UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

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

Respondent- Employer

v. Case 19-CA-240187

NATIONAL ASSOCIATION OF
BROADCAST EMPLOYEES AND
TECHNICIANS –
COMMUNICATION WORKERS OF
AMERICA, AFL-CIO LOCAL 51

Charging Party -Union

REPLY BRIEF OF RESPONDENT

Nexstar Broadcasting, Inc. d/b/a KOIN-TV ("KOIN", "Respondent" or "Company") hereby submits its Reply Brief in Further Support of Exceptions from the Decision by the Administrative Law Judge, and in Reply to the Brief filed by the Counsel for the General Counsel('CGC") on October 8, 2020:

I. REPLY IN FURTHER SUPPORT OF EXCEPTIONS 1-7 *KOIN lawfully responded to the Union's Request for Information dated December X, 2018:*

Exceptions 1 and 7 both relate to the ALJ's overall conclusion that KOIN violated the Act in connection with NABET's December 14, 2018 request for information. The portions of the ALJ's Decision excepted to in Exceptions # 1 and #7 comprise the conclusions that the ALJ reached on the ultimate questions posed. In response to these conclusions, we assert that as our own conclusion, and one that this Board should adopt, that it is clear that KOIN lawfully responded to the request for information by sufficiently responding to the Union as to Item #3, and that the Union failed to establish the relevance of extra-unit information requested in Items #1 and #2.

II. REPLY BRIEF IN FURTHER SUPPORT OF EXCEPTIONS 2-5 *The General Counsel Failed to Establish a Violation of Section 8(b)(3) of the Act with Respect to Items 1 and 2 that Request Only Extra-Unit Information By Failing to Establish the Relevance of this Information:*

The ALJ and CGC both applied the well-established axiom that it is well-settled that information sought that does not directly relate to bargaining unit employees is deemed not to be presumptively relevant. *Island Creek* 292 NLRB 480 (1989);*NLRB v. Postal Service,* 888 F.2d 1568, 1570 (11th Cir.1989); *Walter N. Yorder & Sons v. NLRB,* 754 F.2d 531, 535 (4th Cir.1985); *Oil Chemical & Atomic Workers v. NLRB*, 711 F.2d 348, 359 (D.C.Cir.1983) *Marshall v. Western Grain Co*., 838 F.2d 1165 (11th Cir.1988), cert. denied, --- U.S ---- , 109 S.Ct. 137, 102 L.Ed.2d 110 (1988),. **The law that has emerged as a corollary to this principle is that the requesting party, here the union, bears the burden of establishing the relevance of the requested information,** *NLRB v. Leonard B. Herbert, Jr. & Co*., 696 F.2d 1120, 1124 (5th Cir.1983), and enjoys no presumption of relevance when the information does not concern bargaining unit employees. *NLRB v. A.S. Abell Co.,* 624 F.2d 506, 510 (4th Cir.1980) Extra- unit information will be found relevant where it is needed by the requesting party to engage intelligently in contract negotiations and administration. See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–153 (1956). A requesting party must offer more than a "hypothetical theory" about the relevance of requested documents, and "mere suspicion or surmise" will not suffice. *Disneyland Park*, 350 NLRB 1256, 1258 fn.5 (2007); *Sheraton Hartford Hotel*, 289 NLRB 463, 464 (1985); *Southern Nevada Builders Assn.*, 274 NLRB 350, 351 (1985). Nor is a party granted "carte blanche" to engage in a wholesale exploration into the records of its bargaining partner merely because it "can articulate some bargaining strategy that will render the information pertinent in some peripheral or theoretical fashion to the bargaining process." See *E.I. du Pont & Co. v. NLRB*, 744 F.2d 536 (6th Cir. 1984). This standard prevents fishing expeditions; without it, a party requesting documents would effectively have "unlimited access to any and all data" in possession of its bargaining

partner. *Southern Nevada Builders Assn.*, supra.

The Board, in the instant case, should agree with the ALJ, (and as the CGC has apparently conceded) that the **information sought in items #1 and #2 did not have a presumption of relevance**, and impose upon the NABET a duty to show that it was relevant as NABET's requests embodied in items #1 and #2 sought the production of information from stations owned by other Nexstar television stations around the country other than KOIN-TV.

