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

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 19

CHARLES W. PAUTSCH, Attorney for
Nexstar Media Group,

Charging Party,

and

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

Respondent.

No. 19-CB-234944

BRIEF OF RESPONDENT

I. INTRODUCTION

Respondent, National Association of Broadcast Employees and Technicians, the Broadcasting and Cable Television Workers Sector of the Communications Workers of America, Local 51, AFL-CIO (“Union”) hereby submits this brief to the Administrative Law Judge. This matter is before the Honorable Mara-Louise Anzalone, Administrative Law Judge, on a

Complaint alleging that the Employer, Nexstar Broadcasting, Inc., dba KOIN-TV, made a request for information allegedly necessary for the Employer's duties and responsibilities in the collective bargaining process, and that the Union allegedly failed and refused to furnish the Employer with the information requested. As discussed below, the Employer did not make a good faith request for information relevant to bargaining; instead, the memorandum in question merely attacked the Union about an article in a news publication. Moreover, the Complaint is moot because the Union answered the Employer's memorandum in writing on April 30, 2019, and the Employer has not identified any remaining issues.

II. SUMMARY OF FACTS

The facts are set forth in the Joint Motion and Stipulation of Facts (hereinafter "JMSF"); the exhibits are attached to the JMSF. To summarize:

The Employer operates a television station, KOIN-TV, in Portland, Oregon. The Union is the exclusive bargaining representative of the engineers, production employees, news and creative services employees, and web producers employed by the Employer at KOIN-TV. The Union was the exclusive bargaining representative of the same units employed by Media General KOIN-TV prior to January 2017. The Employer purchased the business of Media General KOIN-TV in January 2017, and has continued to operate the business in basically unchanged form, employing former employees of Media General KOIN-TV as a majority of its employees. As such, the Employer is the successor to Media General KOIN-TV. (JMSF ¶¶4-6, 12-13.)

At all relevant times, Carrie Biggs-Adams has been the Lead Negotiator and Local President of Respondent. (JMSF ¶11.)

The most recent collective bargaining agreement ("CBA") expired September 8, 2017. At all relevant times, the Union and the Employer have been engaged in bargaining for a successor CBA. (JMSF ¶¶13, 16.)

On or about November 20, 2018, a daily news publication called The People's World published an article titled "TV chain Nexstar splits workers with different raise offers, shifts cash

to shareholders,” by Mark Gruenberg. (JMSF ¶17 and Exhibit E.) The article later became the subject of the Employer’s so-called “request for information.” In relevant part, the article stated:

In another example of enormous corporate greed, a rich Texas-based TV chain—one whose own financial statements point to close to \$2 billion in revenue in the first nine months of this year—is offering raises of 1 percent to workers at one of its New York state TV stations, and 0.1 percent to workers at KOIN-TV in Portland, Ore.

...

At Buffalo’s WIVB-TV, bargaining has foundered over Nexstar’s about-face on paid leave to work out management-labor differences.

...

The situation is even worse—if you can believe it—at KOIN, says local President Carrie Biggs-Adams, whose local represents TV station workers from San Francisco northwards.

Biggs-Adams also has a basis for comparison nationwide. Until recently she was a top worker at NABET-CWA headquarters in D.C...

KOIN offered its workers the 0.1 percent hike, and that wasn’t all, she said. It wants to cut severance pay to two weeks...

Nexstar would impose more extra costs on NABET by making the union—not the company—responsible for precisely checking and following every single state, local, and federal law before filing grievances on various issues, including discrimination. One slip-up or small omission and the grievance gets tossed.

The *coup de grace*, however, is in a non-financial area. In the #MeToo era, where opposition to sexual harassment on the job has become a nationwide cause, Nexstar wants to eliminate the current contract’s protections against job discrimination, by sex, race, or anything else. “They won’t go beyond federal law,” Biggs-Adams says.

The company, meanwhile, has other uses for its millions. In its public financial statement, Nexstar’s revenue totaled \$693 million in the third quarter of the year, 13.3 percent more than in the third quarter of 2017. It earned \$485 million in the first nine months of this year—a 31.4 percent jump—on \$1.97 billion in overall revenue nationwide since Jan. 1.

