

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

POUDRE VALLEY RURAL ELECTRIC ASSOCIATION,

and

Case 27-CA-167119

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS LOCAL 111**

RESPONDENT'S REPLY IN SUPPORT OF EXCEPTIONS

Raymond M. Deeny, Esq.
SHERMAN & HOWARD L.L.C.
90 South Cascade Avenue, Suite 1500
Colorado Springs, Colorado 80903

Jonathon M. Watson, Esq.
SHERMAN & HOWARD L.L.C.
633 Seventeenth Street, Suite 3000
Denver, Colorado 80202

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INTRODUCTION

On February 27, 2017, ALJ Etchingham issued his Decision and Recommended Order (“Decision”) finding that Poudre Valley Rural Electric Association (“Poudre Valley,” “PVREA,” or “Respondent”) violated the Act. On April 26, 2017, Poudre Valley filed a Statement of Exceptions (“Exceptions”) and Brief in Support of Exceptions (“Brief”), which argued the Decision must be reversed because ALJ Etchingham disregarded the record, erred in applying the relevant law, and, in some instances, completely disregarded governing legal precedent.

On May 9, 2017, the Counsel for the General Counsel (“CGC”) filed an Answer to Poudre Valley’s Exceptions (“Answer”). Throughout its Answer, the CGC fails to address Poudre Valley’s arguments and ignores the significance of the errors in ALJ Etchingham’s legal analysis. The CGC avoids an analysis of material facts and evidence by either misconstruing the evidence entirely or ignoring their existence. The CGC’s Answer is insufficient to salvage ALJ Etchingham’s Decision. The Decision must be reversed.

ARGUMENT

A. The Complaint Is Barred By Section 10(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 stemming from, and related to, the first request. Thus, the limitations period began with the March 2015 request, and the Complaint is time-barred.

The CGC’s specious justifications for extending its time limit relies on ALJ Etchingham’s erroneous conclusion that the Union made “an *independent* information request beginning on October 29 to later become the November 6 information request at issue here.” Answer, pp. 17-18 (emphasis added). The evidence does not support a finding that the Union’s

October 29, 2015 request was “independent” of its March 2015 request. Indeed, Meisinger twice testified that he referred to the March 2015 request for information during the October 29, 2015 meeting and said he knew the information had been requested previously, but that he was requesting it again. Tr. 100:10-15; 139:5-13.

The CGC also attempts to break the link between the March 2015 request and the renewed October 2015 request by arguing those requests were “materially different.” Answer, p. 18. As ALJ Etchingham specifically found, the Union’s requests “evolved” over time. 6 ALJD 24-25; 33-35; 13 ALJD 6-9 (“The Union’s initial information request containing the request for bargaining unit employees’ names, address, and telephone numbers began verbally on October 29, 2015 and evolved on November 6 to become the information request at issue here.”). The same is true for the Union’s March 2015 information request, which “evolved” in October 2015 and again in November 2015 to be the request at issue here. Neither the CGC nor ALJ Etchingham may avoid the effect of the March 2015 information request by simply ignoring its existence. Because the Union’s March 2015 request for information is outside the six-month limitations period, all of its future requests are also barred.

B. The Union Is Attempting To Unilaterally Modify The Parties’ 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. According to ALJ Etchingham, the Union sought the additional information outside of that permitted under the CBA for the purpose of updating the its internal records. 7 ALJD fn. 10; 17 ALJD 40-41; 19 ALJD 25-29. 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. *See* Brief, pp. 23-24.

The CGC describes the meaning and effect of Article 8 of the parties' CBA by stating that "the purpose of Article 8 was to allow employees to see, annually, the seniority roster so that they could be aware of the recorded seniority dates and correct any mistakes in the roster." Answer, p. 14. The CGC's assertion is not supported by any evidence in the record regarding the parties' intent when drafting Article 8 and, as such, is pure speculation. *See Jackson Hosp. Corp. v. N.L.R.B.*, 647 F.3d 1137, 1142 (D.C. Cir. 2011) (granting the petition for review and concluding that "[t]he Board's theory is mere speculation without a jot of evidentiary support in the record."). Moreover, the fact that the CGC refers to the parties' intent in drafting Article 8 is further evidence that this matter should be deferred. Courts and arbitrators, not the Board, should interpret the CBA. *See N.L.R.B. v. Solutia, Inc.*, 699 F.3d 50, 67 n. 16 (1st Cir. 2012).

