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

RESPONDENT'S STATEMENT OF EXCEPTIONS

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Respondent Poudre Valley Rural Electric Association ("Poudre Valley," "PVREA," or "Respondent") by and through its attorneys, Sherman & Howard L.L.C., pursuant to National Labor Relations Board ("NLRB" or "Board") Rules and Regulations § 102.46, hereby takes the following exceptions to Chief Administrative Law Judge Gerald M. Etchingham ("ALJ Etchingham") Decision and Recommended Order ("Decision"):[1]

1. ALJ Etchingham's reference to the dictionary definition of "seniority" rather than relying on the party's intended meaning of that term as used in Article 8 of the CBA. ALJD 3 fn. 5.

2. ALJ Etchingham's failure to credit the undisputed testimony that the terms "seniority list" and "employee list" were used interchangeably by the parties. Tr. 106:10-13.

3. ALJ Etchingham's failure to consider the fact that the International Brotherhood of Electrical Workers, Local 111 ("Charging Party," "Local 111," or "Union") has never requested that Poudre Valley negotiate or expand the information it is entitled to receive under Article 8 of the CBA. Tr. 143:10-14.

4. ALJ Etchingham's failure to consider the Union's access to bulletin boards to communicate with employees, as well as its use of the bulletin board in the past to communicate with bargaining unit members and its failure to do so in this circumstance. GC. Ex. 2, Appendix B, p. 19; Tr. 112:5-10.

5. ALJ Etchingham's failure to consider the Union's ability to meet with employees in person on site each month. Tr. 59:4-7; 65:6-10.

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[1] Citations in this Statement of Exceptions will be as follows: "Tr. __:__" to indicate the hearing transcript's page and line numbers; "R. Ex. __" to indicate Respondent's exhibits' "GC __" to indicate Counsel for the General Counsel's exhibits; "Jt. Ex. __" to indicate joint exhibits; and "__ ALJD __" to indicate the page (preceding ALJD) and line numbers (following ALJD) of the decision of the Administrative Law Judge.

6. ALJ Etchingham's finding that "Meisinger did not specifically refer to the McCarville/Johnson correspondence from March/April 2015 referenced above at any time to the management group on October 29." 6 ALJD 7-9.

7. ALJ Etchingham's conclusion that Poudre Valley "made no offer of accommodation" in Witherell's November 9, 2015 email and failure to find that Poudre Valley accommodate the Union's request by providing an updated employee list as of November 1, 2015. 8 ALJD 10-11; GC Ex. 8(c).

8. ALJ Etchingham's finding that the "Union could not use the Respondent's email system to notify an employee if the Union did not already know the name of an employee." 9 ALJD 22-23.

9. ALJ Etchingham's conclusion that Poudre Valley "made no offer of accommodation to the Union" in its December 22, 2015 correspondence to the Union. 10 ALJD 18-19.

10. ALJ Etchingham's failure to consider the Union's use of its on-site monthly meetings a means to communicate directly with employees and an appropriate accommodation to its request for information. Tr. 59:4-7; 65:6-10; 114:11-21.

11. ALJ Etchingham's failure to consider the Union's previous use of its stewards as a means to communicate directly with employees and an appropriate accommodation to its request for information. Tr. 81:4-7; 114:11-21.

12. ALJ Etchingham's failure to consider the Union's previous use of its bulletin boards as a means to communicate directly with employees and an appropriate accommodation to its request for information. Tr. 59:8-13; 114:11-21.

13. ALJ Etchingham's failure to consider the Union's ability to use employees' email addresses a means to communicate directly with employees and an appropriate accommodation to its request for information. Tr. 114:3-21.

14. ALJ Etchingham's reliance on the Union's reasoning presented at the hearing and not conveyed to Poudre Valley for why it needed the requested information. 11 ALJD 3-11.

15. ALJ Etchingham's failure to rely on undisputed evidence that the Union did not attempt to obtain the requested information directly from employees and did not look to see if it already had the information. Tr. 49:24-25; 50:1-2; 70:25:71:1-4.

16. ALJ Etchingham's failure to consider undisputed evidence that the Union harassed employees regarding the payment of their Union dues in 2013 by serving those employees with letters at their homes. Tr. 145:1-21; 162:11-16.

17. ALJ Etchingham's failure to consider undisputed evidence that the Union and Poudre Valley resolved the Union's intrusion into employees' privacy in 2013 by agreeing that the Union would post a letter to employees on the bulletin board. GC. Ex. 14(b).

18. ALJ Etchingham's rejection of evidence at the hearing relating to the Union's harassment of employees in 2013 and the parties' resolution of the dispute relating to the Union's conduct. Tr. 146:16-25; 147:9.

19. ALJ Etchingham's attempt to distinguish *Local Lodge No. 1424 v. N. L. R. B.*, 362 U.S. 411 (1960). 13 ALJD 13-18.

20. ALJ Etchingham's failure to find that the Union's October 29, 2015 request for information stemmed from and related to its March 31, 2015 request. 13 ALJD 5-26.

