

**KIRO, Inc. and American Federation of Television
and Radio Artists, Seattle Local, AFL-CIO.**
Case 19-CA-21781

May 28, 1993

DECISION ON MOTION¹

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On December 30, 1991, the Regional Director for Region 19 issued a complaint and notice of hearing in this case alleging, inter alia, that the Respondent, KIRO, Inc., violated Section 8(a)(5) and (1) of the Act by implementing a news program without prior notice to the Union or affording it an opportunity to bargain over the implementation and its effect on bargaining unit employees, and by refusing to provide the Union with certain requested information relating to the wages, hours, and other terms and conditions of employment of bargaining unit employees.² With respect to the latter allegation, the complaint alleged that the information requested by the Union involved mandatory subjects of bargaining and was necessary for and relevant to the Union's performance of its role as the unit employees' exclusive bargaining representative. The Respondent thereafter filed an answer admitting some, and denying other, allegations in the complaint.

On January 15, 1992, the Respondent filed with the Board a Motion for Summary Judgment, with an accompanying memorandum, seeking dismissal of the complaint. As grounds therefor, the Respondent argued that the information sought by the Union involved financial data and that, under current case law, no presumption of relevance attaches to such information. Further, the Respondent claimed that the Union had not demonstrated that the information sought was relevant to the bargaining process, and had failed to articulate a reason, cognizable under case law, for needing the information.

The General Counsel opposed the Respondent's motion. In his brief to the Board, he argued that the information requested by the Union was relevant because it related to the unit employees' terms and conditions of employment and involved mandatory subjects of bargaining. The General Counsel asserted that the Re-

spondent's denial that the information was relevant raised triable issues of fact requiring a hearing. The General Counsel also disputed the Respondent's assertion that the information sought involved only "financial data." He further noted that, although the Respondent was seeking dismissal of the entire complaint, it had proffered no explanation for seeking the dismissal of the complaint allegation that it unlawfully implemented the new "news program" without first notifying, or bargaining with, the Union over that decision and its effect on unit employees. For these reasons, the General Counsel argued that the Board should deny the Respondent's motion.

As noted, on April 15, 1992, the Board denied the Respondent's Motion for Summary Judgment.

In our view, the complaint and the denials in the Respondent's answer, plus the assertions made by the Respondent and the General Counsel in their submissions to the Board regarding the motion to dismiss, reveal the existence of factual issues requiring an evidentiary hearing before an administrative law judge. More particularly, the complaint alleges that the information sought pertains to unit employees' terms and conditions of employment and is relevant to the Union's performance of its role as the employees' bargaining representative. The Respondent, in its answer and motion to dismiss, has denied the relevancy of the information. In support of its motion, the Respondent has set forth its version of the facts. In response, the General Counsel indicates that he has a different version of the facts. As the General Counsel states, there are "factual issues that must be resolved through a hearing."

We also note that the General Counsel, in his opposition brief, disputes the Respondent's assertion that the information sought involves only "financial data."

Based on the above, we believe that a hearing is needed to resolve these and other disputed issues of fact.³

We disagree with our dissenting colleague's suggestion that a question regarding the relevancy of requested information raises a purely legal issue that must be resolved in the first instance by the Board, rather than by a trier of fact. Rather, the Board and the

¹ On April 15, 1992, the Board denied, without comment, a motion by the Respondent to have the complaint in this case dismissed in its entirety. The Board stated that a fully articulated decision would follow. The Board's reasons for denying the Respondent's motion are fully set forth in this decision.

² The Union sought the following information from the Respondent: (1) copies of all documentation that exist between KIRO-TV and/or their respective parent corporations pertaining to this joint venture, including, but not limited to, any preliminary or tentative memoranda, letters of intent, and/or letters of understanding; and (2) a copy of the contract between the two stations, including the terms and conditions under which this venture will operate.

