

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

Respondent- Employer

V.

Case 19-CA-21106

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

Charging Party - Union

REPLY BRIEF IN FURTHER SUPPORT OF EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE'S DECISION

Nexstar Broadcasting, Inc. d/b/a KOIN-TV ("Nexstar", "Respondent" or "Company") hereby submits its Reply Brief in Further Support of Exceptions from the Decision by Administrative Law Judge Eleanor Laws and in Reply to the Brief filed by the Counsel for the General Counsel on December 7, 2018. Nexstar repeats that it strongly denies that it has violated the National Labor Relations Act. We submit that this National Labor Relations Board ("the Board") should refuse to follow the recommendations in said Decision and should dismiss the Complaint against Nexstar for all of the reasons set forth in Nexstar's Exceptions, the supporting Brief filed with the Exceptions, and this Reply Brief.

I. THE GENERAL COUNSEL HAS FAILED TO PROVE THAT NEXSTAR DID NOT SUPPLY THE INFORMATION REQUESTED BY THE UNION IN A REASONABLE, ADEQUATE AND TIMELY MANNER.

Contrary to the assertions in the Reply Brief by the Counsel for the General Counsel filed herein, we renew our assertion that the General Counsel failed to prove that Nexstar failed to supply the Union with the information that it requested regarding the Graphics Design work at this television broadcasting station. In a passage the CGC's Reply Brief labels "punchy", we asserted in our Initial Brief that a violation of the Act is found herein "only by engaging in an unusual and unprecedented 'fly-specking' of the Nexstar's detailed response to a request for information on singular topic in the course of the parties' collective bargaining negotiations". Nothing submitted in the CGC's Reply Brief challenges that "punchy" assertion. As will be discussed below, the law cited by the CGC either deals with wholly different factual settings or reaches different conclusions with respect to the adequacy of information request responses. As such, the ALJ's Decision is not properly supported by precedent of this Board or the courts.

As we have consistently noted in the briefing of this case, at no point during the investigation of this Charge, nor at any other point during the pendency of this case, did Respondent contend that the material requested by the Union was not relevant to the Union's ability to bargain in relation to the topic of Graphics Arts. So, the only question properly before the Board is whether or not the information requested was adequately supplied as determined under existing law. On that question, we submit that Nexstar acted in good faith to fulfill the request for information made by the Union.

The burden of proof in unfair labor practices is, of course, on the General Counsel, who must prove by a preponderance of the evidence that an unfair labor practice has

been committed. Section 10(c) of the National Labor Relations Act. 29 USC 160(c). The CGC has failed to carry its burden in this case that Nexstar failed to respond in a reasonable and adequate fashion to the Union's request for information on the status of graphic arts' work. This Board should find that Respondent supplied the Union with adequate information responsive to its' request on the Graphic Arts/Still stores issue.

Several legal principles regarding the duty to provide information support this conclusion. First, we note that the duty to furnish information does not operate on its own but is triggered only after a request or demand has been made for certain information held by the employer. *NLRB v Boston Herald Traveler Corp.*, 210 F.2d 134 (1st Cir. 1954). It has also been recognized by the Board and the courts that while certain guidelines exist for the disclosure of information, the circumstances of each particular case must be examined to determine if the information a union seeks must be turned over by the employer. *NLRB v Truitt Mfg. Co.*, 351 U.S. 149 (1956). One of the primary principles distilled from this case is that the duty to supply information under the NLRA turns upon "the circumstances of the particular case." *Id.*, 351 U.S. at 153 (1956). We submit that it flows from this key principle that the **adequacy of a response** to a request for information should also be analyzed on a case by case basis. And the cases have approached it in this fashion.

For example, the Board has held that the information returned to the union by the employer need not provide information in any particular form, so long as it is not unduly burdensome on the union. *Cincinnati Steel Castings Co.*, 86 NLRB 592, 24 LRRM 1657 (1949). The employer need only provide such information to the union in a **reasonably clear and understandable form**. *Food Employers Council*, 197 NLRB 651, 80 LRRM 1440 (1972). Obviously, the facts of each particular case will determine

whether the information provided meets the “reasonably clear and understandable” threshold offered by *Food Employers*. Here, the fact that the list of devices upon which the graphics art work would be performed upon its’ intended return to KOIN-TV was set out in a job description that was provided does not undercut in any way the notion that the information was provided in a ‘reasonably clear and understandable” manner.

