

**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**

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**RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS**

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## STATEMENT OF THE CASE<sup>1</sup>

This matter was heard before Chief Administrative Law Judge Gerald M. Etchingham (“ALJ Etchingham”) on June 2, 2016 at the Regional Office’s Hearing Room, Byron Rogers United States Courthouse, 1929 Stout Street, Denver, CO 80294. The Counsel for the General Counsel (“CGC”) and International Brotherhood of Electrical Workers, Local 111 (“Charging Party,” “Local 111,” or “Union”) contended Poudre Valley Rural Electric Association (“Poudre Valley,” “PVREA,” or “Respondent”) violated Sections 8(a)(5) and (1) of the National Labor Relations Act (“Act”) by failing and refusing to furnish the Union with requested employees’ home addresses and telephone numbers.

ALJ Etchingham’s Decision and Recommended Order (“Decision”) must be reversed because ALJ Etchingham ignored undisputed facts and blatantly disregarded binding Board and Circuit Court law. The parties’ have specifically negotiated a provision in their collective bargaining agreement (“CBA”) that outlines the information the Union is entitled to receive regarding employees. The Union’s request for employees’ addresses and telephone numbers exceeds the scope of the parties’ agreement. The Union’s unfair labor practice charge – and the CGC’s prosecution of that charge – is an attempt to unilaterally rewrite and expand the unambiguous terms of the CBA. Moreover, because the CBA specifically addresses the scope of information the Union is entitled to receive, this matter should be deferred to the parties’ grievance and arbitration process pursuant to principles established in *Collyer Insulated Wire*, 192 NLRB 837 (1971). The Complaint is also barred by Section 10(b) because it stems from the

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<sup>1</sup> Citations in this Brief 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.

Union's initial request, which occurred more than six-months prior to the filing of the relevant unfair labor practice charge.

Assuming, *arguendo*, ALJ Etchingham properly considered the merits of the Complaint, the Decision should still be reversed because the information sought by the Union is not relevant and, even if it is relevant, such information is private and confidential. In addition, although ALJ Etchingham explicitly recognized the requested information was only sought for internal Union business, he failed to reconcile this fact with well-settled law holding that such purposes do not require disclosure by the Company. Accordingly, ALJ Etchingham's Decision must be reversed and the Complaint should be dismissed in its entirety.

#### **QUESTIONS PRESENTED**

1. Whether ALJ Etchingham erred in finding the Complaint is not barred by Section 10(b). (Exceptions 6, 19, 20, 21, ad 67).
2. Whether ALJ Etchingham erred in concluding the Union's request was an attempt to unilaterally expand and rewrite the CBA. (Exceptions 3, 4, 5, 8, 22, 23, and 67).
3. Whether ALJ Etchingham erred by not deferring this matter to the parties' grievance and arbitration process. (Exceptions 3, 4, 5, 24, 25, 26, 27, 28, 29, and 67).
4. Whether ALJ Etchingham erred in concluding the Union has not already exercised its statutory right to an employee list. (Exceptions 4, 5, 7, 8, 15, 30, 31, 32, and 67).
5. Whether ALJ Etchingham erred in concluding the Union did not waive its right to an employee list. (Exceptions 1, 2, 4, 5, 7, 8, 33, 34, 35, 36, 37, 38, and 67).
6. Whether ALJ Etchingham erred in concluding the requested employee list is relevant. (Exceptions 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, and 67).
7. Whether ALJ Etchingham erred by not finding the requested information is private and confidential. (Exceptions 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, and 67).

## FACTUAL BACKGROUND

### A. General Background.

Poudre Valley has had a bargaining relationship with the Union since at least the 1970s, if not longer. 2 ALJD 34-35; Tr. 142:20-24. The parties' most recent CBA – and the CBA relevant to this matter – had a term of October 1, 2013 through September 30, 2016. 2 ALJD 36; 3 ALJD 1; GC Ex. 2. Approximately, 42 of Poudre Valley's employees are included in the bargaining unit. 3 ALJD 13-14; Tr. 18:23-25; 19:1. Of those, approximately half are dues-paying members. 3 ALJD 13-14; Tr. 76:11-21.

New employees hired into a position that is part of the bargaining unit are advised by Sarah Witherell, Poudre Valley's Human Resources Director, that they are covered by the CBA. Tr. 99:5-23. Witherell also advises the employee that he or she can get more information about the CBA and Union by contacting a Union Steward. *Id.* When a new employee contacts the Union, the Union gives the employee a "whole packet" of information. Tr. 51:1-8. As part of that packet, employees are asked to fill out their name, address, telephone number, and possibly their email address.<sup>2</sup> Tr. 51:9-19. Similarly, Union Stewards are responsible for personally contacting employees to discuss the Union and gather their information. Tr. 175: 7-13. The Union possesses information about members of the bargaining unit, including their names, addresses, and telephone numbers. 3 ALJD 15-16; Tr. 77:4-8.

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<sup>2</sup> Even if the Union does not have formal notice of bargaining unit members' email addresses, they are easily discernable and all addresses are created the same way: the first letter of employees' first name and then their full last name @pvrea.com. Tr. 114:6-10.

## **B. The Parties' Collective Bargaining Agreement.**

Article 8 of the CBA outlines the information the Union is entitled to receive regarding employees, including the Union's entitlement to an employee list:<sup>3</sup>

Within thirty (30) days after the beginning of each calendar year the Association will post a seniority list for the Association including all employees in the bargaining unit, their classifications, and their date of hiring. Any dispute regarding the seniority posting shall be taken up by the bargaining committee and representatives of the Association within thirty (30) days after this posting.

3 ALJD 26-33; GC Ex. 2, Article 8, p. 3. The information identified in Article 8 is the only employee information the Union is entitled to receive. Tr. 92:11-16. The parties have maintained this process of providing an employee list for many years without objection from the Union. The Union has never asked Poudre Valley to negotiate over this language or to expand it to require Poudre Valley to provide an employee list or other employee information at any other point throughout the year. Tr. 143:10-14. Indeed, the Union never notified Poudre Valley that it wanted to open negotiations regarding the Union's right to obtain an employee list that includes employees' home addresses and telephone numbers. Tr. 66:19-24. In the electrical utility industry in Colorado, including the REA system, this provision has existed unaltered for over 40 years. Tr. 143:1-14.

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<sup>3</sup> ALJ Etchingham's reliance on *Webster's II, New Riverside University Dictionary* for the definition of "seniority" is erroneous. See ALJD 3 fn. 5. A dictionary definition of a term in the parties' CBA is not relevant. The relevant inquiry is the parties' intended and understood meaning of the term. See *Mining Specialists, Inc.*, 314 NLRB 268, 269 (1994) ("In contract interpretation matters like this, the parties' actual intent underlying the contractual language in question is always paramount, and is given controlling weight."); see also *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 933 (2015) (noting that it "interpret[s] collective-bargaining agreements . . . according to ordinary principles of contract law . . ."). Here, the undisputed testimony is that the terms "seniority list" and "employee list" were used interchangeably by the parties. Tr. 106:10-13; GC Ex. 1(a); GC Ex. 5. Moreover, this issue is exactly the sort to fall within an arbitrator's purview; the Board has no expertise on this matter.

As part of its obligation under this provision, Poudre Valley posts an employee list and emails a copy of the list to the Union's Assistant Business Manager<sup>4</sup> in January of each year.<sup>5</sup>

4 ALJD 1-3; Tr. 61:21-24; 118:11-18. Poudre Valley provided this information in both January 2015 and January 2016. Tr. 92:20-24. The Union has not filed a grievance alleging Poudre Valley violated this provision and the Union does not contend Poudre Valley violated the CBA. Tr. 65:18-24; 92:25; 93:1-2.

The CBA also contains a specific provision dealing with the Union's use of a bulletin board. Tr. 111:10-12. Appendix B, Working Rule 13 states,

The Association will furnish a bulletin board for the purpose of posting officially signed Union bulletins, provided that no material is posted thereon that would reflect against or discredit the Association or any individual or is of a political or controversial nature.

GC Ex. 2, Appendix B, p. 19. As Witherell explained, this provision provides the Union access to the bulletin board for the "Union [t]o post[], anything related to Union business, information, notification, and any information that they need to get to the membership." Tr. 112:5-10. The Union has used the bulletin board in the past to communicate with bargaining unit employees.<sup>6</sup> Tr. 112:11-13. As explained in Poudre Valley's Motion to Reopen the Record, the Union even used the bulletin board to communicate with employees regarding ALJ Etchingham's Decision. Although not required under the CBA, Poudre Valley also permits the Union to meet with employees onsite for monthly Union meetings. Tr. 59:4-7; 65:6-10.

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<sup>4</sup> The Union's current Assistant Business Manager is Rich Meisinger. Meisinger's predecessor was Timio Archuleta, who was present at the hearing but not called as a witness. Tr. 20:23-25.

<sup>5</sup> Although not required by the CBA, it has been the parties' long-standing practice for Poudre Valley to email the employee list to the Union in January of each year. Tr. 129:7-21.

<sup>6</sup> Witherell described the bulletin boards as being in each of the break rooms, which are also where the monthly Union meetings are held. Tr. 126:1-18.

The CBA also contains a provision relating to the parties' grievance and arbitration process. GC Ex. 2, Article 21, pp. 11-12. Article 21 grants the Union the ability to challenge Poudre Valley's alleged violations of the CBA and, if not resolved informally, the dispute will be heard by an impartial arbitrator. *Id.* The Union has previously filed unfair labor practice charges with the Board that have been deferred to arbitration. Tr. 182:6-11. Poudre Valley has always been amenable to this matter being resolved through the parties' grievance and arbitration process. Tr. 152:25; 153:1-5.

