

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

**NEXSTAR BROADCASTING, INC.
d/b/a KOIN-TV**

and

Cases 19-CA-211026

**NATIONAL ASSOCIATION OF BROADCAST
EMPLOYEES & TECHNICIANS, THE
BROADCASTING AND CABLE TELEVISION
WORKERS SECTOR OF THE COMMUNICATIONS
WORKERS OF AMERICA, LOCAL 51, AFL-CIO**

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

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Pursuant to § 102.46 of the Rules and Regulations of the National Labor Relations Board (“Board”), Counsel for the General Counsel submits this Answering Brief to the Exceptions and supporting brief filed by Respondent Nexstar Broadcasting, Inc. d/b/a KOIN-TV (“Respondent”) to the September 25, 2018, decision (the “ALJD”) of Administrative Law Judge Eleanor Laws (“ALJ”).¹ Respondent’s exceptions take issue with the ALJ’s findings that it violated §§ 8(a)(1) and (5) of the Act as alleged in the Complaint (“Complaint”) when it failed and refused to furnish relevant information requested by the Charging Party Union, the National Association of Broadcast Employees & Technicians, the Broadcasting and Cable Television Workers Sector of the Communications Workers of America, Local 51, AFL-CIO (the “Union”) because Respondent did not identify who is/was performing graphic artist work or provide information about what equipment had replaced the still store. Respondent also excepts to the ALJ’s finding that it violated §§ 8(a)(1) and (5) by unreasonably delaying in identifying when graphic artist work would return to the Portland. As discussed in detail below, the ALJ’s findings are appropriate, proper, and fully supported by the record. Accordingly, the Board should sustain the ALJ’s findings of fact, conclusions of law, proposed remedy, and recommended order concerning Respondent’s violations of §§ 8(a)(1) and (5) of the Act.

I. OVERVIEW

Respondent is a corporation with an office and place of business in Portland, Oregon (the “facility”), where it is engaged in the operation of a television station. On or

¹ JD (SF)-31-18. References to the ALJD are noted as: (JD __:__), which shows the decision page and line, respectively. References to Respondent’s Brief in Support of Exceptions to the Decision of the Administrative Law Judge will be referred to by page number as (R. Br. __). References to the Stipulation are noted as: (JM. __:__), which shows the Stipulation page and paragraph. References to Joint exhibits will be made as: (JX.__).

about January 17, 2017, Respondent purchased the business of LIN Television Corporation, a Media General Company, d/b/a KOIN-TV (“Media General KOIN-TV”), and continues to operate the business of Media General KOIN-TV in basically unchanged form, and has employed as a majority of its employees individuals who were previously employees of Media General KOIN-TV. Respondent continued as the employing entity and is a successor to Media General KOIN-TV. (JD 2:8–21).

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of § 2(11) of the Act and/or agents of the Respondent within the meaning of § 2(13) of the Act: Tim Busch (“Busch”), President; Patrick Nevin (“Nevin”), Vice President and General Manager; and Casey Wenger (“Wenger”), Business Administrator. (JD 2:23–29).

The following employees of the Respondent constitute units (the “Units”) appropriate for the purposes of collective bargaining within the meaning of § 9(b) of the Act:

The first, as certified by the National Labor Relations Board, consists of all regular full-time and regular part-time engineers and production employees, but excluding chief engineer, office clericals, professionals, guards and supervisors as defined in the Act, and all other employees of KOIN-TV.

The second, as voluntarily recognized by the parties, consists of all regular full-time and regular part-time news, creative services employees, and web producers, but excluding news producers, IT employees, on-air talent (aka “performer”), office clericals, professionals, guards and supervisors as defined in the Act and all other employees of KOIN-TV.

(JD 2:33–3:3).