Further there is no *per se* rule as to when information must be provided. The Board looks at the totality of the circumstances to determine whether the parties have made a diligent effort to obtain or provide requested information reasonably promptly. *West Penn Power Co. d/b/a Allegheny Power*, 339 NLRB 585, 587 173 LRRM 1125 (2003). Compare *Pan American Grain Co.*, 343 NLRB 318 (2004), enforced in relevant part, 432 F.3d 69 (1st Cir. 2005) (3 month delay unreasonable); *Bundy Corp.*, 292 NLRB 671 (1989) (delay of 2.5 months violates the Act); *Woodland Clinic*, 331 NLRB 735 (2000) (7-week delay unreasonable) with *Union Carbide Corp. Nuclear Div.*, 275 NLRB 197 119 LRRM 1077 (1985) (delay of 10 ½ months justifiable where there was no evidence employer could produce information faster and union was not prejudiced).

For that reason, we take great exception to the assertion by the General Counsel, accepted by the ALJ, that that Respondent “has **failed and refused** to provide information related to the work performed by the Units at KOIN-TV; work involving creating graphics, promotions, and videos on specialized equipment.” This assertion is simply not true, as the CGC has failed to prove that Nexstar did not adequately respond to the requests propounded by the Union on this issue. As such it is certainly not true that Nexstar ‘refused’ to fulfill the request at any time, as there is not the slightest hint in the record in this case that Nexstar acted willfully to rebuff the Union’s request. Indeed, a violation was found only because the General Counsel, and then the ALJ, objected to

the fact that the information was provided in documents rather than in a format more akin to the interrogatories used in civil discovery. They did this even though there is nothing in the record that the Union objected to this manner of production. Further there is nothing at all in the record that establishes that the union agent did not understand the information that was provided to her. All of the information requested was provided, albeit some of it in a mixed Q & A format with attached documents rather than in a pure Q & A form that the General Counsel seemingly required.

We submit that this is a case where the General Counsel has been allowed to exalt form over substance in an unusual and unprecedented way. This Board should reverse this totally unjustified Decision. The CGC presented a set of cases and argued that they provided precedent for this Decision. The Brief of CGC at p. 8 cited the following cases, without discussion of the facts in each case for the principle, which we do not dispute, that a response must be “adequate”: “*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)”. However other than standing for the obvious general principle that an adequate response must be given, these cases do not even remotely resemble the factual circumstances here and thus do not provide precedent for the ALJ’s unprecedented decision in the instant case.

None of the CGC’s cited cases contain any sort of meaningful analysis of what constitutes an “adequate” response to a request for information. None of the CGC’s cited cases involve a situation where an isolated request for information was responded to with a set of documents containing the requested information presented in such a way that the Union did not make a follow-up request for more information or request clarification. None of the cited cases involve a situation where a violation was found

even though the record was devoid of any proof that the Union did not understand the information provided. *Metta Electric*, supra, for example, presented a situation where the Employer flat-out refused to present the requested information about the status of replacement workers following a strike. Likewise, *King Soopers*, supra presented a situation where again an employer completely refused to provide information requested by a union. The *DuPont* case cited by the CGC at p. 8 of his Brief involved an admitted complete failure to provide information on seven (7) specific requests, leaving the causal connection to impasse as the only remaining issue to be decided in that 2005 case. And finally, *Good Life Beverage*, supra, involved a circumstance wherein the Board determined that a five-month delay in supplying information was not unreasonable. 312 NLRB 1060, 1062.

Simply put, the citation of these factually inapposite cases does not support the Decision of the ALJ, which remains, we submit, unsupported by the law, as well as the facts.

As we have consistently stated, the facts involved in this matter are simple and straight-forward. And that includes both the Request **and the Response to the Request**. We have established that Nexstar furnished the Union with all of the information that it has requested during the course of bargaining, including all items requested in Ms. Biggs- Adams' request for information of November 30, 2017. In her letter she inquired as to: 1) who was performing graphics artist work at the time of the request and 2) what equipment replaced the "still store" at KOIN-TV. We believe that we have established that this information was fully provided in a timely fashion. In his Reply Brief, Counsel for the General Counsel ignores these facts, quibbling with the way that the "answers" to the "questions" were provided as we argued above. Because of this attempt to ignore

the fact that a full response was made we will again lay out the simple, but thorough, responses made to the simple requests posed.

As previously argued, items #21 and #22 in the Joint Motion and Stipulation of Facts alone, establish that a Request (#21) (**Exhibit F**) was made and a proper Response (#22) (**Exhibit G with important attachment**) was given. Pat Nevin, Vice-President and General Manager of KOIN-TV quickly responded to Ms. Biggs-Adams' November 30, 2017 request for information on the Graphic Arts issue by responding in writing on December 8, 2017 to the request following discussions had on the topic at bargaining sessions held on the same date the request was made:

In response to your graphics RFI dated 11/30/17 -

Stating for the record, I am not sure why it is necessary to memorialize the conversation we had in person during the last round of our negotiations.....