As for what it wants to do with the money, besides not paying workers, Nexstar CEO Perry Sook said in the statement the network would “apply our growing free cash flow to drive

shareholder returns. . . In the third quarter we allocated a total of approximately \$180 million to return of capital, leverage reduction, and strategic M&A initiatives.”

“M&A” stands for “mergers and acquisitions,” and Biggs-Adams suspects she knows where. From broadcast industry sources, she believes Nexstar is angling to buy the Tribune Company’s stations, after federal regulators quashed a prior big Tribune sale.

Biggs-Adams doubts Nexstar would succeed, though, because its acquisition of Tribune’s stations would put it over Federal Communications Commission limits on market concentration, just as the prior Tribune sale that collapsed did.

Still, “the impact on workers is pretty massive, and it’s a structural problem with the capitalist system,” she says. It’s especially acute, she notes, when hedge funds take over media chains, run them for 18 months while milking profits by slashing staff, then selling them.

That’s what’s happened, Biggs-Adams notes, at KOIN.

(Exhibit E.)

The Employer and the Union reached tentative agreements on several issues, including non-discrimination language, as of December 13, 2018. (JMSF ¶22.)

On or about December 14, 2018, the Employer’s General Manager, Pat Nevin, sent Ms. Biggs-Adams a memorandum with the subject line: “Request for information—peoplesworld.org article dated 11/20/18.” (JMSF ¶18 and Exhibit F.) Under the guise of a “request for information,” the memorandum merely sought to harass the Union for the opinions that were attributed to Ms. Biggs-Adams in the article. The memorandum stated in the first paragraph of the body:

On November 20, 2018 an article was published which contained materially false statements regarding our current negotiations at KOIN-TV. In order to assess the impact of these statements on our bargaining we send you this Request for Information. Please review and respond to the following requests for information below:

(Exhibit F.) The memorandum did not identify what Mr. Nevin considered “materially false statements.” The memorandum then included a list numbered 1 through 11. Item 1 demanded correspondence between Ms. Biggs-Adams and Mark Gruenberg. Items 2 and 3 demanded documents, correspondence and messages referring or relating to wage proposals and severance

pay proposals by KOIN to NABET. Item 4 demanded documents, correspondence and messages referring or relating to any proposals made by other Nexstar stations to NABET. Item 5 demanded documents, correspondence and messages referring or relating to discrimination harassment proposals by KOIN to NABET (despite the fact that, on the previous day, the parties had already reached a tentative agreement regarding the discrimination and harassment contract language). Items 6 and 7 demanded documents, correspondence and messages referring or relating to wage proposals and severance pay proposals by NABET to KOIN. Item 8 demanded documents, correspondence and messages referring or relating to any proposals by NABET to other Nexstar stations. Item 9 demanded documents, correspondence and messages referring or relating to discrimination harassment proposals by NABET to KOIN. Item 10 demanded documents, correspondence and messages referring or relating to “your apparent assertion in the November 20, 2018 edition that ‘when hedge funds take over media chains, run them for 18 months while milking profits by slashing staff, then selling them. That’s what happened, Biggs-Adams notes at KOIN.’” Item 11 demanded documents, correspondence and messages from any NABET agent to any bargaining unit employee at KOIN relating or referring to the peoplesworld.org article dated November 20, 2018. (Exhibit F.)

On or about January 25, 2019, Ms. Biggs-Adams and the Employer’s bargaining spokesperson, Charging Party Charles Pautsch, had an oral conversation in which Ms. Biggs-Adams commented that she believed the December 14 request was improper because it was seeking a journalist’s sources. Apart from that conversation, until April 30, 2019, Respondent did not substantively respond to the December 14 memorandum. (JMSF ¶19.)

Mr. Pautsch filed the charge on January 29, 2019. (JMSF ¶1 and Exhibit A.¹)

On April 30, 2019, Ms. Biggs-Adams sent a letter to Mr. Nevin. (JMSF ¶20 and Exhibit G.) The letter stated:

¹ The charge erroneously alleged a violation of section 8(b)(5), but the Complaint did not allege a violation of that subdivision.

In response to your information request of December 14th regarding the peoplesworld.org article dated November 20th, 2018. We have a few questions and responses.

NABET-CWA Local 51 does not believe that points 1, 10 or 11 relate to information that the employer needs for bargaining purposes.