**C. The Union's Requests For An Employee List And Poudre Valley's Responses.**

On March 31, 2015, the Union sent Poudre Valley its first request for an employee list. 4 ALJD 7-13; Tr. 94:20-22; GC Ex. 6(b). This request came from Sean McCarville, the Union's Business Manager/Financial Secretary. *Id.* In his March 31, 2015 letter, McCarville asked that the employee list include "the employee's name, classification, date of hire, and last four digits of their social security number." *Id.* McCarville said the information was requested "[i]n an effort to update [the Union's] records and maintain accurate information." *Id.* Poudre Valley's then-Human Resources Director, Vinnie Johnson,<sup>7</sup> responded to McCarville's request on April 2, 2015. GC Ex. 6(c). In that response, Johnson stated Poudre Valley would not provide the last four digits of employees' social security numbers, but, as an "accommodation" to the Union's request, Johnson provided an employee list with the remaining information that was updated as of March 31, 2015.<sup>8</sup> 4 ALJD 23-27; GC Ex. 6(c).

Six months later, on October 29, 2015, Meisinger met with Jeff Wadsworth, Sarah Witherell, Lisa Wright, and John Bowerfind from Poudre Valley. 5 ALJD 1-3; Tr. 19:19-25;

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<sup>7</sup> Johnson was Poudre Valley's previous Human Resources Director. Johnson left Poudre Valley in September 2015. Tr. 88:19-21.

<sup>8</sup> The accommodation was to the contractual requirement of providing the list only annually and to only provide employees' names, classification, and date of hire. *See* GC Ex. 2, Article 8.

20:1-22; 96:20-21. During that meeting, Meisinger requested an employee list and, specifically, asked that Poudre Valley update the employee list each time a new employee is hired. Tr. 97:15-25. When speaking with Poudre Valley, Meisinger stated that he knew this information had been requested previously, but he was asking for it again.<sup>9</sup> Tr. 100:10-15. To that point, Wadsworth testified that during the October 29, 2015 meeting, Meisinger specifically said, “I know we requested this information in the past, but I’m going to request it again, and here’s – and we do need it.” Tr. 139:5-13. Meisinger testified that what he really wanted was “a list of new hires.” 5 ALJD 27-33; Tr. 57:9-11.

According to Meisinger, the Union wanted the updated employee list because a new employee at Poudre Valley, Dane Hanson, was mistakenly placed in a wrong bargaining unit, according to the Union’s internal records. 5 ALJD 18-26; Tr. 63:6-20. Indeed, it was the Union’s disorganization relating to Hanson’s placement that “predicated this request for information.” Tr. 63:21-24; 83:5-22.

In response to Meisinger’s request, on the same day, Witherell emailed Meisinger and stated,

Regarding your request to provide you with notification of new hires, we have reviewed the CBA and there is not language in the present CBA requiring us to do so. As such, we will continue with our current process of advising new employees to contact the Union directly if they have any interest in doing so.

6 ALJD 10-16; Tr. 23:9-17; GC Ex. 3. Witherell testified that Poudre Valley has never provided the Union with an updated employee list when new employees are hired. Tr. 98:5-11.

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<sup>9</sup> ALJ Etchingham erroneously and in direct contradiction of Meisinger’s testimony concluded 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. At two different points during his testimony at the hearing Meisinger explained that during the October 29, 2015 meeting, he stated he knew the information had been requested previously, but he is requesting it again. *See* Tr. 100:10-15; 139:5-13. ALJ Etchingham’s blatant disregard for this testimony is fatal error.

On November 2, 2015, Meisinger again emailed Witherell and requested an employee list to include “the employee’s name, classification, date of hire, current address, phone number and last four digits of their social security number.” 6 ALJD 23-27; Tr. 24:7-14; GC Ex. 4. Like McCarville, Meisinger said the information was needed “[i]n an effort to update [the Union’s] records and maintain accurate information.” 6 ALJD 27-28; GC Ex. 4.

Also on November 2, 2015, Meisinger sent a letter to Poudre Valley requesting an employee list that “include[s] the employee’s name, classification, date of hire, and current address.” 6 ALJD 33-36; GC Ex. 5. Again, the purpose of Meisinger’s request was to “update [the Union’s] records and maintain accurate information.” *Id.* The “RE” line on the November 2, 2015 letter stated “Employee List as of January 31, 2015.”<sup>10</sup> GC Ex. 5. There is no dispute the Union received the employee list to which it is entitled in January 2015. Tr. 92:20-25; 93:1-2. Moreover, Poudre Valley sent the Union an updated version of that list in March 2015 in response to its March 31, 2015 request. GC Ex. 6(b)-(d). The Union’s reference to the January 31, 2015 deadline demonstrates it was referring to the same employee list it is entitled to receive within the first 30 days of the year pursuant to Article 8 of the CBA.

On November 3, 2015, Witherell responded to Meisinger’s latest request for an employee list via email, stating,

As I stated in my initial email, we are not required to provide the requested information per the current Collective Bargaining Agreement. As such, we will continue our current practice of advising new employees to make contact with the Union directly if they wish to do so.

7 ALJD 3-11; Tr. 26:9-17; GC Ex. 6. Witherell also noted that Poudre Valley had “received this request previously and provided the same response.” *Id.* In so stating, Witherell was referring to

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<sup>10</sup> The fact that the Union referred to the January list as an “employee list” is further evidence the parties used the phrases “employee list” and “Seniority List” interchangeably.

the Union's March 31, 2015 request for an employee list, and she attached both the request and Poudre Valley's response to her November 3, 2015 email. 7 ALJD 3-11; Tr. 26:18-25; 27:1-5; 102:5-8. Witherell testified that she believed the Union's October-November request for an employee list was related to its March 31, 2015 request for information. Tr. 102:13-19. Although each request varied slightly, Witherell referred to her other responses because she considered it to be another request for the same information from the Union. Tr. 108:14-24.

On November 6, 2015, Meisinger emailed Witherell and attached the November 2, 2015 letter he sent to Wadsworth requesting the employee list. 7 ALJD 19-22; GC Ex. 7. Like the Union's previous requests, Meisinger maintained the information was necessary to "update [the Union's] records and maintain accurate information." GC Ex. 7(b).

Witherell responded to the Union's request via email on November 9, 2015. 8 ALJD 3-6; GC Ex. 8. In that email, Witherell reiterated Poudre Valley's position that the Union's request for an employee list was covered by Article 8 of the CBA, stating, "Article 8 of the current Collective Bargaining Agreement calls for the posting of the seniority list within a discreet period during the year and also defines what information is to be included on the list (name, classification, and date of hire)." *Id.* In an attempt to accommodate the Union's request once again, however, Witherell provided a current employee list that was updated as of November 2015. 8 ALJD 6-8; GC Ex. 8(c). The employee list provided by Witherell included employee names, classification, and dates of hire. Tr. 33:5-9; GC Ex. 8(c). Thus, the only information requested by the Union that was not provided was employees' home addresses. Tr. 33:13-17. To that point, Witherell explained in her email that Poudre Valley would not "share private employee information, such as current addresses, and have not shared this information

previously.” GC Ex. 8. Poudre Valley has always taken the position that this information is private and confidential. Tr. 103:16-24; 136:12-16.

On November 16, 2015, Meisinger sent Poudre Valley another letter requesting an “Employee List.” 8 ALJD 13-21; GC Ex. 9. As part of the employee list, Meisinger requested “a list of bargaining unit employees that are currently identified in the collective bargaining agreement by classification between Poudre Valley REA and IBEW Local Union 111[, including] the employees [*sic*] name, address and phone number.” *Id.* For the first time after multiple correspondence regarding this issue, the Union stated the information was requested “[i]n furtherance of [it’s] obligation as collective bargaining representative and in order to properly represent the bargaining unit.” *Id.* The Union, however, did not explain what it means by such a statement. *Id.* Poudre Valley did not understand what the Union meant by “furtherance of the Union’s obligation as collective bargaining representative and in order to properly represent the bargaining unit.” Tr. 109:20-25; 110:1. At trial, Meisinger admitted this was added by the Union’s attorney, Naomi Perera. Tr. 65:11-17; 84:3-13.

On December 3, 2015, Witherell responded to Meisinger’s letter, again via email. 8 ALJD 22-28; GC Ex. 10. In that response, Witherell reiterated her previous responses and stated that Poudre Valley “fulfilled [its] obligation to provide a seniority list, as outlined in the current Collective Bargaining Agreement, and have provided the seniority list at more frequent intervals than required, as a courtesy.” GC Ex. 10. At this point, Witherell also asked Meisinger to direct any questions he may have about her response to Ray Deeny, Poudre Valley’s attorney. *Id.*

Meisinger responded to Witherell’s email on December 18, 2015, also via email. 8 ALJD 29-37; GC Ex. 11. In that response, for the first time, Meisinger stated that the Union

was “not requesting this information under a provision of the CBA – it is doing so in furtherance of its representative duties, and in order to police the CBA.” *Id.* Meisinger also asserted his position that the Union is “legally entitled to this information under the NLRA.” *Id.* Again, Meisinger did not explain how employee addresses and telephone numbers relate to its representative duties or policing the CBA and Poudre Valley did not understand how they relate. Tr. 109:20-25; 110:1. Meisinger copied the Union’s attorney, Perera, on the email and threatened to file an unfair labor practice charge if Poudre Valley did not “disgorge this information.” 8 ALJD 35-37; GC Ex. 11.

On December 19, 2015, Deeny responded to Meisinger’s email and stated, in part, that the Union has the opportunity to meet with bargaining unit personnel and elicit the private information the Union seeks directly from them. 9 ALJD 8-10; GC Ex. 12. Deeny also requested that future correspondence relating to this matter be directed to him. *Id.* In response, On December 21, 2015, Perera emailed Deeny and provided citations to a variety of Board cases in support of the Union’s position. 9 ALJD 25-28; GC Ex. 13.

