

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**TEGNA, INC. d/b/a KGW-TV**

**and**

**Case 19-CA-148474**

**INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL 48, AFL-CIO**

**ANSWERING BRIEF OF COUNSEL FOR THE GENERAL COUNSEL  
TO EXCEPTIONS OF RESPONDENT TO THE DECISION  
OF THE ADMINISTRATIVE LAW JUDGE**

Carolyn McConnell  
Counsel for the General Counsel  
National Labor Relations Board, Region 19  
2948 Jackson Federal Building  
915 Second Avenue  
Seattle, Washington 98174

## **I. OVERVIEW**

Pursuant to § 102.46 of the Rules and Regulations of the National Labor Relations Board (Board), Counsel for the General Counsel (General Counsel) submits this Answering Brief to the Exceptions filed by Tegna, Inc., d/b/a KGW-TV (Respondent), to the December 20, 2016, decision of Administrative Law Judge Mara-Louise Anzalone (ALJ) in the above-captioned case.<sup>1</sup> The ALJ found that Respondent violated §§ 8(a)(5) and (1) of the Act by failing and refusing to provide relevant information to International Brotherhood of Electrical Workers, Local 48, AFL-CIO (Union),<sup>2</sup> and rejected Respondent's procedurally and substantively defective motion to reopen the record. As discussed in detail below, the ALJ's findings are proper and amply supported by the credible record evidence and longstanding Board law. Respondent does not raise any issues not already addressed by the ALJ. Accordingly, the Board should sustain the ALJ's decision and recommended order.

## **II. THE ALJ'S REFUSAL TO REOPEN RECORD SHOULD BE AFFIRMED**

In refusing to reopen the record, the ALJ correctly applied the Board's Rules and Regulations and well-established Board law, finding that the parties' having reached a successor collective bargaining agreement (CBA) after the hearing closed did not qualify as "newly discovered evidence" under § 102.48(d). [ALJD 2]. In excepting to this finding, Respondent mistakenly asserts the ALJ ignored a prong of this correctly applied standard.

The Board has consistently held that evidence counts as newly discovered or newly available under § 102.48(d) only if it existed at the time of the hearing, which post-hearing

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<sup>1</sup> JD (SF)-48-16. References to the ALJ's decision will be designated by [ALJD \_\_\_] followed by the appropriate page number(s), followed, where applicable, by a colon and line number(s). References to Respondent's Brief in Support of Exceptions will be designated by "R. Brief," followed by page number, followed, where applicable, by a colon and line number(s). References to the hearing transcript will be by [Tr. \_\_\_] and those to hearing exhibits will be by [GC \_\_\_] (General Counsel's exhibits), [R \_\_\_] (Respondent's exhibits), or [Jt. \_\_\_] (joint exhibits).

<sup>2</sup> The ALJ, however, found that Respondent did not unlawfully refuse to provide one part of the requested information, Request 8, on corporate ownership and effects of corporate restructuring. [ALJD 24-25]

ratification of a CBA clearly did not. [ALJD 2, citing *Rush Univ. Med. Ctr.*, 362 NLRB No. 23, slip op. at 1 n.2 (2015); *Allis-Chalmers Corp.*, 286 NLRB 219, 219 n.1 (1987)]. Section 102.48(d) also requires that a motion to reopen be granted only if that new evidence would mandate a different result. As the ALJ correctly found, Respondent's evidence would not mandate a different result.

Respondent claims that its evidence goes beyond having entered into a CBA; namely that it demonstrates the Union agreed to withdraw the charge. It does not. While a settlement of the matter would have obviated the need for a decision by the ALJ, as the ALJ noted, the Union opposed Respondent's motion and contested the claim that it had agreed to withdraw the charge. [ALJD 2]. Thus, Respondent's citation to *Independent Stave Co.*, 287 NLRB 740 (1987), which sets out a framework for evaluating the appropriateness of accepting a non-Board settlement that provides for withdrawal of a charge, is a non-sequitur.

