant because  
17                  it does not pertain to employees represented by IBEW. But to the extent such information  
18                  could possibly be relevant (it is not), KGW discussed at the bargaining table on several  
19                  occasions how its non-exclusive jurisdiction proposal would apply to the operation of new  
20                  trucks. *See, e.g.*, Tr. at 386:18-387:10, 402:18-403:1,445:17-446:6; 454:5-13 (and exhibits  
21                  cited therein). The ALJ does not explain why or how KGW responses are insufficient, and  
22                  the charges should be dismissed.

23                   **10.    KGW Responded to Requests About Specific Instances of**  
                  **Subcontracting.**

                  The ALJ improperly found merit with the following allegation:

                  On about November 18, 2014, the Union requested, in writing, that  
                  Respondent furnish the Union with the following information:

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<sup>11</sup> The International Association of Theatrical and Stage Employees represents the videographers at KGW.

1 (iii) Documents concerning job title, responsibilities, pay, benefits, and  
2 hours for employees Dave Tinkham (from January 1, 2011 to the date of the  
3 request) and John Morgan (from January 1, 2008 to the date of the request),  
4 who were employed as subcontractors after retiring from Unit positions.

5 Am. Compl. ¶ 6(b)(iii). This allegation corresponds to the IBEW's Requests 14(a) and (b)  
6 of the November Request. JE 15.

7 ***The ALJ does not offer any reasoning for her finding that KGW failed to***  
8 ***respond to this request. Indeed, other than referring to the request by number,***  
9 ***she does not discuss the request or response at all in her opinion.***

10 The evidence at the hearing easily demonstrates that these requests were not  
11 relevant to any bargaining. First, as to Dave Tinkham, he was not performing  
12 bargaining unit work at the time in question. See Tr. 364: 18-365:15. Therefore,  
13 information about his job responsibilities, pay, and benefits was not presumptively  
14 relevant, and there is no reason to think that KGW should have thought it relevant.  
15 Because neither the General Counsel nor the IBEW provided objective evidence  
16 demonstrating relevance, KGW was not obligated to provide the information  
17 requested. See, e.g., *Disneyland Park*, 350 NLRB at 1257-58.

18 John Morgan, on the other hand, was a bargaining unit employee at the time  
19 in question and not a subcontractor, contrary to the IBEW's assertions. Tr. 363:8-  
20 9. Additionally, the IBEW already knew, or should have known, that Mr. Morgan  
21 was a bargaining unit employee during this time. It had ready access to Mr.  
22 Morgan's pay and benefits information, and there was no reason to ask KGW to  
23 provide it again. Tr. 363:3-364:17, JE 13. In any event, KGW previously provided  
the IBEW with much of the information it asked for when it provided the overtime

1 spreadsheet in response to Question 7a. *See* JE 13. That spreadsheet identifies Mr.  
2 Morgan as a bargaining unit employee, provides his job classification, and specifies  
3 his current wage. *Id.* It also provided an accounting of overtime and holiday time  
4 worked. *Id.*

5 **F. The ALJ Should Not Have Denied KGW’s Motion To Reopen The**  
6 **Hearing**

7 The ALJ refused to reopen the record because the evidence submitted by KGW did  
8 not exist at the time of the hearing and, therefore, did not qualify, in the ALJ’s opinion, as  
9 “newly discovered evidence.”<sup>12</sup> The ALJ refused to consider any alternative basis for  
10 reopening the record. But, the standard relied on by the ALJ is *narrower* than that set forth  
11 in Section 102.48 of the Board’s Rules and Regulations. Section 102.48(d) expressly  
12 permits a record to be reopened based on either “newly discovered evidence” or “*evidence*  
13 *which has become available only since the close of the hearing.*” Here, the evidence  
14 KGW seeks to admit – bargaining notes, proposals, and a successor CBA – became  
15 available only since the close of the hearing and, thus, meets the requirements of Section  
16 102.48(d). It was error for the ALJ to mechanically apply only the standard for “newly  
17 discovered evidence” when the evidence clearly satisfied the remaining requirements of  
18 Section 102.48(d).

