

C O R R E C T E D

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

POUDRE VALLEY RURAL ELECTRIC
ASSOCIATION

and

Case 27-CA-167119

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS LOCAL 111

**GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO REOPEN
THE RECORD**

COMES NOW, Isabel C. Saveland and Daniel J. Michalski, Counsels for the General Counsel, and submit this Opposition to Respondent's Motion to Reopen the Record. Counsels for the General Counsel request that Respondent's Motion to Reopen the Record be denied for the following reasons:

1. On April 5, 2016, the Regional Director for Region 27 issued a Complaint and Notice of Hearing in this matter alleging that Respondent violated Sections 8(a)(1) and (5) of the National Labor Relations Act (Act), by refusing to provide the International Brotherhood of Electrical Workers, Local 111 (Union) with employee home addresses and telephone numbers that are relevant to its duty as bargaining representative of Poudre Valley Rural Electric Association's employees.

2. The trial in this matter was held on June 2, 2016 in Denver, Colorado, before the Honorable Gerald M. Etchingham (Judge Etchingham).

3. On February 27, 2017, Judge Etchingham issued a Decision and Order finding that Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with information that is relevant to its duty as bargaining representative of Respondent's employees. (ALJD P1-22).

4. On March 24, 2017, Respondent filed a Motion to Reopen the Record (Motion) contending that extraordinary circumstances exist that justify reopening the record to take additional evidence in this matter. In support of its Motion, Respondent contends that certain actions allegedly taken by the Union in February 2017 constitute newly discovered evidence requiring that the Board reopen the record in this matter. Specifically, Respondent asserts that the Union: (1) in February 2017, posted the ALJD in this matter on a bulletin board located on Respondent's premises; and (2) on February 23, 2017 posted an article online asking employees to update their beneficiary contact information.

5. "A motion to reopen the record must state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes may have been taken at the hearing will be taken at any further hearing." Section 102.48(c)(1) of the Board's Rules and Regulations (29 C.F.R. S 102.48(c) (1)). Respondent's Motion fails to establish either factor required to reopen the record. The evidence proffered by Respondent in its Motion is clearly not newly discovered evidence as articulated by the Board.

6. Board law is clear that newly discovered evidence is "evidence which was in existence" at the time of the hearing, and the movant was "excusably ignorant" of it, i.e. the

movant “acted with reasonable diligence to uncover and introduce the evidence.” Fitel/Lucent Technologies, Inc., 326 NLRB 46 n. 1 (1998). Crediting Respondent’s assertions concerning the Union’s actions in February 2017, the basis for its Motion to Reopen the Record is based on events that occurred well after the hearing in this matter. Accordingly, the evidence did *not* exist at the time of hearing because the events occurred eight months *after* the hearing in this matter.

The party moving to reopen the record must establish that the evidence it seeks to introduce was “capable of being presented at the original hearing.” Rush University Medical Center, 362 NLRB No. 23, at fn. 2 (2015), *enfd.* F.3d (D.C. Cir. Aug. 16, 2016). See also Allis-Chalmers Corp., 286 NLRB 219 n. 1 (1987) (evidence that did not exist at the time of the hearing because it relates to events that occurred after the hearing closed is not “newly discovered.”); Wayron, LLC, 2017 WL 971620 (2017) (Board refused to accept documents submitted by the respondent after the hearing closed as the evidence was not newly discovered); United States Postal Service, 2016 WL 4502618 (2016) (Board refused to accept “evidence of events that postdated the close of hearing”). Accordingly, Respondent fails to establish that any newly discovered evidence exists in support of its Motion to Reopen the Record.

7. In addition to presenting newly discovered evidence in support of its motion, Respondent must establish that the new evidence “would require a different result than that reached by the judge.” Fitel/Lucent Technologies, Inc., 326 NLRB 46 n. 1 (1998). See also County Waste of Ulster, 354 NLRB 392 (2009), *reaffd.* 355 NLRB 413 (2010). In its Motion, Respondent contends that the evidence concerning the Union’s alleged use of email and a bulletin board to communicate with employees should be considered as further evidence that the Union had alternative means of communication with unit employees which excuses its refusal to provide the Union with relevant requested information. Assuming *arguendo* that Respondent’s

assertions about the Union's actions in February 2017 are newly discovered evidence, such evidence would not require a different result than that reached by Judge Etchingham. At hearing, Respondent introduced evidence that the Union could communicate with employees via the Union bulletin board on Respondent's premises (Tr.112: 11-13). Judge Etchingham dismissed Respondent's defense finding that the fact that the Union might obtain the information elsewhere was not grounds for Respondent's refusal to provide presumptively relevant information. (ALJD P15: FN 15; P17:15-33). Therefore, additional evidence that the Union had alternative means to communicate with employees makes no difference to Respondent's duty to provide the information that it has in its possession.