21. ALJ Etchingham's failure to conclude that the Complaint is time-barred by Section 10(b) of the Act. 12 ALJD 27-40; 13 ALJD 1-33.

22. ALJ Etchingham's failure to find that Poudre Valley and the Union have negotiated a specific provision relating to the Union's receipt of information about bargaining unit employees. GC Ex. 2.

23. ALJ Etchingham's failure to conclude that the Union's request for information is an attempt to unilaterally modify the CBA. *See* 28 U.S.C. § 158(d).

24. ALJ Etchingham's finding that the alleged unfair labor practice issue and the collective bargaining agreement issue are separate and distinguishable. 19 ALJD 25-29.

25. ALJ Etchingham's adherence to the Board's policy of refusing to defer disputes relating to information requests. 12 ALJD 17-25.

26. ALJ Etchingham's failure to consider the exceptions to the Board's general policy against deferral in information request cases. *In Re Endo Painting Serv., Inc.*, 360 NLRB No. 61 at *3 n. 6 (Feb. 28, 2014).

27. ALJ Etchingham's failure to evaluate whether the Board's policy underlying its general rule against deferring information request cases to arbitration applies in this context. *See In Re Endo Painting Serv., Inc.*, 360 NLRB No. 61 at *3 n. 6 (Feb. 28, 2014).

28. ALJ Etchingham's failure to consider the Region's stated reason for not deferring this matter to arbitration, including its apparent concern that the Union would lose at arbitration. Tr. 166:23-25; 167:1-19.

29. ALJ Etchingham's failure to defer this matter to the parties' grievance and arbitration process. 12 ALJD 17-25.

30. ALJ Etchingham's failure to apply the two-step framework to decide if there has been a valid waiver of the Union's statutory right to the information requested. *Local Union 36, Int'l Bhd. of Elec. Workers, v. N.L.R.B.*, 706 F.3d 73, 83-84 (2d Cir. 2013).

31. ALJ Etchingham's finding that "[t]his is not a dispute regarding the Seniority List posting." 19 ALJD 3.

32. ALJ Etchingham's failure to conclude that the Union exercised its statutory right to the employee list through Article 8 of the CBA. GC. Ex. 2, Article 8, p. 3; Tr. 92:11-16.

33. ALJ Etchingham's conclusion that because Article 8 is "silent with respect to home addresses and telephone numbers of unit employees . . . there is no basis to claim that the providing of unit employees' phone numbers and home addresses is covered by Article 8 of the contract." 19 ALJD 37-41; *see also* 19 ALJD 2-8.

34. ALJ Etchingham's failure to consider Acting Chairman Miscimarra's dissent in *Graymont Pa, Inc.*, 364 NLRB No. 37 (June 29, 2016).

35. ALJ Etchingham's apparent requirement that Poudre Valley and the Union identify each and every item the Union is *not* entitled to receive in order to find an effective waiver. 19 ALJD 2-8; 19 ALJD 37-41; 20 ALJD 19-21.

36. ALJ Etchingham's conclusion that the Union is entitled to obtain information not identified in Article 8 of the CBA. 19 ALJD 37-41; *see also* 19 ALJD 2-8.

37. ALJ Etchingham's failure to rely on the parties' past practice and course of dealing when considering whether the Union waived its right to the requested employee information. 18 ALJD 30-45; 19 ALJD 1-46; 20 ALJD 2-27.

38. ALJ Etchingham's conclusion that the Union did not waive its right under the Act to the requested information. 20 ALJD 17-19.

39. ALJ Etchingham's failure to hold his factual finding that the information requested by the Union neither related to contract negotiations nor the administration of the CBA compelled the conclusion that the requested information was not relevant. 9 ALJD 1-4.

40. ALJ Etchingham's failure to consider the fact that the Union's desire to update its records and organize files are insufficient bases to show that the requested information was relevant. *See In Re Marion Hosp. Corp.*, 335 NLRB 1016, 1017 (2001); *United Food & Commercial Workers Union, Local 101, & Fed'n of Agents & Int'l Representatives*, 2000 WL 33664285 (N.L.R.B. Div. of Judges) (June 14, 2000); *see also Graymont Pa, Inc.* 364 NLRB No. 37, slip. op. *13 (June 29, 2016) (Miscimarra, Dissent).

41. ALJ Etchingham's failure to consider Member Johansen's dissent in *Postal Serv.*, 280 NLRB 685 (1986).

42. ALJ Etchingham's conclusion that "[i]nformation related to bargaining unit members is presumptively relevant, including, names addresses, and phone numbers . . ." 14 ALJD 29-30.

43. ALJ Etchingham's conclusion that this matter is controlled by *Childrens Center for Behavioral Development*, 347 NLRB 35 (2006) and *River Oak Center for Children*, 345 NLRB 1335 (2005). 14 ALJD 30-36.

44. ALJ Etchingham's apparent reliance on his statement that "[a]n employer must . . . provide information connected to collective bargaining or contract administration" despite the fact that the Union's request for information did not relate to collective bargaining or contract administration. 14 ALJD 17-20.