Until January 17, 2017, the Union had been the exclusive collective-bargaining representative of the Units employed by Media General KOIN-TV, and during that time the Union had been recognized as such representative by Media General KOIN-TV. This recognition was embodied in successive collective-bargaining agreements, the most recent of which was in effect from July 29, 2015, to August 18, 2017 (“expired CBA”). Since about January 17, 2017, the Union has been the designated exclusive collective-bargaining representative of the Units. (JD 3:7–12, JM. 5:15–16).

Under the expired CBA, Respondent’s employees in the Units include Graphic Artists who are responsible for: (1) the creation of specialty on-air graphics, promotional material, video, and special web graphics; (2) posting content to web and any other platforms used by the Station; the operation of the graphics computer system and still store; and (3) Respondent’s graphic needs. At all material times, Respondent and the Union were engaged in or were preparing to engage in bargaining for a successor CBA. (JD 3:14–19).

A. The Union’s Oral June 21, 2017, and Written November 30, 2017, Requests for Information

At a bargaining session on about June 21, 2017, Respondent and the Union discussed the Graphic Artist position. The Union noted in a partial set of proposals passed to Respondent, “13.1 Hubbing of Graphics, need to understand status of graphics at the station, impact on recall rights and jurisdiction.” Union Business Representative Carrie J. Biggs-Adams (“Biggs-Adams”) orally asked when the graphics work would return to the Units’ employees. Vice President and General Manager Nevin verbally agreed to research the Union’s question and provide an answer.

Again, at a bargaining session on about November 30, 2017, Respondent and the Union discussed the Graphic Artist position. At this meeting the parties also discussed “Company Proposal #36” (originally presented on about June 21, 2017), which proposed to eliminate the “still store” from the list of equipment used for the creation of graphics used at KOIN-TV. (JD 3:21–32, JX. H).

On about November 30, 2017, Biggs-Adams sent an email to Business Administrator Wegner that stated in part:

We heard that Nexstar has ended hubbing of graphics (I believe in the spring of this year). When we asked when the graphics work was coming back to the station we were told the station would check and get back to us.

Please now consider this a formal information request in regard to the work of “creating specialty on-air graphics, promotional material, video, and special web graphics” at KOIN TV. Where is the work being performed, and by whom? When did, or will, the work return to Portland?

You have proposed to eliminate the “still store” from the list of equipment to be operated at KOIN TV for the creation of news graphics, Creative Services and promotion graphics. Please provide a comprehensive list of the equipment currently used to perform this work.

Please also separate the equipment by category, so that we may understand what language should replace the phrase “still store.”

(JD 4:1–2, 10–25, JX. F).

The Union and Respondent are currently engaged in or preparing to continue to engage in successor bargaining and have reached tentative agreements on several issues, including Company Proposal #36. (JD 4:32–34, 44–5:17, 5:23–25, JX. G, H). The tentative agreement on Company Proposal #36 was signed by the parties on March 23, 2018. (JD 5:23–25, JX. H).

B. Respondent's Written December 8, 2017 Response to the Union's Oral June 21, 2017 and Written November 30, 2017 Requests for Information

On about December 8, 2017, Nevin emailed the following response to Biggs-Adams that opened with "In Response to your graphics RFI dated 11/30/17" and stated in part:

The Station's current graphics needs have been supported through the Nexstar Nashville Design Center. As I explained in detail to you in previous bargaining sessions, on air-graphics within KOIN newscasts may be produced at the local level using templates that have been pre-built, and prepopulated. With respect to your reference of an outdated and retired piece of equipment identified as a "Still Store", again that equipment is no longer relevant, nor in use. Someone with your production background should certainly be aware that a "Still Store" is a system out of production for many years, obsolete and technologically antiquated graphics generating equipment. Like many other television stations, KOIN retired and replaced the "Still Store" with a contemporary, state of the art device. Specifically, this piece of equipment was replaced at the Station in 2009.