Even if, despite the Union's claim to the contrary, Respondent's assertion regarding the proffered evidence of a CBA were admitted, it still would not resolve the question at issue: whether Respondent refused to provide relevant information during bargaining. Indeed, that the Union agreed to a CBA does not mean that the information sought would not have been useful to it during bargaining. For the same reasons, Respondent's supposed new evidence does not demonstrate that the remedy ordered by the ALJ is inappropriate; the mere fact that the parties ratified a successor CBA does not vitiate the Union's need for such relevant information. Therefore, the ALJ correctly refused the motion to reopen and Respondent's exception to this finding should be rejected.

### **III. THE ALJ'S FINDINGS THAT RESPONDENT UNLAWFULLY FAILED TO PROVIDE RELEVANT INFORMATION SHOULD BE AFFIRMED**

In finding that the information requested by the Union during the course of bargaining for a successor agreement was either presumptively relevant or made relevant by Respondent's claims or proposals during bargaining, the ALJ rejected Respondent's defenses of confidentiality and Union bad faith, as well as its claim that it had, in fact, provided adequate responses to requests. In its Brief in Support of Exceptions, Respondent makes factual claims not supported by the record, mischaracterizes Board cases accurately cited by the ALJ, and seems to misunderstand the well-established Board standards on which the ALJ correctly based her decision. Further, Respondent seems to suggest that scrutiny of the specific information requests and responses is not required [R. Brief 2:22] and that, instead, the question of whether it unlawfully failed to provide information should turn on the overall balance of good and bad faith in bargaining between it and the Union. [R. Brief 1-2; 17-21]. However, Respondent fails to offer any case law in support of this claim and, in arguing that an employer is free to refuse to respond to relevant information requests as long as it does so in good faith, cites to case law that does not support its contention.

First, Respondent's assertion that the ALJ applied an impermissibly broad definition of relevance in evaluating the facts of this case is mistaken.<sup>3</sup> As the ALJ correctly noted, longstanding Board case law holds that, although the relevance of non-presumptively relevant information must be demonstrated, such relevance is demonstrated if the information is necessary to assess a bargaining party's statements and bargaining proposals. [ALJD 17, citing *Caldwell Mfg. Co.*, 346 NLRB 1159 (2006)]. The ALJ correctly explained that each of the

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<sup>3</sup> The prime example Respondent uses to demonstrate the lack of relevance of Union requests is the request for a list of shareholders [R. Brief 21, 26]—*on which the ALJ agreed with Respondent*. The shareholder information was part of Request 8, the lone request as to which the ALJ found no violation. [ALJD 24-25].

Union's requests, except for Request 8, was relevant to assessing either Respondent's specific bargaining proposals or its claimed bases for them. [ALJD 19–23].

Second, as to Respondent's claims concerning bad faith, although the ALJ cites accurately to *Hawkins Constr. Co.*, 285 NLRB 1313 (1987) [ALJD 23:26–27], Respondent completely confuses that case's holding. [R. Brief 18:14–15]. In that case, the judge found that the employer acted lawfully due to the union's bad faith, but the Board reversed, finding the employer unlawfully failed to provide relevant information that was requested in good faith. *Hawkins Constr.*, 285 NLRB at 1314–15. Other cases cited by Respondent for the proposition that subjective good faith excuses an employer from providing information make clear that the Board's standard is, in fact, an objective one; an employer may be "entitled to make a good faith objection" to an information request [R. Brief 18:16–19], but unless the objection is timely raised and found to be reasonable, the employer won't be excused from providing the information. *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1095 (1<sup>st</sup> Cir. 1981); *West Penn Power Co.*, 339 NLRB 585, 590 (2003).

Similarly, other cases cited by Respondent do not support its argument that refusing to provide information relevant to its bargaining responsibilities is not in itself unlawful. They actually stand for other propositions: there is no per se rule as to how much delay in providing information is too long, *West Penn Power Co.*, 339 NLRB 585; other legitimate interests that are timely raised may in special circumstances be found to outweigh a union's need for information, *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); and an employer may be found to have met its legal burden if it timely offers the requester information in a different but mutually satisfactory form. *Emeryville Research Ctr., Shell Dev. Co., v. NLRB*, 441 F.2d 880 (9<sup>th</sup> Cir. 1971). None of these situations pertains to this case and Respondent cannot claim they do.