³ We note that the Respondent's denial of the allegation that it unlawfully implemented the news program without bargaining with the Union, and its failure to provide a reason in its motion for seeking the dismissal of that allegation, also raise factual issues requiring a hearing. We further note that the Respondent's refusal to furnish the information to the Union was at the outset based on a claim that the information was "confidential and proprietary" and not on a lack of relevancy. It is unclear from the Respondent's answer and motion to dismiss whether it continues to assert "confidentiality" as a defense to the refusal-to-provide information allegation. If so, it bears the burden of proving that claim. *AGA Gas*, 307 NLRB 1327, 1329 (1992); *Remington Arms Co.*, 298 NLRB 266, 273 (1990); *Howard University*, 290 NLRB 1006, 1007 (1988), and a hearing is needed for the purpose of allowing it to do so.

courts have long held that resolution of relevancy issues turns on the factual circumstances of each particular case. In *Leland Stanford Junior University*, 262 NLRB 136 (1982), for example, cited by our dissenting colleague, the Board agreed, inter alia, with an administrative law judge that the determination of relevance “depends on the factual circumstances of each particular case.” *Id.* at 139. See also *Press Democrat Publishing Co. v. NLRB*, 629 F.2d 1320, 1324 (9th Cir. 1980) (“relevance depends . . . on the particular facts of each case”); *Procter & Gamble Mfg. Co. v. NLRB*, 603 F.2d 1310, 1313 (8th Cir. 1979) (“what is or is not relevant depends on the particular facts in each case”); *General Motors Corp. v. NLRB*, 700 F.2d 1083, 1088 (6th Cir. 1983) (“the ultimate factual determination of relevance depends upon the circumstances of each case”).

We agree with our dissenting colleague that where the relevant facts are not in dispute, the Board may rule on the relevancy question without the need for a hearing. In *E. I. du Pont & Co.*, 268 NLRB 1031 (1984), for example, the relevancy determination rendered by the Board was made pursuant to a stipulation of agreed-upon facts submitted by the parties to the proceeding. But where, as here, there is no stipulation of facts pertinent to the information issue, an evidentiary hearing is required to resolve the factual disputes. Here, the General Counsel contends, and the Respondent disputes, that the information sought by the Union is necessary and relevant. Thus, regardless of whether the information requested involved financial data only, a factual issue clearly exists regarding the relevancy of such information which must first be resolved before a legal determination can be made as to the legality of the Respondent’s refusal to furnish the information.

Our dissenting colleague faults the General Counsel for his purported failure to controvert specifically each of the factual assertions made by the Respondent in its motion. While the General Counsel may not have responded to each and every factual assertion made by the Respondent in support of its motion, we find nothing in the General Counsel’s opposition to suggest that he acquiesces in, or agrees with, the Respondent’s version of the facts. Indeed, the General Counsel’s disagreement with the Respondent’s claim that the information sought involved only financial data, and his assertion that there are factual issues raised by the Respondent’s motion that must be resolved at a hearing, demonstrates clearly that the General Counsel’s version of the facts differs from that presented by the Respondent in its supporting brief.

According to our dissenting colleague, our position leads to the result that “a party could always get a hearing on a legally insufficient complaint merely by claiming there were disputed factual issues when there

really were none.” We do not take the position ascribed to us by our colleague. If the complaint is indeed “legally insufficient,” the motion would admit all factual allegations of the complaint, and would contend that they do not constitute a violation. In that situation, there is no need for a hearing; a pure question of law is presented. But, that is not the case here. In the instant case, there are factual issues which are contested.

Nor do we believe that it was incumbent on the General Counsel, during this motion stage of the proceeding, to set forth the precise facts on which he relies. The Board has no provision comparable to Rule 56(e) of the Federal Rules of Civil Procedure under which a moving party can set forth its version of the facts, and the other party must either admit or controvert with specific facts. See *Machinists Lodge 64 v. NLRB*, 949 F.2d 441, 450 (D.C. Cir. 1991). We find nothing in the language of Section 102.24 of the Board’s Rules, which sets forth the requirements for the filing of motions with the Board, to suggest otherwise.⁴ Rather, Section 102.24(b) provides, in relevant part, that a party opposing a motion for summary judgment or dismissal is not required to submit affidavits or documentary evidence to show that there is a genuine issue for hearing, and that “[t]he Board in its discretion may deny the motion where the motion itself fails to establish the absence of a genuine issue, or where the opposing party’s pleadings, opposition and/or response indicate on their face that a genuine issue may exist.” As it is patently clear to us from the parties’ pleadings, the Respondent’s motion, and the General Counsel’s opposition brief, that genuine issues of fact existed, we deem it appropriate, in the exercise of the discretion afforded us under Section 102.24, to have the entire matter remanded to an administrative law judge for resolution of these disputed issues of fact.