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

The CGC argues that Poudre Valley "misunderstands" the relationship between the Act and the CBA. Answer, pp. 13-14. In apparent support for this conclusion, the CGC misconstrues Poudre Valley's position to be "that the Union is not entitled to any information about unit employees unless the parties' collective-bargaining agreement affirmatively and expressly provides for such information to be provided." Answer, p. 13. The CGC misstates Poudre Valley's position. The existence of a detailed and unambiguous provision in the CBA relating to the specific information the Union is entitled to receive regarding employees curtails the Union's rights under the Act. The Union has already exercised its statutory right to obtain the employee list or, alternatively, waived its right to the requested information. Brief, pp. 24-29. This position is consistent with the law. *See Local Union 36, Int'l Bhd. of Elec. Workers, v. N.L.R.B.*, 706 F.3d 73, 83-84 (2d Cir. 2013).

The CGC responds by arguing that the Union's request for an employee list is separate from the information identified in Article 8 of the CBA. Answer, pp. 14-17. The CGC even goes so far as to claim "[t]here is no connection . . . between the agreement in Article 8 over provisions for posting the seniority list and the Union's entitlement to unit employees' contact information." Answer, pp. 15-17. The CGC's argument ignores undisputed testimony.

As Meisinger admitted during trial, what he really wanted was "a list of new hires." Tr. 57:9-11. Moreover, the parties repeatedly used the phrases "seniority list" and "employee list" interchangeably during their colloquy over the Union's "evolving" request. Tr. 106:10-13; GC Ex. 1(a); GC Ex. 5. Further, the only reason the Union requested the employee list was because it 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. Thus, the information the Union is entitled to in Article 8 is not separate from the information the Union requested; indeed, the extent of the Union's entitlement is expressly detailed in Article 8.

Article 8 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 Mfg. CO v. N.L.R.B.*, 603 F.2d 1310, 1318 (8th Cir. 1979). Because the parties 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.

The waiver doctrine does not require that the parties identify each and every piece of information the Union is and is not entitled to receive from the Company, as the CGC suggests.

Such a requirement is divorced from the reality of collective bargaining and imposes an unrealistic burden on the parties. As Chairman Miscimarra recently noted, provisions in collective bargaining agreements “must be expressed in general and flexible terms because one cannot spell out every detail of life in an industrial establishment.” *Graymont Pa, Inc.*, 364 NLRB No. 37 at *13 (June 29, 2016) (Miscimarra, Dissent) (internal quotations omitted). This concern is especially true here where the parties could not have anticipated that the Union would request information needed to reorganize its internal records. By negotiating and agreeing on the information the Union *is* entitled to receive, the parties necessarily excluded information the Union is *not* entitled to receive. Thus, the Union waived its right to receive the employee list.

D. ALJ Etchingham Erred By Not Deferring This Case To Arbitration.

The parties have a specific bargained-for provision regarding the disclosure of information about employees. The Union’s requests for information are, therefore, a matter of contract coverage. As noted above, an arbitrator – not the Board, is best 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. Courts have long held that the Board has no role to play when the contractual and unfair labor practice issues are identical. *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). An arbitrator could fully consider the issues and remedy any alleged breach of the CBA, as well as alleged violations of the Act. ALJ Etchingham, therefore, erred by not deferring this matter.

The CGC’s argument that deferral is not appropriate in order “to avoid a two-tiered arbitration process” is unsupportable in the present circumstances. Answer, p. 18. The Board’s concern for a “two-tiered arbitration process” was born out of a fear that there would be two

separate arbitrations: one relating to the information request and a second for the underlying grievance. *See United Techs. Corp.*, 274 NLRB 504, 505 (1985) (noting that the information request was for the purpose of pursuing employee grievances). Of course, this concern has no application to cases, such as this, where the underlying grievance and the information request are the same. And, as courts have repeatedly found, deferral is appropriate when the contractual and statutory issues overlap. *See Am. Freight Sys.*, 722 F.2d at 832.