**A. The ALJ Correctly Found Respondent Unlawfully Failed to Provide Competitive Disadvantage and Competitor/Advertiser Data**

As the ALJ found, Respondent put data on its market share, competitors, revenue, expenses, and advertising at issue due to its presentations about specific new media competitors and urgent threats to its ability to compete for advertising dollars and its claim that it required substantial concessions as a result.<sup>4</sup> [ALJD 19–20]. The ALJ rejected Respondent’s argument that its presentations referred to predictions about the future; rather, Respondent’s presentations suggested that its market share was *currently* being harmed by new competitors. [ALJD 20–21]. She also correctly rejected Respondent’s defense of confidentiality. [ALJD 21–22].

First, Respondent’s citations to the record do not undermine the ALJ’s findings as to what claims Respondent made during bargaining, as they reference testimony by the Union’s lead bargainer on Respondent’s claimed desire for flexibility, Respondent’s statements about its need to compete in the changing media market, and the Union’s stated need to test Respondent’s assertions through its information requests. [R. Brief 23:11–12]. Second, although Respondent states that “[i]t is undisputed that KGW never made an ‘inability to pay’ claim” and that the Union “conceded that Respondent’s proposals did not grow out of an inability to pay” [R. Brief 30:15–17], neither of these claims is accurate, and the citations Respondent offers do not support them. In the passages cited from the transcript at this point, the Union’s lead bargainer repeats what Respondent’s representatives said in bargaining: that their proposals were based on a need to compete. [Tr. 58:21, 201: 14–19]. Third, the ALJ clearly and accurately laid out the standards applicable to claims of inability to pay and carefully addressed whether Respondent made such a claim, finding that Respondent’s gamesmanship made it impossible for the Union to assess whether Respondent was making a claim of inability to pay the requirements of the

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<sup>4</sup> Union Requests 2 and 11.

expired contract during the life of the next contract—thus making information necessary to assess that ability highly relevant. [ALJD 18–21].

Respondent also misunderstands the Board’s standard applicable to claims of confidentiality, overbreadth, and overburdensomeness of requested information. Respondent here again mistakes the Board’s objective standard for a subjective one, misciting case law in support of its claim that merely raising concerns about confidentiality and overbreadth in conclusory and general terms is enough. In fact, in the case cited heavily by Respondent, the Board found that the employer had both rebutted the relevance of the union’s requests and timely asserted burdensomeness and overbreadth, then offered an accommodation of the union’s needs. *United Parcel Serv.*, 362 NLRB No.22 (Feb. 26, 2015). Because Respondent did none of these things, its circumstances and those in *United Parcel Serv.* are not “nearly identical.” [R. Brief 20 n.9; *see also* ALJD 24 n.20]

As the ALJ noted, when a Union makes a request for relevant information, it is the employer’s burden to timely raise specific, legitimate concerns and offer to bargain to an accommodation between those concerns and the Union’s needs. [ALJD 21]. The ALJ found that Respondent never timely raised legitimate and specific confidentiality concerns about the Union’s requests nor offered any accommodation of the Union’s needs. [ALJD 21]. Respondent does not, and cannot, claim it in fact did so. What Respondent did was simply demand that the Union pick out some of its requests to drop; reasonably enough, the Union wanted the information it had asked for and declined this invitation to bargain against itself. Yet the Union did go above and beyond its obligations by offering to work out which parts of the information requests were objectionable and which could be satisfied. [GC 2 p.36].

Since Respondent raises nothing warranting setting aside the ALJ's finding that Respondent unlawfully failed to provide information in response to Union Requests 2 and 11, its exceptions should be denied.

**B. Requests Regarding Specific Bargaining Proposals**

Respondent vaguely takes issue with the ALJ's findings that Requests 3–5, 7, 9, 13, and 14 explicitly sought information made relevant by Respondent's bargaining proposals, claiming incorrectly that she relied only on "superficial" Union testimony for these findings. [R. Brief 24]. In fact, the ALJ relied on credible testimony as well as on the requests themselves, which, on their face, related tightly to Respondent's proposals and included explanations as to how they related. [ALJD 8–10, 22].