19  
20  
21 \_\_\_\_\_  
22 <sup>12</sup> All three of the decisions cited by the ALJ in support of her holding dealt with an  
23 employer’s refusal to bargain with a union based on a challenge to the certification petition  
and, at least one of the decisions, *Rush University Medical Center*, seems to limit its  
holding to that scenario: “To qualify as newly discovered evidence *in this context*, such  
evidence....” 362 NLRB No. 23, fn.2 (2015) (emphasis added).

1           **G.     The New Evidence Affects Whether the ALJ Should Issue a Merit**  
2           **Determination At All**

3           The additional evidence to be introduced includes evidence that the parties  
4           negotiated a non-Board resolution to the ULP charge. This evidence affects whether the  
5           ALJ should issue a merit determination at all.

6           There is an “important public interest in encouraging the parties’ achievement of a  
7           mutually agreeable settlement ....” *Independent Stave Co.*, 287 NLRB 740, 742 (1987).

8           When deciding to approve non-Board settlements, the Board analyzes four-factors:

- 9           •       whether the parties have agreed to be bound regarding the settlement;
- 10          •       whether the settlement is reasonable in light of the violations alleged, the  
11           risks inherent in litigation and the stage of litigation;
- 12          •       whether there has been any fraud, coercion, or duress by any party in  
13           reaching the settlement; and
- 14          •       whether the respondent has a history of violations of the Act or has  
15           breached past settlement agreements.

16          *Id.*

17           All four factors weigh in favor of approving the parties’ voluntary resolution of this  
18           dispute. The IBEW agreed it would no longer need the information requested and would  
19           voluntarily withdraw its ULP charge if the parties negotiated a successor CBA. KGW  
20           relied on the IBEW’s representations in good faith, increasing its economic offer as a  
21           result. None of the bargaining unit employees are affected by the non-Board resolution –  
22           no individual rights are at stake in this dispute. The successor agreement contains non-  
23           exclusive jurisdiction language, confirming that that IBEW no longer needs the  
24           information requested for bargaining (if, in fact, it ever did). There are no allegations that  
25           KGW used fraud, coercion, or duress to induce the IBEW to reach resolution, either.

1 Finally, the parties have a long collective bargaining history, one that it is void of a history  
2 of breached past settlement agreements.<sup>13</sup>

3 An important purpose of the Act is to encourage collective bargaining to achieve  
4 industrial peace and stability. *See Sea Bay Manor Home for Adults*, 253 NLRB 739, 741  
5 (1980). The parties have achieved this goal by ratifying an Overall Tentative Agreement  
6 into a new CBA and agreeing that the IBEW would voluntarily withdraw its ULP charge.  
7 The IBEW should honor its agreement. Indeed, it would be contrary to the Act to  
8 completely ignore the IBEW's statement (and its impact on bargaining) that the ULP  
9 would "go away", which was asserted during the final moments leading up the Overall  
10 Tentative Agreement on that day.

11 The ALJ focused solely on the fact that the parties had negotiated a new collective  
12 bargaining agreement and held that alone did not warrant reopening the hearing. The ALJ  
13 ignored, however, the evidence that, *in addition to the collective bargaining agreement*,  
14 the parties negotiated a settlement or resolution of the grievance. The ALJ should have  
15 reopened the record to consider evidence of this settlement and the effect it would have on  
16 a merit determination.

#### 17 **H. Newly Discovered Evidence Affects the Remedy**

18 The second reason KGW's motion should have been granted is that it affects the  
19 remedy.

20  
21 \_\_\_\_\_  
22 <sup>13</sup> The only deceit here is that committed by the IBEW. By agreeing to withdraw the  
23 charge and then refusing to do so, the IBEW engaged in bad faith negotiations in violation  
of Section 8(a)(3) of the Act. *See, e.g., Sea Bay Manor Home for Adults*, 253 NLRB 739,  
741 (1980).





1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this day I caused to be served via e-mail a copy of the  
3 foregoing brief upon the following:

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20 DATED this 31st day of January, 2017.

21   
22 Claire D. Tollfeldt  
23