Deeny responded to Perera’s email via letter on December 22, 2015. 9 ALJD 29-30; GC Ex. 14. In that letter, Deeny reiterated the CBA’s specific provision relating to employee lists and noted the CBA provision permitting the Union to use the bulletin boards to obtain the requested information. 10 ALJD 1-17; GC Ex. 14(a). Deeny also noted that Poudre Valley considers the requested information to be private employee information and that “[n]o employee has authorized PVREA to disclose that confidential information, and no contract provision compels that outcome either.” *Id.* Finally, Deeny described the manner in which the collective bargaining parties resolved a similar information request by the Union and offered various accommodations available to the Union to obtain the requested information, stating,

We offer now those similar accommodations – post a letter to your unit and solicit their addresses from them; access the premises to hold a meeting to gain signed authorizations to have the employer release their addresses; hold a Union meeting offsite to gain the employees’ approval to release this private confidential information; use an independent third-party mailer; or, as the Union as done before, bring such a proposal to modify the current CBA to the bargaining table. These accommodations are appropriate under the circumstances.

10 ALJD 1-17; GC Ex. 14(b); *see also* Tr. 111:4-9 (Witherell’s testimony regarding Poudre Valley’s proposed accommodations). Deeny even indicated Poudre Valley’s willingness to discuss other, Union-preferred alternatives, stating, “[f]eel free to propose alternative accommodations for PVREA’s consideration.” *Id.* The Union did not respond to Poudre Valley’s suggested accommodations and it did not offer any alternatives. Tr. 114:22-24; 166:9-14. Instead, the Union filed its unfair labor practice charges.<sup>11</sup>

**D. Poudre Valley’s Concern For Employees’ Privacy.**

Wadsworth testified that he directed Human Resources, both Johnson and Witherell, to deny the Union’s request for employees’ addresses, telephone numbers, and social security numbers based on privacy concerns and being outside the parameters of the CBA. Tr. 136:12-16. Poudre Valley considers employees’ personal home addresses and telephone numbers to be private and confidential information. Tr. 103:16-24. Poudre Valley takes this position because it is the company’s responsibility to ensure that information disclosed to it by employees “is not disseminated without employee approval, authorization, [or] awareness.” Tr. 104:2-7. Moreover, Wadsworth described his concern with disclosing private employee information as implicating cyber security:

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<sup>11</sup> Notably, the Union’s first Charge only alleged Poudre Valley “refused to provide a current list of all employees covered under the CBA between IBEW Local 111 and the employer.” GC Ex. 1(a). It is undisputed, however, that Poudre Valley provided this list no fewer than three times. Tr. 57:12-14. Again, the Union’s description of this list as an employee list is further evidence the parties used the phrases “employee list” and “Seniority List” interchangeably.

in our day and age, cyber security is a huge issue. And in our industry, cyber security is a huge issue. We go to conferences and such. And they talk about cyber security and the threat of what that looks like and what that is, of us as a utility industry, being very specific to attacks. There've been attacks over in Ukraine that they got confidential employee information, were able to hack onto the system and actually be able to shut down the electric system. So that's a big concern. And then as well our employees, their privacy and what that looks like. I hold that near and dear to my heart of – when it comes to making sure that that is – we keep that. It's a trust thing between us and our employees of making sure that the information they provide to us, that we keep it under lock and key.

4 ALJD 14-22; Tr. 136:17-25; 137:1-6. No employee authorized Poudre Valley to disclose their home addresses or telephone numbers to the Union. Tr. 104:8-10.

**E. The Union's Contact With Employees And Ability To Obtain Their Information.**

The Union regularly relies on stewards to provide information about employees, including information about when a new employee is hired. Tr. 81:4-7. During their repeated requests for an employee list and employee information, which spanned over a period of ten months, however, the Union never approached its stewards to try and get the information. Tr. 49:24-25; 50:1-2. The Union did not even ask their stewards if they already possessed the information. *Id.*; Tr. 70:25:71:1-4.

In addition to having daily contact with bargaining unit employees via the stewards, the Union hosts monthly meetings at Poudre Valley. Tr. 59:4-7; 65:6-10. All bargaining unit employees are eligible to attend the meetings. Tr. 113:17-18. The meetings have regularly occurred since at least October 2014. Tr. 113:19-24.

As described above, the Union also has access to the bulletin boards located at Poudre Valley to communicate with bargaining unit employees. Tr. 59:8-13. The Union, however, never used the bulletin boards to communicate with employees regarding its request for their home addresses or telephone numbers. *Id.*; Tr. 72:8-10. Despite having employees' email addresses, the Union also did not send bargaining unit employees an email to get their home

addresses or approval for Poudre Valley to release their home addresses.<sup>12</sup> Tr. 114:3-10. The Union has used these accommodations to communicate with employees and obtain information about bargaining unit employees in the past. Tr. 114:11-21.

**F. The Union Previously Harassed Employees.**

In 2013, Poudre Valley received complaints from employees that the Union was harassing them regarding the payment of their Union dues. Tr. 146:1-5. At that time, several employees were behind in paying their dues and the Union served those employees with letters at their homes and offices demanding payment of the dues. Tr. 145:7-21; 162:11-16. In an effort to resolve this intrusion, Poudre Valley met with the Union to create a way for the Union to communicate with employees about this issue, but not harass and intimidate the employees. Tr. 146:6-12. The agreement between Poudre Valley and the Union was referenced in Deeny's December 22, 2015 letter to Perera. GC Ex. 14. As described in that letter, the Union sought access to confidential employee information to help collect the employees' dues payments. GC Ex. 14(b). To permit the Union to communicate with employees, but protect the employees' from the Union's harassing communications, the parties agreed the Union would post a letter to employees on Poudre Valley's bulletin board. *Id.*

Additional information, including testimony and exhibits, relating to the parties' agreement were excluded by ALJ Etchingham on the basis of relevance. Tr. 146:16-25; 147:9. As an offer of proof, and despite being rejected by ALJ Etchingham, Poudre Valley introduced its Exhibits 1 and 2. Those exhibits demonstrate that when the Union previously harassed

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<sup>12</sup> 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" is belied by the undisputed fact that the Union received an updated employee list no fewer than three times in 2015. *See* 9 ALJD 22-23. Thus, the Union had all of the bargaining unit employees' full first and last names and, therefore, could have emailed each of them directly.

employees, Poudre Valley and the Union negotiated a way for the Union to communicate with the employees without infringing on the employees' privacy. As described in more detail below, this information is directly relevant to Poudre Valley's confidentiality and course of dealing defenses and, therefore, it was error for ALJ Etchingham to preclude the admission of this evidence.

### **ARGUMENT**

#### **A. The Complaint Is Barred By Section 10(b).**

The Act provides “[t]hat no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such a charge is made . . . .” 29 U.S.C. § 160(b). The Union first requested the employee list in March 2015. ALJD 7-13; Tr. 94:20-22; GC Ex. 6(b). More than nine months later, on January 5, 2016, the Union filed an unfair labor practice charge. 10 ALJD 22; GC Ex. 1(a). Each of the Union's subsequent requests were follow-up requests stemming from, and related to, the first. Indeed, despite ALJ Etchingham's erroneous finding to the contrary, Meisinger specifically referred to the Union's March 2015 request in October 29, 2015 by stating, “I know we requested this information in the past, but I'm going to request it again, and here's – and we do need it.” Tr. 139:5-13. Poudre Valley responded to each request in the same way: with proposed accommodations. Thus, the limitations period began running from the March 2015 request, and the Complaint is time-barred.

Like the CGC, ALJ Etchingham entirely ignored the March 31, 2015 information request and stated that “[t]he Union's initial information request containing the request for bargaining unit employees' names, addresses, and telephone numbers, began verbally on October 29, 2015 and evolved on November 6 to become the information request at issue here.” 13 ALJD 6-8.

ALJ Etchingham may not avoid the effect of the March 31 information request by simply ignoring its existence and claiming “that earlier request is not at issue in this proceeding.” 12 ALJD 38-39. Because the Union’s requests for information began on March 31, 2015 and each of the proceeding requests stemmed from that request, the limitations period began running from Poudre Valley’s refusal to provide the information in April 2015.

ALJ Etchingham’s attempt to avoid the Act’s six-month limitations period by omitting information about the Union’s March 2015 request for an employee list and ignoring the fact that the Union sent nearly identical requests dating back to that period must not be countenanced. The Supreme Court’s decision in *Local Lodge No. 1424 v. N. L. R. B.*, 362 U.S. 411 (1960) is instructive here. In that case, the Court found that “where a complaint based upon [an] earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.” *Id.* at 417. Here, the Union is attempting to revive a time-barred alleged unfair labor practice (the Union’s March 2015 request and Poudre Valley’s April 2015 refusal to provide the employee list) into falling within the limitations period by ignoring it and focusing only on the subsequent requests.

ALJ Etchingham attempts to distinguish *Local Lodge* on the basis that “the General Counsel is not relying on the facts relating to the March 31 information request.” 13 ALJD 14-15. Again, because the Union referred to its March 2015 request for information in making its future requests, the Union’s subsequent requests relate back to its original request. And, because the original request is outside of the limitations period, all of the future requests are similarly barred. Because the Union’s unfair labor practice charge was filed more than six months after the alleged unfair labor practice occurred, the Complaint must be dismissed in its entirety.

**B. The Union Is Attempting To Unilaterally Modify The Parties' CBA.**

The Union is attempting to rewrite the unambiguous terms of the parties' CBA and expand the information it is entitled to receive regarding employees. Thus, despite the Union – and the CGC's – efforts to classify this as a run-of-the-mill information request case, at bottom, this is a contract coverage case involving the interpretation of Article 8 of the CBA.