The CGC's reasoning is also flawed because pursuing Board proceedings regarding the information request and then an arbitration regarding the underlying grievance itself is no different than a two-tiered arbitration process and, in fact, has already prolonged resolution of the issues in this case. The time spent on the Board trial and appeal would have been better spent by following the Board's deferral policy, and the parties would likely already have a full resolution if this matter were deferred.

During its 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. In the Answer, the CGC seemingly argues that this evidence was properly excluded because it was hearsay. *See Answer*, p. 19. ALJ Etchingham, however, did not find it was hearsay and the CGC neither objected nor argued it was hearsay at trial. *See Tr.* 168: 14-22; 169:16-21. Rather, ALJ Etchingham concluded the information was irrelevant. *Id.* ALJ Etchingham's conclusion is erroneous as a matter of law. Information regarding the Region's basis for not deferring is directly relevant to demonstrate that the Region was primarily concerned with the Union's ability to succeed on the merits, rather than its general policy against deferring information request cases. Thus, ALJ Etchingham erred and the Decision must be reversed.

E. The Employee List Is Not Relevant.

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. v. NLRB*, 440 U.S. 301, 314 (1979). "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).

The CGC's primary argument is that the employee list is relevant for the Union to communicate with employees. Answer, pp. 6-8. The Union, however, did not state the information was necessary to communicate with employees and the CGC did not make that argument during the hearing. The CGC's *post hoc* attempt to justify the Union's request fails.

The CGC's argument also fails because it is undisputed that the Union has multiple sufficient means of communicating with employees; including in person through the Union Stewards, in person at the monthly Union meetings, via the Union's bulletin board, via the Union's website, via email, and via telephone or letter because the Union likely already possesses many of the bargaining unit members' addresses and telephone numbers. Indeed, ALJ Etchingham concluded that the Union already possessed bargaining unit members' names, addresses, and telephone numbers. 3 ALJD 15-16. And, the Union requests all bargaining unit members' addresses and telephone numbers when employees begin working at Poudre Valley. Tr. 51:1-19. Thus, the CGC's citation to communication cases is misplaced.

The CGC also argues that the employee list was relevant to bargain over a successor contract. Answer, p. 8. The CGC's argument is directly contrary to the undisputed evidence and ALJ Etchingham's factual findings. The Union never stated the information was necessary to prepare for collective bargaining negotiations. Tr. 110:2-12. ALJ Etchingham specifically

concluded 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." 9 ALJD 1-4. Indeed, the CBA did not expire until September 30, 2016, more than 18 months after the Union's first request for information in March 2015. *See* GC Ex. 2. The CGC's disregard of these findings of fact is shameful and must be rejected.

The CGC also claims – without analysis – that Poudre Valley failed to rebut the presumption of relevance. Answer, p. 8. The CGC's assertion entirely ignores Poudre Valley's lengthy argument and multiple case citations showing that requests geared toward internal Union record keeping are not relevant, presumptively or otherwise. *See* Brief, pp. 31-34, 34-36. It is undisputed the Union requested the employee list to update its internal records. 7 ALJD fn. 10; 17 ALJD 40-41; 19 ALJD 25-29. Thus, when put in context, the requested information is irrelevant to any legitimate Union collective bargaining.

F. The Information Requested By The Union Is Private And Confidential.

"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). The instant case is identical to the Circuit Courts' decisions in *Chicago Tribune, Grinnell Fire Prot. Sys. CO v. NLRB*, 272 F.3d 1028 (8th Cir. 2001), and *JHP & Associates, LLC v. N.L.R.B.*, 360 F.3d 904 (8th Cir. 2004). Here, as in those cases, the employees' privacy interests in the requested information outweighs the Union's interest in receiving the information. As described in detail in Respondent's Brief, the employees' addresses and telephone numbers are confidential and must not be disclosed. The Union has

previously harassed employees and, as a result of such harassment, the parties agreed to an appropriate form for the Union to communicate with employees. Tr. 146:6-12; GC Ex. 14(b). In addition, employees have not permitted the disclosure of this information and the Union has several other ways of obtaining it. Moreover, Poudre Valley had legitimate fears that disclosing private employee information could implicate their cyber security. 4 ALJD 14-22; Tr. 136:17-25; 137:1-6.