As to requests 2-9, please clarify whether you are seeking the communications and proposals that these parties have already exchanged. These should already be in your possession, but if you have reason to believe otherwise, please advise. There would be no other communications in the categories described in requests 2-9 except privileged communications, if any, between myself as the Union's representative and affected members or the Union's counsel.

(Exhibit G.)

The Employer did not respond, and there have been no further written or oral communications between the Union and the Employer about the December 14, 2018 memorandum. (JMSF ¶21.)

On May 30, 2019, the Complaint issued, alleging a violation of section 8(b)(3) of the Act. (JMSF ¶2 and Exhibit B.) The Complaint recited the requests that were numbered 2-9 of the December 14 memorandum. (See Exhibit F [December 14 memorandum] and compare with Exhibit B, pp. 4-5 [Complaint ¶6(a)].) The Complaint alleged,

The information requested by the Employer, as described above in paragraph 6(a) is necessary for, and relevant to, the Employer's duties and responsibilities in the collective bargaining process, to the extent that it encompasses:

- i. Bargaining communications and proposals made by KOIN-TV to NABET and by NABET to KOIN-TV.
- ii. Bargaining communications and proposals made by other Nexstar Owned Stations to NABET and by NABET to other Nexstar Owned Stations.

(Exhibit B, p. 5 [Complaint ¶6(b)].) The Complaint did not include any mention of the April 30 letter from the Union to the Employer, nor did it include any issue about the Union's claim of privilege with respect to the communications between Ms. Biggs-Adams and affected members and between Ms. Biggs-Adams and the Union's counsel.

Likewise, the position of the Counsel for the General Counsel (hereinafter “CGC”) does not contend that the Union’s claim of privilege violated the Act; instead, the CGC’s position is that Respondent allegedly refused to provide information “until April 30, 2019.” (JMSF, p. 9.)

The parties remain engaged in successor bargaining. They have not reached a tentative agreement on wages or severance. (JMSF ¶22.)

III. ANALYSIS

A. **THE DECEMBER 14, 2018 MEMORANDUM DID NOT CONSTITUTE A GOOD-FAITH REQUEST FOR INFORMATION RELEVANT TO BARGAINING**

The obligation to provide information upon request is limited to information relevant to fulfillment of the collective bargaining responsibilities, including the negotiation and administration of a collective bargaining agreement. *Local 13, Detroit Newspaper Printing and Graphic Communications Union*, 233 NLRB 994 (1977). Relevance is determined by the circumstances of each case. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

Unlike the cases in which the Board has found that an employer has made a legitimate request for information of a union -- such as information relating to a union’s distribution of work calls or information necessary to determine what entity represented a bargaining unit after a union merger -- the December 14, 2018 memorandum from General Manager Nevin (Exhibit F) did not actually seek any information or data in the Union’s possession which would be relevant to bargaining. Instead, it was merely harassing the Union about the People’s World article; and to that end, the Employer was improperly seeking the journalist’s sources as well as the Union’s communications with its members. The record supports this interpretation, including the December 14 memorandum itself as well as the parties’ subsequent communications about it. The December 14 memorandum (Exhibit F) expressly referred to the article and argued that it was false. Its list of “requests” included some requests calling for the journalist’s sources, such as items 1 and 10; a request directly seeking communications between any union agent and bargaining unit members relating or referring to the article (item 11); and broad requests for all documents and communications about the bargaining problems that were mentioned in the

article, including but not limited to the discrimination language, upon which the parties had since reached tentative agreement.

The parties' subsequent communications further support the interpretation that the December 14 memorandum was not a good-faith request for information for any legitimate bargaining purposes. Ms. Biggs-Adams, as the Union's representative who had been at the table with the Employer for a year and a half already at that point, knew the Employer did not actually believe the Union had information the Employer did not already have for the purpose of bargaining wages, severance pay and the other topics listed in the memorandum; instead, she correctly understood the memorandum as an attempt to harangue and harass her in retaliation for the opinions attributed to her in the article. Thus, Ms. Biggs-Adams commented to the Employer's spokesperson on January 25 that she believed the December 14 request was improper because it was seeking a journalist's sources. The Employer did not clarify, but instead filed a charge a few days later. (JMSF ¶¶1, 19.) Ms. Biggs-Adams' April 30 letter (Exhibit G) stated that items 1, 10 and 11 did not relate to information that the Employer needs for bargaining purposes, and requested clarification about items 2-9. The letter clarified that the communications and proposals Nexstar and NABET already exchanged should be in the Employer's possession, and that there would be no other responsive communications except privileged ones between herself and the Union's members or the Union's counsel. Tellingly, the Employer did not respond. The Employer has not clarified to identify any relevant information that it claimed to be seeking from the Union, because there was none, and that was never the Employer's intent in the first place.