Attached you will find the full job description and duties of the open Graphic Designer position that was posted on 10/20/17 (6 weeks ago), posted internally on KOIN Company bulletin boards, and externally published with over two dozen external sources, including NABET (see attached). As you should recall, during our meeting and in prior conversations, I have noted and continue to note herein we, seek to fill the position and once that candidate commences in that new role, you will be made aware through the normal course of action. As to the timeline, that will occur when we make the hire.

Respondent concedes that the Union made a relevant request. (JD 6:13–14, R.Br. 6).

C. The ALJ Properly Found that Respondent Violated the Act

On these facts, the ALJ correctly determined that Respondent violated §§ 8(a)(1) and (5) of the Act by failing and refusing to furnish relevant information requested by the Union because Respondent did not identify who is/was performing graphic artist work or provide information about what equipment had replaced the still store. (JD 9:17–18,

7:18–33, 8:5–6). The ALJ also correctly found that Respondent violated §§ 8(a)(1) and (5) of the Act when it unreasonably delayed in identifying when graphic artist work would return to the Portland facility. (JD 9:1–18). Finally, the ALJ also correctly found that Respondent violated §§ 8(a)(1) and (5), regardless that the parties reached a tentative agreement to eliminate “still store” language in the successor contract. (JD 7:35–8:6).

II. RESPONDENT’S EXCEPTIONS ARE WITHOUT MERIT

Respondent’s brief in support of exceptions reiterates many of its same convoluted legal and factual arguments already rejected by the ALJ after proper consideration. Respondent’s arguments can be distilled into roughly five categories of purported errors by the ALJ:

- (1) finding that Respondent failed to sufficiently identify the “state of the art device” that replaced the “still store” by failing to conclude that Respondent, in an adequate fashion, supplied the information in a reasonably clear and understandable manner;
- (2) failing to conclude that, with regard to information requested about the still store, pursuit of this Complaint would not effectuate the purposes of the Act because the parties reached a tentative agreement on the proposal to eliminate the still store language in the successor contract;
- (3) finding that Respondent failed to sufficiently identify who is/was performing graphic artist work by failing to conclude that Respondent, in a reasonable and adequate fashion, supplied the information to a sufficient degree;
- (4) finding that Respondent unreasonably delayed in identifying when graphic

artist work would return to the Portland facility by failing to conclude that Respondent, in a reasonable and adequate fashion, fully supplied the information in a timely manner; and

- (5) ordering the standard Board remedies for these straightforward violations of §§ 8(a)(1) and (5) of the Act because the information requested was fully supplied.

A. The ALJ Properly Found that Respondent Failed to Sufficiently Identify the State of the Art Device that Replaced the Still Store (Exceptions 1–7, and 9)

Respondent’s brief opens with a punchy assertion that “[o]nly by engaging in an unusual and unprecedented ‘fly-specking’” of Respondent’s response “is a violation of the Act found.” (R. Br. 6). Respondent essentially asserts in its exceptions that a job description attached to its response was sufficient to identify the state of the art device that replaced the still store. It was not. However, a simple explanation of how the job description identified the equipment that replaced the still store would have sufficed. Instead, Respondent seems to have expected the Union to do its own “fly-specking” to glean any requested information from Respondent’s cryptic and clearly inadequate response. (JD 6:40–7:7, R. Br. 7, 14).

The remainder of Respondent’s arguments underpinning its exceptions are inapposite to the established landscape of the Act’s request for information jurisprudence. Once a union makes an information request, an employer meets its obligation by providing the information it possesses. *Whitesell Corp.*, 352 NLRB 1196, 1197 (2008), *affirmed and adopted*, 355 NLRB 635 (2010). *See also, e.g., Good Life Beverage Co.*, 312 NLRB 1060, 1062 n.9 (1993); *E. I. Du Pont & Co.*, 291 NLRB 759

n.1 (1988) (reasonable, good-faith effort to respond to the request as promptly as circumstances allow is required). (JD 6:9–11, 7:5–7). Since Respondent was in possession of the requested information (JD 7:29–32), there is no question that the ALJ appropriately applied Board law.

