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BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the matter of

TEGNA, INC., D/B/A KGW-TV

Respondent,

and

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

Charging Party.

No. 19-CA-148474

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

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I. INTRODUCTION

The General Counsel has the burden of establishing that KGW committed an unfair labor practice. General Counsel's opposition to KGW's exceptions demonstrates that it did not satisfy that burden at the hearing and it cannot satisfy that burden now.

II. ARGUMENT

A. KGW Responded In Good Faith to the IBEW's Requests for Information

General Counsel ignores the multiple Supreme Court and Board decisions holding that an employer's obligation to respond to a union's request for information arises from the duty to bargain in good faith. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-154 (1956); *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 318 (1979); *West Penn Power Co.*, 339 NLRB 585, 587 (2003). Following the logical extension of these holdings, an employer may refuse to respond to a union's request for information without violating the Act, provided that the employer acts in good faith when doing so. General Counsel does not dispute the import of these holdings and concedes that employers are "entitled" to make *good faith* objections to information requests without violating the Act. Opposition at 4.

Here, the ALJ erred by applying an inappropriate *per se* rule: she found that KGW violated the Act despite the fact that it responded to several of IBEW's requests for information and made reasonable objections to the rest. Again, the Board and courts have held that such a *per se* rule is misplaced and inappropriate, especially when, as in this case, the General Counsel does not offer any authority to the contrary. *Emeryville Research Center, Shell Development Co. v. NLRB*, 441 F.2d 880, 886 (9th Cir. 1971) ("We do not understand the Supreme Court to have enunciated such a *per se* rule."); *West Penn Power Co.*, 339 NLRB 585, 587 (2003) ("Indeed, it is *well established that the duty to furnish*

1 *requested information cannot be defined in terms of a per se rule.* What is required is a
2 reasonable *good faith* effort to respond to the request as promptly as circumstances
3 allow.”) (emphasis added); quoting *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9
4 (1993).

5 While the ALJ claimed to have analyzed the merits of KGW’s objections, she did
6 *not* analyze whether KGW acted in good faith when it raised the objections. Merely
7 because the ALJ disagreed with the *merits* of KGW’s objections does not mean that KGW
8 made them in bad faith. An employer does not have to be “correct” about its objections so
9 long as it does not make them in bad faith. Parties may reasonably disagree on issues like
10 relevance or confidentiality. A rule that automatically penalizes a party for raising such
11 objections—and not being “right” about the outcome—would frustrate the entire process
12 for exchanging information and completely ignores the Act’s insistence on good faith
13 discussions. Here, there is *no evidence* in the record that KGW acted in bad faith at any
14 point during the collective bargaining process (and, notably, General Counsel fails to cite
15 any such evidence in his opposition). In the absence of evidence of bad faith, the ALJ is
16 improperly penalizing KGW for “getting it wrong.” The proper inquiry, which the ALJ
17 ignores, is whether under the circumstances of the particular case, the statutory obligation
18 to respond in good faith has been met. *See Truitt Mfg. Co.*, 351 U.S. at 152-54.

19 General Counsel’s arguments about *Hawkins Constr. Co.*, 285 NLRB 1313 (1987)
20 completely miss the mark. In *Hawkins*, the Board analyzed whether *the union*—the
21 requesting party—made its requests in good faith. Nothing in *Hawkins* addresses the issue
22 here: whether in the absence of evidence of bad faith *by KGW*—the *responding* party—
23 the ALJ properly found that it violated the Act. In other words, as a matter of law, the ALJ

1 cannot find a violation of the Act when the General Counsel presents no evidence of bad
2 faith by KGW and, in fact, the record contains *no evidence* suggesting bad faith by KGW.

3 **B. The ALJ's Standard of Relevance Was Wrong**

4 The ALJ applied an impermissibly broad standard of relevance. The broad
5 discovery-type standard used to determine relevance is not without limits, and the Act does
6 not permit the kind of wide ranging and burdensome requests that are at issue here. See,
7 Brief in Support of Exceptions at 22:5-21. General Counsel simply ignores this authority
8 in his opposition. Moreover, the burden is on *the union* to demonstrate relevance where
9 the requested evidence does not directly pertain to employees in the bargaining unit.