The parties have negotiated and included in the CBA a specific provision relating to the Union's receipt of information about bargaining unit employees. *See* GC Ex. 2. The Union's requests for an employee list, including information relating to employees' social security numbers, home addresses, and telephone numbers constitutes bad faith bargaining and is an attempt by the Union to unilaterally modify the parties' CBA. *See e.g.*, 28 U.S.C. § 158(d) (“the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract . . . .”); *Bath Iron Works Corp. & Local Lodge S-7, Dist. Lodge 4*, 345 NLRB 499, 501 (2005) (noting that the remedy for a contract modification is to honor the contract); *Dunham-Bush, Inc.*, 264 NLRB 1347, 1352 n. 5 (1982) (“a unilateral contract modification is in bad faith by definition.”); *Paramount Potato Chip CO, Inc.*, 252 NLRB 794, 797 (1980) (noting that where a breach of the contract is so clear and flagrant as to amount to either a repudiation of the contract or a unilateral modification of the contract, it violates the Act); *H. K. Porter CO v. N. L. R. B.*, 397 U.S. 99, 102 (1970) (holding that although the NLRB has authority to “require employers and employees to negotiate, it is without power to compel a company or a union to agree on any substantive contractual provision of a collective-bargaining agreement.”).

The Union's unlawful unilateral modification of the CBA is further evident from Meisinger's admissions regarding the purpose of his requests and his stated goal for making the

requests. Meisinger's only basis for his request for an employee list was "an effort to update[ the Union's] records and maintain accurate information." 4 ALJD 11-13; 5 ALJD 31-33; 6 ALJD 27-31; GC Exs. 4, 5, 6(b), and 7(b). Consistent with this undisputed evidence, ALJ Etchingham specifically found the Union requested the information in an effort to update its internal records. 7 ALJD fn. 10; 17 ALJD 40-41; 19 ALJD 25-29. Moreover, Meisinger admitted the Union is not entitled to the requested employee list pursuant to the CBA. Tr. 54:19-22; 55:2-13. Thus, according to Meisinger, he wanted additional information outside of that permitted under the CBA for the purpose of resolving internal Union disorganization. The Union's request for an employee list was, therefore, an attempt to unilaterally expand the CBA and grant the Union access to information it was not permitted to obtain under the terms of the CBA. The Union's efforts to unilaterally rewrite the CBA are unlawful.<sup>13</sup>

**C. ALJ Etchingham Erred By Not Deferring This Case To The Parties' Grievance And Arbitration Process.**

Because the parties have a specific bargained-for provision regarding the disclosure of information about employees, the Union's requests for information are a matter of contract coverage. The Board should not permit the Union to use the Board's procedures to curb the Company's bargained-for rights under the CBA. The appropriate outcome is to defer to the parties' grievance and arbitration process. *See Appollo Sys., Inc. & Int'l Bhd. of Elec. Workers, Local 292*, 360 NLRB No. 80 at \*3 (Apr. 24, 2014) ("deferral is appropriate when resolution of the issue turns solely on the proper interpretation of the parties' contract.") (internal quotations omitted); *Berklee Coll. of Music*, 362 NLRB No. 178 n. 1 (Aug. 26, 2015) ("When a party's action presents questions about both the interpretation of a CBA and legal obligations under the

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<sup>13</sup> There was no valid 29 U.S.C. § 158(d) notice provided by the Union to warrant such a departure from the parties' CBA and orderly collective bargaining; nor to justify the Union's unilateral action. Tr. 85:11-23.

Act, the Board will frequently defer to the arbitration procedures contained in the parties' CBA.").

ALJ Etchingham's Decision undermines the Board's pre-arbitral deferral policy and the strong federal policy favoring the arbitration of labor disputes. *See e.g., Douglas Aircraft CO v. N.L.R.B.*, 609 F.2d 352, 353 (9th Cir. 1979) ("Federal policy favors arbitration of labor disputes."). In *Collyer Insulated Wire*, 192 NLRB 837 (1971), the board renewed its approval of the policy favoring arbitration. There, the Board dismissed a complaint alleging unilateral changes in wages and working conditions in violation of Section 8(a)(5) in deference to the parties' grievance-arbitration machinery. In so doing, the Board

articulated several factors favoring deferral: [t]he dispute arose within the confines of a long and productive collective-bargaining relationship; there was no claim of employer animosity to the employees' exercise of protected rights; the parties' contract provided for arbitration in a very broad range of disputes; the arbitration clause clearly encompassed the dispute at issue; the employer had asserted its willingness to utilize arbitration to resolve the dispute; and the dispute was eminently well suited to resolution by arbitration. In these circumstances, deferral to the arbitral process merely gave full effect to the parties' agreement to submit disputes to arbitration. In essence, the *Collyer* majority was holding the parties to their bargain by directing them to avoid substituting the Board's processes for their own mutually agreed-upon method for dispute resolution.

*United Techs. Corp.*, 268 NLRB 557, 558 (1984); *see also Local Union No. 2188, v. N. L. R. B.*, 494 F.2d 1087, 1090 (D.C. Cir. 1974) (listing factors for *Collyer* deferral).

The *Collyer* factors compel deferral here. It is undisputed that the parties have a long and productive bargaining relationship. Indeed, the parties have successfully negotiated collective bargaining agreements since at least the 1970s. Tr. 142:20-24. There has also been no claim of animosity by Poudre Valley against the Union and, in fact, the parties believe they have a positive working relationship. Tr. 130:5-7; 138:5-10; 164:24-25; 165:1-6. The parties' CBA has a broad grievance and arbitration procedure that covers this dispute. *See* GC Ex. 2, Article 21,

p. 11. Indeed, Article 8 specifically provides that disputes relating to the employee list shall be resolved through the collective bargaining process. GC Ex. 2, Article 8, p. 3. In addition, Poudre Valley has undisputedly asserted its willingness to resolve this dispute through arbitration. Tr. 152:25; 153:1-5. Finally, this dispute is well-suited for arbitration because, as described above, it is a matter of contract interpretation. Thus, here, like in *Collyer* and its progeny, the parties should be held to their bargain and compelled to arbitrate this dispute. *United Techs. Corp.*, 268 NLRB at 558.

Deferral is also appropriate here because an arbitrator, and not the Board, is better suited to interpret the parties' CBA and determine whether the Union has exercised its statutory right to the information in the CBA or has waived its right to the requested employee list. *See e.g., Local Union 36, Int'l Bhd. of Elec. Workers, v. N.L.R.B.*, 706 F.3d 73, 83-84 (2d Cir. 2013) ("We do not, however, defer to the Board's interpretation of a contract such as a CBA because the interpretation of contracts falls under the special, if not unique, competence of courts."); *N.L.R.B. v. Solutia, Inc.*, 699 F.3d 50, 67 n. 16 (1st Cir. 2012) ("federal labor laws establish that courts and arbitrators generally are the primary interpreters of labor contracts."). The Supreme Court has similarly noted that it "interpret[s] collective-bargaining agreements . . . according to ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy." *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 933 (2015). It would be inconsistent with federal labor policy to allow ALJ Etchingham to impose terms on the parties that do not exist in the CBA, such as a requirement to provide bargaining unit employees' home addresses and telephone numbers.

Without addressing the substance of Poudre Valley's deferral argument, ALJ Etchingham summarily concluded he would not defer to the parties' grievance and arbitration process

because the Board generally does not defer request for information cases to arbitration.<sup>14</sup> 12 ALJD 17-25. ALJ Etchingham's conclusion misses the point. First, this is not an information request case. The parties have a specific provision in their CBA that outlines the information the Union is eligible to receive regarding employees. That information includes a list of bargaining unit employees, which identifies their names, classifications, and date of hire. *See* GC Ex. 2, Article 8, p. 3; Tr. 92:11-16. Thus, what the CGC refers to as a "straightforward information request case," is really an attempt by the Union to unlawfully expand the CBA and undo the parties' agreement relating to employee information. Accordingly, the Board's general policy against deferral in information request cases does not apply here.

The policy considerations underlying the Board's general rule not to defer to arbitration in information request cases is also inapplicable here. As Acting Chairman Miscimarra specifically noted,

the Board's policy is not to defer information-request disputes to arbitration, but [] deferral to arbitration could be appropriate where either (1) the scope of an information request would be significantly affected by the merits of a particular grievance pending arbitration, and/or (2) nondeferral would result in duplicative litigation that undermines the role played by arbitration as the method agreed upon by the parties for the final adjustment of disputes involving interpretation of collective-bargaining agreements.

*In Re Endo Painting Serv., Inc.*, 360 NLRB No. 61 at \*3 n. 6 (Feb. 28, 2014) (citing Labor Management Relations Act § 203(d) and 29 U.S.C. § 173(d)). The information included in, and timeframe for which, the Union may receive an employee list is specifically identified in Article 8 of the CBA. The Board's resolution of this matter directly undermines the forum that

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<sup>14</sup> Members of the Board have previously questioned the Board's general policy against deferring information request cases. *See e.g., Team Clean, Inc. & Unite Here! Local 5*, 348 NLRB 1231, 1231 n. 1 (2006); *Pac. Bell Tel. Co. d/b/a Sbc California & Commc'ns Workers of Am.*, 344 NLRB 243 n. 3 (2005). For all of the reasons described herein, that policy is flawed and should be reversed; or, at minimum, the policy should be qualified so as to keep the CGC from using it as an opportunity to dictate the terms of parties' collective bargaining agreement.

was agreed upon by the parties for the final adjustment of disputes involving the interpretation of this provision. Accordingly, because the policy underlying the Board's refusal to defer to arbitration in information request cases does not apply, there is no basis upon which to decline deferral here.