First, as to the request, even Respondent describes the Union’s request as singular and straightforward; the ALJ agreed. (JD 9:8–9, R. Br. 6). It follows that a singular and straightforward request would require a singular and straightforward response. It did not. Thus, despite having the actual information, Respondent responded that the still store was replaced by a “state of the art device” without a modicum of explanation. As the ALJ correctly found, such response was inadequate. (JD 6:39–44, 7:1–7, 18–27, 29–34). Had ample basis in law for so finding. See, e.g., *E. I. Du Pont & Co.*, 291 NLRB at 759 n.1; *Good Life Beverage Co.*, 312 NLRB at 1062 n.9. See also *Metta Elec.*, 349 NLRB 1088 (2007); *King Soopers, Inc.*, 344 NLRB 842 (2005).

Second, Respondent repeatedly notes in its brief that the graphics artist job description attached to its response provided a “detailed list of the software to be used in the job.” (R. Br.12–13, JX. G). This is simply not true. While the Union may have been able to consult with its members to make an educated guess on the matter, it was under no obligation to do so. *Metta Elec.*, 349 NLRB 1088 (2007); *King Soopers, Inc.*, 344 NLRB 842 (2005); *Illinois-American Water Co.*, 296 NLRB 715, 724–725 (1989) (rejecting employer's contention it was relieved from providing information it believed was in possession of union or available through union stewards or union records), *enfd.* 933 F.2d 1368 (7th Cir. 1991). (JD 7:22–27). Thus, absent an explanation that the

attached graphics artist job description complemented Respondent's cryptic and essentially silent written response as to what equipment actually replaced the still store with a sufficient (although less than categorized) list of graphics software and equipment, the ALJ properly relied on Board precedent in finding that Respondent violated §§ 8(a)(1) and (5) of the Act.² (JD 6:39–44, 7:1–7, 23–27, 29–34, 8:5–6).

B. The ALJ Properly Found that the Parties' Subsequent Tentative Agreement in No Way Excused Respondent's Failure to Respond to the Union's Relevant Information Request (Exception 8)

This exception is facially flawed because, as the ALJ properly noted, Respondent's position is contrary to Board law. (JD 7:36). Board law is clear that "a union's proffered reasons for demanding the information, as well as the employer's motives for refusing that demand, must be examined as of the time of the demand and the refusal." *Kraft Foods N. Am., Inc.*, 355 NLRB 753, 755 (2010) (citing *General Electric Co. v. NLRB*, 916 F.2d 1163, 1169 (7th Cir. 1998)). (JD 7:36–8:1). The ALJ properly concluded that Respondent was not absolved from responding to the November 30, 2017, information request in light of the parties reaching a tentative agreement on March 23, 2018, to eliminate the still store language in the successor contract. (JD 7:35–40, 8:1–4, R. Br. 14, JX. H).

C. The ALJ Properly Found that Respondent Failed to Sufficiently Identify Who Is/Was Performing Graphic Artist Work (Exception 10)

In its brief, Respondent argues that answering "the Stations' graphics needs were being fulfilled, ('pre-built'), by the Nexstar Nashville Design Center," was more than sufficient to identify who is/was performing graphic artist work at the facility in a

² Respondent also inexplicably excepts to ALJ comments that were properly relegated to footnotes. Footnote 2 provides a simple analogy to complement the ALJ's reasoning and Footnote 3 contains a notation that the ALJ was not relying on the subject of the footnote (JD 6: nn.2, 3; R. Br. 11).

reasonable and adequate fashion. (R. Br. 16). Respondent mistakenly asserts that the ALJ erred by requiring that it respond with specificity regarding “non-unit work,” citing *Shopper Food Warehouse Corp.*, 315 NLRB 258 (1994) (the burden is on the union to demonstrate relevance when the information requested concerns matters outside the bargaining unit). (R. Br. 16). However, having already conceded presumptive relevance (JD 6:13–14), Respondent compounded its error by failing to mention that its written response went on to explain that on-air graphics “may be produced at the local level” using these “pre-built” templates. (R. Br. 9, JX. G).