10 *Disneyland Park*, 350 NLRB 1256, 1257 (2007). There is no *evidence* in the record that
11 Mr. Fair's comments about the changing media market and KGW's proposal about flexible
12 staffing—for the purposes of allowing KGW to gather more content—were linked to the
13 accompanying information requests for extensive financial and other information about
14 advertisers, competitors, market share, ratings, revenues, and expenses. The ALJ simply
15 adopted IBEW's superficial arguments that the topics were all related. Argument,
16 however, is not evidence.

17 In addition, Mr. Fair provided information to the IBEW that related to *and*
18 *supported* the statements he made in his prefatory remarks. General Counsel cannot and
19 does not dispute that KGW, therefore, bargained in good faith by providing information at
20 the bargaining table in support of its position. What the General Counsel appears to
21 contend—again without any authority—is that KGW's responses violated the Act because
22 *the IBEW* was not satisfied with them. Whether or not the information was *satisfactory* to
23 the union is irrelevant. This is not the measure of relevance *or* good faith bargaining.

1 Indeed, the ALJ's finding of relevance is based almost entirely on prefatory
2 statements made by Mr. Fair at the commencement of bargaining. Mr. Fair's statements
3 consisted of the following:

- 4 • A situation where KGW found itself short staffed during a breaking news
5 story;
- 6 • Mr. Fair identified Millennials as the largest demographic group in the
7 United States with \$1.3 trillion in consumer spending;
- 8 • Millennials use multiple electronic devices and social medial platforms to
9 watch television;
- 10 • Millennials lack brand loyalty to television networks;
- 11 • Millennials' creation of their own media content (including a hypothetical
12 example of a college student who produces a sitcom); and
- 13 • An explanation about how technological improvements in mobile devices,
14 broadband internet access, and cloud computing had removed cost as a
15 barrier to creating and distributing content.

16 See, Brief in Support of Exceptions, at 3:15-6:7.

17 Mr. Fair's comments *did not* state that advertisers or advertising revenue for KGW
18 was in jeopardy.¹ Mr. Fair's comments *did not* reference competition from other media
19 outlets or the threat of competition from such sources. Mr. Fair's comments *did not*
20 reference station revenue or operating expenses or KGW's general financial situation.
21 Mr. Fair's comments *did not* specifically reference ratings or market share, or even *any*

22 _____
23 ¹ Mr. Fair stated that advertisers *generally* were shifting dollars to the mobile ad market.
He supported this statement with a Comcast study and Pew Institute documents, both of
which KGW provided to the IBEW.

1 current effect on the station's financial performance. And yet, despite the fact that Mr. Fair
2 did not reference any of these topics during his presentation, the ALJ held that detailed and
3 intrusive information requests on *all* of these topics were presumptively relevant.

4 Moreover, the ALJ failed to address the context surrounding the IBEW's detailed and
5 intrusive information requests. The IBEW made these requests only *after* KGW made its
6 proposal on non-exclusive jurisdiction. The abusive requests were part and parcel of the
7 union's strong negative reaction to the proposal and the IBEW intended to harass (and
8 punish) the company rather than obtain relevant information. Instead, the ALJ made this
9 holding *without any evidence from the IBEW* linking Mr. Fair's comments with the topics
10 of the information requests. It was improper for the ALJ to hold the requests were relevant
11 where the IBEW based their position entirely on conjecture and not evidence.

12 Similarly, although General Counsel appears to argue that KGW's statements about
13 the changing media markets are the equivalent of an "inability to pay" claim, he offers no
14 evidence or authority in support of this extraordinary claim. In this regard, the General
15 Counsel's argument is particularly troubling to the extent that he asserts that an employer
16 opens the door to detailed and intrusive information requests about its finances by merely
17 referencing a changing market—a factor that is out of the employer's control. As KGW
18 demonstrated in its opening brief, proposing changes at the bargaining table in a good faith
19 effort to compete for a superior and more appealing product is nothing like claiming
20 financial hardship due to competition. Brief in Support of Exceptions at 30:15-31:3. This
21 is especially true where, as here, KGW made a corresponding statement that it was open to
22 considering economic enhancements.