Courts have long held that the Board has no role to play when the contractual and unfair labor practice issues overlap. *See e.g., Am. Freight Sys., Inc. v. N.L.R.B.*, 722 F.2d 828, 831 (D.C. Cir. 1983); *Plumbers & Pipefitters Local Union No. 520 v. N.L.R.B.*, 955 F.2d 744, 754 (D.C. Cir. 1992). For example, in *American Freight System*, the Board refused to defer to the parties' grievance and arbitration process because it believed the case involved two distinct issues: a contractual claim and separate statutory claim. 722 F.2d at 831. On appeal the court rejected that reasoning, stating:

[t]he obvious fallacy in the Board's analysis is its contention that there is a statutory issue apart from the contractual issue. This analytical flaw is born of the Board's total failure to consider contractual waiver doctrine . . . In this case, whatever statutory right McArthur may have had to refuse to drive his truck based on his "good faith" belief that it was unsafe was clearly and unmistakably waived by article 16 of the collective bargaining agreement, which dictates that his refusal must be "justified" . . . This case, therefore, involves solely a contractual claim, not an unfair labor practice claim . . . In other words, assuming, *arguendo*, that an individual employee has a right under the NLRA to refuse to work in order to pursue a contract claim that is not in fact "justified" but only supported by a "good faith" belief of wrongdoing, that alleged right was waived by the collective bargaining agreement in this case.

772 F. 2d at 832. Similarly, here, ALJ Etchingham wrongly concluded that the Union's request for information implicated a "separate statutory right distinguishable from its rights under the CBA . . . ." 19 ALJD 25-29. Because the CBA specifically contemplates the scope of employee information the Union is entitled to receive, the contract issue and statutory issue are the same and should have been resolved by an arbitrator. Moreover, even if ALJ Etchingham did not believe the Union's request was covered by Article 8 of the CBA, an arbitrator is in the best

position to evaluate the parties' contractual scope and intent. Indeed, an arbitrator could have fully considered the issues and remedied any alleged breach of the CBA and violations of the Act. The Board, therefore, must defer this matter to arbitration so an arbitrator may exercise his or her appropriate jurisdiction to interpret the CBA consistent with the parties' intent and federal labor policy.

ALJ Etchingham also erred by not considering the Region's purported basis for not deferring this case. During the investigation, the Region's stated reason for not deferring this matter to arbitration was its belief that if it went to arbitration, Poudre Valley would prevail. Tr. 166:23-25; 167:1-6. This information came straight from the Region's investigator. Tr. 167:13-19. Indeed, as Deeny described as an offer of proof, "it was unanimous not to defer because the region decided that an arbitrator would rule against the Union, based on the clarity of the [CBA]."<sup>15</sup> Tr. 169:2-5. The Board is not permitted to consider the merits of the underlying arbitration when deciding whether or not a matter should be deferred. *See e.g., Andersen Sand & Gravel CO*, 277 NLRB 1204, 1213 (1985) (stating, in the context of *Spielberg* deferral that "the appropriateness of deferral should be considered *before* considering the merits of the arbitrator's award.") (emphasis in original). Because the undisputed facts demonstrate that the Region was primarily concerned with whether Poudre Valley would prevail at arbitration, the CGC's recent *post hoc* explanation should be given no weight. This matter should be deferred to the parties' grievance and arbitration process and the Complaint should be dismissed in its entirety.

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<sup>15</sup> Following the CGC's objection, ALJ Etchingham precluded Poudre Valley from introducing evidence relating to this issue. ALJ Etchingham's ruling was error because the testimony is direct evidence that the Region's present basis for not deferring is pretextual.

**D. The Union Has Already Exercised Its Statutory Right To An Employee List Or, Alternatively, The Union Has Waived Its Right To An Employee List.**

Courts apply a two-step framework to determine if there has been a valid waiver of a statutory right by the Union:

At the first step, we ask whether the issue is clearly and unmistakably resolved (or “covered”) by the contract. If so, the question of waiver is inapposite because the union has already clearly and unmistakably exercised its statutory right to bargain and has resolved the matter to its satisfaction. *See Bath Marine Draftsmen's Ass'n v. N.L.R.B.*, 475 F.3d 14, 25 (1st Cir. 2007) (waiver standard is irrelevant if “the Unions have already exercised their right to bargain”); *N.L.R.B. v. U.S. Postal Serv.*, 8 F.3d 832, 836 (D.C. Cir. 1993) (“[Q]uestions of ‘waiver’ normally do not come into play with respect to subjects already covered by a collective bargaining agreement.”). The interpretation of such a contract is a question of law. *See id.* at 837.

If we determine that the applicable CBA does not clearly and unmistakably cover the decision or effects at issue, we proceed to the second step, at which we ask whether the union has clearly and unmistakably *waived* its right to bargain . . . Under this two-step process, an employer can successfully carry its burden of proof by showing either that the CBA (or any other contract governing the relations between the parties) covers a particular decision, or that the Union has waived its right to bargain over a particular decision. *See Olivetti Office U.S.A.*, 926 F.2d at 187 (noting that “[t]he burden of proving a union waiver rests with the employer.”). At either step, however, the contractual indicia of exercise of the right to bargain or proffered proof of waiver must clearly and unmistakably demonstrate the coverage or waiver sought to be proved. *Metro. Edison CO*, 460 U.S. at 708, 103 S.Ct. 1467 (“[A] union’s intention to waive a right must be clear before a claim of waiver can succeed.”).

*Local Union 36, Int'l Bhd. of Elec. Workers, v. N.L.R.B.*, 706 F.3d 73, 83-84 (2d Cir. 2013) (internal footnotes omitted). ALJ Etchingham failed to conduct this analysis and, instead, choose to label Poudre Valley’s argument as “thrown in”; as though it were an afterthought undeserving of his full attention. 18 ALJD 30. ALJ Etchingham’s arrogant and careless analysis requires reversal. The clear language of the CBA demonstrates that the Union has already exercised its right to obtain certain employee information. Alternatively, the Union waived its right to the requested employee list. Either way, the Board should dismiss the Complaint.

i. The Union has exercised its statutory right to obtain the employee list.

If the collective bargaining agreement covers the issue, then “the question of waiver is inapposite because the union has already clearly and unmistakably exercised its statutory right to bargain and has resolved the matter to its satisfaction.” *Local Union 36*, 706 F.3d at 83-84 (citing *Bath Marine Draftsmen's Ass'n v. N.L.R.B.*, 475 F.3d 14, 25 (1st Cir. 2007) (waiver standard is irrelevant if “the Unions have already exercised their right to bargain”); *N.L.R.B. v. U.S. Postal Serv.*, 8 F.3d 832, 836 (D.C. Cir. 1993) (“[Q]uestions of ‘waiver’ normally do not come into play with respect to subjects already covered by a collective bargaining agreement.”)).

Article 8 of the CBA specifically covers the Union’s request for an employee list in this matter. In Article 8, the parties agreed the Union would receive a list of employees including their name, classification, and date of hire within 30 days after the first of each year. GC Ex. 2, Article 8, p. 3; Tr. 92:11-16. Poudre Valley complied with this requirement several times between January 2015 and January 2016. Tr. 92:20-24. In negotiating and agreeing to the portion of Article 8 dealing with the Union’s entitlement to an employee list, the Union exercised its statutory right to the information.

ALJ Etchingham attempts to avoid this conclusion by stating “[t]his is not a dispute regarding the Seniority List posting.” 19 ALJD 3. ALJ Etchingham’s finding, however, misses the point. The Union’s request for an employee list is just an extension of its entitlement to a list of employees in Article 8. Indeed, as Meisinger admitted, what he really wanted was “a list of new hires.” Tr. 57:9-11. Further, the only reason the Union requested the employee list was because the Union mistakenly placed new employee Hanson in the wrong bargaining unit for purposes of the Union’s internal record keeping, and Meisinger hoped to avoid this issue in the future. Tr. 63:6-24; 83:5-22. Because the Union’s requests for an employee list in March-

December, 2015 are specifically covered by Article 8 of the CBA, the Union already exercised its statutory right to obtain the information and Poudre Valley's failure to provide another list outside of the provisions of Article 8 did not violate the Act.<sup>16</sup>

ii. The Union waived its right to the employee list.

Alternatively, the Board must dismiss the Complaint because the Union waived its right to obtain the information now requested by negotiating the unambiguous language in the CBA relating to the recovery of information about employees. It is well-settled that a union can waive employees' statutory rights if such a waiver is "clear and unmistakable." *Metro. Edison Co. v. N.L.R.B.*, 460 U.S. 693, 708-09 (1983) (waivers must be "clear and unmistakable"); *see also Procter & Gamble Mfg. CO v. N.L.R.B.*, 603 F.2d 1310, 1318 (8th Cir. 1979) (stating that a waiver of a right to information requires evidence to "show that the parties intended to limit the Union's statutory right to the information."). Such a waiver "may be found in an express provision in the parties' collective bargaining agreement, *or by the conduct of the parties, including their past practices and bargaining history, or by a combination of the two.*" *Local Union 36*, 706 F.3d at 84 (citing *N.L.R.B. v. United Techs. Corp.*, 884 F.2d 1569, 1575 (2d Cir. 1989)) (emphasis added); *see also Resorts Int'l Hotel Casino v. N.L.R.B.*, 996 F.2d 1553, 1559 (3d Cir. 1993) ("A clear and unmistakable waiver may be found in the express language of the collective bargaining agreement; or it may even be implied from the structure of the agreement and the parties' course of conduct.").

The Union clearly and unmistakably waived its right to the employee list it now requests. On its face, Article 8 outlines the entirety of information the Union is entitled to receive

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<sup>16</sup> The D.C. Circuit recently rejected the Board's refusal to apply the "contract coverage" analysis in light of controlling circuit court law requiring that test. *See 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.").

regarding employees. That Article specifically and unambiguously states that the Union is only entitled to a list of “all employees in the bargaining unit, their classifications, and their date of hir[e].” GC Ex. 2, Article 8, p. 3. Article 8 is unambiguous evidence that the parties “intended to limit the Union’s right to the” employee list it now requests. *See Procter & Gamble*, 603 F.2d at 1318. Because the parties have specifically bargained over employee information the Union is entitled to receive, it has waived its right to additional information. *See Metro. Edison*, 460 U.S. at 708-09.