Nevertheless, I will now memorialize, and I trust this time clear up any confusion you may have over the station's current production of graphic elements for broadcast.

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. Furthermore, this is precisely the reason why we proposed to have it removed in our Company Proposal #36, which was originally presented to you on 6/21/17, which has been met with your strong opposition.

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. (Jt. Stip. 22; Jt. Exh. G.)

As he indicated he would, Nevin attached the job description and duties for the broadcast graphic design position to his letter. It stated:

Broadcast Graphic Designer

KOIN 6, a Nexstar Media Group, Inc. Television Station in Portland, Oregon is seeking an experienced Broadcast Graphic Designer. The successful candidate will have a high degree of professionalism, effective interpersonal relation skills, ability to organize and prioritize workload and function well under tight deadlines.

JOB SUMMARY: Develop and maintain a consistent design direction for on-air broadcast and digital media platforms.

Principal Duties & Responsibilities:

- * Oversee on and off-air branding projects. Conceive, create and design creative solutions.

- Design a variety of graphics for: daily news, on set graphics, production graphics, animations and some print materials.

Design, develop and build on-air Chyron templates for producers.

Work with producers, reporters, directors, and production staff to create a professional look and maintain accuracy in all graphics.

Specialized Knowledge/Skills/Abilities:

*Seeking candidates with proven abilities with ChyronHego's Lyric software. Template building, macro scripting and complex template functionality a plus.

Seeking candidates with Cinema 4D experience. 3D model and scene building, design and animation skills preferred.

- Highly organized and detailed oriented.

Working knowledge of computer graphics equipment, and other related software required for placing the graphics on-air.

- Excellent grammar and spelling.
- Ability to think conceptually, and effectively communicate creative vision.
- Ability to work independently and as a team.

Education/Experience:

Bachelor's degree in graphic design, motion design, or a related field, or equivalent experience. Broadcast television station experience preferred.

Training/Equipment:

In addition to Chyron Lyric and Cinema 4D, thorough knowledge of the Adobe Creative Suite, specifically After Effects, Photoshop and Illustrator is needed.

Work Environment/Mental/Physical Requirements:

High stress environment with deadline pressures.

The Complaint asserted that Nexstar failed to sufficiently identify the ‘devices’ that replaced the ‘still store’ system. On this query, Nevin gave the following narrative response: “...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. Furthermore, this is precisely the reason why we proposed to have it removed in our Company Proposal #36, which was originally presented to you on 6/21/17, which has been met with your strong opposition”. And further responding to this inquiry about what equipment was being

used to replace the ‘Still Store’, Nevin attached to his Response to Ms. Biggs-Adams a job description for the graphics artist position which gave a **detailed list of the software to be used in the job: TRAINING AND EQUIPMENT: Chyron Lyric and Cinema 4D, Adobe Creative Suite, (After Effects, Photoshop and Illustrator).**

Despite the production of this information detailing the software that was being used to perform the Graphic Design job, the General Counsel and then the ALJ conclude that this was inadequate. Again, it should be emphasized that they so concluded without any PROOF whatsoever that the Union did not understand the information that was being provided to them or ask for a clarification or additional information. We submit that the GC and the ALJ did not understand the import of the information that was provided.

This is evident from the following finding made by the ALJ

“To put the response into terms to which attorneys would readily relate, suppose attorneys in a represented group have been using Westlaw to do their legal research. The Respondent's response to the Union regarding the still store is akin to the employer telling the attorneys' bargaining representative that it replaced Westlaw with a "revolutionary, cutting edge research engine." (JD 6: fn 2)

That the GC and ALJ did not understand the import of this disclosure does not prove that the Union agent did not understand its’ import. As we noted in our initial Brief in support of our Exceptions, the Response listed the equipment that is utilized to create graphics for the station’s use. This list of equipment (**Chyron Lyric and Cinema 4D, Adobe Creative Suite, (After Effects, Photoshop and Illustrator)**) is relatively standard, and we submit came as no surprise to Ms. Biggs-Adams these are brand names at least as familiar as Westlaw is to lawyers. One only has to google the term “**Chyron Lyric**” to go to a plethora of websites featuring this mainstream product for performing graphic design work. While the list may not have been understandable to the Counsel for the General Counsel or the ALJ, there is no proof whatsoever that the

Union did not understand what was being provided to them. As these answers were full and complete in indicating that trade name products such as Chyron Lyric were being used to perform the graphic design work, it is not surprising that the Ms. Biggs-Adams did not object to their incompleteness or make any follow-up inquiry. Given these facts we believe it is clear that the list of devices was provided in the attached job description in a clear and understandable manner. The CGC's Brief only challenges that conclusion by saying that the question could have been answered more directly. This however does not satisfy his burden that the information was not provided in a clear and understandable manner as there is absolutely no proof that it was NOT understood by the Union agent who received it. And on top of that, there is NO proof that the Union agent objected in any way to what was produced or that she sought clarification by way of follow-up inquiry or otherwise.