Indeed, the Region's Complaint reflects that the Region focused upon items 2-9 of the December 14 memorandum, and the Complaint alleged merely that the Employer's request would be necessary and relevant "to the extent that it encompass[ed]" bargaining communications and proposals between the parties themselves – that is, between KOIN and NABET, or between other Nexstar stations and NABET. (Exhibit B, p. 5 [Complaint ¶6(b)].) The Complaint gave the Employer the benefit of the doubt by reading items 2-9 in isolation --

out of the context of the rest of the memorandum – and asserting a hypothetical possibility that the Employer could have been asking for the communications and proposals between the parties themselves.

But that was not what the Employer was asking for. Mr. Pautsch, as Nexstar Media Group’s counsel in Texas, did not lack access of his own to documents or information about bargaining between other Nexstar stations and NABET. Neither he nor Mr. Nevin, as General Manager of Nexstar Broadcasting dba KOIN-TV, lacked information and documents about the bargaining they themselves had been engaged in with NABET Local 51. The hypothetical theory of relevance alleged in the Complaint did not take into account Ms. Biggs-Adams’ April 30 letter (Exhibit G) and the Employer’s non-response to it. Exhibit G expressly requested clarification whether the Employer was seeking the communications and proposals that the parties had already exchanged. The letter noted that the Union understood the Employer was already in possession of the bargaining communications and proposals between the parties themselves, and if the Employer thought that was not the case, the Employer should so advise. The Employer did not. The inference is clear that the Union’s reasonable understanding was correct – the Employer already had the communications and proposals between the parties themselves. The Employer was not asking for anything the parties exchanged with each other. Instead, in demanding all documents and messages “referring or relating to” the proposals, the Employer was merely harassing the Union by demanding any communications it had with the journalist and with its members. Thus, the Employer was not actually asking for the things that the Complaint theorized might be relevant and necessary for bargaining – the proposals and communications that Nexstar and NABET exchanged with each other.

Although the CGC takes the position that the Union delayed by allegedly refusing to provide information until April 30, 2019 (JMSF p. 9), there was no “delay” because the Employer was not in fact requesting relevant information in the first place. Only by taking items 2-9 of the Employer’s “request” out of context could one consider those items ambiguous enough to “encompass” proposals and communications between Nexstar and NABET. But

again, the record reflects that the Union did not take items 2-9 out of context, and the Union did not adopt a strained interpretation that Nexstar was asking for documents it already had. On January 25, Ms. Biggs-Adams commented to Mr. Pautsch that she thought the request improper, and he did not clarify. And as discussed above, the Employer's non-response to the April 30 letter demonstrates that the Union was right in believing that the Employer already had all proposals and communications that NABET and Nexstar had already exchanged, and the Employer was not in fact making a bona fide request for any information relevant to bargaining.

B. THE VALIDITY OF THE UNION'S CLAIM OF PRIVILEGE IN THE APRIL 30 LETTER IS NOT AN ISSUE AS DEFINED BY THE CGC'S POSITION

The CGC only contends that the Union refused to provide information "until April 30, 2019," and neither the Complaint nor the CGC's position statement states any theory challenging the Union's claim of privilege in the April 30 letter. Nor does the CGC's position statement or the Complaint assert that the Union was required to provide the Employer with the Union's communications, if any, with its members regarding the bargaining proposals. Charging Party's position statement ambiguously implies that it may be advancing a different theory or theories, by stating that the April 30 letter "finally responded to the request...in a disingenuous manner claiming unspecified privilege as justification for not producing the documents relevant to the ongoing negotiations." (JMSF, p. 11.) To the extent Charging Party seeks to pursue a different theory of violation than the CGC, it is not an issue properly before the Administrative Law Judge or the Board. The General Counsel's theory of the case is controlling, and a Charging Party may not add a different theory of violation, enlarge upon or change the General Counsel's theory. See, e.g., *Local 282, Int'l Brotherhood of Teamsters, AFL-CIO*, 335 NLRB 1253 (2001) (where General Counsel alleged that a union's 8(b)(3) violation was engaging in an allegedly illegal strike, and the General Counsel was not claiming the union bargained in bad faith prior to the strike, the Charging Party in that case was not allowed to add an issue about whether the union had also violated 8(b)(3) by allegedly bargaining in bad faith prior to the strike); *Zurn/N.E.P.C.O.*, 329 NLRB 484 (1999) (where General Counsel alleged that a hiring preference