8. In its Post-Hearing brief and in its Motion to Reopen the Record, Respondent relies on Chicago Tribune Co. v. NLRB, 79 F.3d 604 (7th Cir. 1996), and Grinnell Fire Protection Systems Co. v. NLRB, 272 F.3d 1028 (8th Cir. 2001): the courts in those cases determined that unions were not entitled to home addresses of striker permanent replacement employees, where the employers offered to provide reasonable alternatives to producing the requested information. Respondent argues that the analysis ends there and asserts that Judge Etchingham's decision is flawed because there is no difference between striker replacement employees and regular full-time employees. Respondent misrepresents Board law in this regard and fails to acknowledge that Judge Etchingham's decision explicitly distinguishes those cases from the one at bar based on extant Board precedent. (ALJD 17-18).

Indeed, Chicago Tribune and Grinnell are easily distinguishable from the present case. In Chicago Tribune, the court determined that the striker replacements had a legitimate privacy and safety interest in protecting their home addresses, based on "the pattern of violence that surrounded the strike" and "in light of threats of violence the replacements endured." In

Grinnell, the court decided that, even though there was no specific evidence of threats of violence, the replacements had a “greater privacy interest in protecting the location of their homes” than the union had in getting those addresses, especially since the union had other means available to it for contacting the replacement workers (such as visiting work sites or otherwise contacting them at work). These cases, however, are not relevant to the Union’s request in this case for unit employees’ addresses and phone numbers, as there is no evidence that the unit includes striker replacements or of any violence or threats directed at bargaining unit employees. (Tr. 127:11-13; 162:8-10); See, e.g., River Oak Center for Children, 345 NLRB at 1335-1336 (2005) (distinguishing Chicago Tribune, Grinnell, and JHP & Associates, LLC v. NLRB, 360 F.3d 904 (8th Cir. 2004), on the grounds that “[e]ach involved a union’s request for the addresses of striker replacements or non-striking union employees in the context of an ongoing strike and labor unrest, where there were threats of violence and the potential for misuse of the information [whereas h]ere, in contrast, the request was made in the context of the parties’ peaceful renegotiation of a collective-bargaining agreement”).

Judge Etchingham correctly concluded that this matter is distinguishable from those in Chicago Tribune and Grinnell because there is no credible evidence in the record that this unit contained striker replacement employees or that there was a strike in progress. (ALJD P17:18). Judge Etchingham properly found that in the existing circumstances the Respondent must produce the information, without any accommodations by the Union, because Respondent failed to present any legitimate argument, or credible circumstances, that would trigger an accommodation like the ones in Chicago Tribune and Grinnell. (ALJD P17-18). The Union’s actions in February 2017 do not bear any relevance to the circumstances that were present leading up to and during the hearing in this matter. Accordingly, the evidence proffered by

Respondent in its Motion to Reopen the Record would not require a difference result in this matter.

Based upon the foregoing, Counsels for the General Counsel request that Respondent's March 24, 2017 Motion to Reopen the Record be denied.

DATED at Denver Colorado, this 13th day of April 2017.

Respectfully Submitted:

A handwritten signature in cursive script, appearing to read "Isabel C. Saveland", is written over a horizontal line.

Isabel C. Saveland and Daniel J. Michalski
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**AFFIDAVIT OF SERVICE OF CORRECTED GENERAL COUNSEL'S OPPOSITION TO
RESPONDENT'S MOTION TO REOPEN THE RECORD**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **April 13, 2017**, I served the above-entitled document(s) by **E-File, E-Mail and Regular Mail** upon the following persons, addressed to them at the following addresses:

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April 13, 2017

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Designated Agent of NLRB

Date

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Signature