The CGC's Reply Brief supported the ALJ's conclusion that Nexstar did not adequately respond to the Union's inquiry as to the current location of the work that replaced the outdated 'still-store' graphic design system and the plan for its' ultimate return to KOIN-TV. Nexstar responded in a reasonable and adequate fashion to this aspect of the Union's request for information. Again, we submit Response clearly indicates that, at the time the request was answered, the Stations' graphics needs were being fulfilled, ('pre-built'), **by the Nexstar Nashville Design Center**. The ALJ indicates that this response was inadequate because it did not identify the individuals in this facility, by name, who were performing the work. This conclusion ignores the fact that the Board has routinely rejected as unreasonable requests for information calling for the production of such specificity regarding non-unit work See *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 258, 147 LRRM 1179 (1994)(the burden is on the

union to demonstrate relevance when the information requested concerns matters outside the bargaining unit) see also, *Disneyland Park*, 350 NLRB No. 88 (Sep. 13, 2007). Here the design center in Nashville, Tennessee is nearly two thousand miles from the station in Portland, Oregon.

We argued in our initial Brief that Nevin stated in response to the inquiry as to when the work would return to KOIN as follows: “As you should recall, during our meeting and in our 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”. (**Exhibit G, p.1**) We argued that the ALJ erred in concluding that Respondent failed to promptly respond to the inquiry as to” if and when the work would return to the Units” (Jt. Motion, p. 8). We submitted that Nevin responded that the work would return to the unit once a hire into the posted Graphic Designer position was made. The ALJ wrongly concluded that Nevin delayed five months in providing this information. There is no showing that this was the case, as there is no evidence that Nevin knew when the work was going to return until the position was filled which is what he advised the Union. Again, like in other aspects of this Complaint, there **was no showing that the Union objected to this disclosure, or its timing.** The CGC, responded to this argument by saying that this “information” should have been provided when the job was posted in October. However, there was no proof that the Union was not provided with this posting, or that it objected to the delay beyond that point.

II. THE PURPOSES OF THE ACT ARE NOT FURTHERED OR EFFECUATED BY THE PURSUIT OF THIS COMPLAINT

As we have noted above, the ALJ's Decision is unprecedented under law and unsupported by the facts. The Counsel for the General Counsel failed to carry the burden to establish that the Company failed to respond adequately to the Union's singular request for information during the early stages of successor bargaining. Compounding this failure to carry this burden we point to the established fact that the CGC has submitted absolutely no proof that the Union was harmed in any way by this alleged 'failure to adequately disclose', or that it even complained that it did not understand or comprehend the substantial amount of information that it was provided by Mr. Nevin. This is truly a case where it can be said, 'no harm, no foul'.

In this vein, we submit that the ALJ misapprehended the thrust of our argument with respect to the fact that a tentative agreement had been reached on the proposal related to the singular request for information. (**Exhibit H** to Joint Stipulation of Facts). Nexstar raised this fact as further support for its' contention that the pursuit of this Complaint does not serve to effectuate the purposes of the National Labor Relations Act. In this regard we note that there is no evidence that the alleged violation was in any way willful or that it involved a matter of seminal significance in the parties' collective bargaining relationship. And again, there was no showing whatsoever that the Union was harmed in any way by the alleged failure to provide the information and the fact that the tentative agreement was arrived at on the sole related proposal supports that notion. And finally, we submit that the fact that a tentative agreement was arrived at is additional support for the conclusion noted above that it is apparent that the Union had no difficulty with the information provided in response to their request for information.

III. CONCLUSION

In sum, we believe that the record is clear that Respondent has furnished the

Union with the information responsive to its' request. This Board should refuse to adopt the recommendations and conclusions in the Administrative Law Judge's Decision sustaining the General Counsel' s Complaint in this matter as the General Counsel and the Union have failed to sustain their burden that the Company has violated section 8(a)(5) of the National Labor Relations Act.

For all of the foregoing reasons, the Complaint should be dismissed in its' entirety.

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AFFIDAVIT OF SERVICE

I hereby certify that I served on 12/21/18 the foregoing Reply Brief of Respondent Employer in Further Support of its Exceptions from the Decision of the Administrative Law Judge on counsel for the Charging Party Union, the Regional Director for Region 19 and Counsel for the General Counsel by emailing a copy of same to their email addresses as noted below:

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