It is at this point, however, that the CGC's case should fall apart as in no way did the NABET act to justify or argue for its access to the requested -for extra unit information. Here, as in cases such as *Island Creek*, supra, the requesting party union gave no detailed explanation nor reasonable notice of the purpose of this request for information. Also, as in *Island Creek*, supra, the union failed to indicate before filing charges why the respondents' responses and furnishing of at least some of the information was "insufficient". **Because the record is completely devoid of any attempt by the requesting party union to justify their request for extra-unit information the CGC's case fails. In the ALJ's Decision at p. 7, lines 19-24 it is asserted that:**

> Items 1 and 2 of the information request concern subjects not directly related to the bargaining unit, and thus, the Union must establish relevance. The Union established relevance by repeatedly explaining that it sought the other collective-bargaining agreements with similar provisions as proposed by Respondent to formulate its own counterproposal. Even during subsequent bargaining sessions, the Union requested this information as its own research did not match what Respondent had conveyed during the bargaining sessions.

However this factual assertion, (excepted to by Respondent's Exception #3) is not supported by any record citation-------nor could it be, as a careful review of

the very brief stipulated record set forth in full in our Initial Brief at pp. 2-6 shows that there was no such justification offered at subsequent bargaining sessions.

Apparently sensing this was the case, the CGC attempted to establish the relevance of the requested information by noting the record evidence that the union's initial request for the extra-unit information followed the Company's statement that such charges had been agreed to by the union at other stations. This has been deemed insufficient to establish the relevance of extra-unit information in the absence of other facts or justifications. Support for this assertion, ironically comes out of a decision involving he same parties and the same negotiations. In an earlier dispute over an information request sent by KOIN to NABET, the Board affirmed Administrative Law Judge Mara-Louise Anzalone's Decision and Order, in the absence of exceptions, finding NABET guilty of Section 8(b)(3) in connection with a number of information requests calling for the production of presumptively relevant items regarding its' proposals made during negotiations between the parties in 2018. *National Association of Broadcast Employees & Technicians, The Broadcasting and Cable Television Workers Sector of the Communication Workers of America Local 51, AFL-CIO*. JD (SF-08-20)(19-CB-234944)(enf'd by Board April 22, 2020) **However, in the same Decision, ALJ Anzalone determined that two requested items, which called for the production of extra-unit information (collective bargaining proposals exchanged at other Nexstar stations) were not presumptively relevant and that KOIN did not sufficiently establish their relevance. And as a result, the ALJ determined that NABET did not violate the Act when it refused to furnish the information.**

The ALJ, in the instant case, rejected application of this case involving the same

parties engaged in the same negotiations because it was not precedent of this Board because NABET failed to take exception to the ALJ's ruling. ALJ Decision at p.7, fn. 12. The CGC dismisses it as involving different facts. CGC Brief p.4

However, we again offer that prior Decision for the Board's review as all the Respondent wants here is fair play and equal treatment on what we believe our nearly identical facts posed in a mirror way. Equal treatment should be applied under long-established Board law which holds that the union's duty to respond to information requests is identical and parallel to the employer's duty to respond as was recently recognized and applied by the current Board in *UNITE HERE Local 1*, 369 NLRB No. 65 (April 30, 2020).

Due to the pertinence of this Decision due to the similarity of the issues faced by the ALJ therein and the instant case, and the CGC's attempt to have it disregarded in her brief, we again set out the decision at length. The ALJ opened the analysis by stating:

> I turn now to Requests 4 and 8, which request documents related to proposals made between Local 51's international, NABET, and "other Nexstar Owned Stations," a term that is not defined by the request or stipulated to by the parties…….
>
> Clearly, Requests 4 and 8 sought extra-unit information for which Charging Party must demonstrate relevance. As noted, supra, information regarding an employer's extra-unit employees may certainly be relevant to a bargainable issue and therefore to the union's performance of its representative obligations. See *Curtis-Wright Corp., Wright Aeronautical Division v. NLRB*, 347 F.2d 61 (3d Cir. 1965), enfg. 145 NLRB 152 (1963); see also *General Electric Co.*, 199 NLRB 286 (1972). This typically results from the non-requesting party placing extra-unit terms and conditions at issue during bargaining. See, e.g., *Harmon Auto Glass*, 352 NLRB 152, 152 (2008) (union entitled to learn the dollar amount contributed by the employer's non-union employees towards their health insurance, after employer proposed that unit employees contribute an equal amount), reaffd. 355 NLRB 364, 364 fn. 3 (2010), enf'd. 649 F.3d 873 (8th Cir. 2011), cert. denied 565 U.S. 1259 (2012), Applying these standards here, I find that Charging Party was entitled to rely on Biggs- Adams' representations regarding

bargaining over the KOIN–TV units as reported in the online peoplesworld.org article in requesting extra-unit information. JD (SF-08-20) p.11.

While the ALJ in the *NABET* case sees some initial link to establish relevancy due to the non-responding party NABET's bringing the other Nexstar negotiations into the discussion, as noted above, she ultimately decides that it is too tenuous to sustain in the absence of any justification offered by the requesting party, (there the employer KOIN), as noted above:

> What is missing from the record, however, is a logical connection between Biggs-Adams' statements about bargaining over the KOIN–TV units and the Union's records regarding bargaining in units other than the KOIN–TV units. On its face, the written request makes no claim that such documents would assist Charging Party in assessing the accuracy of any particular proposal made by Local 51 or in developing any particular counterproposal. Nor is the request for extra-unit information obvious from the surrounding circumstances. By giving an interview about bargaining in the KOIN–TV units, Local 51 president Biggs-Adams simply cannot be said to have placed the status of bargaining at other stations owned by Charging Party's parent company, Nexstar, at issue such that the Union was required to open its books with respect to bargaining at those locations. See *Caldwell Mfg. Co.* and *NLRB v. Truitt Mfg. Co.*, supra Virtually any document could theoretically be relevant to some aspect of bargaining; the General Counsel's bare assertion of possible relevance is insufficient to trigger the duty to provide the requested extra-unit information. See *Island Creek Coal Co.*, 292 NLRB at 490 fn. 19 (more than a "generalized, conclusionary explanation" is required to trigger the obligation to supply non- presumptively relevant information); see also *E.I. du Pont & Co. v. NLRB* and *Southern Nevada Builders Assn.*, supra.
>
> Finally, it is argued that Charging Party was entitled to extra-unit bargaining documents because, based on Biggs-Adams' reported statements, Local 51 "clearly relied upon and surveyed other proposals between Respondent and Charging Party" in formulating its own bargaining strategy and that Charging Party was entitled to "understand just how [Local 51] had used the information in the bargaining process." I disagree. There is simply no evidence that the Union at any time undertook a survey of extra-unit proposals, made any proposal based on extra-unit information or otherwise "used" it in bargaining for the KOIN–TV unit. Indeed, it is unclear whether Biggs-Adams was even the source of the article's various anecdotal references to

> bargaining in units at four stations other than KOIN–TV.
>
> Thus, because the record reveals no logical connection—expressly stated or otherwise obvious—between the extra-unit documents sought and Charging Party's need to assess the impact of Biggs-Adams' alleged "material misrepresentations" regarding bargaining for the KOIN-TV unit employees, I find that the relevance of these requests has not been shown. JD (SF-08-20) p. 11-12.

As was the case posed against the requesting party employer KOIN in the *NABET* matter cited above, the Union's assertion in **this case** supporting information request items #1 and #2 was a "generalized, conclusionary explanation" that has been deemed insufficient to "trigger the obligation to supply non- presumptively relevant information" Here Biggs-Adams' only explanation for the request for a substantial amount of extra-unit information from other Nexstar stations was that KOIN "contended that Nexstar has a practice of charging unions this amount in other union represented locations". This bare assertion made before KOIN responded at all, is simply not enough to sustain a claim of relevance under the case law cited above. There is no explanation or analysis that would suggest how receipt of this information would be of value to the Union in assessing whether it would accept the Company's proposal C-6. Therefore, relevancy of the information of the information was not sufficiently established. See *Island Creek Coal Co.*,292 NLRB at 490 fn. 19 (more than a "generalized, conclusionary explanation" is required to trigger the obligation to supply non-presumptively relevant information).