1 **C. IBEW Engaged In Bad Faith Bargaining**

2 The General Counsel argues that the IBEW did not engage in bad faith bargaining
3 because the ALJ held that its bargaining proposals were made in response to KGW's
4 specific bargaining proposals. The validity of this argument, however, hinges on the
5 existence of *evidence* demonstrating a connection between IBEW's overreaching
6 information requests and KGW's position. As discussed above, no such evidence exists.

7 Neither the IBEW nor the General Counsel make a serious effort to defend IBEW's
8 bad faith conduct (indeed the IBEW, in adopting the General Counsel's arguments, makes
9 no independent effort to defend its own conduct). IBEW repeatedly refused to
10 meaningfully bargain with KGW over the scope of its requests and took the entirely
11 unreasonable and unwarranted position that KGW had to turn over everything "because we
12 said so." Such bare assertions are insufficient to establish relevance—General Counsel
13 cites no authority to the contrary—and in the absence of relevance, the IBEW's requests
14 were made in bad faith. Similarly, the IBEW requested voluminous information about
15 stockholders, which it did not look at, and made duplicative and harassing requests for
16 information after KGW informed IBEW that responsive information did not exist. IBEW
17 does not dispute this conduct. Instead, the General Counsel tries to justify IBEW's
18 behavior by claiming that IBEW did not believe KGW when it said it did not have
19 responsive information. The problem with this position is that, like the rest of the General
20 Counsel's arguments, there is no evidence to even remotely support IBEW's supposed
21 belief that KGW was withholding responsive documents. While KGW tried to negotiate
22 mutually agreeable terms surrounding the exchange of information, IBEW frustrated those
23 efforts at every turn by refusing to further discuss the scope of the responses. *American*

1 Cyanamid, 129 NLRB 683, 684 (1960) (union's "adamant insistence . . . on its right to
2 have the Respondent's records in the terms set forth in its demand precluded, in effect, a
3 test of the Respondent's willingness to give the Union access to the [presumptively
4 relevant] wage information involved on mutually satisfactory terms").

5 **D. The ALJ Improperly Held That KGW's Responses To Individual Requests**
6 **Were Inadequate**

7 In its brief supporting its exceptions, KGW detailed the various ways in which the
8 ALJ's rulings with regard to specific requests were incorrect. Given that General Counsel
9 largely failed to address any of these arguments in its Opposition, KGW will not repeat
10 them here.

11 KGW did, however, spend approximately 17 pages of its brief identifying the
12 requests that were at issue, citing record evidence of how it responded to each of the
13 requests, identifying (again, with cites to the record) where KGW did not have responsive
14 information, providing legal authority in support of its objections to the requests, and
15 explaining why the ALJ's conclusions with regard to each request were incorrect. Despite
16 KGW's detailed analysis of each request, the General Counsel disingenuously
17 characterizes KGW's numerous arguments: "Respondent *vaguely* takes issue with the
18 ALJ's findings that Request 3-5, 7, 9, 13, and 14 explicitly sought information made
19 relevant by Respondent's bargaining proposals, claiming incorrectly that she relied only on
20 'superficial' Union testimony for these findings." Opposition at 7.

21 The reason for General Counsel's glib dismissal of KGW's arguments is clear. He
22 knows, as demonstrated by KGW in its opening brief, that the ALJ's analysis of KGW's
23 responses to the requests is fatally flawed and does not survive any serious scrutiny. He
clearly hopes to gloss over the errors by mischaracterizing the extent and substance of

1 KGW's exceptions. For example, the ALJ found that KGW failed to respond to several of
2 IBEW's information requests despite the fact that the record evidence unequivocally shows
3 that it did provide substantive responses (both in writing and at the bargaining table). See,
4 Brief in Support of Exceptions, Secs. IV.E.5, 6, 9, 10. Similarly, in several other instances,
5 the ALJ found that KGW failed to respond to a request even though KGW told the IBEW
6 that it did not have responsive information and there was no *evidence* that KGW's
7 representations were untrue. See, Brief in Support of Exceptions, Secs. IV.E.3, 4, 6, 7.
8 General Counsel completely ignores these two glaring errors with the ALJ's analysis.