ALJ Etchingham’s only response to this well-settled law was to summarily conclude 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. ALJ Etchingham’s finding is circular and is further evidence that he is permitting the Union to unilaterally modify the CBA. If the Board enforces ALJ Etchingham’s conclusion, then no provision in a collective bargaining agreement relating to information a union is entitled to obtain about bargaining unit employees would ever constitute a waiver. Instead, the union would just request information not listed in the agreement and claim it is, therefore, distinguishable and not waived. This result is absurd and cannot be countenanced. Here, the only difference between the information the Union is entitled to receive under Article 8 and the information it requested in March-December 2015 is that the Union requested *more* information than it is entitled under Article 8 in its latest requests. This is clear evidence that the Union is attempting to unilaterally modify Article 8 of the CBA to grant it access to greater employee information. Article 8 clearly identifies the information the Union is entitled to recover and, as such, the Union waived its right to additional information.

Acting Chairman Miscimarra's recent dissent in *Graymont Pa, Inc.*, 364 NLRB No. 37 (June 29, 2016) is instructive on this point. In *Graymont*, the Board considered whether respondent violated the Act by unilaterally making changes to its absenteeism policy and progressive discipline policy in light of the broad management rights provision in the parties' collective bargaining agreement. Applying both the "clear and unmistakable waiver" standard and the "contract coverage" analysis, Member Miscimarra found respondent had the authority, pursuant to the agreement, to unilaterally implement its changes. In particular, Member Miscimarra noted,

the insistence on more detailed language referencing a particular change fails to account for the reality that many provisions in collective-bargaining agreements 'must be expressed in general and flexible terms' because '[o]ne cannot spell out every detail of life in an industrial establishment.' Management-rights language may be general and, at the same time, clear and unmistakable. Here, the parties agreed that Graymont reserved the right, without exception, 'to adopt and enforce rules and regulations and policies and procedures.' No reasonable person reading this language could conclude that Graymont's right of unilateral action extended to rules, regulations, policies and procedures concerning *some* matters but not others. The language reflects an agreement to reserve to Graymont the right 'to adopt and enforce rules and regulations and policies and procedures' concerning *all* matters--including, as relevant here, punctuality, attendance, and discipline.

NLRB No. 37 at \*13 (internal footnote omitted, emphasis in original). By parity of reasoning, it is unrealistic for the parties to spell out every piece of information the Union is *not* entitled to receive. Rather, the parties negotiated and agreed on the information the Union *is* entitled to receive about employees and included a specific provision reflecting that agreement in the CBA. Such inclusion by definition excludes those items not identified. Here, like in *Graymont*, no reasonable person reading the language in Article 8 could conclude the Union was entitled additional information not included in that Article. Thus, the Union waived its right to the requested employee list and ALJ Etchingham's Decision must be reversed.

ALJ Etchingham's attempt to distinguish the Union's current request from Article 8 on the basis that Article 8 is titled "Seniority" is similarly misplaced. *See* 19 ALJD 3. Whether the list is referred to as a "seniority list" or "employee list," is immaterial. Indeed, Witherell presented uncontroverted testimony that those terms were used interchangeably. Tr. 106:10-13. Similarly, the Union used those phrases interchangeably and regularly referred to the "Seniority List" as an "employee list" or "list of all employees." GC Ex. 1(a); GC Ex. 5. Thus, regardless of whether the list is called an "employee list" or "seniority list," the Union has specifically bargained over, and agreed regarding, the information it is entitled to obtain. Moreover, the internal disorganization the Union purportedly sought to remedy involved employees' seniority. That is, where people who transfer jobs fall on the seniority list. As such, the information Poudre Valley provided resolved its concern.

The parties' past practice and course of dealing also demonstrates the Union waived its right to the information it seeks. Poudre Valley has never provided the Union with the information and employee list it now requests. Tr. 98:5-11. Rather, employee information has been obtained through the Union's stewards, or other communications directly between the Union and bargaining unit employees. Witherell even referred the Union to the parties' past practice in her November 3, 2015 email where she said she would "continue our current practice of advising new employees to make contact with the Union directly if they wish to do so." Tr. 26:9-17; GC Ex. 6. The parties' past practice regarding the Union's collection of employee information coupled with the unambiguous language of Article 8 demonstrates that the Union has waived its right to receive the additional information it now seeks. As such, the Union has waived its right to request additional information and the Complaint must be dismissed.

**E. The Employee List Is Not Relevant.**

The employee list is also not relevant in these circumstances. An employer's duty to provide information arises only when the information is "needed for the proper performance of the union's duties as the employees' bargaining representative." *Detroit Edison CO v. N.L.R.B.*, 440 U.S. 301, 303 (1979). A union's bare assertion that it needs information does not automatically oblige the employer to supply all the information in the manner requested. *Detroit Edison CO, Id.* at 314. "The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met." *Nat'l Labor Relations Bd. v. Truitt Mfg. CO*, 351 U.S. 149, 153-54 (1956); *see also Detroit Edison CO v. NLRB*, 440 U.S. 301, 303 (1979). "A union may legitimately request information if the information is necessary to either (1) negotiate a new CBA or (2) to administer/police an existing CBA." *Sara Lee Bakery Grp., Inc. v. N.L.R.B.*, 514 F.3d 422, 432 (5th Cir. 2008). The requested information was neither related to the negotiation of a collective bargaining agreement nor to administer or police the parties' existing CBA.

The Union admits it did not "need" the employee list to prepare for collective bargaining negotiations and that the list does not relate to employees' terms and conditions of employment or to a grievance. Tr. 110:2-12. It is undisputed that at the time of the Union's request for the employee list there was no grievance relating to any wages, hours, or working conditions. Tr. 85:8-10. Moreover, the relevant CBA did not expire until September 30, 2016. GC Ex. 2. Indeed, ALJ Etchingham found that at the time of the Union's requests, "the Union was not preparing for or having ongoing collective bargaining negotiations with [Poudre Valley], there were no ongoing grievances pending or to be filed involving any wages, hours, or working

conditions, and there was no notice to commence bargaining at this time.”<sup>17</sup> 9 ALJD 1-4. Thus, it cannot be disputed that the requested information was not necessary to prepare for negotiations or administer the CBA. ALJ Etchingham’s factual finding that the Union’s request for information did not relate to negotiations or the administration of the CBA compels the legal conclusion that the information requested was not relevant. *See Sara Lee Bakery*, 514 F.3d at 432.

For the duration of the Union’s requests, it stated the list was sought in “an effort to update[ the Union’s] records and maintain accurate information.” GC Exs. 4, 5, 6(b), and 7(b). Indeed, there is no dispute – and ALJ Etchingham found – that each of the Union’s requests stated the employee list was required to update the Union’s internal records and maintain accurate information. 4 ALJD 10-12; 6 ALJD 27-28.

The Union’s desire to update its records and organize its files are insufficient bases to demonstrate a “need” for the employee list. *See In Re Marion Hosp. Corp.*, 335 NLRB 1016, 1017 (2001) (affirming the ALJ’s decision that the employer violated Section 8(a)(5) by conditioning further bargaining on the receipt and evaluation of information that “related to an internal union matter and was irrelevant to mandatory subjects of bargaining.”); *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) (finding the employer did not violate the Act by not responding to information requests that relate to internal union political activity); *see also Graymont Pa, Inc.* 364 NLRB No. 37, slip. op. \*13 (June 29, 2016) (Miscimarra, Dissent)

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<sup>17</sup> Later in his Decision, ALJ Etchingham contradicted this finding by stating “the requested information is necessary for collective bargaining and for the Union’s representational role as the CBA was expiring in September 2016.” 15 ALJD 20-22. Thus, it appears ALJ Etchingham is bootstrapping to gain his preordained outcome. Regardless, the undisputed evidence is that the parties were not preparing for negotiations and at the time of the Union’s initial request for information, the expiration of the CBA was more than 17 months away.

(“When bargaining is not required regarding a particular matter, either because the matter is a nonmandatory bargaining subject or because the parties have waived any bargaining rights, the union has no right under Section 8(a)(5) to request and receive information regarding the matter.”).

Member Johansen’s dissent in *Postal Serv.*, 280 NLRB 685 (1986) is instructive.<sup>18</sup> There, “the Union’s president informed one of the Respondent’s labor relations managers that it needed the information so that it could enforce the Union’s recent constitutional amendment prohibiting its officers and stewards from applying for supervisory positions.” *Id.* at 686. Member Johansen concluded that respondent did not violate the act by failing to provide information because, “an employer is obligated only to furnish information with respect to mandatory subjects of bargaining. Neither internal union rules nor union discipline, however, have been found to be mandatory subjects of bargaining.” *Id.*

Similarly, here, Meisinger repeatedly stated he requested the employee list “to update[ the Union’s] records and maintain accurate information.” 4 ALJD 10-12; 6 ALJD 27-28; GC Exs. 4, 5, 6(b), and 7(b). Information needed to update the Union’s internal records is not a mandatory subject of bargaining and, therefore, Poudre Valley had no obligation to provide the list.

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<sup>18</sup> The basis for the majority’s holding in *Postal Service* is not applicable here. In particular, the majority concluded that a list of union officials and stewards who had applied for supervisory positions was relevant and ordered its disclosure to the union. In reaching this result, the majority reasoned that the possibility that union officials or stewards might be disloyal to the union if they were aspiring to positions in management made it reasonable for the union to exclude them from union representational functions in order to avoid undermining employee confidence in the collective-bargaining representative. The majority thus found that the names of those who were applying for supervisory positions were relevant to the union’s interest in avoiding injurious conflicts of interest in its representatives. No such conflict exists here. Thus, the portion of Member Johansen’s dissent cited herein was based on grounds unrelated to the conflict in *Postal Service* and his reasoning applies.