Accordingly, the Board, on April 15, 1992, properly denied the Respondent’s motion to dismiss and ordered the matter remanded to the Regional Director for further appropriate action.⁵

MEMBER OVIATT, dissenting.

The majority denies the Respondent’s motion for summary dismissal of the information request aspect of the complaint on the ground that it raises factual is-

⁴ Indeed, when enacting Sec. 102.24, the Board, noting the contrary requirements of Rule 56(e) of the Fed.R.Civ.P., reasoned that it would be impracticable for the Board to follow Rule 56(e) because unlike the Federal courts, the Board has never allowed prehearing discovery as such. See 54 Fed.Reg. 38516 (1989).

⁵ Contrary to our dissenting colleague, we do not believe that our ruling is unfair to the Respondent. Assuming, arguendo, that the information sought by the Union is not presumptively relevant, the General Counsel must demonstrate relevance as part of his prima facie case. If the Respondent claims surprise after the General Counsel’s showing, it can seek additional time to prepare its defense.

sues. Finding no disputed issues of fact, and that the General Counsel has not made a preliminary showing that the information request is even arguably relevant to the Union's responsibilities as bargaining representative, I would grant the motion.

The complaint alleges, among other things, that on learning that the Respondent, Seattle Television Station KIRO-TV, broadcasting on Channel 7, planned to produce a half-hour weekly news program for broadcast over Seattle television station KTZZ-TV (a separate nonunion business entity broadcasting on Channel 22), the Union requested copies of any documents relating to the Respondent's "joint venture" with KTZZ-TV, including tentative memoranda, letters of intent, and letters of understanding, and also requested copies of the contract between the two stations showing the terms under which the venture would be operated. According to the complaint, the Respondent refused to provide the Union with the requested information. As to the Union's need for this information, the complaint states in the most general of ways that the information "is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative" Exactly how it is relevant to, or necessary for, the Union's performance of its duties is not revealed.

In its memorandum in support of its Motion for Summary Judgment, the Respondent explains that for a number of years its late-evening news broadcast, produced by its employees in its studios, has aired on Channel 7 at 11 p.m. According to the Respondent, in mid-1991 it entered into an agreement with KTZZ, much like its other commercial agreements to produce programs for viewing elsewhere, whereby the Respondent produces a news program to be telecast at 10 p.m. on KTZZ. The program is produced by KIRO employees in KIRO's studio, at a time when they are not working on any other matter. The Respondent states that when the Union's executive director, Anthony Hazapis, requested the KIRO-KTZZ material, he did not claim that the KIRO-KTZZ arrangement was in violation of the Union's collective-bargaining agreement with the Respondent, and no grievance has been filed on the theory that there was a contract breach. The Respondent also notes that it has made no proposal to cut any wages or benefits for any bargaining unit member engaged in the production of the KTZZ news program. Finally, the Respondent observes that KTZZ employees are not producing any KIRO programs.

None of the Respondent's factual assertions in its motion papers is controverted by the General Counsel. Instead, in his response, the General Counsel refers to the Respondent's answer to the complaint. There, the Respondent denied that the information requested by the Union related to wages, hours, and other terms and

conditions of employment of the bargaining unit employees and also denied that this information was relevant to the Union's performance of its duty as the exclusive collective-bargaining representative. This denial, argues the General Counsel, "generates factual issues that must be resolved through a hearing."

Unlike the General Counsel, who apparently sees "factual issues" at every turn, I find none. Stating that there is a dispute over the relevance of the requested information, because one side baldly contends that it is relevant to wages, hours, and other terms and conditions of employment, and the other side argues that it is not, does not create a factual issue. Questions of relevance are legal ones for the court (or, in this case, the administrative agency), not factual ones for the trier of fact. Thus, the Board may decide relevancy questions on the undisputed underlying facts, and no evidentiary hearing is necessary. See, e.g., *Home Insurance Co. v. Ballenger Corp.*, 74 F.R.D. 93, 101-102 (N.D.Ga. 1977) (court finds that general allegation of relevancy of certain files does not establish their relevancy, and discovery not permitted); *Lynch v. Richardson-Merrell, Inc.*, 646 F.Supp. 856, 864-866 (D.Mass.1986), affd. 830 F.2d 1190 (1st Cir. 1987); *Shape of Things To Come v. Kane*, 588 F.Supp. 1192, 1193 (N.D.Ill.1984). Were it otherwise, the General Counsel could, in every case where the requested information was not presumptively relevant, simply plead that the information was relevant to the Union's duty as a collective-bargaining representative and get a hearing. The Respondent would thus be left completely in the dark as to just how the requested information bore on the Union's collective-bargaining responsibilities. This is not notice pleading that fairly permits the Respondent to prepare a defense.¹