Respondent also tries to argue that, despite providing the Union with only a single document in response to these requests, it did in fact fully respond to the requests. As the ALJ accurately explained, that isn't so; instead, Respondent made coy, evasive, and in some cases incredible verbal responses that served to obscure rather than clarify. [ALJD 22–23].

The ALJ also fully addressed Respondent's argument that the Union made its requests in bad faith, noting accurately that the burden for such a claim rests with Respondent and that it is met only if no reason for the request can be justified. [ALJD 23]. Respondent cannot meet that burden because, as the ALJ explained, each one of the requests was made early in bargaining in explicit response to a specific bargaining proposal. [ALJD 23–24]. In light of this well-reasoned finding, Respondent's continued claims of Union bad faith as well as its citations to the record in support in its Exceptions Brief are mystifying.

For example, Respondent provides no record citation at all for its claim that the Union "mishandled information it was given" and that Respondent provided multiple copies of

documents. [R. Brief 19 n.8]. Another example is Respondent's claim that the Union refused to engage in bargaining while its information requests were pending, but Respondent's own citations to the record do not support that claim. [R. Brief 12:12–15]. One cited passage shows the Union suggesting that the information would be helpful in working towards a deal. [GC 2 p.32]. Another shows the parties examining a bargaining proposal made by the Union—doing precisely what Respondent claims the Union refused to do. [R 11, p.18]. It is unclear what the last citation, to the parties' joint factual stipulation, has to do with Respondent's claims here at all. [Jt. 17].

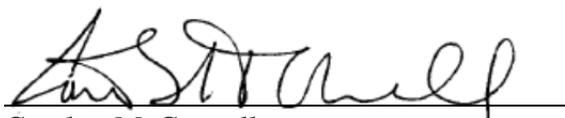
Thus, nothing raised by Respondent warrants setting aside the ALJ's findings that Requests 3–5, 7, 9, 13, and 14 were relevant to Respondent's bargaining proposals, the Union explained their links to the proposals, and Respondent failed to respond adequately, without any supportable defense.

#### **IV. CONCLUSION**

Based on the foregoing, Counsel for the General Counsel respectfully asks that the Board deny Respondent's Exceptions and adopt the ALJ's findings of fact and conclusions of law that Respondent violated §§ 8(a)(1) and (5) of the Act.

DATED at Seattle, Washington, this 14th day of February, 2017.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Carolyn McConnell', written over a horizontal line.

Carolyn McConnell  
Counsel for the General Counsel  
2948 Jackson Federal Building  
915 Second Avenue  
Seattle, Washington 98174  
Telephone: (206) 220-6285  
Email: [carolyn.mcconnell@nlrb.gov](mailto:carolyn.mcconnell@nlrb.gov)

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the Answering Brief of Counsel for the General Counsel to Exceptions of Respondent to the Decision of the Administrative Law Judge was served on the 14<sup>th</sup> day of February, 2017, on the following parties:

**E-file:**

Gary Shinnors, Executive Secretary  
National Labor Relations Board  
1015 Half Street SE  
Washington, D.C. 20570

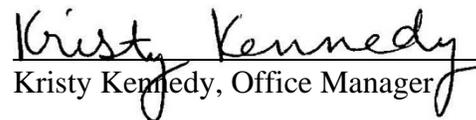
**E-Mail:**

John Hodges-Howell, Attorney  
Davis Wright Tremaine LLP  
[johnhodgeshowell@dwt.com](mailto:johnhodgeshowell@dwt.com)

Henry E. Farber, Attorney  
Davis Wright Tremaine LLP  
[henryfarber@dwt.com](mailto:henryfarber@dwt.com)

John Bishop, Attorney  
McKanna Bishop Joffe LLP  
[jbishop@mbjlaw.com](mailto:jbishop@mbjlaw.com)

Diana Winther, General Counsel  
IBEW, Local 48  
[diana@ibew48.com](mailto:diana@ibew48.com)

  
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Kristy Kennedy, Office Manager