ALJ Etchingham ignored this established law entirely and, instead, attempted to jam the round peg of the Union’s information request into the square hole of “presumptively” relevant information. *See* 14 ALJD 29-38. In support for his conclusion, ALJ Etchingham relies on the obvious mandate that “[a]n employer must . . . provide information connected to collective bargaining or contract administration.”<sup>19</sup> 14 ALJD 17-20. Again, as noted above, it is undisputed that the requested information was not “connected to collective bargaining or contract administration” and was, instead, connected to internal Union record keeping.

ALJ Etchingham’s sweeping conclusion that “[i]nformation related to bargaining unit members is presumptively relevant, including, names, addresses, and phone numbers” is a significant expansion of Board law. *See* 14 ALJD 29-30. ALJ Etchingham’s broad statement ignores the fact that relevance may not be determined in a vacuum and must be determined on a case by case basis turning upon “the circumstances of the particular case.” *Detroit Edison*, 440 U.S. at 314. Thus, it is entirely inappropriate – and in direct contravention of established Supreme Court precedent – for ALJ Etchingham to proclaim that employee names, addresses, and phone numbers are always “presumptively” relevant in all circumstances.

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<sup>19</sup> ALJ Etchingham only mentions the Union’s attorney’s bald claim that the information was requested to “police” the CBA in his restatement of the presented evidence. *See* 8 ALJD 29-35 (quoting Meisinger’s December 18 email); 11 ALJD 3-6 (summarizing Perera’s stated reasons for requesting the information). ALJ Etchingham did not, however, conclude that the Union requested the information to police the CBA and he did not find the information was relevant on that basis. 14 ALJD 8-43; 15 ALJD 1-3. Nor was there record evidence to support such a conclusion. Rather, ALJ Etchingham’s conclusion that the requested information was presumptively relevant is based entirely on his finding that “information related to bargaining unit members is presumptively relevant . . .” 14 ALJD 29-31. Thus, Poudre Valley does not address whether the information was in-fact requested in an effort to police the CBA or whether such a purpose compelled its disclosure. Because ALJ Etchingham’s basis for finding the requested information was relevant is contradictory to established law, the Decision must be reversed.

Moreover, the cases ALJ Etchingham cites do not support such a conclusion and are inapposite. Indeed, the cases finding that employees' addresses and telephone numbers are "presumptively relevant" and requiring the employer to provide that information – including those cited by ALJ Etchingham – do so in the context of the two circumstances described above: negotiating a new CBA and/or policing the CBA. *See e.g., Childrens Ctr. for Behavioral Dev.*, 347 NLRB 35, 49 (2006) (employee addresses and telephone numbers sought to prepare for collective bargaining negotiations); *River Oak Ctr. for Children, Inc.*, 345 NLRB 1335 (2005) (stating that "addresses and telephone numbers of bargaining unit employees are presumptively relevant *for purposes of collective bargaining.*") (emphasis added).

In addition, "presumptive" relevance is a rebuttable presumption. *See Coca-Cola Bottling Co.*, 311 NLRB 424, 425–26 (1993) ("[E]ven assuming that the retirement benefit cost data concerning unit employees is presumptively relevant to the Union's bargaining responsibilities, the Respondent has shown that substantial record evidence rebuts the presumptive relevancy of the information, as requested, and that it is irrelevant to any legitimate collective-bargaining need of the Union as representative of the Respondent's employees."). Poudre Valley presented significant evidence to rebut such a presumption here. Indeed, ALJ Etchingham specifically found "the Union was not preparing for or having ongoing collective bargaining negotiations with [Poudre Valley], there were no ongoing grievances pending or to be filed involving any wages, hours, or working conditions, and there was no notice to commence bargaining at this time." 9 ALJD 1-4. Rather, the information sought by the Union was admittedly for the sole purpose of updating its internal records. 7 ALJD fn. 10; 17 ALJD 40-41; 19 ALJD 25-29. Thus, Poudre Valley has rebutted the presumptive relevance of the requested information and it is irrelevant to any legitimate collective bargaining need of the Union.

The Union may not seek allegedly “presumptively relevant” information for any purpose whatsoever. The Board must look past ALJ Etchingham’s rigid and broad definition of presumptive relevance and consider the Union’s express reasons for requesting the employee list to determine whether the information is relevant. As the Board has previously stated, if the information requested is “presumptively relevant,”

and the employer refuses to provide that requested information, the employer has the burden to prove either lack of relevance or to provide adequate reasons why it cannot, in good faith, supply the information. If the information requested is shown to be irrelevant to any legitimate union collective-bargaining need, however, a refusal to furnish it is not an unfair labor practice.

*Coca-Cola Bottling CO*, 311 NLRB 424, 425 (1993) (emphasis added). It is undisputed that the employee list was neither sought for negotiation of a collective bargaining agreement nor to administer or police the parties’ existing CBA. Thus, the employee list was “irrelevant to any legitimate union collective-bargaining need,” and Poudre Valley’s refusal to furnish it was not an unfair labor practice. *Id.*; see also *Sara Lee Bakery*, 514 F.3d at 431-32 (noting that to prove an employer violated Sections 8(a)(5) and (1) the union must show (1) that it articulated a legitimate purpose for seeking the information at the time of the information request, and (2) that the information requested bears a logical relationship to a legitimate union purpose).

The District of Columbia recently questioned 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). There, the court remanded to the Board and admonished that the Board must consider “the implication of a rule that would permit a union to harass an employer by repeated and burdensome requests for irrelevant information only because it can be said it somehow relates to bargaining unit employees—without even a union’s statement of its need.” *Id.* at 701. Such a consideration is applicable here as well. ALJ Etchingham’s finding that Poudre Valley was

required to provide the requested employee list because the information related to bargaining unit employees regardless of the Union's stated reason for the information or the relevant provisions of the CBA is too broad and is unsupported by the law. In circumstances such as this, where the purpose of the Union's request is only for internal Union recordkeeping matters, the Union has not demonstrated a "need" for the information and there is no basis to find a violation of the Act.<sup>20</sup> The Board should reverse ALJ Etchingham's Decision and dismiss the Complaint.

**F. The Information Requested By The Union Is Private And Confidential.<sup>21</sup>**

Even if ALJ Etchingham properly found the information was relevant, which Poudre Valley disputes, employees' home addresses and telephone numbers are confidential information and need not be disclosed. "Information may be withheld from a union where the interest in confidentiality outweighs the union's need for the information." *Chicago Tribune CO v. N.L.R.B.*, 79 F.3d 604, 608 (7th Cir. 1996) (citing *East Tennessee Baptist Hospital v. NLRB*, 6 F.3d 1139, 1144 (6th Cir. 1993)). In *Chicago Tribune*, the union sought replacement workers' names, addresses, and information related to the terms of their employment. *Id.* at 606. The court held employees' addresses were confidential and need not be disclosed because of safety

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<sup>20</sup> Also, in his "Summary," ALJ Etchingham noted 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. It is unclear whether this statement played a role in ALJ Etchingham's analysis. Assuming, *arguendo*, it did, it is entirely irrelevant. The information Meisinger received from other employers has nothing whatsoever to do with what he is entitled to receive from Poudre Valley. Thus, to the extent ALJ Etchingham relied on this finding for his conclusion that Poudre Valley unlawfully failed to provide the requested information, his doing so was error.

<sup>21</sup> Seemingly out of nowhere, ALJ Etchingham also stated, "assuming *arguendo* that the Respondent is not estopped from asserting the confidentiality claim the Respondent's claim must still fail. 17 ALJD 6-7. ALJ Etchingham did not elaborate on this statement and it is unclear on what it is based. There is no evidence or basis to find Poudre Valley is estopped from asserting that the information requested is private and confidential and ALJ Etchingham's comment should be disregarded.

concerns, privacy rights and the union's ability to communicate with the employees through alternative means. *Id.* at 607-608. In particular, the Union had previously verbally and physically harassed the workers, the employees' had not previously permitted the disclosure of their home addresses, and the union had alternative methods of communication with employees. *Id.*

The same considerations precluding disclosure in *Chicago Tribune* apply here. First, the Union has previously harassed employees in their offices and homes. As described above, in 2013, Poudre Valley received complaints from employees that the Union was harassing them regarding the payment of their Union dues. Tr. 146:1-5. If ALJ Etchingham would have permitted Poudre Valley to introduce additional evidence relating to that incident, the record would also contain evidence that the Union was seeking information relating to the home addresses of bargaining unit employees. Apparently, the Union intended to send the employees threatening letters and visit their homes in an attempt to collect the past due Union dues. Thus, although there was no direct violence, the Union has a history of abusing their access to bargaining unit employee information and harassing employees. There is no reason to believe the Union would not have undertaken the same abusive techniques if given the requested information here.

ALJ Etchingham disregarded the Union's previous misconduct 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. ALJ Etchingham, however, misses the point. Although the Union's misconduct occurred three years prior to the current request for information, the Union's conduct in that instance occurred the *very last time* it requested this information. Indeed, it is undisputed that the only other time the

Union has requested the information at issue in this case, it misused the information and harassed employees. Stated differently, there has been no other occasion in which the Union has requested employee information and not misused it to harass employees. Moreover, the Union's previous misconduct involved the Union's request for the very same information. There is no reason to find that the Union would behave any differently toward employees in this instance simply because of the passage of time; nor is there any evidence in the record upon which the base such a conclusion. Thus, ALJ Etchingham's attempt to disregard the Union's history of misconduct fails.