My colleagues attempt to infer factual issues warranting a hearing where there are none. They suggest that the "Respondent's assertion that the information sought involves only financial data" somehow raises a factual issue warranting a hearing. In fact, the Respondent *admitted* in its answer, and did not contest, the facts in paragraph 6(b) of the complaint, which detail the information the Union sought. The Respondent also quoted the substance of the Union's information request in its summary judgment memorandum. It never contended that the Union requested *only* financial data, although obviously the material requested might well include financial data. Thus, the Respondent does not now dispute what material the Union requested, but only whether it is legally required to turn

¹ Unlike Rule 26, Fed.R.Civ.P., which permits extensive discovery in the Federal courts, discovery in Board unfair labor practice proceedings is quite limited. This is all the more reason why an unfair labor practice complaint alleging a violation for the Respondent's failure to turn over information that is not presumptively relevant should allege sufficient facts to permit the Respondent to understand the General Counsel's theory of relevance.

that material over to the Union. No evidentiary hearing is required on what plainly has been admitted.

My colleagues also rely on the General Counsel's bald assertion that there are factual issues that must be resolved at a hearing. But to say that there are factual issues, when in fact there are none, does not make it so. Were it otherwise, a party could always get a hearing on a legally insufficient complaint merely by claiming there were disputed factual issues when there really were none.

Finally, while I agree with my colleagues that to get an evidentiary hearing the General Counsel need not specifically controvert in his opposition any of the factual assertions in the Respondent's motion, the General Counsel must at the least show that the Respondent disputes material allegations of fact in the complaint. I strongly disagree that because there are insufficient agreed-upon facts pertinent to the relevancy question, this in and of itself somehow raises "factual disputes" warranting a hearing. No facts are not the legal equivalent of disputed facts, and here the General Counsel has plainly avoided his responsibilities by alleging absolutely nothing on the relevancy question.

There being no disputed issue of facts, I shall proceed to consider the Respondent's Motion for Summary Judgment on its merits. A union's request for information relating to matters outside the bargaining unit requires a special demonstration of relevance. *E. I. du Pont & Co.*, 268 NLRB 1031 (1984); *Leland Stanford Junior University*, 262 NLRB 136 (1982), *enfd.* 715 F.2d 473 (9th Cir. 1983). The facts must establish more than a mere suspicion of possible relevance for the Union to be entitled to information pertaining to nonunit matters that do not appear to bear directly on the wages, hours, and working conditions

of the unit's employees. *Sheraton Hartford Hotel*, 289 NLRB 463, 464 (1985). The Board will not speculate or concoct theories as to why the requested information might be relevant; that is for the General Counsel to show. *Southern Nevada Builders Assn.*, 274 NLRB 350, 351 (1985), and cases cited there.

On its face, the requested information does not pertain to the bargaining unit. Thus, the General Counsel must demonstrate in his pleadings or by affidavit the relevance of the requested information. We are not, however, given even an inkling from the General Counsel's papers as to how the requested information could be relevant. On its face the requested information appears to be proprietary in nature and may well also be confidential. It plainly deals with matters affecting the unrepresented employees of another company, but there is nothing on this record that fairly suggests that the requested information is relevant to the Union's responsibilities as the bargaining representative of the Respondent's employees. Thus, there is no basis for compelling the requested information's disclosure to the Union.

I would grant the Respondent's Motion for Summary Judgment and dismiss that aspect of the complaint relating to the information request.²

²In addition to its allegations with respect to the failure to supply the requested information, the complaint, in pars. 7(b) and 8, alleges that the Respondent violated Sec. 8(a)(5) by producing the KTZZ news program without prior notice to the Union or affording the Union an opportunity to bargain about the program or its effects. While the Respondent's Motion for Summary Judgment appears to seek dismissal of the complaint in its entirety, the Respondent's memorandum in support of its motion addresses just the information request. Because the alleged unilateral act of instituting the KTZZ program is not argued in the Respondent's papers, I would not grant summary judgment with respect to it.