45. ALJ Etchingham's apparent conclusion that employee names, addresses, and phone numbers are always presumptively relevant in all circumstances. 14 ALJD 29-30.

46. ALJ Etchingham's failure to consider the court's admonition against an expansive approach to "presumptively relevant" information in *IronTiger Logistics, Inc. v. N.L.R.B.*, 823 F.3d 696 (D.C. Cir. May 20, 2016).

47. ALJ Etchingham's failure to conclude that the requested information was neither sought for negotiation of a collective bargaining agreement nor to administer or police the parties' existing CBA.

48. ALJ Etchingham's finding that Meisinger requested the information because he "was not receiving information on newly hired employees at Respondent that he expected and normally received from other employers . . ." 11 ALJD 30-34.

49. ALJ Etchingham's failure to apply the court's reasoning in *Chicago Tribune Co. v. N.L.R.B.*, 79 F.3d 604 (7th Cir. 1996).

50. ALJ Etchingham's attempt to discredit the Union's history of misconduct and harassment of employees by finding that it occurred almost three years before the current information request and, therefore, "is too tenuous and irrelevant to the current information request." 12 ALJD 7-11; *see also* 16 ALJD fn. 16.

51. ALJ Etchingham's failure to conclude that Poudre Valley had a reasonable fear of the Union harassing employees based on his history of misconduct. 12 ALJD 7-11; *see also* 16 ALJD fn. 16.

52. ALJ Etchingham's failure to credit the undisputed evidence that no employee authorized Poudre Valley to disclose their home addresses or telephone numbers to the Union. Tr. 104:8-10.

53. ALJ Etchingham's failure to find that the Union has several opportunities to obtain employees' addresses and telephone numbers. *See Chicago Tribune Co. v. N.L.R.B.*, 79 F.3d 604, 607 (7th Cir. 1996).

54. ALJ Etchingham's finding that Poudre Valley's proposed accommodations were nothing more than a "disingenuous reference to 'accommodation.'" 10 ALJD fn. 13.

55. ALJ Etchingham's apparent finding that Poudre Valley was required to propose either a protective order or to limit the requested information in order to bargain in good faith regarding its confidentiality concerns. 17 ALJD 21-26.

56. ALJ Etchingham's failure to credit undisputed evidence that Poudre Valley asked the Union to propose alternative accommodations. GC. Ex. 14(b).

57. ALJ Etchingham's failure to find Poudre Valley attempted in good faith to negotiate accommodations relating to the Union's request for information. 17 ALJD 21-33.

58. ALJ Etchingham's failure to conclude that the Union did not engage in any negotiations whatsoever, let alone good faith negotiations, relating to Poudre Valley's proposed accommodations to the Union's information request. 17 ALJD 21-33.

59. ALJ Etchingham's failure to rely on the Court's analysis in *Grinnell Fire Prot. Sys. Co. v. NLRB*, 272 F.3d 1028, 1029-30 (8th Cir. 2001).

60. ALJ Etchingham's failure to rely on the Court's analysis in *JHP & Associates, LLC v. N.L.R.B.*, 360 F.3d 904, 911-12 (8th Cir. 2004).

61. ALJ Etchingham's attempt to distinguish *Chicago Tribune Co. v. N.L.R.B.*, 79 F.3d 604, 607 (7th Cir. 1996), *Grinnell Fire Prot. Sys. Co. v. NLRB*, 272 F.3d 1028, 1029-30 (8th Cir. 2001), and *JHP & Associates, LLC v. N.L.R.B.*, 360 F.3d 904, 911-12 (8th Cir. 2004) on the basis that the employees involved in those cases were strike permanent replacement workers. 17 ALJD 35-41; 18 ALJD 1-3.

62. ALJ Etchingham's failure to recognize that strike permanent replacement workers have the same rights under the Act as regularly full time employees. 17 ALJD 35-41; 18 ALJD -3.

63. ALJ Etchingham's apparent reliance on Board law at the exclusion of controlling Circuit Court of Appeals decisions. 18 ALJD 1-3; *see also Heartland Plymouth Court MI, LLC v. Nat'l Labor Relations Bd.*, 2016 WL 3040451, at *1 (D.C. Cir. May 3, 2016) ("The Board's refusal to adhere to our precedent dooms its decision before this court.").

64. ALJ Etchingham's unsupported suggestion that Poudre Valley may be "estopped from asserting the confidentiality claim . . . ." 17 ALJD 6-7.

65. ALJ Etchingham's finding that the Union had "ineffective alternatives" to its request for information. 15 ALJD 13-20.

66. ALJ Etchingham's conclusion that "in this time of computerized data maintenance … the requested bargaining unit employee names, addresses, and telephone numbers for approximately under 50 employees would place no material burden on Respondent to produce." 11 ALJD 12-13.

67. ALJ Etchingham's conclusion that Poudre Valley violated the Act by not providing the requested information. 20 ALJD 23-27.

Respectfully submitted this 26th day of April, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of April, 2017, a true and correct copy of the foregoing **RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS** was filed addressed to the following:

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