The second *Chicago Tribune* factor also applies here. No employee has authorized Poudre Valley to disclose their home addresses or telephone numbers to the Union. Tr. 104:8-10. This is especially worrisome because employees receive a "whole packet" of information from the Union when they are first hired, which requests their home addresses and telephone numbers, among other things, and Union Stewards personally contact each new employee to discuss the Union. Tr. 51:1-19; 175: 7-13. If bargaining unit employees desired the Union to have their personal information, they had plenty of opportunities to provide it. The fact that they had not done so, suggests the bargaining unit employees did not want to provide the information to the Union. In addition, here, just as the court noted in *Chicago Tribune*, the employees "worked side-by-side with union members for several years, and the [Union] had ample opportunities to communicate with the [] employees. If the employees want to be contacted at home, they easily [could] provide their own addresses." 79 F.3d at 607.

Finally, the Union had multiple alternative methods for communicating with bargaining unit members. For example, the Union could have posted on the bulletin board, emailed employees, had the stewards reach out to the employees, or spoken to unit members during an

on-site monthly Union meeting. Tr. 49:24-25; 50:1-2; 59:4-7; 65:6-10; 72:8-10; 112:5-10.

Deeny also offered other accommodations:

We offer now those similar accommodations – post a letter to your unit and solicit their addresses from them; access the premises to hold a meeting to gain signed authorizations to have the employer release their addresses; hold a Union meeting offsite to gain the employees’ approval to release this private confidential information; use an independent third-party mailer; or, as the Union has done before, bring such a proposal to modify the current CBA to the bargaining table. These accommodations are appropriate under the circumstances.

GC Ex. 14(b); *see also* Tr. 111:4-9 (Witherell’s testimony regarding Poudre Valley’s proposed accommodations). Moreover, although the Union may have already possessed the requested information, it did not look to see. Tr. 49:24-25; 50:1-2; 51:9-19. Thus, not only did the Union have multiple alternative means to communicate with bargaining unit employees, but Poudre Valley specifically offered several accommodations and even offered to discuss any accommodations proposed by the Union.

Despite these proposed accommodations, ALJ Etchingham found there to be “ineffective alternatives” to the Union’s request for information. 15 ALJD 13-20. This conclusion is pure speculation. First, Meisinger did not testify that there “is an unusual difficulty for the Union effectively to communicate with all of the unit employees, members and non-members . . . .” and ALJ Etchingham does not cite any portion of the record for such a conclusion. *See* 15 ALJD 13-15. Moreover, although the Union may have already possessed the information it was seeking, it did not even look to see. Tr. 49:24-25; 50:1-2; 51:9-19. Finally, ALJ Etchingham’s conclusion ignores the undisputed evidence that the Union could have communicated directly with all employees via email or the bulletin board. Indeed, the Union’s use of the bulletin board and its website to communicate with employees was the subject of Poudre Valley’s March 24, 2017 Motion to Reopen the Record. As evidenced by the Union’s communication with employees

regarding ALJ Etchingham's Decision and employees' benefit plans, the Union could have easily communicated with employees via these and other means to gain their home addresses and telephone numbers. Thus, ALJ Etchingham's conclusion that there were "ineffective alternatives" is erroneous and must be rejected.

ALJ Etchingham also quickly discounted Poudre Valley's proposed accommodations, finding them to be nothing more than a "disingenuous reference to 'accommodation.'" 10 ALJD fn. 13. ALJ Carter's conclusion is unfounded and confounding. Poudre Valley's proposed accommodations are the same accommodations in which Poudre Valley and the Union have agreed to use in the past. Tr. 145:7-21; 146:1-12; 162:11-16; GC EX. 14. Poudre Valley's proposed accommodations are also exactly of the type Circuit Courts have found to be permissible and effective. *See Chicago Tribune*, 79 F.3d 604 at 608 ("In this case, the Tribune has offered not only to provide third party mailing, but also to allow personal communication with replacement employees by union representatives during non-work times, the posting of union notices on company bulletin boards, and the distribution of union information and materials in non-work areas."). Moreover, here, like in *Chicago Tribune*, Poudre Valley "agreed to provide information in any mutually agreeable manner proposed by the [union], but no proposal other than the disclosure of the addresses has been forthcoming." *See* GC Ex. 14(b). Poudre Valley's offered accommodations and indication of its willingness to entertain any Union-proposed alternatives is the hallmark of good faith negotiations over the accommodation.

Moreover, ALJ Etchingham's apparent requirement that Poudre Valley propose his preferred accommodations of a protective order or limiting the information provided is erroneous. 17 ALJD 21-26. ALJ Etchingham is not permitted to compel particular accommodations or to disregard Poudre Valley's proposed accommodations simply because they

are not to his liking. The fact is, Poudre Valley made the same accommodations that have been found reasonable in other cases and, as such, Poudre Valley met its burden as a matter of law to negotiate an accommodation in good faith. Poudre Valley, in fact, went beyond that required by specifically offering to negotiate with the Union over any of *its* preferred alternative accommodations. The Union, in contrast, did not respond to Poudre Valley's proposed accommodations, did not propose any of its own and, overall, actively engaged in no good faith negotiations. Thus, although Poudre Valley attempted to negotiate an agreeable accommodation to the Union's request, the Union remained steadfast in its unwillingness to modify its request or engage in accommodation discussions whatsoever.

Other courts in more recent cases have adopted the Seventh Circuit's analysis in *Chicago Tribune* regarding employees' home addresses and telephone numbers. For example, in *Grinnell Fire Prot. Sys. CO v. NLRB*, 272 F.3d 1028, 1029-30 (8th Cir. 2001), the court held respondent did not violate the Act by refusing to disclose employees' home addresses because the union did not demonstrate a "need" for the information and the Union had ample opportunity obtain the information in other ways. Notably, the court also found employees have a privacy interest in protecting the location of their home "even though there is no evidence of threats of violence." *Id.* at 1030. Thus, according to the Eighth Circuit, a threat of violence is not necessary to find an employer is not required to disclose employees' home addresses.

In *JHP & Associates, LLC v. N.L.R.B.*, 360 F.3d 904, 911-12 (8th Cir. 2004), the Eighth Circuit also held an employer did not violate the Act by failing to disclose employees' home addresses and telephone numbers in response to a request for information by the union. In so holding, the court noted that the case involved only "a routine request for this information so the Union can understand the bargaining goals of the strike replacement employees" and the union

failed to show a “compelling need” for the information. *Id.* at 912. The court further stated, [w]e have no doubt the Union, armed only with the names of the strike replacement employees, will have enough information to contact those employees should the Union deem it necessary to talk to or to represent the strike replacement employees” and “[w]ithout the Union making a greater showing of need for the employees’ home addresses and telephone numbers, we will not require disclosure of this personal and confidential information.” *Id.* (internal footnotes omitted). Here, too, the Union’s request for the employee list is a “routine request,” which was made only so that it could “update[ its] records and maintain accurate information.” GC Exs. 4, 5, 6(b), and 7(b). Moreover, as identified above, the Union had multiple other avenues to communicate with employees and obtain this information. Thus, the Union did not have a compelling need for the employee list and the Complaint must be dismissed.

ALJ Etchingham attempts to distinguish the above-cited cases by arguing that they all involved information requests related to strike replacement employees, and there are no strike employees here. 17 ALJD 35-41; 18 ALJD 1-3. ALJ Etchingham’s position is a distinction without a difference. Unions are on equal footing with respect to requests for information for replacement employees as they are for full-time regular employees and, as such, there is no basis upon which to treat regular employees and replacement employees differently with regard to information requests. *See Chicago Tribune*, 79 F.3d at 607 (“the Board consistently has taken the view that the names and addresses of replacement workers are presumptively relevant information to which a union is entitled.”). In addition, PVREA presented some, but was precluded from presenting other, evidence regarding the Union’s history of abusing employees’ personal and confidential information, including their home addresses and telephone numbers.

See Tr. 145:7-21; 146:1-12; 162:11-16; GC EX. 14; CO Exs. 1 & 2. Thus, ALJ Etchingham's attempt to distinguish these cases is meaningless, fails as a matter of law, and must be rejected.<sup>22</sup>

ALJ Etchingham cites *Transport of New Jersey*, 233 NLRB 694 (1977) in support of his conclusion that Poudre Valley was required to disclose the requested information. 16 ALJD 16-19. It is unclear how that case is relevant to the instant matter. There, the Union requested names and addresses for *non*-employee witnesses to a bus accident in an effort to process a grievance. Here, in contrast, that Union is requesting employees' addresses and telephone numbers in an effort to update its internal records.

Finally, 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" appears to be an unnecessary and gratuitous finding that bears no relationship to the matter in issue. 11 ALJD 12-13. This conclusion is wholly unsupported by the record; no testimony or evidence was presented as to the difficulty or burden of compiling the requested information. Nor was any evidence presented that Poudre Valley even maintains this information electronically. The burden is on the CGC to show why this information should be obtained outside of the CBA; it failed to meet its burden. ALJ Etchingham's Decision is error and must be reversed.

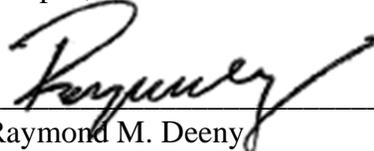
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<sup>22</sup> In an apparent effort to further distinguish these cases, ALJ Etchingham also states that "controlling Board precedent is to the contrary." 18 ALJD 1-3. The Board, however, is not permitted to disregard courts' analysis. Rather, the Board is bound by the courts of appeals' decisions and it has been specifically admonished to follow such decisions. See *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.").

**CONCLUSION**

ALJ Etchingham fashioned a conclusion that fit his interests and worked to conform the parties CBA, evidentiary record, and law to reach his desired result. The Board must not countenance ALJ Etchingham's result-oriented approach. ALJ Etchingham's Decision is riddled with errors and, as such, it must be reversed. The Board should dismiss the Complaint in its entirety.

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:

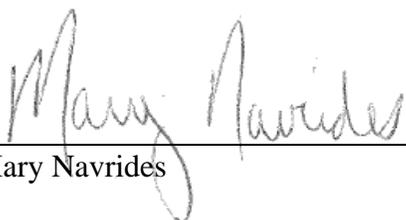
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