Given the relevance, there can be no good faith dispute that the information would be useful in discharging the Union’s statutory responsibilities and Respondent had a duty to provide it. See *Washington Beef, Inc.*, 328 NLRB 612, 617–618 (1994) (must provide information relevant to monitoring compliance and effectively policing the collective bargaining agreement). As such, the ALJ correctly applied proper Board law holding that once the obligation to produce the requested information attaches, the employer cannot remain silent, and must either produce the information or provide an explanation for its refusal to provide it. *USPS*, 332 NLRB 635, 639 (2000). (JD 6:7–11).

D. The ALJ Properly Found that the Actions of Respondent Unreasonably Delayed in Identifying Where Graphic Artist Work was Being Performed and When This Work Would Return to the Portland Facility (Exceptions 11–13)

Respondent argues that its December 8, 2017, written response represents a fully supplied answer in a timely manner to the Union’s June 21 and November 30, 2017, information requests as to “when the work would return to the Units.” (R. Br. 16). Respondent relies on providing the Graphic Designer job posting to show that the ALJ wrongly concluded that it delayed five months in providing this information. (JD 9:7–14,

R. Br. 16). Respondent's reliance is misplaced.

Respondent ignores that the Union's June 21, 2017, oral request for information of when graphics work would return to the Portland facility was made during discussions about the "status of graphics at the station, impact on recall rights and jurisdiction." (R. Br. 4, JM 6:19). It is for this reason that the ALJ properly analyzed the request as dating from June 21, 2017, and treated the Union's written request as a *renewal* of the Union's oral request as to "when the work would return to the Units." (JD 9:7–14).

Even if Respondent's response as to providing "where" graphics work was being performed were to be considered reasonable because it was first requested on November 30, 2017, the ALJ still properly applied Board law in finding that Respondent unreasonably delayed providing an answer as to "when" it would return to the facility. (JD 9:7–18). As the ALJ correctly analyzed, even if Respondent was unsure of an exact date, it should have at least informed the Union prior to the October 20, 2017, job posting. *USPS*, 332 NLRB at 639 (once the obligation to produce the requested information attaches, the employer cannot remain silent, and must either produce the information or provide an explanation for its refusal to provide it). (JD 9:10–13). Thus, the ALJ's decision was correct and should be adopted.

E. The ALJ Properly Ordered Standard Board Remedies for the Above-Described Straightforward Violations of §§ 8(a)(1) and (5) of the Act (Exceptions 14–17)

Respondent objects generally to the ALJ's conclusions of law and recommended order. Respondent specifically objects to a notice posting and the standard order to provide the Union the requested information: "which individuals were performing graphic artist work and information about what equipment has replaced the still store."

(JD 7:28–11:20, R. Br. 17–19). In support, Respondent regurgitates Board law, yet fails to provide any compelling evidence that the ALJ erred in applying that law to the Union’s singular and straightforward information request. (R. Br. 17–19). Of course, as the cases Respondent cites make clear, the remedies are standard Board remedies for cases such as this, as found by the ALJ. Accordingly, the ALJ certainly did not err in ordering them.

III. CONCLUSION

Based on the foregoing, and the entire record evidence, Counsel for the General Counsel respectfully submits that the Board should reject Respondent’s exceptions, as the ALJ properly found that Respondent violated §§ 8(a)(1) and (5) of the Act as alleged in the Complaint. As such, the Board should affirm and adopt the ALJ’s findings of fact, conclusions of law, and recommended order.

Dated at Portland, Oregon this 7th day of December, 2018.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision was served on the 7th day of December, 2018, on the following parties:

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