9 **E. The Record Needs To Be Reopened So That The ALJ Can Evaluate Whether**
10 **The Parties Reached An Agreement Regarding The Withdrawal Of The**
11 **Charge**

12 As conceded by both the ALJ and General Counsel, Section 102.48 of the Board's
13 Rules and Regulations governs when the record should be reopened. Section 102.48(d)
14 permits a record to be reopened based on either "newly discovered evidence" *or* "evidence
15 which has become available only since the close of the hearing." General Counsel
16 completely ignores the plain language of the rule and argues that "newly discovered
17 evidence" and "evidence which has become available only since the close of the hearing"
18 are one and the same. In his view, both types of evidence must have existed at the time of
19 the hearing in order for it to be relied upon to reopen the record. This argument does not
20 make sense given the rule's actual language: the rule expressly differentiates between
21 newly discovered evidence and evidence which has become available only since the close
22 of the hearing. "Evidence which has become available only since the close of the hearing"
23 is therefore distinct from newly-discovered evidence, it is not an example of newly
discovered evidence. Under the General Counsel's proposed interpretation, "newly

1 discovered” evidence would refer to evidence that existed but one or both parties did not
2 *know* about until after the hearing, and “evidence which has become available only since
3 the close of the hearing” would refer to evidence that existed and that both parties knew
4 about but was not available to one or both of the parties. Nothing in the rule defines
5 “available,” yet Section 102.48 also requires that a party explain why evidence was not
6 presented previously at the hearing. If a party did not know that evidence existed, it would
7 be able to explain why the evidence was not presented at the hearing. If a party was *aware*
8 that evidence existed and did not take proper steps to procure it (i.e., make it available) at
9 the hearing, the party would not be in a position to explain why the evidence was not
10 presented. General Counsel does not cite any authority for his interpretation of the rule.
11 The more commonsense interpretation of the rule is that evidence that has become
12 “available” only after the close of the hearing did not exist at the time of the hearing.

13 Moreover, General Counsel (and the ALJ) do not seriously dispute that *if* the
14 IBEW agreed to settle the charge in the course of bargaining, the union’s agreement *would*
15 change the outcome of the hearing and moot the need for a decision by the ALJ.
16 Opposition, p.2. (“While a settlement of the matter would have obviated the need for a
17 decision by the ALJ....”) They argue, however, that no such further determination is
18 necessary because the IBEW contested KGW’s motion to reopen the record and argued
19 that it had not agreed to withdraw the charge. This argument accepts the IBEW’s version
20 of events without question. However, there is a dispute between IBEW’s position and the
21 evidence submitted by KGW demonstrating that there was a settlement. If for no other
22 reason, the hearing should be reopened so that the evidence from both sides can be tested
23

1 and evaluated. This is especially true where, as here, the ALJ already found that the
2 testimony of the IBEW's lead negotiator was not especially reliable. ALJD, at 16:15-17.

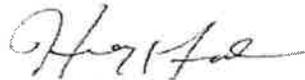
3 Moreover, the question of remedy must be decided separately from the question of
4 whether a violation occurred.

5 [T]he issue of whether there is a violation is to be determined
6 by the facts as they existed at the time of the union request.
7 However, the remedy for that violation must take into
8 account the facts as they exist at the time of the Board's
9 order.

10 *Borgess Medical Center*, 342 NLRB 1105, 1107 (2004). "If the requesting union has no
11 need for the information requested, the Board will not order the employer to produce it,
12 despite finding a violation." *The Boeing Co. & Soc'y of Prof'l Eng'g Employees in*
13 *Aerospace*, 364 NLRB No. 24 at 3 (June 9, 2016). Whether the IBEW ratified a Tentative
14 Agreement, therefore, would affect the remedy because the IBEW simply would no longer
15 need the information it requested. The General Counsel does not even address this point in
16 its Opposition. Given the undisputed effect this evidence will have on the remedy, the
17 record should be reopened to accept it.

18 DATED this 28th day of February, 2017.

19 Davis Wright Tremaine LLP
20 Attorneys for Tegna, Inc., d/b/a KGW-TV



21 By _____

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1 **CERTIFICATE OF SERVICE**

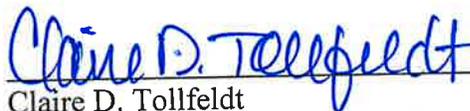
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