policy was unlawful as applied at certain sites only, the Charging Party's contention that the hiring policy itself was unlawful could not be considered).

Thus, to the extent the Charging Party seeks to enlarge or change the issues presented, it is not permitted to do so, and Respondent is not required to litigate any issues not presented by the CGC.

C. THE COMPLAINT SHOULD BE DISMISSED BECAUSE IT IS MOOT

As an independent basis to dismiss the Complaint, it has become moot. The Union's April 30, 2019 letter clarified that the Union is not in possession of any responsive non-privileged documents the Employer does not already have. (Exhibit G.) The Employer did not identify any remaining issue or identify anything else it was seeking of the Union.

The Board has recognized the doctrine of mootness, and has dismissed complaints where no justiciable controversy existed. See, e.g., *Local 14055, United Steelworkers of America, AFL-CIO*, 229 NLRB 302 (1977).

Here, since the April 30 letter has clarified that the Union was not refusing to answer, but it has no responsive non-privileged documents or information to produce, there is nothing to compel the Union to do. Nor is there any present justiciable controversy about whether the Union is required to respond to requests for information that are relevant and necessary to bargaining – Respondent does not deny, and has never denied, that it has such obligation.

Rather, this case initially arose under the unique circumstance that the Employer expressly posed its entire memorandum as a response to a journalist's article and the opinions that were attributed to Ms. Biggs-Adams in the article. The Union simply believed the Employer was improperly seeking a journalist's sources and the Union's communications with its own members to harass the Union. The Union's April 30 letter clarified that the Union believed items 1, 10 and 11 did not call for information needed by the Employer for bargaining purposes. In items 2-9 of the memorandum, the Union did not understand the Employer to be asking for NABET and Nexstar's bargaining communications with each other, because the Union understood the Employer already had such documents. The Union requested that if the

Employer had reason to believe otherwise, the Employer should so advise. The Union further clarified that the only other responsive communications in those categories, if any, would be privileged communications between Ms. Biggs-Adams and the affected members or between Ms. Biggs-Adams and the Union's counsel. Thus, the April 30 letter clarified that the Union was not refusing to respond to requests for information relevant and necessary to bargaining. There is no present controversy about that.

IV. CONCLUSION

For the reasons discussed above, the Complaint should be dismissed. Respondent did not refuse to respond to any bona fide request for information within the meaning of the duty to bargain in good faith under section 8(b)(3) of the Act. Moreover, the question is moot in light of the fact that Respondent clarified on April 30 that it does not have any responsive documents and communications other than the communications exchanged between Nexstar and NABET that the Employer already has, and any privileged communications that may exist between Ms. Biggs-Adams as the Union's representative and affected members or the Union's counsel. The Employer did not identify any reason to believe there were any other responsive documents or communications for the Union to produce. Indeed, the Employer did not respond at all. Therefore, it is evident that the Employer does not truly seek any information or records from the Union legitimately relevant to bargaining; and the Complaint is moot.

Dated: November 8, 2019

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By:  _____
ANNE I. YEN

Attorneys for Respondent NATIONAL
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**PROOF OF SERVICE
(CCP §1013)**

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On November 8, 2019, I served the following documents in the manner described below:

BRIEF OF RESPONDENT

- (BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Alameda, California.
- (BY OVERNIGHT MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by United Parcel Service for overnight delivery.
- (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from smizuhara@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

Mr. Charles W. Pautsch
Nexstar Media Group, Inc.
545 E. John Carpenter Fwy., Suite 700
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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on November 8, 2019, at Alameda, California.


Stephanie Mizuhara