III. REPLY BRIEF IN FURTHER SUPPORT OF EXCEPTION 6: *KOIN responded in a reasonable and adequate fashion to the Union's Item #3 request for information.*

In Exception # 6, "KOIN takes exception with the ALJ's finding of facts of and conclusions of law with regard to Item #3 of NABET's December 14 request for

information. This simple presumptively relevant request was thus fulfilled immediately by this response. But additional information was provided in subsequent negotiating sessions which further fulfilled the information request #3. On April 23, 2019, during bargaining, Respondent provided a revised proposal to its December 14, 2018 proposal addressing dues checkoff processing costs. The revised proposal attached as **Exhibit G** reduced the proposed administrative fee to $50 per month. At the time this proposal was presented, Respondent repeated that NABET had agree to a similar processing fee in other locations and noted that it had verified that the amount charged in these other locations was $50 per month. Respondent's negotiator, Casey Wenger, spoke to the time it takes for him to process payroll, including dues checkoff, due to the varying hours, pay, other cash compensation, and the fact that dues vary from month to month given the fact that dues were based on a percentage of gross compensation. At bargaining sessions held on June 27, 2019, and October 7, 2019, the Union reiterated its request for the information related to dues processing. Mr. Wenger again asserted that the amount of time spent on this work was approximately five (5) hours per pay period and again indicated that NABET had agreed to such a fee in at least two other locations. The Union, through Ms. Biggs Adams, told Respondent that, after research, she had only found one location in which another branch of the Union had agreed to a dues checkoff processing fee, and explained why that situation was distinguishable from that of Respondent and the Union, including the fact that the fee was contingent on the bank being unable to process dues checkoff via automatic debit. In assessing whether the information supplied in response to Item #3 is sufficient, it is well -established that the information returned to the union by the employer need not be provided in any particular form, so long as it is not unduly burdensome upon the union. *Cincinnati Steel Castings Co.,* 86 NLRB 592, 24 LRRM 1657 (1949). Frankly speaking, here it should be held that Wenger's estimate of the time he spent on processing the checkoff was a sufficient response for the simple fact that there was only one item to assess as an underlying cost of processing dues checkoff. Once he provided this information the

response was complete particularly since the record is devoid of any follow-up from NABET. As we noted in our Initial Brief, 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). The facts of each particular case will determine whether the information provided meets the "reasonably clear and understandable" threshold offered by *Food Employers*.

In sum, we believe that the record is clear that sufficient information was provided in response to Item #3.

IV. CONCLUSION

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. The General Counsel and the Union have failed to sustain their burden that the Company has violated sections 8(a)(1) and (a)(5) of the National Labor Relations Act. Given the facts and the argument set forth herein, we submit that there is no merit to the Complaint filed in this action and it should be dismissed in its entirety. The Exceptions to the Administrative Law Judge's Recommended Decision, Remedy and Order should be granted and an Order dismissing the Complaint in its' entirety should be entered.

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

Charles W. Pautsch

By: Charles W. Pautsch, Esq.
Associate Counsel
Nexstar Media Group, Inc.
545 E. John Carpenter Freeway
Suite 700
Irving, TX 75062
972-373-8800
cpautsch@nexstar.tv

Dated: October 22, 2020

AFFIDAVIT OF SERVICE

I hereby certify that I served the foregoing REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECSION on Anne Yen counsel for the Charging Party Union by e-mailing a copy of same in to ayen@unioncounsel.net, to Sarah Ingebritsen, Counsel for the General Counsel at Sarah.Ingebritsen@nlrb.gov. and Ronald Hooks, the Regional Director of Region 19, at Ronald.hooks@nlrb.gov on 10/22/20.

Charles W. Pautsch

Charles W. Pautsch