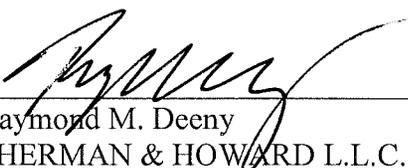
The CGC's attempt to distinguish these cases by arguing the bargaining unit at issue here "did not include any striker replacements and there was no recent history of strikes or similar labor unrest or tension" fails. Answer, p. 11. It is legally irrelevant that the employees in the Circuit Court cases were striker replacements and the employees here are full time regular employees. Unions are on equal footing with respect to requests for information for replacement employees as they are for full-time regular employees. *See Chicago Tribune*, 79 F.3d at 607. In addition, Poudre Valley 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. Importantly, the *very last* time the Union requested employees' home addresses and telephone numbers, it used that information to harass employees. Co. Exs. 1 & 2; GC Ex. 14. Also, because Poudre Valley's proposed accommodations are identical to the accommodations found to be permissible in *Chicago Tribune*, Poudre Valley satisfied its obligation by offering reasonable accommodations. *See* Brief, pp. 40-41.

In contrast to Poudre Valley's legitimate concern for providing the employee list to the Union, the Union has a very limited interest in obtaining the information. The employee list was not requested for any collective bargaining need. Rather, the Union requested the employee list

only so that it could “update[its] records and maintain accurate information.” GC Exs. 4, 5, 6(b), and 7(b). The Union’s desire to update its records is not sufficient. *See e.g., 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) (employer did not violate the Act by not responding to information requests relating to internal union political activity); *see also Graymont*, 364 NLRB No. 37 at *13 (“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.”). Because the employee list was not requested for any collective bargaining need, Poudre Valley’s legitimate concerns outweigh the Union’s interests.

Finally, the CGC’s continued reliance on the Board’s decision in *River Oak Center for Children*, 345 NLRB 1335 (2005) ignores the context of that case. It cannot be disputed that the Union requested information in *River Oak* to aid in collective bargaining negotiations. *Id.* at 1335-36. Here, in contrast, the Union did not request the employee list to aid in its negotiation of a successor agreement. Thus, *River Oak* is inapposite. The information requested by the Union is private and confidential and, as such, Poudre Valley did not violate the Act by refusing to disclose it to the Union. ALJ Etchingham’s Decision must be reversed.

Respectfully submitted this 24th day of May, 2017.


Raymond M. Deeny
SHERMAN & HOWARD L.L.C.
90 South Cascade, Suite 1500
Colorado Springs, CO 80903
rdeeny@shermanhoward.com

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of May, 2017, a true and correct copy of the foregoing **RESPONDENT'S REPLY IN SUPPORT OF EXCEPTIONS** was filed addressed to the following:

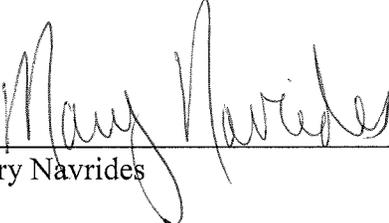
Gary Shinnors (E-File)
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570

Paula S. Sawyer (E-File)
Regional Director
National Labor Relations Board, Region 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

Dan Michalski (Via Email)
Field Attorney
National Labor Relations Board
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

Naomi Perera, Esq. (Via Email)
Buescher, Kelman, Perera & Turner, P.C.
600 Grant St., Ste. 450
Denver CO 80203

International Brotherhood of
Electrical Workers Local 111
5965 E. 39th Ave
Denver, CO 80207
(Via U.S. Mail, first class, postage prepaid)



Mary Navrides